May 2013

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ADMINISTRATIVE LAW JUDGE ORDERS

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COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

May 9, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2011-693-M
v.	:	
STANSLEY MINERAL RESOURCES, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"). The Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to Stansley Mineral Resources, Inc. ("Stansley") pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1). Administrative Law Judge David F. Barbour assessed a penalty of $1,000 for the violation. 34 FMSHRC 1500, 1510 (June 2012) (ALJ).

The Commission granted the Secretary of Labor's petition for discretionary review. For the following reasons, we vacate the judge's penalty assessment and impose the $2,000 minimum penalty required by the Mine Act.

I.

Factual and Procedural Background

Stansley owns and operates a sand and gravel processing facility in Tecumseh, Michigan. *Id.* at 1500. On November 8, 2010, MSHA issued Citation No. 6504341, alleging that Stansley violated 30 C.F.R. § 56.14107(a),[1] that the violation was a significant and substantial ("S&S")

[1] 30 C.F.R. § 56.14107(a) provides that:

> Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup

(continued...)

contribution to a mine safety hazard, and that it was caused by Stansley's unwarrantable failure to comply with the standard.[2] *Id.* The Secretary proposed a penalty of $2,000. *Id.* Stansley admitted that it violated section 56.14107(a), but disputed the S&S and unwarrantable designations. *Id.* at 1505.

The judge found that the violation was S&S and the result of Stansley's unwarrantable failure. *Id.* at 1506-07. The judge identified the third issue in dispute as the "amount of the civil penalty that must be assessed for the violation, taking into consideration the civil penalty criteria set forth in section 110(i) of the Act." *Id.* at 1505. The judge analyzed the six statutory criteria as they applied to this case and concluded that the penalty of $2,000 proposed by the Secretary was excessive in view of Stansley's small violation history, small size, and good faith abatement of the violation in a timely manner. *Id.* at 1510. As a result, the judge assessed a penalty of $1,000. *Id.*

II.

Disposition

Section 110(i) of the Mine Act grants the Commission "authority to assess all civil penalties provided [under the Act]." It further directs that the Commission, in determining penalty amounts, 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.

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[1](...continued)

> pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

[2] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." The unwarrantable failure terminology is also taken from section 104(d)(1) of the Act, 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." If an MSHA inspector finds that a violation is S&S and due to the operator's unwarrantable failure, the citation is to be issued pursuant to section 104(d)(1), which can lead to more stringent enforcement measures.

30 U.S.C. § 820(i). The penalty assessment for a particular violation is within the sound discretion of the administrative law judge so long as the six statutory criteria are given due consideration. *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1152 (7th Cir. 1984); *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1764 (Aug. 2012); *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).[3]

In 2006, Congress passed the Mine Improvement and New Emergency Response Act ("MINER Act"). Pub. L. No. 109-236, 120 Stat. 493 (2006). Among other things, the MINER Act amended section 110(a) of the Mine Act, by adding the following provisions:

> *(3)(A) The minimum penalty for any citation or order issued under section 104(d)(1) shall be $2,000.*
>
> (B) The minimum penalty for any order issued under section 104(d)(2) shall be $4,000.
>
> (4) Nothing in this subsection shall be construed to prevent an operator from obtaining a review, in accordance with section 106, of an order imposing a penalty described in this subsection. *If a court, in making such review, sustains the order, the court shall apply at least the minimum penalties required under this subsection.*

30 U.S.C. § 820(a)(3) - (4) (emphasis added). Prior to this amendment, the Act had not specified a minimum penalty for section 104(d) citations or orders.

The Secretary argues that the judge erred in this case by assessing a penalty below the statutory minimum for a violation resulting in a section 104(d)(1) citation. He maintains that, pursuant to section 110(a)(3)(A) of the Act, 30 U.S.C. § 820(a)(3)(A), the judge cannot assess a penalty for such a violation below the statutorily mandated minimum of $2,000.

In this case, the judge resolved all competing claims and determined that Stansley's violation rose to the level of a section 104(d)(1) citation under the Mine Act. 34 FMSHRC at 1505-09. The judge fully explained how his findings contributed to his penalty assessment,

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[3] The Secretary acknowledges that "it is the Secretary's responsibility to propose penalties . . . and it is the Commission's responsibility to assess penalties after determination of any contested issues." PDR at 5 (emphasis in original). As the Secretary states, due to the bifurcated nature of the penalty process, the Secretary proposes civil penalties, but "the Commission is the only entity that can actually assess penalties." *Id.*; *see Sellersburg Stone Co.*, 736 F.2d at 1151-52 ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties . . . we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission.").

giving each of the six statutory criteria in section 110(i) due consideration, and explaining his deviation from the Secretary's proposed penalty. *Id.* at 1510; *see, e.g., Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983); *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC at 620-23 (citations omitted). However, although the judge properly applied the statutory criteria in section 110(i), he did not additionally address the language of section 110(a)(3)(A).[4]

The issue before us is whether the Commission and its judges are strictly bound by the minimum penalty assessment provisions of section 110(a)(3) and whether those provisions can be reconciled with the broad discretion granted to the Commission in section 110(i). We conclude that the language of section 110(a)(3) is clear, and that it is consistent with the penalty assessment provisions in section 110(i).[5] Read together, the two subsections do confer broad discretionary authority upon the Commission and its judges to apply the criteria in section 110(i), but require that no penalty for a section 104(d) citation or order may be assessed at less than the statutory minimums in section 110(a)(3). This reading comports with a "fundamental rule of construction . . . that effect must be given to every part of a statute . . . so that no part will be meaningless." *Daanen & Janssen, Inc.*, 20 FMSHRC 189, 194 (Mar. 1998) (citing *Sekula v. FDIC*, 39 F.3d 448, 454 (3d Cir. 1994)).

Our conclusion that Congress intended that the Commission adhere to the minimum penalty assessment amounts in section 110(a)(3) is further confirmed by section 110(a)(4) of the Act, 30 U.S.C. § 820(a)(4), which dictates that courts of appeals, in reviewing Commission decisions pursuant to section 106, 30 U.S.C. § 816, "shall apply at least the minimum penalties required under this subsection." Accordingly, a court of appeals would be required to reverse any final Commission decision imposing a penalty less than the relevant minimum amount in section 110(a)(3).

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[4] Based on our review of the record below, it appears that the parties did not bring the language of section 110(a)(3)(A) to the judge's attention.

[5] The MINER Act's legislative history says little about the new statutory minimum penalty provisions. The Senate Report essentially repeats the language of the statute. S. Rep. No. 109-365, at 14 (2006).

III.

Conclusion

For the foregoing reasons, we conclude that the judge erred by assessing a penalty of less than $2,000 for a violation under section 104(d)(1), in conflict with section 110(a)(3)(A) of the Mine Act. We therefore vacate the judge's penalty assessment. Finding no fault otherwise in the reasoning underlying his assessment, we impose the $2,000 minimum penalty required by the Mine Act.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

Brian B. Barger
Brady, Coyle & Schmidt, Ltd.
4052 Holland-Sylvania Rd.
Toledo, OH 63623

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

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

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

Administrative Law Judge David F. Barbour
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 10, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of DUSTIN RODRIGUEZ	:	
	:	Docket No. WEST 2013-618-DM
v.	:	
C.R. MEYER AND SONS COMPANY	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

DECISION

BY THE COMMISSION:

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On April 17, 2013, following a hearing, Administrative Law Judge William S. Steele issued a decision and order temporarily reinstating Dustin Rodriguez to employment with C.R. Meyer and Sons Company ("C.R. Meyer"), pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). 35 FMSHRC __, slip op. at 25. On April 23, 2013, C.R. Meyer petitioned for review of that decision and order. The operator argues that the judge erred when he refused to admit certain evidence supporting its contention that, regardless of the validity of Rodriguez's discharge on January 25, the temporary reinstatement obligation should have been tolled as of February 22, 2013 (the date the operator alleges Mr. Rodriguez would have been laid off in any event). For the reasons that follow, we agree that the judge erroneously excluded the evidence. Consequently, we remand this case for further proceedings on the issue raised by the operator.[1]

[1] With its petition for review of the judge's reinstatement order, the operator also moved to stay the effect of the order while the Commission considered its petition. On April 24, 2013, the Secretary of Labor filed a response in opposition to the motion for stay. In an order issued April 26, 2013, we denied the motion for stay.

I.

Factual and Procedural Background

Mr. Rodriguez, a resident of Las Vegas, NV, and a member of the San Bernardino and Riverside Counties (CA) Plumber and Pipefitters, Local 364, Union, was originally hired by C.R. Meyer, along with a dozen or so other "local" employees, in early December 2012. Tr. 12-13, 50. Rodriguez was brought on as a journeyman pipefitter at Molycorp Inc.'s Pass Mine and Mill in Mountain Pass, California, to work on the mine's "Phoenix" construction project. Tr. 5, 13, 16, 80-81. C.R. Meyer also employed union miners from its Michigan location, and considered these individuals "regular" employees for purposes of work at the mine. Tr. 75-76, 96, 115-16.

After C.R. Meyer's work on the Phoenix project ended, several "local" employees were let go, but Rodriguez was kept on and assigned to additional C.R. Meyer maintenance and other projects at the mine. Rodriguez testified at reinstatement hearing that on January 24, 2013, while working on those projects, he requested safety information regarding exposure to the sodium carbonate with which he would be working, and also raised safety concerns about the scaffolding around a sodium carbonate tank.

There was testimony at the hearing that, over the course of its month-long work on the Phoenix project, C.R. Meyer was pleased with Rodriguez's work, particularly in the area of worker safety and interacting with the primary contractor on the project. Tr. 82-83. Rodriguez testified that C.R. Meyer viewed him as a candidate for long-term employment with it, including as a foreman. Tr. 43, 62. In addition, Rodriguez testified that, on the morning of January 24, Mark Cartwright, C.R. Meyer's piping supervisor, instructed and trained him regarding a piping construction project at the mine that the company had just been awarded. Tr. 20-24. Rodriguez stated that he would supervise four men on the project, which would take approximately one month to complete. Tr. 20-22. However, Cartwright testified that he had begun hearing that week about instances, and observed one himself, where Rodriguez was seen standing around watching others doing tasks in which he should have been assisting. Tr. 87-89. Cartwright alleges that he therefore decided to terminate Rodriguez on Thursday morning of that week, January 24, before Rodriguez was assigned to work on the sodium carbonate tank project. Tr. 89-90. Rodriguez was discharged the next day, January 25.

On February 25, 2013, Rodriguez filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"), alleging that C.R. Meyer's discharge of him amounted to discrimination in violation of section 105(c) of the Mine Act. The Secretary filed an Application for Temporary Reinstatement on March 25, 2013, requesting an order requiring the operator to temporarily reinstate Mr. Rodriguez to his former position of journeyman pipefitter. On April 3, C.R. Meyer requested a hearing on the Secretary's application.

In response to the judge's April 4 notice of hearing, the operator on April 8 submitted a list of witnesses and exhibits that stated that, for its projects at the mine, it would be offering evidence regarding "the circumstances surrounding the hiring and layoff of the 'local' employees who performed services for C.R. Meyer in December of 2012 through February of 2013." The Secretary filed a Motion in Limine, seeking to exclude "any evidence presented by Respondent for the purpose of creating a testimonial conflict or for the purpose of supporting an affirmative or rebuttal defense." Mot. at 4.

At the April 10 hearing, the judge granted the Secretary's motion in limine and ruled that C.R. Meyer could not introduce any evidence on the issue of whether the temporary reinstatement should be tolled. Slip op. at 4, 22. The judge permitted counsel for the operator to make a proffer for the record. *Id*.; Tr. 9-10, 114-18. According to C.R. Meyer's proffer, because Molycorp had placed a limit on the number of employees C.R. Meyer could have work at the mine, subsequent to Rodriguez's discharge it had to reduce its workforce there. The operator claimed that it chose to lay off all of its remaining "local" miners. Accordingly, C.R. Meyer maintained that Rodriguez would have been laid off with those local miners in any event, even if his employment had not already been terminated. Tr. 114-17. In making his proffer on the issue, counsel for the operator repeatedly stated the date of the layoff to be January 25, 2013, the same date Rodriguez was discharged. Tr. 116-17.

On April 17, 2013, the judge issued a decision concluding that Rodriguez's complaint had met the "not frivolously brought" standard for temporary reinstatement.[2] Slip op. at 24. The judge relied on testimony that Rodriguez had engaged in protected activity and that the operator was both aware of Rodriguez's protected activity and had demonstrated animus toward those actions. *Id.* at 19-21. The judge also considered that less than 24 hours passed between Rodriguez's protected activities and his termination. *Id*. at 21-22. Accordingly, the judge held that the Secretary had introduced sufficient evidence of a nexus between Rodriguez's protected activity and his termination to warrant temporary reinstatement. He further ordered that Rodriguez be paid at a journeyman pipefitter rate for the same number of hours worked, and with the same benefits he had been receiving at the time of his discharge. *Id*. at 25.

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[2] Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The Commission has repeatedly recognized that the "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *See Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd,* 920 F.2d 738 (11th Cir. 1990). It is "not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings." *Sec'y on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). In reviewing a judge's temporary reinstatement order, the Commission has applied the substantial evidence standard. *See id.* at 719; *Sec'y on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993).

The judge disagreed with the claim that the layoff of all local employees constituted a tolling argument. Based on C.R. Meyer's counsel's proffer that all of the "local" employees would have been laid off by January 25, the judge characterized the operator's argument as an alternative explanation for Rodriguez's discharge on January 25 and rejected it as an affirmative defense that was outside the scope of the temporary reinstatement proceeding. *Id*. at 22-23.

II.

Disposition

C.R. Meyer does not challenge the judge's finding that the Secretary established that Rodriguez's discrimination complaint was not frivolously brought. We therefore limit our review to the issue of whether the judge erred in declining to admit the operator's evidence and failing to consider its argument that any obligation it had to reinstate Rodriguez should have been tolled as of February 22, 2013.

We have recognized that "the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation." *Sec'y on behalf of Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 996, 1000 (May 2012) (citations omitted). Consistent with the narrow scope of temporary reinstatement proceedings, we have permitted a limited inquiry to determine whether the obligation to reinstate a miner may be tolled even when it has been established that the miner's discrimination complaint is not frivolous. *See Sec'y on behalf of Gatlin v. KenAmerican Res., Inc.*, 31 FMSHRC 1050, 1054 (Oct. 2009) (temporary reinstatement order does not require that a miner is owed reinstatement under every circumstance, regardless of changes that occur at the mine after issuance of the order). In *Gatlin*, we held that the duration of a miner's temporary reinstatement may be modified if the operator can prove that the miner's inclusion in a subsequent layoff was entirely unrelated to his protected activity. *Id* at 1055.

We recently addressed this issue again, in *Secretary on behalf of Ratliff v. Cobra Natural Resources, LLC*, 35 FMSHRC ___ (Feb. 28, 2013). We reiterated that, when an operator attempts to demonstrate that a layoff properly included a reinstated miner (or would have included the miner if he or she had not been discharged previously, in the case of a complaining miner whose case is being heard), the Secretary may "assert that the miner's inclusion in the layoff was, or might have been, related to protected activity engaged in by the miner." Slip op. at 4. Given that "the layoff itself, as a termination of employment, must at that point be evaluated as a potentially wrongful adverse action," we held that

> if the objectivity of the layoff as applied to the miner is called into question in the temporary reinstatement phase of the litigation, judges must apply the "not frivolously brought" standard contained in section 105(c)(2) of the Mine Act to the miner's claim [regarding the layoff]. . . . In other words, temporary reinstatement should be granted and not tolled unless the operator shows that the

> claim that the layoff arose at least in part from protected activity is frivolous.

Id. In the instant case this procedure was not followed.

C.R. Meyer's asserted grounds for tolling appear simple and straight-forward, i.e., that because of a 10-person limit placed on the maintenance project by its customer, Molycorp, it laid off all miners hired locally, and these layoffs would have legitimately included Rodriguez. However, in its proffer, C.R. Meyer's counsel represented that all of the layoffs had occurred by January 25, 2013, which was also the date Rodriguez was discharged. In his decision, the judge understandably relied on counsel's representation to conclude that the operator was not making a tolling argument but rather was affirmatively defending its actions by claiming that, on the same day it terminated him, it would have laid off Rodriguez for economic reasons regardless of his protected activity.

In its petition for review, C.R. Meyer states that the January 25, 2013 date stated during the proffer as the date for the completion of the layoffs was an error, and that the correct date was February 22, 2013. That an error was made is supported by exhibits submitted during the proffer which reflect that the last layoff of a local miner was on February 22, 2013. Proffered Ex. E, F. Based on our review of the operator's April 8, 2013 submission, its proffer at the hearing including the exhibits, and the clarification of its proffer in the petition for review, we find that, based on our holdings in *Gatlin* and *Cobra*, the judge erred in excluding C.R. Meyer's evidence regarding the layoff.[3] The judge's exclusion of this evidence resulted in no consideration being given to the tolling issue. On remand, the judge must allow C.R. Meyer to offer its evidence on tolling the complainant's temporary reinstatement.

We reiterate that the inquiry into tolling must be limited, consistent with the scope and spirit of a temporary reinstatement proceeding. Nevertheless, the Secretary shall be allowed to present the rebuttal evidence he indicated he was prepared to introduce on the issue of tolling at the original hearing. Tr. 74-75. The Secretary can also introduce evidence and cross-examine witnesses to question the objectivity of the layoff as it would have applied to Rodriguez. If the Secretary pursues that issue, the judge shall determine whether the evidence, as a whole, supports a "non-frivolous" claim that such a layoff might have been motivated in any way by the miner's protected activity. If it does, the operator's request that reinstatement be tolled must be denied. *See Cobra*, slip op. at 4. Because it is inappropriate to resolve conflicting testimony at this stage, the Secretary's burden of proof is limited to establishing facts which *could* support the

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[3] "When reviewing a judge's evidentiary ruling, the Commission applies an abuse of discretion standard. . . . Abuse of discretion may be found when 'there is no evidence to support the decision *or if the decision is based on an improper understanding of the law*.'" *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1366 (Dec. 2000) (emphasis in original) (quoting *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249-50 n.5 (Feb. 1997)).

claim that any inclusion of the complaining miner in the layoff might have been based in part on the miner's protected activity.

Should the Secretary fail to sufficiently establish the possibility that any inclusion of Rodriguez in the layoff might have been motivated by the miner's protected activity, the judge must then consider the entire record and determine whether the operator has proven by a preponderance of the evidence that the layoff of local miners, which the operator alleges took place no later than February 22, justifies tolling its obligation to temporarily reinstate Rodriguez. If the operator succeeds in proving that tolling is justified, the judge shall determine the period of time for which the layoff would have properly included Rodriguez and shall limit any tolling to that period.

III.

Conclusion

For the foregoing reasons, we reverse the judge's decision solely with respect to the admission of evidence related to tolling, and remand the case to him for further proceedings consistent with this opinion. Until the judge issues his decision on remand, the miner remains reinstated under the terms of the judge's original decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

Dustin Rodriguez
1464 Labrador Drive
Las Vegas, NV 89142

David Hertel, Esq.
Eric Eisenmann, Esq.
Whythe, Hirschboeck, Dudek S.C.
555 East Wells St., Suite 1900
Milwaukee, WI 53202-3819
dhertel@whdlaw.com
eeisenmann@whdlaw.com

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

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

Administrative Law Judge William S. Steele
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
7 Parkway Center
875 Greentree Rd., Suite 290
Pittsburgh, PA 15220

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 21, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2012-698-M
v.	:	A.C. No. 23-00458-284711
THE DOE RUN COMPANY	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On June 27, 2012, the Commission received from The Doe Run Company ("Doe Run") a motion 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).

MSHA's record indicates that the proposed assessment was delivered on April 10, 2012, and became a final order of the Commission on May 10, 2012. Doe Run asserts that although its safety director timely reviewed the assessment on April 23, because of increased responsibilities she failed to mail the contest in a timely fashion. The safety director discovered the delinquency on June 6 and contacted counsel. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Doe Run'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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

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

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 21, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
	:	Docket No. CENT 2012-825-M
v.	:	A.C. No. 23-02296-289528
	:	
NORRIS QUARRIES, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 21, 2012, the Commission received from Norris Quarries, LLC ("Norris") a motion 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).

MSHA's records indicate that this proposed assessment was delivered on May 22, 2012, and became a final order of the Commission on June 21, 2012. Norris asserts that upon receiving MSHA's delinquency notice, dated August 6, 2012, it contacted its corporate owner and discovered that this assessment was confused with another similarly numbered assessment received at the same time. The Secretary does not oppose the request to reopen, and notes that MSHA received payment for the uncontested penalties by check dated June 5, 2012. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Norris'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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

Rick Grauel, Safety Director
Norris Quarries, LLC
1115 West Grand
P.O. Box 190
Cameron, MO 64429

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 21, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2012-1591
v.	:	A.C. No. 15-18775-179585-02
MCCOY ELKHORN COAL CORPORATION	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 21, 2012, the Commission received from McCoy Elkhorn Coal Corporation ("McCoy") a motion seeking to reopen a penalty assessment that according to MSHA's records 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).

McCoy asserts that it filed a timely notice of contest and encloses a copy of its completed contest form with MSHA's receipt stamp. McCoy states that it discovered the delinquency after receiving notice from the Department of Treasury. The Secretary confirms that MSHA received the timely contest form.

Having reviewed McCoy's request and the Secretary's response, we find that the penalty assessment in this matter has not become a final order. We therefore 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

Melanie J. Kilpatrick, Esq.
Rajkovich, Williams, Kilpatrick & True, PLLC
3151 Beaumont Centre Circle, Suite 375
Lexington, KY 40513

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 21, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 2010-249-M A.C. No. 01-00003-270566A[1]
JOE ESTIS, employed by CHEMICAL LIME COMPANY OF ALABAMA, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 19, 2012, the Commission received a motion seeking to reopen a penalty assessment under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission. The motion was filed by counsel for Joe Estis and Chemical Lime Company of Alabama, LLC ("Chemical Lime").

Under the Commission's Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders. *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

[1] Although the motion to reopen referred to A.C. No. 000201778-01, we have used A.C. No. 000270566A, which was assigned to Mr. Estis's individual proposed assessment.

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).

Counsel asserts that Mr. Estis left his employment with Chemical Lime on or about September 11, 2009. Counsel further states that MSHA mailed the proposed assessment, dated October 25, 2011, to an address where Mr. Estis no longer resided. As a result, Mr. Estis apparently did not contest the proposed penalty in a timely manner.

Administrative Law Judge Jeffrey Tureck issued a Decision Approving Settlement of Docket No. SE 2010-249-M on May 17, 2012. Judge Tureck also ordered that "all existing or potential investigations under Section 110(c) related to Docket No. SE 2010-249-M be dismissed." The purpose of the motion to reopen is to confirm that the penalty proceeding involving Mr. Estis was specifically dismissed. The Secretary does not oppose the request to reopen and confirms that the settlement agreement contemplated dismissal of the section 110(c) proceeding against Mr. Estis.

Having reviewed this request and the Secretary's response, we find that reopening this matter is unnecessary as the judge specifically and properly dismissed this section 110(c) proceeding against Mr. Estis. Accordingly, the request to reopen is dismissed as moot.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

Steven Baker, Regional Safety Manager
Lhoist North America
2885 Highway 31
Calera, AL 35040

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

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

Administrative Law Judge Jeffrey Tureck
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 21, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2012-564-M
v.	:	A.C. No. 09-00337-283898 A4243
UTILITY SERVICES CO., INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 3, 2012, the Commission received from Utility Services Co., Inc. ("Utility") a motion 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).

MSHA's record indicates that the proposed assessment was delivered on March 27, 2012, and became a final order of the Commission on April 26, 2012. Utility asserts that it never received the assessment and only became aware of it after receiving the delinquency notice, dated June 12, 2012. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Utility'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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

Carla J. Gunnin, Esq.
Constangy, Brooks & Smith, LLC
230 Peachtree St., Suite 2400
Atlanta, Ga 30303-1557

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 21, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
	:	Docket No. WEST 2012-1223-M
v.	:	A.C. No. 24-02221-286321
	:	
BAY MATERIALS, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 18, 2012, the Commission received from Bay Materials, LLC ("Bay") a motion 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).

MSHA's record indicates that the proposed assessment was delivered on April 24, 2012, and became a final order of the Commission on May 24, 2012. Bay's counsel asserts that Bay forwarded the assessment to her on May 23, 2012 without indicating whether it wished to contest it. Counsel took no action until Bay received a delinquency notice dated July 10, 2012. The Secretary does not oppose the request to reopen based primarily on the timeliness of the request to reopen after receipt of the delinquency notice. The Secretary cautions that he may oppose future penalty contests that are not timely filed.

We note that Bay is a small operator without significant experience with the assessment process. This, however, does not explain counsel's inaction for almost two months between May 23 and July 17. We urge counsel to discuss the assessment process with her clients and verify contest due dates as soon as she receives the proposed assessment. Counsel should take all steps necessary to ensure that penalty contests are filed timely, rather than waiting for the delinquency notice.

Having reviewed Bay'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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

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

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 21, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2012-1227-M A.C. No. 24-01779-285510
v.	:	Docket No. WEST 2012-1228-M A.C. No. 24-01779-291297
D & S MINING AND EXPLORATION	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 23, 2012, the Commission received from D & S Mining and Exploration ("D&S") two motions 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] The Secretary does not oppose the requests to reopen.

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

We have held, 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

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2012-1227-M and WEST 2012-1228-M, both captioned *D & S Mining and Exploration*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

Sadaie Barac, Office Manager
D & S Mining & Exploration
522 Jetway Dr.
Beltgrade, MT 59714

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 21, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2012-1799
v.	:	A.C. No. 46-01816-291154
PINNACLE MINING COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 20, 2012, the Commission received from Pinnacle Mining Company, LLC ("Pinnacle") a motion 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).

Pinnacle asserts that it received the proposed assessment on June 6, 2012 and forwarded it to its counsel on June 9. Pinnacle's counsel forwarded the contest form to his assistant on June 11, but due to her health problems and other personnel changes, the assistant missed the filing deadline. Pinnacle further states that before discovering the delinquency on August 30, 2012, it mistakenly paid the penalty. The Secretary does not oppose the request to reopen. The Secretary urges the operator and its counsel to take steps to ensure that future penalty contests are timely filed.

Having reviewed Pinnacle'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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

Robert H. Beatty, Jr., Esq.
Lorna M. Waddell Esq.
Dinsmore & Shohl, LLP
215 Don Knotts Blvd., Suite 310
Morgantown, WV 26501

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 21, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2012-1814
v.	:	A.C. No. 46-04236-296917
MAPLE COAL COMPANY	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 26, 2012, the Commission received from Maple Coal Company ("Maple") a motion 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).

MSHA's record indicates that the proposed assessment was delivered on August 9, 2012, and became a final order of the Commission on September 10, 2012. Maple asserts that its parent company's counsel timely prepared the contest form on August 23, but the response was then put on hold for further investigation. Maple's paralegal discovered the contest form was not timely filed on September 11, and immediately sent the signed form to MSHA. The Secretary does not oppose the request to reopen, and urges the operator and counsel to take steps to ensure that future penalty contests are timely filed.

Having reviewed Maple'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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

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

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 23, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 2012-1435
	:	A.C. No. 46-08884-286693
v.	:	
	:	Docket No. WEVA 2012-1436
PAY CAR MINING, INC.	:	A.C. No. 46-09062-286698

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 6, 2012, the Commission received from Pay Car Mining, Inc. ("Pay Car") two motions 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 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

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2012-1435 and WEVA 2012-1436, both captioned *Pay Car Mining, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

Pay Car's representative asserts that he received the proposed assessments on April 24, 2012, and placed them in his secretary's work box for contest. Due to unforeseen medical developments, the secretary did not contest the assessments until June 6, 2012. However, the proposed assessment had become a final order on May 24, 2012. The Secretary does not oppose the requests to reopen, but urges the representative to establish procedures to ensure that personal developments do not prevent timely filing of future penalty contests. The Secretary also notes that Pay Car is currently delinquent in the payment of approximately $91,946.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

James F. Bowman, Representative
Pay Car Mining, Inc.
P.O. Box 99,
Midway, WV 25878
jimbowman61@hotmail.com

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
	:	Docket No. CENT 2012-807
v.	:	A.C. No. 29-01879-287632 W771
	:	
P&H MINEPRO SERVICES SOUTH CENTRAL OPERATIONS	: :	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 16, 2012, the Commission received from P&H MinePro Services South Central Operations ("P&H") a motion 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).

MSHA's record indicates that the proposed assessment was delivered on May 3, 2012, and became a final order of the Commission on June 4, 2012. P&H asserts that due to a miscommunication, its safety manager and its counsel believed that the other had filed a timely contest. P&H further states that it discovered the mistake after receiving the delinquency notice, dated July 18, 2012. P&H has implemented new policies to avoid such mistakes in the future. The Secretary does not oppose the request to reopen, based primarily on its timeliness after receipt of the delinquency notice. The Secretary urges the operator and its counsel to take steps to ensure that future penalty contests are timely filed.

Having reviewed P&H'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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

Eric E. Hobbs, Esq.
Michael Best & Friedrich, LLP
100 East Wisconsin Avenue, Suite 3300
Milwaukee, WI 53202-4108

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

May 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2013-115-M
v.	:	A.C. No. 29-01667-298231
WAYCOR MATERIALS, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 21, 2012, the Commission received from Waycor Materials, Inc. ("Waycor") a motion 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).

MSHA's records indicate that the proposed assessment was delivered on August 22, 2012, and became a final order of the Commission on September 21, 2012. Waycor asserts that it mailed a timely notice of contest to the Commission, instead of MSHA. Waycor discovered the error after receiving a delinquency notice, dated November 6, 2012. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed and mailed to the civil penalty compliance office in Arlington, VA.

Having reviewed Waycor'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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

Elizabeth B. Ames, Esq.
Oldcastle Law Group
900 Ashwood Parkway, Suite 600
Atlanta, GA 30338-4780

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2013-172-M
v.	:	A.C. No. 41-01665-294219
MILWHITE, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 13, 2012, the Commission received from Milwhite, Inc. ("Milwhite") a motion 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). The Secretary does not oppose the request to reopen.

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

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

Having reviewed Milwhite's request and the Secretary's response, in the interest 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

A.C. Rodriguez
Milwhite, Inc.
7693 Dallas Street
Corpus Christi, TX 78413

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 30, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 2012-1399
	:	A.C. No. 15-17216-291755
v.	:	
	:	Docket No. KENT 2012-1432
WARRIOR COAL, LLC	:	A.C. No. 15-17216-289049

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 1 and 14, 2012, the Commission received from Warrior Coal, LLC ("Warrior") two motions 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 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

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2012-1399 and KENT 2012-1432, both captioned *Warrior Coal, LLC*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

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 proceeding on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Warrior asserts that it received proposed assessment No. 000291755 on June 14, 2012, marking the last day for contest as July 16, 2012. The mine offices were closed between June 25 and July 9 during an extended closure of the mine, and Warrior's safety director completed the contest form on July 13. However, the form was inadvertently misfiled and mailed to MSHA two days late, on July 18, 2012. Proposed assessment No. 000289049 was received on May 15, 2012, and became a final order of the Commission on June 14, 2012. Warrior's safety director completed the contest form on June 6, but the accounts payable clerk did not mail it to MSHA until June 19, due to her responsibilities in preparing for the mine closure. Warrior has taken steps to ensure that future penalty contests are timely filed. The Secretary does not oppose the requests to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed even during periods of mine closure.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

Gary D. McCollum, Esq.
Warrior Coal, LLC
771 Corporate Drive, Suite 500
Lexington, KY 40515

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2012-1569
v.	:	A.C. No. 15-19608-294682
TACKETT CREEK MINING, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 19, 2012, the Commission received from Tackett Creek Mining, Inc. ("Tackett") a motion 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).

MSHA's record indicates that this proposed assessment was delivered on July 19, 2012, and became a final order of the Commission on August 20, 2012. Tackett asserts that its president suffered medical issues during July and August, and forwarded the assessment to its representative for contest upon his return in September. The Secretary does not oppose the request to reopen, based solely on the president's health problems. The Secretary notes that MSHA received a late contest dated September 10, 2012. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Tackett'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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

Michael D. Clements, Representative
Tackett Creek Mining, Inc.
408 A Manor Drive
Kingsport, TN 37660

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 2013-12
	:	A.C. No. 15-17587-296918
OHIO COUNTY COAL COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 1, 2012, the Commission received from Ohio County Coal Company, LLC ("Ohio") a motion 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 record indicates that this proposed assessment was delivered on August 8, 2012, and became a final order of the Commission on September 7, 2012. Ohio asserts that its safety manager only received the proposed assessment on August 14, 2012, due to a failure with its internal mail delivery system. The Secretary does not oppose the request to reopen based solely on the fact that the penalty contest was mailed seven days after becoming a final order. The Secretary notes that MSHA received a payment for the uncontested penalties, by check dated September 25, 2012. The Secretary further notes that this is the operator's third motion to reopen stating the same reason for late contest (KENT 2012-652, KENT 2012-656). The Secretary cautions that she may oppose future motions to reopen penalty assessments that are not contested in a timely manner.

The Commission has made it clear that where a failure results from an inadequate or unreliable internal processing system, the operator is unlikely to establish grounds for reopening the assessment. *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1061, 1062 (Dec. 2008). As we stated in our previous order, we urge the operator to take all steps necessary to ensure that future penalty contests are timely filed. *Ohio County Coal Co.*, 35 FMSHRC ___, slip op. at 2, Nos. KENT 2012-652, KENT 2012-656 (Jan. 3, 2013).

Having reviewed Ohio'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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

Jeffrey K. Phillips, Esq.
Steptoe & Johnson, PLLC
1010 Monarch Street, Suite 250
Lexington, KY 40591-0810

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2013-34-M
v.	:	A.C. No. 33-00178-294451
WATERLOO COAL COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 9, 2012, the Commission received from Waterloo Coal Company, Inc. ("Waterloo") a motion 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).

MSHA's records indicate that the proposed assessment was delivered on July 17, 2012, and became a final order of the Commission on August 16, 2012. MSHA received timely payment for the uncontested penalties by check dated August 3, 2012. Waterloo asserts that it usually sends contests along with payment for uncontested penalties. Waterloo states that it discovered the error after receiving a delinquency notice, dated October 1, 2012. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed and mailed to the civil penalty compliance office, 1100 Wilson Blvd., Arlington, VA 22209.

Having reviewed Waterloo'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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

Melanie Parks
Waterloo Coal Company, Inc.
3675 Dixon Run Road
Jackson, OH 45640

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2013-88-M
v.	:	A.C. No. 33-04315-297279
PRECISION AGGREGATES, II, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 7, 2012, the Commission received from Precision Aggregates, II, LLC ("Precision") a motion 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).

MSHA's records indicate that the proposed assessment was delivered on August 14, 2012, signed for by R. Wren, and became a final order of the Commission on September 13, 2012. Precision asserts that it did not receive the assessment mailed to its address of record, because it was signed for by someone who is not employed by Precision. Precision discovered the error after receiving MSHA's delinquency notice, mailed to the same address, dated October 31, 2012. The Secretary does not oppose the request to reopen, and urges the operator to ensure that its address of record is accurate and future penalty assessments can be received at that address.

Having reviewed Precision'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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

William R. Schmeltz, Manager
Precision Aggregates, II
12205 E. Gypsy Lane Road
Bowling Green, OH 43402

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2013-187
v.	:	A.C. No. 11-03193-296240
	:	
PRAIRIE STATE GENERATING COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 17, 2012, the Commission received from Prairie State Generating Company, LLC ("Prairie State") a motion 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).

MSHA's records indicate that the proposed assessment was delivered on August 7, 2012, and became a final order of the Commission on September 6, 2012. MSHA sent a delinquency notice on October 22, 2012. Prairie State asserts that its previous safety manager mailed a timely notice of contest with payment for the uncontested citations to St. Louis, Missouri, instead of Arlington, Virginia. Prairie State became concerned that this contest was not processed after receiving a petition for another case. Prairie State contacted MSHA on November 14, 2012. The Secretary does not oppose the request to reopen, and notes that MSHA received payment for the uncontested penalties, by check dated August 15, 2012. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed and mailed to the civil penalty compliance office in Arlington, Virginia.

Having reviewed Prairie State'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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

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

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2013-205-M
v.	:	A.C. No. 47-01525-284056
JENNERJOHN HOLTHAUS, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 20, 2012, the Commission received from Jennerjohn Holthaus, Inc. ("Jennerjohn") a motion 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). The Secretary does not oppose the request to reopen.

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

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

Having reviewed Jennerjohn's request and the Secretary's response, in the interest 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

Ronald D. Fadness, Esq.
Jennerjohn Holthaus, Inc.
P.O. Box 127
Decorah, IA 52101

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2012-445-M
v.	:	A.C. No. 36-05508-270605 A
LANCE R. BATTERSBY	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 19, 2012, the Commission received a motion seeking to reopen a penalty assessment under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission.

Under the Commission's Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders. *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).

MSHA's record indicates that the proposed assessment was delivered on November 7, 2011, signed for by Lance Battersby, and became a final order of the Commission on December 7, 2011. Mr. Battersby filed a late notice of contest on December 24, 2011. The Secretary does not oppose the request to reopen and confirms that MSHA received the late notice of contest. Mr. Battersby asserts that due to his move to Pennsylvania, his mail was not being forwarded in a timely manner. MSHA records show that delinquency notices mailed on January 5 and 24, 2012, were returned undelivered. MSHA transferred this case to the Department of Treasury for collection on May 10, 2012, and was thereafter in email contact with Mr. Battersby between June and September, 2012, prior to his filing this motion to reopen. The Secretary urges Mr. Battersby to take steps to ensure that future penalty contests are timely filed.

Having reviewed this 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

Lance R. Battersby
Route 1, Box 30 N
Peterstown, WV 24963

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
	:	Docket No. PENN 2012-458-M
v.	:	A.C. No. 36-09824-296916
	:	
DAMASCUS 535 QUARRY & STONE PRODUCTS, LLC	: :	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 29, 2012, the Commission received from Damascus 535 Quarry & Stone Products, LLC ("Damascus") a motion 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).

Damascus asserts that its counsel discovered the delinquency on MSHA's website on September 25, 2012, indicating that this assessment became a final order of the Commission on September 9, 2012. Damascus states that it misfiled the assessment with a different case, due in part to unexpected layoffs of office staff and its office manager missing work due to a family member's illness. As a result, Damascus revised its procedures for handling MSHA correspondence. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Damascus' 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

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

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2013-54
v.	:	A.C. No. 01-02901-296437
DRUMMOND COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 25, 2012, the Commission received from Drummond Company, Inc. ("Drummond") a motion 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).

MSHA's record indicates that the proposed assessment was delivered on August 8, 2012, and became a final order of the Commission on September 7, 2012. Drummond asserts that its inside counsel gave the contest form to his secretary to put in the outgoing mail on September 7, but the package was postmarked on September 8, 2012. Drummond implemented new procedures to avoid future defaults. The Secretary does not oppose the request to reopen, and urges the operator and counsel to take steps to ensure that future penalty contests are timely filed.

Having reviewed Drummond'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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

Damon J. Boiles, III, Esq.
Drummond Company, Inc.
P.O. Box 10246
Birmingham, AL 35202

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2013-68-M
v.	:	A.C. No. 01-01138-279202 A
LEWIS JOHNSON, employed by ELMORE SAND AND GRAVEL, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 2, 2012, the Commission received a motion seeking to reopen a penalty assessment under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission.

Under the Commission's Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. MSHA's records indicate that the proposed assessment was mailed on January 31, 2012 and was returned unclaimed. MSHA mailed a delinquency notice on May 17, 2012. Mr. Johnson asserts that he left his employment with Elmore Sand and Gravel, Inc. on January 27, 2012, and has no recollection of receiving the assessment. The Secretary does not oppose the request to reopen.

Having reviewed this request and the Secretary's response, we conclude that the above-captioned assessment has not become a final order of the Commission because it was never received by Mr. Johnson. Accordingly, we deny the request to reopen as moot and remand this matter to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of civil penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

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

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2013-145
v.	:	A.C. No. 40-03338-300728
MOUNTAINSIDE COAL COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 18, 2012, the Commission received from Mountainside Coal Company, Inc. ("Mountainside") a motion 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). The Secretary does not oppose the request to reopen.

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

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

Having reviewed Mountainside's request and the Secretary's response, in the interest 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

Steve Chambers
Mountainside Coal
7692 S. Hwy 25 W.
Williamsburg, KY 40769

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2013-41-M
v.	:	A.C. No. 44-07250-297344
ILUKA RESOURCES, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 25, 2012, the Commission received from Iluka Resources, Inc. ("Iluka") a motion 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 record indicates that the proposed assessment was delivered on August 14, 2012, and became a final order of the Commission on September 13, 2012. Iluka asserts that it mailed a notice of contest on September 17, 2012, and received MSHA's delinquency notice on October 11, 2012. Iluka states that the mine manager was not aware of the deadline, but has now implemented a new procedure to ensure the timely payment or contest of proposed assessments. The Secretary does not oppose the request to reopen, and notes that MSHA received a payment for the uncontested penalties, by check dated September 12, 2012. The Secretary cautions that she may oppose future motions to reopen penalty assessments that are not contested in a timely manner.

Having reviewed Iluka'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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

Christopher D. Pence, Esq
Hardy Pence, PLLC
500 Lee Street, East, Suite 701
P.O. Box 2548
Charleston, WV 25301

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 31, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2013-93-M
v.	:	A.C. No. 05-03695-300295
ANGLOGOLD ASHANTI (COLORADO) CORP.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 22, 2012, the Commission received from Anglogold Ashanti (Colorado) Corp. ("Anglogold") a motion 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).

MSHA's record indicates that the proposed assessment was delivered on September 12, 2012, and became a final order of the Commission on October 12, 2012. Anglogold asserts that its safety manager failed to file a timely contest due to absences from the office and an unexpected illness. The safety manager discovered the delinquency upon reviewing his files in preparation for retirement. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Anglogold'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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

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

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

May 31, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2013-290-M
v.	:	A.C. No. 10-02202-300357
DIAMOND CREEK MILL	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 12, 2012, the Commission received from Diamond Creek Mill ("Diamond") a motion 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).

MSHA's records indicate that the proposed assessment was delivered on September 18, 2012, and became a final order of the Commission on October 18, 2012. Diamond asserts that it received a copy of the proposed assessment in an email with other time-sensitive material and inadvertently neglected to address the proposed assessment. Diamond states that it discovered the delinquency on MSHA's website on December 5, 2012. As a result, Diamond revised its procedures for handling MSHA correspondence. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Diamond'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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

Pascale Tutt, Vice President
Diamond Creek Mill
2520 Manatee Avenue, West
Suite 200
Bradenton, FL 34205

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 31, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2013-298-M
v.	:	A.C. No. 04–04614-302566
WESTERN MESQUITE MINES, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 14, 2012, the Commission received from Western Mesquite Mines, Inc. ("Western") a motion 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).

MSHA's record indicates that the proposed assessment was delivered on October 15, 2012, and became a final order of the Commission on November 14, 2012. Western's counsel asserts that Western discussed the assessment with her on October 31, and requested by email late in the day on November 14 that she file a notice of contest. Counsel received the email request the next day, and faxed a contest form on November 15, 2012. The Secretary does not oppose the request to reopen, and cautions that he may oppose future penalty contests that are not timely filed.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1061, 1062 (Dec. 2008). Moreover, as the Commission stated in *M3 Energy Mining Co.*, 33 FMSHRC 1741, 1746 (Aug. 2011):

> The fact that many of the inadequate and unreliable office procedures in these cases occurred at counsel's office rather than the office of the operators does not affect our analysis. As the Commission noted in *Keokee Mining, LLC*, 32 FMSHRC 64, 66 n.1 (Jan. 2010), "[i]n requesting relief from a final order, a client may be held accountable for the acts and omissions of its attorney." *Keokee Mining* relied on *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 397 (1993), where the Supreme Court made clear that when a party's failure to meet a deadline was caused by the actions of its counsel, and the issue is whether the party would be exonerated on the basis of "excusable neglect," the party would "be held accountable for the acts and omissions of [its] chosen counsel." This is because the party "'voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent.'" *Id.* (quoting *Link v. Wabash R. Co.,* 370 U.S. 626, 633-34 (1962)).

(Footnote omitted). In this case, Counsel submits that she "never received information on the date that [her] client received the proposed assessment and *assumed* it was on October 31." Abrams affidavit at 1 (emphasis added). We urge counsel to discuss the assessment process and the importance of contest due dates with her clients, and verify contest due dates as soon as counsel receives the proposed assessment or discusses the issue with her clients. Counsel should take all steps necessary to ensure that penalty contests are filed timely.

Having reviewed Western's request and the Secretary's response, in the interest 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

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

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 31, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2013-300-M
v.	:	A.C. No. 02-02324-289001
BRIMHALL SAND & ROCK	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 18, 2012, the Commission received from Brimhall Sand & Rock ("Brimhall") a motion 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).

MSHA's records indicate that the proposed assessment was delivered on May 16, 2012, and became a final order of the Commission on June 15, 2012. Brimhall asserts that it mailed a timely notice of contest with payment for the uncontested citations to St. Louis, Missouri, instead of Arlington, Virginia. MSHA received payment for the uncontested penalties, by check dated May 22, 2012. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed and mailed to the civil penalty compliance office in Arlington, VA.

Having reviewed Brimhall's request and the Secretary's response, in the interest 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

Gary R. Brimhall, Owner
Brimhall Sand & Rock
P.O. Box 3365
Indian Wells, AZ 86031

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 31, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2012-1552
ADMINISTRATION (MSHA)	:	A.C. No. 46-05890-273334 JRI
	:	
	:	Docket No. WEVA 2012-1553
	:	A.C. No. 46-06089-273337 JRI
v.	:	
	:	Docket No. WEVA 2012-1554
LOUISA CONSTRUCTION COMPANY	:	A.C. No. 46-09277-273358 JRI

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 2, 2012, the Commission received from Louisa Construction Company ("Louisa") a motion seeking to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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 2012-1552, WEVA 2012-1553 and WEVA 2012-1554, all captioned *Louisa Construction Company*, and 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 proposed assessments were delivered on December 1, 2011, signed for by L. Lyles, and became final orders of the Commission on January 2, 2012. MSHA mailed delinquency notices on February 15, 2012, and Louisa mailed late contests on March 23, 2012. On April 3, 2012, MSHA advised Louisa that the contests were untimely, and on June 7, 2012 referred the assessments to the Department of Treasury for collection. Louisa asserted that its previous office clerk had no experience contesting assessments, and that the new office assistant contacted MSHA to request copies of all the citations to be reviewed.

The Secretary opposed the requests to reopen, stating that they did not show exceptional circumstances. Moreover, the Secretary noted that Louisa did not explain why it took more than five months to request reopening after it received the delinquency notices.

On November 13, 2012, the Commission sent Louisa a letter asking it to explain the delay in filing the motion to reopen and what office procedures were implemented to prevent future defaults. In response, Louisa's new assistant states that she began overseeing MSHA correspondence in March 2012 and immediately mailed late contests expressing the operator's concerns. In the assistant's subsequent correspondence with MSHA there have been mistakes in citation and docket numbers, which caused further delay. Louisa maintains that new procedures were implemented to prevent future defaults.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

Hermie Evans
Louisa Construction Comipany
P.O. Box 178
Louisa, KY 41230

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 31, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2012-1633
v.	:	A.C. No. 46-08194-291394
CARTER ROAG COAL COMPANY	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2012-1634
	:	A.C. No. 46-07191-292169
v.	:	Docket No. WEVA 2012-1635
POCAHONTAS COAL COMPANY	:	A.C. No. 46-08266-292171

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 21, 2012, the Commission received from Carter Roag Coal Company ("Carter"), and Pocahontas Coal Company ("Pocahontas") (collectively "the operators") three motions seeking to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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 2012-1633, WEVA 2012-1634 and WEVA 2012-1635, all involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

MSHA's record indicates that Carter's proposed assessment was delivered on June 12, 2012, and became a final order of the Commission on July 12, 2012. Pocahontas's proposed assessments were delivered on June 19, 2012, and became final orders of the Commission on July 19, 2012. MSHA received contests dated July 25, 2012 for all three proposed assessments, and mailed late notices on August 3, 2012. The operators assert that a mine explosion left their safety department without power and communication from June 29 until July 7, 2012. Because of the explosion the operators were not able to follow their standard procedures for the timely processing of contest forms. The Secretary does not oppose the requests to reopen, and urges the operators to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

Robert H. Beatty, Jr., Esq.
Dinsmore & Shohl, LLP
215 Don Knotts Blvd., Suite 310
Morgantown, WV 26501

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 31, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2012-1822
v.	:	A.C. No. 46-08249-288733
STOLLINGS TRUCKING COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 21, 2012, the Commission received from Stollings Trucking Company, Inc. ("Stollings") a motion 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). The Secretary of Labor does not oppose the request to reopen.

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

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

Having reviewed Stollings' request and the Secretary's response, in the interest 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

Eric T. Frye, Esq.
Craig W. Hundley, Mine Litigation Representative
Flaherty Sensabaugh Bonasso, PLLC
200 Capitol Street
Charleston, WV 25301

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

Distribution:

Eric T. Frye
Craig W. Hundley
Flaherty Sensabaugh Bonasso, PLLC
PO Box 3843
200 Capitol Street
Charleston, WV 25301

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 31, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2013-6
ADMINISTRATION (MSHA)	:	A.C. No. 46-08704-293125 U203
	:	
	:	Docket No. WEVA 2013-7
	:	A.C. No. 46-08772-293126 U203
	:	
v.	:	Docket No. WEVA 2013-8
	:	A.C. No. 46-09428-293137 U203
KIAH CREEK TRANSPORT, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 1, 2012, the Commission received from Kiah Creek Transport, LLC ("Kiah") three motions seeking to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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 2013-6, WEVA 2013-7 and WEVA 2013-8, all captioned *Kiah Creek Transport, LLC*, and 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 proposed assessments were delivered on June 28, 2012, and became final orders of the Commission on July 30, 2012. Kiah asserts that its counsel sent a timely notice of contest but did not use certified mail. Kiah further states that it discovered the error after receiving delinquency notices, dated September 12, 2012. The Secretary does not oppose the requests to reopen, but notes that there is no record that the penalty contest forms were received by the Department of Labor's Mine Safety and Health Administration's ("MSHA") Civil Penalty Compliance Office in Arlington, VA. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

Jill Bruner, Esq.
Kiah Creek Transport, LLC
2408 Sir Barton Way, Suite 375
Lexington, KY 40509

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 31, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2013-25
v.	:	A.C. No. 46-09136-281297 A
SCOTT CARPENTER	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 3, 2012, the Commission received a motion seeking to reopen a penalty assessment under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission.

Under the Commission's Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders. *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).

MSHA's records indicate that the proposed assessment was delivered on February 23, 2012, signed for by J. Carpenter, and became a final order of the Commission on March 26, 2012. MSHA mailed a delinquency notice to the same address on May 9, 2012, and this case was transferred to the Department of Treasury for collection on August 30, 2012. Mr. Carpenter asserts that he no longer resided at that address since August 9, 2010, and that he requested that all correspondence be directed to his counsel by letter dated October 11, 2010. Mr. Carpenter further states that he received a letter from the Department of Treasury on September 22, 2012 and contacted counsel. The Secretary does not oppose the request to reopen.

Having reviewed this 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

Sarah Ghiz Korwan, Esq.
Preservati Law Offices, PLLC
P.O. Box 1431
Charleston, WV 25325

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 31, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2013-41
v.	:	A.C. No. 46-01544-293753-02
SPARTAN MINING COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 9, 2012, the Commission received from Spartan Mining Company, Inc. ("Spartan") a motion 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).

Spartan asserts that it received the proposed assessment on July 12, 2012 and mistakenly paid for Citation Number 8148369 on August 9, 2012. The Secretary does not oppose the request to reopen, and notes that 13 other citations included in this proposed assessment were timely contested and docketed as WEVA 2012-1525.

Having reviewed Spartan'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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

Jason M. Nutzman, Esq.
Dinsmore & Shohl, LLP
P. O. Box 11887
900 Lee Street, Suite 600
Charleston, WV 25339

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 31, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2013-42
v.	:	A.C. No. 46-09289-297656
ATLANTIC LEASECO, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 10, 2012, the Commission received from Atlantic Leaseco, LLC ("Atlantic") a motion 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).

MSHA's record indicates that the proposed assessment was delivered on August 16, 2012, and became a final order of the Commission on September 17, 2012. Atlantic asserts that its legal assistant accidentally deleted the deadline from the company's new computer system and contested the proposed assessment on September 18, 2012. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Atlantic'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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

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

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

May 31, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2012-263
v.	:	A.C. No. 18-00671-287360 NSD
PRESTON CONTRACTORS, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 27, 2012, the Commission received from Preston Contractors, Inc. ("Preston") a motion 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). The Secretary does not oppose the request to reopen.

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

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

Having reviewed Preston'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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

Michael T. Cimino, Esq.
Jackson Kelly, PLC
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 31, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
	:	Docket No. YORK 2013-1-M
v.	:	A.C. No. 30-00083-291556
	:	
TILCON NEW YORK, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 2, 2012, the Commission received from Tilcon New York, Inc. ("Tilcon") a motion 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).

Tilcon asserts that it mailed a timely notice of contest with payment for the uncontested citations to St. Louis, Missouri, instead of Arlington, Virginia. Tilcon discovered the error after receiving a delinquency notice, dated August 27, 2012, indicating that the proposed assessment became a final order on July 12, 2012. Tilcon contacted MSHA on September 10, 2012. The Secretary does not oppose the request to reopen, and notes that MSHA received payment for the uncontested penalties, by check dated June 25, 2012. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Tilcon'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.

s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution

Sarah T. Brooks, Esq.
Oldcastle Materials Law Group
900 Ashwood Parkway, Suite 700
Atlanta, GA 30338-4780

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

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

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19th STREET, SUITE 443
DENVER, CO 80202-2536
303-844-5267/FAX 303-844-5268

May 6, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 2011-1229-M
Petitioner,	:	A.C. No. 13-01225-264361 6JC
	:	
v.	:	
	:	
GARY SISK DRILLING CO., INC.,	:	
Respondent.	:	Durham Mine & Mill

DECISION

Appearances: Courtney Przybylski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Gary Sisk, Gary Sisk Drilling Co., Inc., Odessa, Missouri, for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Gary Sisk Drilling Co., Inc., ("Respondent") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Act" or "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in Kansas City, Missouri, and performed closing arguments.

Gary Sisk Drilling is a drilling contractor that works at mines and other facilities as an independent contractor. A total of nine section 104(a) citations were adjudicated at the hearing. The Secretary proposed a total penalty of $3,029.00 for these citations.

I. BASIC LEGAL PRINCIPLES

A. Significant and Substantial

The Secretary alleges that the violations discussed below were of a significant and substantial ("S&S") nature. An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). 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). In order to establish the S&S nature of a violation, the

Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is most difficult to apply. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.,* 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based upon the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.,* 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). "The Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.* 32 FMSHRC 1257, 1281 (Oct. 2010)).

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The Commission has emphasized that, in accordance with the language of section 104(d)(1), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be S&S. *U.S. Steel Mining Co.*, 6 FMSHRC at 1575.

B. <u>Negligence</u>

The Secretary defines conduct that constitutes negligence under the Mine Act as follows:

> Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence.

30 C.F.R. § 100.3(d).

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8660312

On May 12, 2011, MSHA Inspector Christopher Willett issued Citation No. 8660312 under section 104(a) of the Mine Act, alleging a violation of section 57.14206(b) of the Secretary's safety standards. The citation states, in part, "[t]he bucket of the Cat 973 track loader was not [lowered] to the ground or blocked from movement while unattended." (Ex. G-50). Inspector Willett determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 57.14206(b) of the Secretary's regulations requires that "[w]hen mobile equipment is unattended or not in use, dippers, buckets and scraper blades shall be lowered to the ground. Other movable parts, such as booms, shall be mechanically secured or positioned to prevent movement which would create a hazard to persons." 30 C.F.R. § 57.14206(b). The Secretary proposed a penalty of $243.00 for this citation.

1. Summary of the Evidence

Inspector Christopher Willett testified that he issued Citation No. 8660312 as a violation of section 57.14206(b) because the bucket of a 952 Cat loader was unattended and neither lowered to the ground nor blocked from movement. (Tr. 22).

Inspector Willett designated Citation No. 8660312 as S&S because it was reasonably likely that the bucket could fall onto a miner. (Tr. 26-27). A mechanical failure or blown hose could cause the bucket to drop. (Tr. 27). The inspector testified that the bucket was reasonably likely to injure a miner because footprints and the removal of the grill of the Cat showed him that people had worked underneath the bucket. (Tr. 26). The bucket could cause fatal crushing injuries. (Tr. 28). The bucket had been in a raised position for about one hour. (Tr. 27).

The inspector determined that the violation was the result of the operator's moderate negligence. The cited condition was obvious and respondent provided Inspector Willett with no mitigating factors. (Tr. 30-31). The inspector believed that the operator should have known of the cited condition. (Tr. 30).

The inspector testified that a rod lock, if installed properly, would prevent the bucket assembly from falling, but that it required "a U bolt or a clamp to keep it in place[.]" (Tr. 34). Inspector Willett did not testify regarding the specifics of the rod lock that was installed on the Cat. He also stated that placing something capable of supporting the bucket beneath it, which must be able to support 1.5 times the weight of the bucket according to SAE[1] standards, would be acceptable. (Tr. 37).

Ron Medina, an engineer for MSHA's technical support division who specializes in mobile equipment, testified that the bucket on the Cat was not safely supported. (Tr. 55). He

[1] SAE International is a global organization of engineers and related technical experts that produces standards relating to a variety of equipment. Section 57 does incorporate sections of SAE publications, although section 57.14206 does not.

reviewed photographs of the equipment, the manufacturer's information for the equipment, and the pertinent SAE standard, SAEJ38. (Tr. 49, 56). Medina testified that the rod lock was not adequate to remove the hazard of the bucket crushing someone because it was not secured with a pin or U-bolt. (Tr. 55). Medina did not perform any calculations upon the rod lock to see if it would sufficiently support the arms. (Tr. 57). He also testified that while the arms may be supported, the bucket was not in the proper position and could swing down and potentially injure someone. (Tr. 59).

Gary Sisk, owner of Sisk Drilling, testified that a rod lock prevented the bucket of the Cat from falling. (Tr. 70). Sisk testified that he made the rod lock himself and that it did not have a pin, but had worked for a long period of time. (Tr. 76). He stated that if the bucket were to tilt down, it would be between 5 and 6 feet from the ground. (Tr. 68). Sisk testified that the footprints referenced by Willett were his own, but when he made the prints, a Hitachi was in place underneath the bucket, which fully supported the bucket. (Tr. 71). Sisk stated that he made the decision to leave the bucket in the air while he went to get parts. (Tr. 77). He left the bucket pointing up because he worried debris would fall from the bucket if he did not. (Tr. 72).

2. Discussion and Analysis

I find that Citation No. 8660312 represented a violation by Respondent of section 57.14206(b). Both Sisk and Inspector Willett agree that the equipment was left unattended with the bucket in the air, which is a violation of the standard on its face. Section 57.14206(b) specifically states that booms and other pieces of equipment can be mechanically secured or strategically positioned, but that buckets must be lowered to the ground. Nothing in section 57.14206(b) excuses a raised bucket on an unattended piece of equipment. Sisk admitted, furthermore, that the bucket could fall to within 5 to 6 feet from the ground, even if the arms were supported. A bucket falling that close to the ground could easily injure a miner. Although Sisk testified that a vehicle prevented the bucket from falling at one time, that vehicle was no longer present when Inspector Willett issued the citation. Respondent's failure to lower the bucket of a track loader created the hazard of a miner being crushed by the bucket and violated section 57.14206(b).

I find that Citation No. 8660312 was not S&S, however, because an injury was not reasonably likely to occur as a result of the condition cited. Although the presence of the rod lock did not negate the hazard, it did make the hazard less likely because it supported the arms of the equipment. A rod lock is fastened to the cylinder of the arms of equipment to keep the arms from falling down mechanically when the equipment is powered down. Although Medina testified that the rod lock required a pin or U-lock, he did not supply proof or testimony that it was reasonably likely to fail without one. He also did not inspect or test the rod lock. It was still possible that the bucket could fall, but the Secretary did not present evidence to show that the bucket was reasonably likely to fall or that if the bucket fell it was reasonably likely to strike a miner. Inspector Willett testified that the footprints under the bucket showed an injury to a miner was reasonably likely, but he did not explain why. The simple presence of footprints does not warrant an S&S finding. The conditions underlying the violation were not reasonably likely to cause an injury and therefore the citation was not S&S.

I find that the violation was the result of Respondent's moderate negligence. A penalty of $100.00 is appropriate for this violation.

B. Citation No. 8660305

On July 12, 2011 Inspector Willett issued Citation No. 8660305 under section 104(a) of the Mine Act, alleging a violation of section 57.14207 of the Secretary's safety standards. The citation states:

> The GMC pick-up was parked unattended on a 2 to 3 percent grade without the parking break set [and] the wheels [were not] chocked or turned into a bank. Miners were working downhill from the parked truck. This exposes a person to the hazard of being over traveled by a parked vehicle.

(Ex. G-1). Inspector Willett determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 57.14207 of the Secretary's regulations requires that "[m]obile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank or rib." 30 C.F.R. § 57.14207. The Secretary proposed a penalty of $243.00 for this citation.

1. Summary of the Evidence

Inspector Willett testified that he issued Citation No. 8660305 as a violation of section 57.14207 because a truck was parked on a grade without an activated parking brake or chocked wheels. (Tr. 79). The inspector estimated the grade to be two to three percent. (Tr. 87). He also testified that if the truck were parked so that it did not move when placed in neutral then it would not be cited, but he did not test the cited vehicle. (Tr. 93).

Inspector Willett designated the citation as S&S because it was reasonably likely to cause a serious injury. The inspector viewed men working downhill from the front of the truck and he worried that these men could be "over-traveled" by the vehicle. (Tr. 87). The inspector testified that it is common for fatalities to occur under these circumstances due to crushing injuries, making section 57.14207 one of MSHA's "Rules to Live by" (Tr. 88-89; Ex. G-6).

Inspector Willett determined that the violation was the result of Respondent's moderate negligence. The condition was obvious and the operator should have known of it. (Tr. 91). Sisk told the inspector that he believed placing the vehicle in park was satisfactory, which the inspector viewed as a mitigating circumstance. (Tr. 90-91).

Sisk testified that the vehicle was parked in a rut and did not move when he placed it in neutral before parking it. (Tr. 95). The soft dirt made the vehicle less likely to roll, according to Sisk. (Tr. 98). Sisk testified that a crane was four feet in front of and downhill from the vehicle. The crane would not allow the truck to roll into anyone if it rolled forward down the hill because the workers were on top of the crane. (Tr. 95-96). Sisk admits that the vehicle was parked on a slight grade, was not chocked, and did not have the parking break set. (Tr. 96-97).

2. Discussion and Analysis

I find that Citation No. 8660305 was a violation of section 57.14207. Sisk admits that he left a vehicle without activating its parking brake, chocking its wheels, or turning its wheels into a bank or rib. Sisk's claim that he tested the vehicle to see if it would roll while in neutral is immaterial under section 57.14207. I also credit Inspector Willett's testimony that the vehicle was not secured by being parked in a rut. Regardless of a vehicle's ability to roll, section 57.14207 requires that unattended vehicles have activated parking brakes. The cited vehicle did not. The cited vehicle, furthermore, was on a grade without the tires being chocked or turned into a bank, which on its own violates the standard. Citation No. 8660305 violates both portions of section 57.14207.

I find that the citation was S&S. MSHA classifies section 57.14207 as one of MSHA's "Rules to Live by" because many miners suffer injuries and even fatalities due to violations of that section. In this situation, furthermore, the vehicle was on a grade with miners working in front of it. The fact that the miners were working on the top of the crane is immaterial, as they must eventually descend. Although the truck was only 4 feet from the crane, a miner could be crushed between the crane and the truck. If a vehicle were to crush a miner, a fatality would be likely. I credit the inspector's testimony that no rut existed that was sufficient to detain the truck. I find that a serious injury or even fatality is reasonably likely as a result of the cited condition.

Citation No. 8660305 was the result of Respondent's moderate negligence. Respondent should have known of the violation because it was obvious and section 57.14207 is a rule to live by. A penalty of $250.00 is appropriate for this violation.

C. Citation No. 8660306

On July 12, 2011, Inspector Willett issued Citation No. 8660306 under section 104(a) of the Mine Act, alleging a violation of section 57.14103(b) of the Secretary's safety standards. The citation states, in part:

> The window in the door of the Crane was broken and missing pieces of glass. The operator of the crane access[es] through this door when the crane is operated. The door on the crane is a bi fold style. This exposes the crane operator to the hazard of being cut by the broken window while entering or exiting the crane.

(Ex. G-17). Inspector Willett determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 57.14103(b) of the Secretary's safety standards requires that "[i]f damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed." 30 C.F.R. § 57.14103(b). The Secretary proposed a penalty of $100.00 for this citation.

1. Summary of the Evidence

Inspector Willett issued Citation No. 8660306 as a violation of 57.14103(b) because the crane window was broken on a bi-fold door. (Tr. 104). The shards of glass looked sharp to the inspector. (Tr. 105).

Inspector Willett issued the citation as S&S because it was reasonably likely that someone could sustain an injury as a result of the cited condition. The walkway in the crane is adjacent to the broken window and a miner usually pushes the center of the door below the window to open the door. (Tr. 104). The door does, in fact, have a handle for the purpose of opening it from the inside and the broken glass was not near the miner while exiting the vehicle. (Tr. 111-13). The 1/4 inch shards of glass could result in "minor cuts" that could lead to lost workdays or restricted duty by preventing a person from performing normal activities. (Tr. 108). It is possible the glass could cause cuts requiring stitches. *Id*.

Inspector Willett determined that the violation was the result of the operator's moderate negligence. The inspector testified that Sisk admitted to knowing that this hazard existed. (Tr. 106). Inspector Willett believed it was a mitigating factor that Sisk did not know that the cracked window was a hazard. (Tr. 108).

Sisk does not believe that the cited condition constituted a violation of the standard. It was inconvenient for a person operating the vehicle to contact the glass to open the door and the door could easily be opened by using the handle or by pushing on other parts of the door. (Tr. 119). The condition existed for several years. (Tr. 120). Sisk testified that the door is almost always open, making its window even less likely to be a hazard. (Tr. 123).

2. Discussion and Analysis

I find that Citation No. 8660306 was a violation of section 57.14103(b). Although Sisk testified that the bi-fold door is opened by pushing upon other parts of the door, it can also be opened by pushing upon the glass. Although the operator instructs employees to use the handle to open the door, "[e]ven a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). The broken glass posed the hazard of cutting a miner. The 1/4 inch exposed shards of glass referenced by Inspector Willett as well as captured in the photograph of the window could clearly cut a miner. (Ex. G-19 at 1). The experience and knowledge of workers is not a legal defense to any violation and does not change the fact that glass can cut them if they contact it.

I find that Citation No. 8660306 was not S&S. The broken glass did not obstruct the view of the operator. Although it was possible that the broken glass could cause injury, a miner was not reasonably likely to sustain a serious injury as a result of the hazard. Although the broken glass was located on the door, I agree with Sisk's testimony that it was unlikely that miners would contact the cracked area as the photograph shows that the door handle is some distance from the cracked window on the other half of the bi-fold door. *Id*. at 2. If a miner were to receive a cut from the cracked window, furthermore, I find that the thin cracks and small shards would not cause a lost time injury. *Id*. at 1. A minor cut would be the most likely injury that would only need first-aid treatment.

I find that the violation was the result of Respondent's moderate negligence. The cited violation was obvious and the operator should have known of its existence. A penalty of $100.00 is appropriate for this violation.

D. Citation No. 8660307

On July 12, 2011 Inspector Willett issued Citation No. 8660307 under section 104(a) of the Mine Act, alleging a violation of section 57.14132(b)(1) of the Secretary's safety standards. The citation states:

> The Sterling Boom truck with a restricted view to the rear was not supplied with a back-up alarm. This truck is used in areas where other miners are working. This exposes a person to the hazard of being over traveled without warning.

(Ex. G-21). Inspector Willett determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 57.14132(b)(1) of the Secretary's regulations requires that "[w]hen the operator has an obstructed view to the rear, self-propelled mobile equipment shall have . . . an automatic reverse-activated signal alarm . . . a wheel mounted bell alarm…a discriminating backup alarm . . . or an observer[.]" 30 C.F.R. § 57.14132(b)(1). The Secretary proposed a penalty of $243.00 for this citation.

1. Summary of the Evidence

Inspector Willett testified that he issued Citation No. 8660307 as a violation of section 57.14132(b)(1) because a sterling boom truck had a restricted rear view and lacked a back-up alarm. (Tr. 128). The boom restricted the operator's view, as did a welder and his torch cage that were positioned on the deck of the vehicle. (Tr. 130; Ex. G-22). The inspector did not see a spotter being used and Sisk told him that a spotter was not used. (Tr. 131).

Inspector Willett designated the citation as S&S. The inspector testified that the cited condition was reasonably likely to cause an injury because the truck was used in the presence of employees. (Tr. 132-33). Inspector Willett expected fatal crushing injuries to occur as a result of the cited hazard. (Tr. 133). Inspector Willett admitted that the tires of the vehicle were chocked when he issued the citation. (Tr. 135).

Citation No. 8660307 resulted from the operator's moderate negligence according to the inspector. The operator should have known that a back-up alarm was missing, but did not believe that the alarm was required. (Tr. 133).

Sisk testified that Respondent owned the cited vehicle for three years and always used spotters to operate the vehicle, even in its own shop. (Tr. 138). When the citation was issued, the vehicle was not moving. Although it moves from one site to another, it is typically stationary and occupies only one location at each work site. (Tr. 140-41).

2. Discussion and Analysis

I find that Respondent did not violate section 57.14132(b)(1) because the Secretary did not fulfill his burden to prove that Respondent backed up the cited piece of equipment without using a back-up alarm or a spotter*, i.e.*, an observer. To fulfill his burden, the Secretary must show that the operator backed up the cited equipment without either a back-up alarm or a spotter. *See River Cement Co.,* 10 FMSHRC 1027, 1029-30 (Aug. 1988) (ALJ). The inspector did not see the equipment back up at any time and the equipment was not moved the day of the inspection. (Tr. 136). Although Inspector Willett asserts that Sisk told him that no spotter was used, Sisk insists that Respondent always used spotters. (Tr. 131, 138; Ex. G-22). Sisk claims that any comments he made concerning no spotter being used were specific to the day the citation was issued, when the equipment had chocked wheels and never moved. (Tr. 136, 141-42). I am giving Sisk the benefit of doubt because (1) there was no affirmative proof that the truck was ever operated in reverse without a spotter being present; and (2) Sisk credibly testified that the truck is stationary once it arrives at a new job location. Sisk terminated the citation by installing a back-up alarm on the truck. It would behoove Sisk to maintain the alarm in operating condition because if the company operates the truck in reverse without an operable back-up alarm and a spotter is not present, its violation of the safety standard could well be considered to be an unwarrantable failure to comply with the safety standard.

Citation No. 8660307 is hereby **VACATED**.

E. Citation No 8660308

On July 12, 2011, Inspector Willett issued Citation No. 8660308 under section 104(a) of the Mine Act, alleging a violation of section 57.14132(b)(1) of the Secretary's safety standards. The citation states:

> A travel alarm was not provided for the Hitachi EX 400 excavator which has a restricted view to the rear. This excavator is used in areas where other miners are working. This exposes a person to the hazard of being over traveled without warning.

(Ex. G-29). Inspector Willett determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. The Secretary proposed a penalty of $243.00 for this citation.

1. Summary of the Evidence

Inspector Willett testified that he issued Citation No 8660308 as a violation of section 57.14132(b)(1) because a Hitachi x400 excavator had a restricted rear view and lacked a travel alarm. (Tr. 144). The cab of the equipment was not visible from the back. (Tr. 150; Ex. G-31). The inspector testified that according the Sisk, a spotter was not used for the cited excavator. (Tr. 149).

Inspector Willett designated the citation as S&S. The excavator was operated in a "small" area and the inspector said that Sisk stated that other equipment and up to five people at

a time worked in the area. (Tr. 150-151). An injury as a result of the cited condition would be fatal. (Tr. 151).

The citation resulted from the operator's moderate negligence, testified Inspector Willett. The operator should have known about the condition, according to Inspector Willett. (Tr. 150). The condition was obvious. (Tr. 151).

Sisk testified that the machine made enough noise while operating to alert surrounding workers that it was moving. (Tr. 156). All of the workers were trained to work safely. *Id*. The piece of equipment had a "swing area" of 80 feet that included 40 feet to each side. (Tr. 156). The mine and work area were sometimes invaded by "outsiders" including MSHA inspectors and delivery men, who were at a higher risk of injury than Sisk's employees, according to Sisk. (Tr. 160). When Sisk bought this machine 15 years earlier, it did not have a travel alarm. (Tr. 157). Although Sisk testified that he had been inspected by MSHA before, he had never received citations; these inspections occurred too far in the past for Sisk to remember the dates. (Tr. 158).

2. Discussion and Analysis

I find that Respondent violated section 57.14132(b)(1). Inspector Willett testified that Sisk informed him that no spotter was used and Sisk did not contradict this testimony. Sisk admitted that the alarm was broken and stated that the excavator did not need a travel alarm because the equipment was loud enough to warn of its movements.

I find that Citation No 8660308 was S&S. The citation violated section 57.14132(b)(1), leading to the hazard of a miner being crushed by a piece of equipment and the reasonable likelihood of sustaining serious or fatal injuries. Inspector Willett testified that an injury was reasonably likely as a result of the cited condition because the equipment worked in a small area with miners present. Sisk testified that the equipment had a "swing area" of 80 feet. It is reasonably likely that a machine with a large movement radius and limited visibility could cause a serious injury. Sisk, furthermore, testified that he was confident that no hazard existed because of the experience of his workers, but he did acknowledge that "outsiders," who are safety risks, enter the work zone. The travel alarm is not used to keep the operator of the machine safe; its purpose is to warn others of the equipment's movements because the operator has an obstructed view. No operator, regardless of experience, can avoid an unseen pedestrian. I find that the violation was reasonably likely to cause a serious injury.

I also find that the violation was the result of Respondent's moderate negligence. The violation was obvious and existed for 15 years, which is an extended period of time. Respondent should have known about the inoperable travel alarm on the cited piece of equipment. I find that a penalty of $300.00 is appropriate for this very serious violation.

F. Citation No. 8660309

On July 12, 2011 Inspector Willett issued Citation No. 8660309 under section 104(a) of the Mine Act, alleging a violation of section 57.14132(a) of the Secretary's safety standards. The citation states, in part:

> [Neither] the manual horn nor the back-up alarm supplied by the manufacture[r] were maintained in functional condition on the Cat 973 track loader. This loader is used in areas where other miners are working. This exposes a person to the hazard of being over traveled without warning.

(Ex. G-32). Inspector Willett determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. Section 57.14132(a) of the Secretary's regulations requires that "[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety device shall be maintained in a functional condition." 30 C.F.R. § 57.14132(a). The Secretary proposed a penalty of $807.00 for this citation.

1. Summary of the Evidence

Inspector Willett testified that he issued Citation No. 8660309 as a violation of section 57.14132(a) because a Cat 973 track loader had no manual horn or back-up alarm. (Tr. 163).

Inspector Willett designated the citation as S&S. The inspector believed that this hazard was reasonably likely to result in an injury. (Tr. 166). The vehicle could "overtravel" a person as it changed directions often, had no audible alarms, and worked in a small area that had up to five people in it. *Id*. The area in question was 6 acres and only two men were working at the time of the inspection. (Tr. 170). This hazard could cause a fatality. (Tr. 168).

Inspector Willett determined that the violation was the result of the operator's high negligence because Sisk should have known about the condition and the condition was obvious. (Tr. 167). The inspector designated the negligence as high instead of moderate because the operator noticed neither the absence of a back-up alarm nor the horn. (Tr. 169). The back-up alarm should sound automatically whenever the equipment backs up and the horn should be sounded manually any time the equipment moves. (Tr. 167).

Sisk admitted that the alarms on this vehicle did not work, but testified that the machine was operated far away from anything it might hit and spotters would be used when it moved outside of its area of operation. (Tr. 173). Sisk also stated that Respondent's equipment moved in the vicinity of other pieces of equipment. (Tr. 176). Sisk admitted that he should have known about this violation. (Tr. 175). Inspector Willett did not see any of the equipment being operated and there were two employees present at that time. *Id*.

2. Discussion and Analysis

I find that Respondent violated section 57.14132(a). Both Sisk and Inspector Willett agree that the horn and back-up alarm were not functional, which is a violation of the standard on its face. Although the Inspector did not see the equipment operating without its alarms or a spotter, Sisk admitted that the vehicle operated without a spotter or either type of alarm, stating that the use of a spotter and the alarms was not necessary based upon the location that the equipment operated.

I also find that the citation was S&S. The cited piece of equipment violated section 57.14132(a) and was reasonably likely to lead to the serious injury of a miner. Sisk testified that this equipment operated near other equipment when necessary, but had no signals to warn nearby equipment or pedestrians of its movements or proximity. Even if the operator had experience and operated the equipment safely, that operator would have no way to warn of his presence in the event of another's inattention. I credit Inspector Willett's testimony that the cited piece of equipment was reasonably likely to contribute to a crash that would cause an injury because it moved often and had no alarms. A collision involving this piece of equipment was likely to cause serious injuries including a fatality.

Sisk admitted that he should have known about this violation and provided no mitigating factors. The violation was both obvious and dangerous. I find that Citation No. 8660309 was the result of Respondent's high negligence. I find that a penalty of $900.00 is appropriate for this violation. The absence of both a back-up alarm and a horn made this violation very serious.

G. Citation No. 8660310

On July 12, 2011, Inspector Willett issued Citation No. 8660310 under section 104(a) of the Mine Act, alleging a violation of section 57.14130(a)(1) of the Secretary's safety standards. The citation states, in part:

> A Seatbelt was not supplied in the Cat 973 Track loader. This loader is a 1983 model. This loader is operated on rough uneven surfaces. This exposes a person to the hazard of being ejected from the loader in event of an accident.

(Ex. G-37). Inspector Willett determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 57.14130(a)(1) of the Secretary's regulations requires that "seat belts shall be installed on – (1) Crawler tractors and crawler loaders[.]" 30 C.F.R. § 57.14130(a)(1). The Secretary proposed a penalty of $243.00 for this citation.

1. Summary of the Evidence

Inspector Willett issued Citation No. 8660310 as a violation of section 57.14130(a)(1) because a 973 track loader, which was a crawler loader built in 1983, did not have a seat belt. (Tr. 179, 182, 184).

Inspector Willett designated Citation No. 8660310 as S&S. The inspector believed the absence of the seat belt made an injury likely because the miner operating the loader could be ejected from the equipment on rough terrain. (Tr. 183). An ejected miner could sustain fatal injuries if crushed by the loader or other equipment. (Tr. 183).

Inspector Willett determined that the citation was the result of Respondent's moderate negligence. The operator should have known of the condition and the condition was obvious. (Tr. 184).

Sisk testified that when Respondent acquired the equipment, it lacked a seatbelt and any vestiges of a seatbelt. (Tr. 193). Respondent installed mounts and attached a seatbelt to abate this citation. (Tr. 194). Respondent also had another loader at this time and that piece of equipment had a seatbelt, according to Sisk. (Tr. 193).

2. Discussion and Analysis

I find that Citation No. 8660310 was a violation of section 57.14130(a)(1). The cited piece of equipment is a "crawler loader" or "track loader" that is covered under section 57.14130(a)(1). It did not have a seat belt according to both Inspector Willett and Sisk, which is a violation of section 57.14130(a)(1).

I also find that the violation was S&S. Respondent violated section 57.14130(a)(1), presenting the hazard of a miner being ejected and crushed during an accident. I find that it is reasonably likely that the cited piece of equipment missing a seatbelt would contribute to a serious injury. Hitting a bump, turning too sharply, capsizing the equipment, colliding with another piece of equipment or anything of significant size, or a variety of other situations were likely to lead to a crushing injury without a seatbelt, especially on rough terrain. In addition, even if the miner was not ejected from the vehicle, he could be seriously injured by being thrown around inside the cab in the event of an accident. A loader that does not have a seatbelt is reasonably likely to lead to a serious injury, including a possible fatal injury.

The safety benefits of seat belts are well known by people with no experience or knowledge of mine safety. Respondent, furthermore, could easily have compared the cited loader to the loader that had a belt and realized that a belt increased safety and was required. I find that Respondent's negligence was high in this instance because the violative condition was obvious, existed for an extended period of time, posed a risk of fatality to miners, and Respondent should have known that this condition was a serious violation of MSHA's safety standards. A penalty of $900.00 is appropriate for this violation.

H. Citation No. 8660311

On July 12, 2011 Inspector Willett issued Citation No. 8660311 under section 104(a) of the Mine Act, alleging a violation of section 57.14130(i) of the Secretary's safety standards. The citation states, in part:

> The seat belt supplied in the 973 Cat track loader was not replaced when necessary to insure proper performance. The supplied seat belt had a 3/8 inch long cut in the belt and also had holes burn through the belt in 2 places. This exposes a person to the hazard of the seat belt failing in event of an accident.

(Ex. G-47). Inspector Willett determined that an injury was unlikely to occur, but that such an injury could reasonably be expected to be fatal. Further, he determined that the operator's negligence was moderate and that one person would be affected. Section 57.14130(i) of the Secretary's regulations requires that "[s]eat belts shall be maintained in functional condition, and replaced when necessary to assure proper performance." 30 C.F.R. § 57.14130(i). The Secretary proposed a penalty of $100.00 for this citation.

1. Summary of the Evidence

Inspector Willett issued Citation No. 8660311 as a violation of section 57.14130(i) because a different 973 track loader had a seat belt with a 3/8 inch cut on its edge and two holes burned through it. (Tr. 195-96; Ex G-49). Although the seatbelt was functional, the inspector testified that he issued the citation because the belt needed to be replaced and the damage had compromised the strength of the belt. (Tr. 198). Under normal mining conditions, the inspector believed that the conditions would worsen, leading to the ejection of a miner from the equipment. (Tr. 199). A fatal injury could occur as a result of the conditions underlying the violation. (Tr. 200). The inspector testified that seatbelts should be replaced whenever they are damaged because such damage compromises the strength of seatbelts. (Tr. 201).

Inspector Willett determined that the violation was the result of the operator's moderate negligence because the operator should have known of the cited condition. (Tr. 200). Sisk testified that the seatbelt adequately performed its function and was therefore safe. (Tr. 206).

2. Discussion and Analysis

I find that Citation No. 8660311 set forth a violation of section 57.14130(i). Section 57.14130(i) only requires that a seatbelt be replaced to ensure proper performance. The parties dispute what constitutes proper performance, but neither gives a definition and a seatbelt test was presumably unfeasible. I find that cuts and holes in a seatbelt can compromise its integrity. The area where the belt was cut as well as the area around the holes showed signs of unraveling. (Ex. G-49). The cited seat belt should have been replaced in order to assure proper performance and the failure to do so constituted a violation of section 57.14130(i). The violation was not serious, however.

Respondent's negligence was moderate with respect to this violation because it should have known of the cited condition. A penalty of $80.00 is appropriate for this violation.

I. Citation No. 8660313

On July 12, 2011 Inspector Willett issued Citation No. 8660313 under section 104(a) of the Mine Act, alleging a violation of section 57.14100(a) of the Secretary's safety standards. The citation states:

> A proper pre-shift examination of mobile equipment has not been done due to the number of defects found on the mobile equipment during this inspection. Citations were issued for 3 Back-up / travel alarms, 2 seat belt violations, a broken window and a manual horn not maintained functional. These 7 violations were issued on five pieces of mobile equipment. These defects should have been recognized and repaired in a timely manner. Not completing a proper pre-shift examination of mobile equipment and eliminating the hazards can result in injuries to miners operating or working around the equipment.

(Ex. G-58). Inspector Willett determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation

was S&S, the operator's negligence was high, and that one person would be affected. Section 57.14100(a) of the Secretary's regulations requires that "[s]elf-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift." 30 C.F.R. § 57.14100(a). The Secretary proposed a penalty of $807.00 for this citation.

1. Summary of the Evidence

Inspector Willett testified that he issued Citation No. 8660313 because Respondent was not conducting proper pre-shift examinations on its mobile equipment. (Tr. 209). The inspector issued seven citations on five pieces of equipment; the cited conditions were obvious and addressed back-up alarms, travel alarms, seat belts, and broken windows. *Id*. Respondent never included a seatbelt on one loader or a travel alarm on the excavator. (Tr. 210). The number of violations along with the inspector's belief that some of the violations existed for an extended period of time made the inspector believe that the cited condition of inadequate pre-shift examinations had existed for "[q]uite some time." (Tr. 210). Also, the operator could not supply the inspector with any records of pre-shift examinations that noted these defects. (Tr. 212).

Inspector Willett determined that the violation was S&S because an injury was reasonably likely to occur as a result of the neglected examinations. (Tr. 213). He believed that a fatal or serious injury could occur as a result of the failure of Respondent to conduct adequate examination of the equipment. (Tr. 214). The operator could have easily identified all of the conditions Willett cited on July 12, 2011 if it had performed proper pre-shift examinations. (Tr. 211).

Inspector Willett determined that the violation was the result of Respondent's high negligence. There were no mitigating factors and the inspector believed that numerous violations resulted from the cited condition. (Tr. 214).

Sisk testified that he instructs Respondent's employees to ensure that machines are mechanically sound before operation. (Tr. 220). Sisk instructs equipment operators to check equipment fluids and brakes before operation. (Tr. 222). Sisk does not instruct employees to check alarms or other safety devices before using equipment and no records are kept concerning the checks made by Respondent's employees. (Tr. 223).

2. Discussion and Analysis

I find that Respondent violated section 57.14100(a) by failing to conduct adequate pre-shift examinations upon self-propelled mobile equipment. Sisk testified that he and his employees do not check alarms or other safety devices on equipment and that they do not keep records of safety hazards or of the repairs of those safety hazards. Sisk testified that all he required employees to do before operating machinery was to make sure it was "mechanically sound" by checking fluids and brakes. (Tr. 220). An adequate examination of mobile equipment would identify and record safety hazards relating to seat belts or alarms. Pre-operational safety checks of mobile equipment are crucial to the safe operation of a mine.

I also find that the violation was S&S because conducting inadequate pre-shift examinations was reasonably likely to contribute to a serious injury. Based upon the crushing hazards associated with the violations concerning seat belts and alarms, Respondent's inadequate

inspections led to the hazard of miners being crushed or otherwise injured by mobile equipment. The likelihood that the violation could cause a serious injury, however, goes beyond the sum of the dangers presented by the underlying conditions discovered by the inspector; continued inadequate examinations of mobile equipment could lead to additional hazardous conditions in the future.

I find that the violation was the direct result of Respondent's high negligence. I credit Inspector Willett's testimony that Respondent presented no mitigating factors. When conducting pre-shift examinations, Respondent's employees ignored safety features such as alarms and seat belts because Sisk did not believe that they were particularly important. He referred to them as "ifs" because if something could happen, you get a citation. (Tr. 220-21). Although the equipment can be operated without these safety features, the equipment is more dangerous, which is why these features are required. During a pre-shift examination, an equipment operator must examine his equipment to ensure that it can be operated in a safe manner and, if safety features are not functioning or are missing, he must ensure that corrective action is taken. If a mine operator does not instruct his employees to thoroughly examine equipment to ensure that safety features are functioning, the operator is communicating to the employees that these safety devices are of little importance and need not function. This constitutes a high degree of negligence on the part of the mine operator. The underlying violations were obvious, posed the risk of causing serious injuries or fatalities, and Respondent should have known that its examinations were inadequate.

A penalty of $1,000.00 is appropriate for this violation because of the high gravity of the violation and the high negligence of Respondent. Requiring adequate pre-operational checks of mobile equipment is one of the most important steps a mine operator must take to provide a safe working environment.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Respondent has no history of previous violations. (Ex. G-61). At all pertinent times, Respondent was a very small independent contractor. The violations were abated in good faith. There was no proof that the penalties assessed in this decision will have an adverse effect on Respondent's ability to continue in business. The gravity and negligence findings are set forth above. I would have assessed higher penalties for some of the violations but for Respondent's small size and lack of previous history of violations.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

Citation No.	30 C.F.R. §	Penalty
8660312	57.14206(b)	$100.00
8660305	57.14207	250.00
8660306	57.14103(b)	100.00
8660307	57.14132(b)(1)	Vacated
8660308	57.14132(b)(1)	300.00
8660309	57.14132(a)	900.00
8660310	57.14130(a)(1)	900.00
8660311	57.14130(i)	80.00
8660313	57.14000(a)	1,000.00
	TOTAL PENALTY	$3,630.00

For the reasons set forth above, the citations are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above. Gary Sisk Drilling Company, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $3,630.00 within 40 days of the date of this decision.[2]

/s/ Richard W. Manning

Richard W. Manning
Administrative Law Judge

Distribution:

Courtney Przybylski, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202 (Certified Mail; przybylski.courtne@dol.gov)

Gary Sisk, Gary Sisk Drilling Co., Inc., 4800 N. Outer Road, Odessa, MO 64076 (Certified Mail; drillergary@yahoo.com)

RWM

[2] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER
875 GREENTREE ROAD, SUITE 290
PITTSBURGH, PA 15220
TELEPHONE: (412) 920-2682
FAX: (412) 928-8689

May 7, 2013

MAPLE CREEK MINING, INC., Contestant,	:	CONTEST PROCEEDING
	:	Docket No. PENN 2012-369-R
v.	:	Citation No. 7023028; 07/17/2012
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent.	:	Mine: High Quality Mine ID: 36-08375

DECISION

Appearances: Jennifer L. Klimowicz, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor

Jason D. Witt, Esq., for Maple Creek Mining, Inc., Murray Energy Corp.

Before: Judge Harner

This case is before me on a Notice of Contest filed by Maple Creek Mining, Inc. under Section 105 of the Federal Mine Safety and Health Act of 1977. The case involves one citation. The parties presented testimony and documentary evidence at the hearing held in Pittsburgh, Pennsylvania, on November 14, 2012. Additionally, all parties filed post-hearing briefs, and their positions and arguments have been duly considered.

I. BACKGROUND AND SUMMARY OF EVIDENCE

The parties submitted the following joint stipulations, at Joint Exhibit 1 (JX -1)[1] :

1. High Quality Mine is owned by Contestant, Maple Creek Mining, Inc.

[1] JX or Stip. followed by a number indicates a reference to the 34 numbered stipulations agreed to by the parties in their joint exhibit. GX followed by a number(s) indicates a reference to the appropriate Government exhibit. Tr. followed by a number(s) indicates a reference to the appropriate page numbers of the official Transcript of the hearing.

2. Contestant is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The presiding Administrative Law Judge has jurisdiction over the proceedings pursuant to Section 105 of the Act.

4. The citation involved herein was properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing its issuance.

5. The proposed penalty will have no effect upon Contestant's ability to remain in business.

6. The parties stipulate to the authenticity of their exhibits.

7. Contestant operated High Quality Mine for approximately three years before closing and sealing the mine in 2005.

8. On August 1, 2008, Contestant requested that the mine's status be changed from abandoned to active so that it could "obtain information regarding the current conditions in the slope entry and mine entries proximate to the slope bottom."

9. William Ponceroff, the District 2 Manager at the time, notified Contestant in a letter dated August 14, 2008, that it was required to submit for his approval various plans, including a mine ventilation plan, prior to beginning work underground.

10. In September 2008, Contestant submitted guidelines for the removal of the cap on Bassi return shaft for MSHA's approval. The parties discussed and modified these proposed guidelines during September and the beginning of October 2008. The District Manager approved Contestant's plan for removing one of the three slabs forming the cap over the Bassi Intake Shaft on October 9, 2008.

11. In a letter dated November 17, 2008, Complainant requested approval to remove the seal from the slope at High Quality Mine. The District Manager approved this request on November 19, 2008.

12. Contestant requested approval to explore the slope of High Quality Mine in a letter dated March 31, 2009. Contestant's Slope Exploration Plan was approved by the District Manager April 24, 2009.

13. On October 31, 2009, Contestant notified MSHA of its intent to idle High Quality Mine and requested permission to cease ventilation of the mine during its idle status.

14. The mine remained idle through May 1, 2010, at which time Contestant notified MSHA that it intended to re-start the fan at the Bassi Shaft so that exploration could begin later that year. District Manager Tom Light approved this action in a letter dated May 6, 2010.

15. On May 12, 2010, Contestant resubmitted its previously approved Slope Exploration Plan for MSHA's approval. The plan was approved on May 21, 2010.

Contestant requested MSHA's approval to modify this plan to include the use of a permissible pager system, and approval was granted on June 3, 3010.

16. Contestant discovered a roof fall at the 1220 foot marking on the slope on July 22, 2010. It submitted a plan for the "Re-Exploration of the Slope Entry," which was approved by the Acting District Manager on August 2, 2010. Contestant submitted amendments to this plan on February 18, 2011. The revised plan was approved by the District Manager on February 23, 2011.

17. Contestant's "Addendum to Slope Rehabilitation Plan" was submitted on April 6, 2011 and approved on April 7, 2011.

18. Contestant submitted its Mine Exploration Plan for MSHA's approval on July 7, 2011. The District Manager approved Contestant's Mine Exploration Plan on August 16, 2011.

19. Between September 21 and November 9, 2011, Contestant submitted three addendums/revisions to its Exploration Plan regarding the use of permissible water pumps to remove standing water in the mine, and submitted one plan detailing safeguards to be implemented prior to reenergizing two pumps, all of which were approved by the District Manager.

20. Sometime in November 2011, Contestant called the MSHA District 2 Office to report that it had discovered a large roof fall across all entries of the mine at the No. 18 Crosscut of the No. 1 Mains.

21. On November 19, 2011, Contestant submitted a proposed plan to change the ventilation in the 1 East Bleeder, Slope and Intake Shaft Air Change. The proposed changes were approved by the District Manager on November 23, 2011.

22. As the roof fall at No. 18 crosscut has prevented further exploration of the mine, Contestant has decided to seal off the inaccessible areas of the mine. On December 3, 2011, Contestant submitted a proposed plan to Rehabilitate Entries to Facilitate Seal Installation.

23. In a letter dated December 7, 2011, the District Manager informed Contestant that he could not approve the proposed plan to Rehabilitate Entries to Facilitate Seal Installation because it did not provide reasonable assurances that certain areas of the mine were being adequately ventilated.

24. On January 4, 2012, the District Manager issued a letter notifying Contestant that its Exploration Plan was no longer acceptable, and that Contestant was required to submit a suitable ventilation plan for MSHA's approval within 10 days.

25. Contestant submitted for approval a proposed Ventilation Plan on January 13, 2012. However, the District Manager notified Contestant that he could not approve the proposed plan in a letter dated February 16, 2012.

26. In a letter dated April 25, 2012, the District Manager again advised Contestant that its plan was no longer suitable, and that it was required to submit a complete ventilation plan for approval within 10 days.

27. The parties participated in a meeting on June 12, 2012, to discuss their differences regarding the proposed ventilation plan, but no agreement was reached. The parties agreed that MSHA would issue a citation so that a hearing could be held to resolve the impasse between the parties regarding the ventilation of High Quality Mine.

28. On June 25, 2012, the District Manager reminded Respondent that its previously approved plan was no longer acceptable and that it was required to submit a complete ventilation plan. This letter also notified Contestant that, if no additional information was submitted and approved by July 6, 2012, MSHA's approval for its plan would be revoked. In its July 12, 2012 response, Contestant stated that it did not believe approval of its ventilation plan was required and requested that a citation be issued so that it could "seek resolution through the legal system."

29. Contestant's Exploration Plan was formally revoked on July 6, 2012. Contestant has continued its limited underground activities while awaiting judicial review.

30. The parties engaged in multiple meetings and telephone calls since the massive roof fall was discovered in November 2011 regarding the contents of Contestant's ventilation plan, in addition to the correspondence described above, but they remain unable to reach any agreement regarding Contestant's ventilation plan.

31. Contestant is unable determine whether areas of the mine inby the roof fall are being ventilated because the areas inby the roof fall are inaccessible and cannot be examined.

32. Contestant is also unable to determine whether the East Bleeder Entries are being ventilated. The bleeder entries are not being examined because it has not been determined that it would be safe for miners to travel them.

33. High Quality Mine is a gassy mine, as defined by Section 103(i) of the Mine Act.

34. The parties agree that they each engaged in good faith negotiations to resolve their disputes regarding 1) the revocation of Contestant's Exploration Plan and 2) whether Contestant is required to have an approved Ventilation Plan prior to sealing the area of the mine that can't be traveled or explored. Contestant also agrees that MSHA complied with the "Bishop" process, and that each party was provided ample opportunity to explain its position. *See Bishop Coal Company*, 5 IBMA 231, 1BNA MSHC 1367 (1975).

The docket at issue contains one citation (No. 7023028) that is alleged to be a violation of the Secretary's mandatory health and safety regulations. GX-8.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the

testimony of each witness, I have also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel,* 212 F.3d 433, 436 (8th Cir. 2000)(administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

A. The Citation

After MSHA and the coal operator reached an impasse over the interpretation of the regulations, the operator requested that MSHA issue a citation in order to bring the matter before a court. Tr. 170-171. On July 17, 2012, Inspector Steve Davidovich issued a 104(a) citation -- Citation No. 7023028 -- to Maple Creek Mining for a violation of Section 75.370(a)(1) of the Secretary's regulations. The citation alleges that:

> The mine operator does not have a mine ventilation plan approved by the District Manager. The Operator submitted a plan, in accordance with 30 CFR 75.1721, which was approved for exploration activities on August 16, 2011. However, after the Operator reported that it had discovered a massive roof fall across all entries, MSHA notified the Operator in writing on January 4, 2012 that the previously approved plan was no longer acceptable and that the mine had to have an approved ventilation plan. The parties were unable to reach an agreement regarding the contents of a ventilation plan. On July 6, 2012, the August 2011 plan was formally revoked. On July 17, 2012, during an inspection it was determined that activities underground are continuing. Continued underground activity without an approved ventilation plan is a violation of the standard.

The inspector found that an injury was unlikely to occur, that the injury could reasonably be expected to result in no lost workdays, that the violation was not significant and substantial, that one person was affected, and that the violation was the result of low negligence on the part of the operator. GX-8.

B. The Regulations at Issue:

The regulation alleged to be violated is 30 C.F.R. §75.370(a)(1), which provides as follows:

> **Mine ventilation plan; submission and approval**
>
> (a)(1) 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 shall consist of two parts, the plan content as prescribed in § 75.371 and the ventilation map with information as prescribed in § 75.372. Only that portion of the map which contains information required under § 75.371 will be subject to approval by the district manager.

The body of the citation references 30 C.F.R. §75.1721, which provides in relevant part as follows:

> (a) Each operator of a new underground coal mine, and a mine which has been abandoned or deactivated and is to be reopened or reactivated, shall prior to opening, reopening or reactivating the mine notify the Coal Mine Health and Safety District Manager for the district in which the mine is located of the approximate date of the proposed or actual opening of such mine. Thereafter, and as soon as practicable, the operator of such mine shall submit all preliminary plans in accordance with paragraphs (b) and (c) of this section to the District Manager and the operator shall not develop any part of the coalbed in such mine unless and until all preliminary plans have been approved.

The facts of this case are largely not in dispute. It is in the interpretation of the regulations that the parties differ.

C. The High Quality Mine Reopening:

The High Quality Mine was closed from 2005-2008. Tr. 32-33. At that time, the intake and return shafts were capped and the slope seal was built in the slope in order to prevent access. Tr. 32-33. As a result, there was no ventilation in the mine during those years. Tr. 33. The High Quality Mine is a gassy mine and when ventilation ceases, methane levels build up, oxygen levels decrease and, without pumping, water begins to flood the mine. Stip. 33; Tr. 33, 51. Prior to reopening, the atmosphere was "inert," meaning that there were methane levels beyond the explosive range, and there was little oxygen. Tr. 33-34. During the reopening of a mine, one of the dangers is that the ventilation process brings methane levels back into the explosive range. Tr. 34.

The High Quality Mine has five longwall areas, with four of them having been mined out. Tr. 27-28. There is also a sixth area that was begun, but not completed, and has not been mined out with the longwall. Tr. 30. The mine is a medium sized coal mine that is approximately two to two and a half miles from the slope to the back. Tr. 160. MSHA inspector, Steve Davidovich, estimated that it is approximately 2,000-2,500 feet from the bottom of the slope to the 18 crosscut where the massive roof fall, discussed below, is located.[2] Tr. 160.

[2] Steve Davidovich has worked continuously in coal mining since January 1977. Tr. 157. He has been a ventilation specialist and coal mine inspector for MSHA District 2 for approximately two and a half years. Tr. 155. In this position his duties include inspecting coal mines, reviewing mine ventilation plans and addendums, requesting corrections and additions from operators, and recommending approval or disapproval to the district manager. Tr. 156. With regards to ventilation training, Davidovich has attended annual ventilation specialist training from MSHA for three years. Tr. 156. Prior to working as a ventilation specialist, Davidovich was a mine inspector since February 2006. Tr. 156. In this capacity, he received (continued…)

Access to the mine is gained by way of the slope, which is located at the top left hand corner of the map. Tr. 28; GX-1. This is also where fresh air enters the mine through a negative pressure system. Tr. 28, 32. There are three mains coming off the slope, and they are used to access the rest of the mine and provide ventilation through intake and return air forces. Tr. 29.

In order to have a methane explosion hazard three elements must be present: methane in the explosive range of 5-15%, at least 12% oxygen, and an ignition source. Tr. 126, 127. MSHA Inspector Jeremy Williams testified that ignition sources in worked-out areas of the mine could include a variety of causes, including roof bolts snapping off and sparking or lightning.[3] Tr. 146. Williams did not know the mine roof's composition or whether a roof fall would necessarily cause a spark. Tr. 146.

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[2] (…continued)
initial coal mine inspector training from the Mine Academy as well as training from other inspectors he traveled with during the training period. Tr. 156-157.

Prior to working at MSHA, Davidovich worked at the Ohio Valley Coal Company, Powhatan No. 6 mine as co-safety director for a year and a half. Tr. 157-158. His duties included escorting state and federal mine inspectors, conducting inspections, making recommendations, and conducting respirable dust surveys. Tr. 158. Prior to that, Davidovich worked at the High Quality Mine as a safety director with the same duties as with Ohio Valley Coal. Tr. 158. Prior to the High Quality Mine, Davidovich worked at Maple Creek Mine in the safety department, as a section foreman, a construction foreman, and a mine examiner for 7 to 8 years. Tr. 158-159. Davidovich has a State of Ohio mine foreman's certification, as well as Pennsylvania certification as a mine foreman, assistant mine foreman, and mine examiner. Tr. 159. Additionally, he has a bachelor of science degree in Chemistry. Tr. 159.

[3] Jeremy Williams has been employed by MSHA as a supervisory mine safety and health specialist in the ventilation department since July 2012. Tr. 20. In this position, his duties include supervising the ventilation group, reviewing plans recommended for approval by specialists, and conducting inspections at mines. Tr. 20. Prior to this position, Williams was a ventilation specialist in District 2 from 2008 to 2012, where he reviewed ventilation and firefighting evacuation plans and inspected mines and gas wells. Tr. 21. Prior to that position, Williams was a health specialist with MSHA from 2005 to 2008. Tr. 21. Prior to working for MSHA, Williams worked for Consol from 1998 to 2005, first in the engineering department at the Bailey Mine from 1998 to 2001, then in the safety department of Mine 84 from 2002 to 2003, and lastly as a foreman in the Shoemaker Mine from 2003 to 2005. Tr. 22-23.

Williams has a bachelor's degree in mining engineering from West Virginia University and has West Virginia mine foreman's papers as well as Pennsylvania assistant mine foreman's papers. Tr. 23. While employed with MSHA, Williams has received entry level inspector training at the Academy, ventilation specialist training, health specialist training, mine rescue training, and accident investigation training. Tr. 22. With regard to ventilation, Williams has received training in ventilation one week every year for the past four years. Tr. 22.

On August 1, 2008, the Contestant requested that the mine's status be changed from abandoned to active. Stip. 8. District 2 Manager, William Ponceroff, notified the Contestant on August 14, 2008 that it was required to submit various plans, including a ventilation plan. Stip. 9. In September 2008, the Contestant worked with MSHA to develop guidelines in order to remove the cap on the Bassi return shaft and begin pumping down the water levels in the mine. Tr. 35-36; Stip. 10. The plan, which was approved by the district manager on November 17, 2008, allowed the Contestant to breach the seal on the slope. Stip. 11. The Contestant submitted a Slope Exploration Plan, which would allow it to ventilate for a period of time, and then proceed with a plan for exploration at the bottom of the slope. Tr. 36. The Exploration Plan was approved by the district manager on April 24, 2009. Stip. 12.

On July 22, 2010, the Contestant discovered a roof fall on the slope, so the Contestant submitted a plan to rehabilitate the slope and support the area in order to clean up the fall. Tr. 37. The Contestant submitted a Re-Exploration Plan, along with amendment, which were approved by the district manager on February 23, 2011. Stip. 16.

Inspector Williams testified that 30 C.F.R. 75.1721 required Maple Creek to submit a plan to MSHA in order to rehabilitate the slope.[4] Tr. 37. After the Contestant cleaned the fall, it requested approval to travel to the bottom of the slope in order to begin pumping the bottom of the slope area. Tr. 38. These plans were all submitted by the Contestant to the MSHA ventilation department, and the ventilation department recommended to the district manager that each be approved. Tr. 38. The district manager approved each of them. Tr. 38; Stip. 16-19.

In order to rehabilitate the slope, the Contestant went in and resupported the roof with roof bolts and gunite. Tr. 161. They then brought in a mucking machine and loaded the fallen material onto a car and hauled it out. Tr. 161. The Contestant was required to have safety precautions in place, including temporary supports prior to anyone entering, as well as installing permanent supports and ensuring that fresh air was going over miners' backs. Tr. 161-162.

During conversations between MSHA and the Contestant, MSHA insisted on knowing if the area down to 10 east, and the full extent of 9 east and 8 east, all the way up to the corner between the 60s and 5 east, was ventilated. Tr. 39. MSHA did not think that the mine would be able to be traveled because the mine had a lot of bottom hooving prior to its sealing. Tr. 39-40. Therefore, the plan was to travel down the mains to the bottom of the incompletely developed panel. Tr. 40. The Contestant planned to make sure the area was safe, and then seal off the areas in order to mine the other side of the mains. Tr. 41, 245. There were 10 stages to the plan and 10 different zones in the exploration plan. Tr. 41-42. Williams explained that exploring before reopening a mine is important to make sure all the areas are ventilated properly in order to mitigate or limit hazards. Tr. 42.

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[4] Murray Energy safety manager, William Brady testified that ventilation plans listed under Section 1721 are primarily developed for mining operations. Tr. 257. However, in this instance there was no mining taking place, so he believed such a plan would be unnecessary. Tr. 257. He admitted that an approved ventilation plan is necessary in order to install the seals. Tr. 258.

The Contestant's activity in the mains since the exploration plan was approved has consisted primarily of pumping the water out of the mains. Tr. 162. They have also repaired some stoppings and patched some holes, and they may have set up some posts and jacks. Tr. 162. The Contestant replaced mandoors in stoppings that were rusted out and repaired some overcasts. Tr. 162-163. In order to make the air change in 2011 by the east bleeders, the Contestant had to build one or two stoppings. Tr. 163. This required examinations of the area for methane and oxygen, as well as the roof. Tr. 163.

The Contestant also submitted a plan for approval to explore the mine on July 11, 2011 after the slope had been rehabilitated. Tr. 43-46; GX-2. The mine's representative, Mr. Taylor, was working with the MSHA ventilation department, sending in drafts of the plan and working through various issues. Tr. 46. The July 11 plan was submitted as the final plan. Tr. 47. It dealt with various issues, including ventilation of roof controls, gas levels, action levels, and air qualities. Tr. 47. The plan outlined action levels associated with different possible gas concentrations encountered. Tr. 48. It also addressed ventilation requirements for the mine while the operator was in the exploration phase. Tr. 48.

Williams testified that 30 C.F.R. §75.1721 requires the operator to have a plan that addresses ventilation and roof control issues as the mine is explored. Tr. 48. He described the required plan as "a preliminary plan to reenter the mine, to go in and set up guidelines...[and] what safety precautions are going to be taken while doing it." Tr. 49. The plan was required to be approved by the district manager prior to developing the coal bed, a phrase which MSHA interprets to encompass rehabilitating the area, ventilating the area, and exploring the area while persons are traveling underground. Tr. 49. Williams described these activities as prerequisites to the actual mining process. Tr. 50. It is MSHA's position that the phrase "developing a coal bed" in §1721 is synonymous with "developing the mine." Tr. 138-139. Williams testified that he was not aware of a written policy by MSHA that defines the phrase "developing the coalbed." Tr. 148. However, he stated that the development of a new mine is different than the development of a mine being reopened. Tr. 152. A closed mine that is being reopened must be reventilated, resupported, and pumped out, which MSHA interprets as redevelopment. Tr. 152.

The Contestant planned to repair damaged ventilation controls, stoppings, and overcasts as it came across them in order to keep air flowing in the proper direction. Tr. 51. Ideally, the air should have been drawn in through the Bassi return shaft down the slope and through the ventilation controls using negative pressure. Tr. 52. With regard to the bleeders, air should be coming in through the inlet evaluation points ("IEPs"), course around the perimeter, and return out the 1 east exit. Tr. 52. The air would then exhaust at the bleeder evaluation point ("BEP") at 1 east and travel across the bank of the overcasts and the Bassi return shaft. Tr. 52. Williams testified that at the time of the early exploration period he believed that air was coursing properly, even if travel was not possible. Tr. 53.

MSHA approved the exploration plan in August 2011 because the agency believed it was a safe way to explore and reventilate the mine. Tr. 53. However, MSHA's position was that in order to seal off the area, there would need to be assurances that the area inby the slope fall was safe. Tr. 54. Williams stated that "[w]e didn't feel comfortable approving something and just go in and build seals without knowing what is a hundred feet away." Tr. 54. Williams believed that

the Contestant wanted to install 120 PSI seals, so that, according to the regulations, it would not be necessary to sample the atmosphere behind it. Tr. 55. However, in order to install these seals, the Contestant would have to introduce men and energized equipment into the area, as well as change ventilation, all of which would create an increased exposure to the hazards of methane. Tr. 56. The process would involve removing loose dirt and coal, as well as possibly having to re-support the areas. Tr. 163-164. The Contestant may also have to re-support the roof with either bolts or posts, and support the ribs to ensure safety for miners. Tr. 164.

D. The Roof Fall at 18 Crosscut and the Subsequent Plans:

In early November 2011, the Contestant submitted requests for approval to install additional pumps. Tr. 81-82; Stip. 19; GX-4. In the November 2 letter, a second addendum is attached which requests approval to install two additional portable pumps to deal with water encountered while exploring. Tr. 84. Inspector Williams testified that approval for these pumps was required because MSHA wanted to know the different safety precautions in place while there was use of energized equipment. Tr. 84-85.

On November 10, 2011, the Contestant submitted a letter concerning safety precautions to be taken prior to reenergizing the pumps at the No. 9 entry in the 14 crosscut and the No. 1 entry in the 0 crosscut, which included the use of alarms and continuous methane monitors. Tr. 85. These pumps could function as ignition sources if the methane were at an explosive concentration. Tr. 85-86. Therefore, the Contestant planned to set the methane monitors so that if methane levels reached 1% or greater, an alarm would sound at the surface and a man at the surface would deenergize the power underground. Tr. 85.

At some point in November 2011, the Contestant called the MSHA District 2 office to report that it had discovered a large roof fall across all entries of the mine at the No. 18 crosscut of the No. 1 Mains. Stip. 20. Inspector Davidovich has traveled to the roof fall and testified that, at entries 4 through 10, the fall appears as an area that has been sheared straight. Tr. 166. Only at number 1 entry was there rubble. Tr. 166. However, even there, Davidovich could not determine the height of the fall. Tr. 167. Davidovich was concerned because it was likely that the roof fall destroyed the stopping between the 3 and 4 entries, which was part of a line of stoppings to separate intake and return air. Tr. 168. If this was the case, then it was likely that air was being short-circuited. Tr. 168.

MSHA had discussions with the Contestant about the explosive levels of methane that were being encountered at the 1 east bleeder. Tr. 64. On November 19, 2011, the Contestant submitted a proposed plan to change the ventilation in the 1 East Bleeder, which was approved by the district manager on November 23, 2011. Stip. 21. The Contestant switched the air direction so that rather than air with high levels of methane going over the energized pumps, the air would go into the 1 east area to a BEP. Tr. 65. Around this time, in November, the Contestant was able to see the full extent of the roof fall, and that it extended all of the way across all 9 entries. Tr. 68.

After the Contestant changed the air flow into the 1 east bleeder, there were no explosive levels of methane detected. Tr. 68-69. Williams testified that this air change would reduce the

likelihood of being overcome by low oxygen or moving explosive levels of methane over the energized equipment. Tr. 133. Oxygen deficient air could lead to miners being overcome and passing out or dying from exposure to oxygen deficient environments. Tr. 134. Williams testified that miners would begin to feel these problems at 16% oxygen and then risk death at 12% oxygen. Tr. 135. Between 16-19.5% oxygen miners may or may not be exposed to a hazard. Tr. 135. Due to the other unknowns, Williams could not state whether the air change would be an appropriate way to ventilate the area in order to build seals. Tr. 134.

During this time, Contestant's employee Van Horne[5] was providing MSHA different maps with air readings. Tr. 69. In the course of discussions with Van Horne, Williams was told of methane readings in excess of 5% at the 1 east BEP location. Tr. 69-70. The air readings from November 29-December 15, which MSHA requested for the approval process, were admitted as GX-3. Tr. 72-73, 78. Reviewing these documents, Williams testified that the air readings from November 29 gave him some cause for concern because the methane levels were a little elevated and they were rising and falling. Tr. 74. The oxygen levels also concerned Williams because they were at 19.5% on November 29-30, which is the minimum that is required to allow travel in the mines. Tr. 74-75. Williams testified that these air readings did not provide an accurate indication of the atmosphere in the areas not being traveled because it is being "sweetened"—or having fresh air added—by the air coming up from the examiner's back. Tr. 75-76.

Based on the air readings submitted by the Contestant, Williams stated that the air change was instituted some time between November 29 and December 3. Tr. 77-78. From December 5 until December 15, the readings indicate that the methane levels were decreased, while the oxygen levels still fluctuated. Tr. 77-78. Based on the pump the Contestant was using, methane levels up to 2% were permissible. Tr. 79.

The roof fall at No. 18 crosscut has prevented further exploration of the mine, so the Contestant decided to seal off the inaccessible areas of the mine. Stip. 22. The air directions represented on the map as going around the perimeter of the bleeder cannot be verified because no one can travel that area. Tr. 25-26. The bleeder entries are used to ventilate the worked-out area. Tr. 30. Williams located the bleeder entries as going around the perimeter of the longwall area, because the mine used a wrap-around system. Tr. 27, 30. Therefore intake air would be introduced into the front end of each of the panels and the air would also be directed up and around the outside perimeter of the panel, and then carried back to the Bassi return shaft. Tr. 30-31. That shaft leads to a fan on the surface that draws the air out of the mine. Tr. 31.

MSHA was concerned about letting the Contestant seal off the area without knowing what the atmosphere was beyond the roof fall because there was no assurance of ventilation inby the roof fall. Tr. 57. The Contestant was measuring the air on the intake side of the roof fall, from 4 through 9 entry, and it was at 20.8% oxygen and zero methane. Tr. 57. However, it is unknown if the air is traveling across the roof and just reporting back to the number 1, 2, and 3 entries. Tr. 58. The air may be short-circuiting and coming back, and there is no assurance that the air is reaching the furthest point. Tr. 58. The proposed seal location was just outby the roof fall, so the return air coming from the worked-out area inby the roof fall, which may have a

[5] Mr. Van Horne's position with the Contestant was not identified.

dangerous combination of low oxygen and explosive levels of methane, would be coming over the top of miners where energized equipment would be present. Tr. 58-59. The energized equipment would be used to rehabilitate the roof bolt, scoop silt and fines from flooding, pump water, and for the cementitious material for the seals or glue being used to build the seal. Tr. 59.

Miners working outby the roof fall would be at risk if an explosion or catastrophic event occurred inby the roof fall. Tr. 60. Even if the methane was in an inert state, the low oxygen levels could overcome miners installing the seals and make them unable to breathe. Tr. 60. Additionally, the introduction of oxygen would change the ventilation and bring methane levels down into an explosive range. Tr. 61.

After the massive roof fall was discovered in November 2011, MSHA changed its view as to the acceptability of the ventilation provisions in the approved exploration plan. Tr. 67, 86. At that time, the Manager of Safety and Regulatory Affairs for Murray Energy Corporation, Edwin Patrick Brady was asked by the Contestant for technical advice on the work being performed and in getting commitments from MSHA for plans to seal the mine.[6] Tr. 228, 241. In this capacity, Brady solicited information from operations concerning plans and goals, including

[6] Edwin Patrick Brady has worked for over five years as the Manager of Safety and Regulatory Affairs for Murray Energy Corporation. Tr. 228. At Murray Energy, Brady is involved with assisting operations with the technical and inventory aspects of ventilation plans. Tr. 238. Prior to this position, Brady worked for MSHA as the Superintendent of the National Mining Academy in Beckley, West Virginia. Tr. 228-229. As Superintendent, Brady was responsible for the entire operations of the Academy, which trains coal mine and metal and nonmental inspectors. Tr. 232. Training was conducted in modules, and individuals would have to complete a required number of modules before receiving an authorized representative card. Tr. 233. Brady testified that at the Academy, ventilation was a curriculum that included several modules. Tr. 234-235.

Prior to working at the Academy, he was the District Manager for MSHA, District 4, in Mt. Hope, West Virginia for five years. Tr. 229. In this capacity, Brady was responsible for approximately 100 mines, and may have received up to 200 ventilation plans per year. Tr. 235. Brady testified that when he was a District Manager for MSHA, it was his responsibility to approve or disapprove operators' ventilation plans. Tr. 231. Also, as the head of the engineering group, he was responsible for the individuals who reviewed ventilation plans. Tr. 231. Brady testified that he knows of no regulatory provision that requires a mine exploration plan. Tr. 231.

Prior to serving as District Manager, Brady was the Assistant District Manager for Technical and Engineering Programs for MSHA, District 3, in Morgantown, West Virginia for over six years. Tr. 229. Prior to that he was the Staff Assistant to the District Manager in Coal Mine Safety and Health, District 3, in Morgantown, West Virginia. Tr. 229. Brady has a bachelor's of science degree in mining engineering from West Virginia University and a master's of science degree in safety from Marshall University. Tr. 230. He has a West Virginia coal miner certification, all of MSHA's instructional certifications, and several OSHA certifications in construction. Tr. 230-231. He is also a former member of the National Mine Rescue Team for MSHA. Tr. 231.

ventilation plans. Tr. 242. He also went to MSHA meetings to negotiate a plan that could be approved. Tr. 242.

Under the exploration plan previously approved by MSHA on August 16, 2011, and its subsequent amendments, the mine was to be systematically explored according to 10 stages; however the roof fall in early November 2011 made it so that they could not proceed beyond the first stage. Tr. 86. Because further exploration of the mine was impossible and the intent of the plan could not be fulfilled, the plan would not longer be functioning as an exploration plan. Tr. 87. Therefore, in January 2012, MSHA notified the Contestant that the approved plan was no longer suitable. Tr. 87.

The Contestant proposed installing seals in the 1 main, 2 east, and 1 east locations. Tr. 87. Additionally, in the area outby the fall, the bottoms would need to be scooped, roof bolts may need to be installed, and there may be necessary maintenance of the ribs and roof. Tr. 88. The Contestant submitted a seal rehabilitation plan on December 3, 2011. Tr. 88-89; GX-5. The first page of the document is a letter from MSHA, stating that MSHA could no longer approve the plan because the plan did not provide a reasonable assurance that the area inby 1 east through 6 east and inby the roof fall were adequately ventilated. Tr. 91. Furthermore, it states that a request to approve an alternate method would require approval by the district manager. Tr. 92.

It is MSHA's position that the process of getting the area ready for seals to be installed there would result in an increased exposure of hazards to miners because there would be more miners and energized equipment going into the area. Tr. 92-93. These include roof bolting machines, scoops, battery-powered locomotives, and supply cars going into the area. Tr. 93. There appears to be no reliable remote means to install approved seals. Tr. 56-57. To access the areas inby the roof fall, the Contestant could drill bore holes and go down to the angled reposts that were built up and isolate the area inby, but the testimony indicates that the process is prohibitively expensive. Tr. 57.

During this time the intake shaft was providing fresh air and the return shaft was ventilating methane out to the surface. Tr. 95. The low oxygen or high methane air would travel outby a bank of overcasts that crossed over the mains and went out to the Bassi return shaft. Tr. 96. At different locations on the return side outside air would have to pass miners working to rehabilitate the area. Tr. 96. MSHA was not concerned with the seals, but rather with the hazards involved in the process of installing the seals. Tr. 98.

MSHA supervisory mining engineer, Thomas Morley, reviewed the Contestant's proposed rehabilitation sealing plan and testified that the plan was insufficient because it did not address the worked-out areas, which comprised the majority of the mine.[7] Tr. 201; GX-5. Morley agreed with the district manager's assessment that the plan did not provide a reasonable assurance of ventilation for areas of the mine inby 1 east through 6 east longwall panels, and inby the roof fall, from number 1 entry through number 9 entry at crosscut 18. Tr. 202. Morley testified that the August 15, 2011, plan and the district manager's August 16, 2011, letter do not indicate what regulation the district manager is applying. Tr. 215-216. However Morley believed that the proper regulation to be applied is Part 75, Section 1721.[8] Tr. 216.

Morley reviewed the Contestant's proposed ventilation plan dated January 13, 2012, and testified that it was not sufficient to insure the safety of miners working underground at the mine because it provides no assurances of ventilation past crosscut 18.[9] Tr. 182, 183, 203. Morley testified that it would not be safe for miners to install seals prior to having assurances that the rest of the mine is properly ventilated because constructing seals is a substantial project that involves numerous people for extended periods of time. Tr. 203-204. Additionally, in the course of installing seals, there is always the possibility of moving methane from the worked-out area into the working area. Tr. 204. Bringing additional mobile equipment to construct the seals also increases the risk of an ignition source. Tr. 204-205.

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[7] Thomas Morley is a supervisory mining engineer for MSHA tech support in the ventilation division located in the Pittsburgh Safety and Health Technology Center. Tr. 179. In this capacity, Morley supervises other engineers in surveying ventilation systems of mines, offers opinions and guidance on plans, and performs studies and evaluations on face ventilation systems in mines. Tr. 179. Morley's team also travels to mine fires, explosions, and disasters in order to monitor mine gases and offer opinions to MSHA as to whether the atmospheric conditions in the mine are safe. Tr. 179. He has provided expertise at the Jim Walters mine explosion, the Sago mine investigation, the Alma mine fire, and the Upper Big Branch explosion. Morley has a bachelor of science degree in mining engineering and a master of science degree in mining engineering from West Virginia University. Tr. 180. The Contestant stipulated that Morley qualifies as an expert. Tr. 178.

[8] Brady testified that he interprets §75.1721 as imposing a requirement only to notify, not seek approval from, the district manager before entering a mine that has been abandoned and subsequently to submit preliminary plans concerning mining for coal as soon as possible. Tr. 243. Sections 75.335 and 75.336 require the operator to have an approved ventilation plan in order to install seals. Tr. 244-245. Brady testified that Section 75.334 states that if the operator cannot reasonably evaluate an area of the mine, it had to seal off that area of the mine in accordance with the weekly examinations. Tr. 246-247.

[9] Williams testified that the quality of the air on December 15, 2011, where the proposed seals were to be built, would not pose a hazard to miners. Tr. 137; GX-3. However, he emphasized that because the quality of the air inby the roof fall was unknown, miners in the area would be exposed to hazards. Tr. 182, 183, 203. He further stated that MSHA's previously approved plan could have potentially exposed mine examiners or miners conducting the air change to hazards. Tr. 138.

MSHA sent the Contestant a letter in January 2012, notifying it that the previously approved Exploration Plan was no longer acceptable. Tr. 100; Stip. 24. The reason provided was that the original intent of the plan—to exlore inby the roof fall—could no longer be accomplished. Tr. 100. The letter requested that a complete ventilation plan that complied with 370(a)(1) be submitted within 10 days. Tr. 101; GX-6. Although the Contestant submitted a new plan after that, it was not acceptable to MSHA. Tr. 101; GX-7; Stip. 25.

On the first page of GX-7 is the rejection letter from MSHA, stating that the reason for not approving the plan was that the alternative method of evaluation of the worked-out area was not sufficient to provide reasonable assurance that the area inby the 1 east through 6 east longwall panel and inby the roof fall were being ventilated. Tr. 103; GX-7. The 1 east and 2 east areas at the intake evaluation points, and the 18 crosscut, were the furthest point of travel that was being conducted at the time. Tr. 104-105. It was from these points that the Contestant proposed evaluating the entire mine. Tr. 105. MSHA did not feel comfortable with this proposal because there was a chance that the air was entering the 4 through 9 entries and short-circuiting at the roof fall or inby the roof fall and not ventilating the rest of the mine. Tr. 105, 109. Similarly, MSHA was concerned that the air entering the 1 east and 2 east areas of the mine were short-circuiting, and had no idea what paths they may be taking. Tr. 105.

Pages 2 and 3 of GX-7 were the pages sent by the Contestant to MSHA requesting approval of the mine ventilation plan. Tr. 103; GX-7. The plan included provisions such as ventilation, dust control, and operating sprays for the miners. Tr. 103-104. This plan was more detailed than the original mine exploration plan because it included dust control and ventilation control parameters that would be used for mining coal. Tr. 110. Williams described the plan as being geared more towards operating the coal mine. Tr. 110. Williams also testified that the use of polyurethane foam sealants detailed on page 7 of the submission would not be sufficient for sealing the mine. Tr. 111; GX-7. He further stated that although page 5 of the plan states that there is no bleeder system projected, there was in essence a bleeder system at 1 through 6 east areas of the mine that introduces air into the worked-out area. Tr. 112.

Inspector Williams specified that the plan was not rejected because there was no seal projected, but rather because the areas inby the fall could not be evaluated. Tr. 112-113. He stated that MSHA's stance did not change between December 7 and February 16 with regard to the dangers associated with sending miners and energized equipment to begin construction of the seals. Tr. 113.

MSHA has neither told the Contestant they must drill bore holes for the plan to be approved, nor has it demanded bore holes in specific locations. Tr. 116. In the meetings MSHA wanted reasonable assurance that the worked-out area of the mine was ventilated and contained no hazards. Tr. 248. MSHA and the operator discussed several scenarios, including the idea of removing the materials and putting a fan on a shaft that was partially constructed in the back of the mine. Tr. 248. Another scenario that was discussed involved directional drilling of bore holes into the abandoned area and injecting nitrogen into the holes. Tr. 248. Each of these ideas was ruled out as not economically feasible. Tr. 117. Williams testified that MSHA suggested bore holes as an acceptable means of alternate evaluation. Tr. 118. There were discussions of

drilling bore holes and reversing the fans in order to blow air out of the holes and sample the atmosphere. Tr. 119.

Williams testified that a plan incorporating bore holes could either pull air out of the mine or into the mine, depending on the type of system employed. Tr. 129. If the bore hole hit a mine working, coal block, or collapsed area, there would likely be no air movement in or out. Tr. 130. There would be no way of knowing at the outset whether a bore hole would create air movement. Tr. 130. The bore hole option would not solve the problem, but it would give thedistrict manager an alternative means of evaluating the atmosphere in the area.[10] Tr. 143, 222-223. MSHA has neither provided a precise number of bore holes necessary nor has it insisted on specific placement. Tr. 145, 250-253. However, it did suggest 6-8 inch holes and made suggestions for locations.[11] Tr. 252-253.

Brady, the safety manager at Murray Energy, believes that introducing bore holes or open air shafts would introduce additional hazards into the mine because they will disrupt whatever equilibrium that the mine has established. Tr. 250-251. He has reached the conclusion that the mine is stable because it has not acted in any way other than what was expected. Tr. 259-260. He testified that the operator could drill as many as 20 holes in the mine and, if they are not placed properly, they will not provide the needed information. Tr. 253. Furthermore, because the conditions of the abandoned area are unknown, he would not know how to determine proper placement of the bore holes. Tr. 253.

Brady testified that he did not believe it was possible to provide MSHA with reasonable assurances concerning the atmosphere in the worked-out area of the mine, and therefore it was proper to seal the area. Tr. 254-255. This was because no one knows what is in the worked-out areas of the mine. Tr. 270-271. He stated that, based on his conversations, sinking three bore holes would probably satisfy MSHA, but it wouldn't reveal anything about the atmosphere in the worked-out area. Tr. 271-272. He described it as simply "going through an exercise." Tr. 272.

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[10] Brady does not believe that drilling bore holes would provide reasonable assurance of the atmosphere in the worked-out area of the mine because it is unclear whether there are additional roof falls, how many bore holes would be necessary, or where the ventilation controls are in the abandoned part of the mine. Tr. 249. Furthermore, there is a large body of water in this mine that makes it more difficult to eliminate gases and bad atmosphere. Tr. 250. Brady concluded that there were too many variables that could not be answered by simply drilling bore holes. Tr. 250. He testified that he asked MSHA several times about the number and placement of the bore holes, as well as the rationale for how they were superior to the current precautions, and he received no response. Tr. 250. However he also testified that MSHA did provide several suggestions for locations for the bore holes, and that they suggested six and eight inch holes. Tr. 252, 253. Brady testified that the underlying disagreement was that the operator does not want to drill bore holes, do directional drilling, or inject nitrogen. Tr. 269.

[11] Williams testified that he does not know how many bore holes would be necessary to provide necessary assurances, because potential roof falls could hinder accurate readings. Tr. 145.

Brady does not believe anything short of removing the roof fall and traveling to the worked-out area would provide information of what is inby the roof fall. Tr. 272. Brady proposed placing seals at 1 east to 2 east and some place in front of the fall. Tr. 255, 272. He testified that a satisfactory plan could be designed that would safely keep fresh air on the working area while the seals were being installed. Tr. 256. At the time of hearing, the Contestant had not pursued such a satisfactory plan with MSHA. Tr. 276-278.

Inspector Davidovich issued a citation on July 17, 2012 after the mine operator requested a citation in order to get past the impasse with MSHA. Tr. 170; GX-8. At that time, he observed miners working underground. Tr. 171. Davidovich stated that he determined the gravity in the citation as unlikely that injury or illness would occur, no lost work days, and non-S&S. Tr. 171-172. Davidovich testified that Title 30, Part 75 of the regulations requires the mine operator to have an approved ventilation plan to seal the mine. Tr. 172-173, 176-177. In the body of the citation, Davidovich referenced § 75.1721, but in the box for the section violated he wrote 75.370(a)(1). Tr. 173. Davidovich testified that §75.364 is the regulation that allows an operator to seal a mine instead of exploring it, but he did not agree with the interpretation that the operator has an option between sealing and exploring. Tr. 174-175. Davidovich testified that he has never been in a situation where an operator decided to seal a mine rather than explore it. Tr. 175.

CONTENTIONS OF THE PARTIES

The Secretary argues that the Contestant had an approved mine ventilation plan prior to engaging in exploratory and rehabilitative activities because it was required to have such a plan under 30 C.F.R. §75.1721. The phrase "develop the coalbed" is not defined in Title 30 and the Secretary defines the phrase as synonymous with "develop the mine." Though there is scant caselaw on §1721, the Secretary cites two ALJ decisions (*Apex Minerals, Inc.*, 19 FMSHRC 796 (ALJ) (Apr. 1997) and *Richard Klippstein & W.O. Pickett, Jr.*, 5 FMSHRC 1424, 1430 (ALJ) (Aug. 1983)) to argue that operators must have approved preliminary plans prior to rehabilitating or developing the mine.

The Secretary argues that the Contestant's contention that the phrase "develop the coalbed" is synonymous with "to mine coal" is unsustainable. According to the Operator's reading of the regulation, the Secretary would have to show that coal was mined in order to establish a violation. Whereas in cases such as *Stansbury Coal Co.*, 1 FMSHRC 404, 412-413 (ALJ) (May 1979), the inspector issued the citation after the operator performed roof bolting, blasted the coal seam and bottom rock, and installed ventilation controls. The Secretary argues that even though the ALJ relied on evidence that the operator had gone beyond its rehabilitation plan and developed a solid block of coal in a working face, the other activities cited by the inspector would have been enough to uphold the violation. She argues that the Contestant engaged in similar activities as the operator in *Stansbury Coal*.

The Secretary contends that the Contestant's rehabilitative activities constitute development of the coalbed under the regulation, and therefore it was required to have an approved ventilation plan. She cites to *Richard Klippstein & W.O. Pickett, Jr.*, where an operator was found to have violated §1721 by drilling and blasting in order to evaluate the feasibility of mining the coal deposits. Additionally, in *Apex Minerals*, the ALJ held that §1721

requires "that MSHA approve any proposal for the rehabilitation of a mine." 19 FMSHRC at 802. The Secretary argues that the activities engaged in by the operator, including repairing and building stoppings, installing mandoors, repairing overcasts, setting posts for roof support, setting jacks to support an overcast, and pumping down large accumulations of water constitute development of the mine.

The Secretary further argues that the Contestant was aware of the requirement to submit ventilation plans. The Secretary notes that the Contestant submitted over the course of four years approximately 15 plans, addendums, safeguards, guidelines, and revisions, each specifically requesting MSHA's approval. Moreover, the proposed ventilation plan that was submitted on January 13, 2012, specifically recognizes that 30 C.F.R. §75.1721(b)(7) requires MSHA approval of the plan. GX-7. The Secretary also points to the requirements under §75.334(e) and §75.335(c), which state that approved ventilation plans are required to construct seals.

Finally, the Secretary argues that the District Manager's actions were not abuses of his discretion when he revoked the Contestant's previously approved plan and refused to approve subsequent plans that failed to ensure the safety of the miners underground. Citing *C.W. Mining Co*., 18 FMSHRC 1740 (Oct. 1996), she asserts that the Commission has long recognized the Secretary's authority to revoke approval of a plan that is no longer suitable for the current conditions of the mine. She maintains that it is within the Secretary's discretion to insist upon specific provisions as a condition of a plan's approval. In the instant case, the discovery of the massive roof fall in November 2011 made the previously approved plan no longer suitable. The Secretary argues that with the atmosphere inby the roof fall unknown and unknowable, the District Manager was within his discretion to require a plan that provides reasonable assurances that the worked-out areas are being ventilated. This is especially true where, as here, all the elements for a methane explosion—an explosive level of methane, oxygen, and an ignition source—may be present.

The Contestant argues that the High Quality Mine is currently in a "non-producing and non-developing" status, and was not required to have approved ventilation plans for its activities. It states that the plans were submitted to the District Manager as a courtesy, rather than as a requirement. The Contestant reads 30 C.F.R. §75.1721 as requiring an operator to submit to MSHA a ventilation plan, but does not require approval until the coalbed is developed. The Contestant interprets the phrase "development of the coalbed" to mean that "mining equipment consisting of a mining unit must be installed in the mine, and must be in operation." Contestant Post-Hearing Brief, 2. According to the Contestant, the term "coalbed" is synonymous in the industry with "coal seam," and developing the coalbed means mining coal. Applying this definition, the exploration, rehabilitation, and ventilation did not constitute development of the coalbed at the High Quality Mine, and therefore there was no violation of §1721.

The Contestant argues that after discovering the massive roof fall, further exploration became impossible, it petitioned MSHA to seal the worked-out areas in accordance with 30 C.F.R. §75.334(d), which requires an operator to seal off inaccessible worked out areas. The Contestant maintains that its examinations and precautions will adequately protect miners who are installing the seals. It argues that MSHA's suggested drilling of bore holes would provide no conclusive evidence of the atmosphere in the worked out areas, and carries with it the potential

of introducing new hazards, such as oxygen, into the mine. Therefore, the Contestant argues that the District Manager abused his discretion and acted beyond his authority by refusing to approve the seal plan without an approved ventilation plan.

ANALYSIS

1. An Approved Ventilation Plan is Required Under the Regulations

At the heart of this case is the meaning of the phrase "develop any part of the coalbed" in 30 C.F.R. §75.1721. Neither the exact phrase, nor any similar permutation of it is used elsewhere in the Mine Act or regulations. Furthermore, it has not been directly interpreted by the Commission or its judges. The Secretary interprets the phrase to mean "developing the mine," which would include activities taken in preparation of mining. The Contestant interprets the phrase to mean actual mining, and contends that anything short of actual mining is not comprehended by the phrase.

In order to interpret the meaning of the regulation, it is necessary to begin by looking at the language of the regulation. *Sedgman*, 28 FMSHRC 322, 329 (June 2006). The Commission has stated:

> Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded.

Nally & Hamilton Enterprises, 33 FMSHRC 1759, 1762 (Aug. 2011) (citations omitted).

The regulation states in relevant part:

> Each operator of a new underground coal mine, and a mine which has been abandoned or deactivated and is to be reopened or reactivated, shall prior to opening, reopening or reactivating the mine notify the Coal Mine Health and Safety District Manager for the district in which the mine is located of the approximate date of the proposed or actual opening of such mine. Thereafter, and as soon as practicable, the operator of such mine shall submit all preliminary plans in accordance with paragraphs (b) and (c) of this section to the District Manager and the operator shall not develop any part of the coalbed in such mine unless and until all preliminary plans have been approved.

30 C.F.R. 75.1721(a).

The clear meaning of the phrase "develop any part of the coalbed," as it is used in §75.1721, is to prepare the mine. The term "develop" indicates steps taken in preparation. The dictionary defines "develop" in this context as: "to prepare (a mineral-bearing deposit) for the extraction of ore (as by driving mine workings and passageways and providing power,

ventilation, and other equipment)." *Webster's Third New International Dictionary, Unabridged.* The term "coalbed" is defined in an unhelpful and tautological fashion in the *Dictionary of Mining, Mineral, and Related Terms* as "a bed or stratum of coal." *Dictionary of Mining, Mineral, and Related Terms* (1968), quoted in *Eastover Mining Co*., 4 FMSHRC 1207, 1209 (July 1982).[12] However, the Commission has interpreted the term "coalbed" in the regulations as being broader than the bed or stratum of coal.

Interpreting the meaning of the phrase "height of the coalbed" in 30 C.F.R. §75.1710, the Commission has held that the term "coalbed" is not limited to coal, but refers more generally to all the material that has been extracted. *Eastover Mining Co*., 4 FMSHRC 1207. In *Eastover Mining*, the Commission rejected the argument that "coalbed" should be interpreted according to a technical meaning limited to the stratum of coal. *Id.* at 1210. The Commission looked to the legislative history and purpose of the Act, as well as common sense, in interpreting the phrase:

> As the judge noted, the word "coalbed" may be used in mining parlance to mean bed or stratum of coal. We conclude, however, that when the drafters used the word "coalbed" as a benchmark for the canopy requirement, they were not referring literally to the height of the coal bed, but were conditioning installation on the actual height of the material being extracted. Although the legislative history does not contain an express explanation as to why the phrase was used, Congress was concerned with [] protecting miners under actual mining conditions. In practice, sound mining methodology and safety considerations often dictate extraction of more or less than the entire coal seam itself. Common sense suggests that in practice it is the actual extracted height in the entry rather than the coal seam height that provides the space in which to accommodate a canopy. Thus, given Congress' expressed desire to protect life and limb, we conclude that the drafters used the term "height of the coalbed" to indicate that the Secretary could require canopies where the actual extracted or mined height permitted.

Id. at 1212. The Commission stated that the alternative of interpreting the term "coalbed" as synonymous with stratum of coal or coal seam would lead to the absurd result where the protections afforded to miners would depend on the arbitrary criterion of how much coal was extracted rather than how much total material was extracted. *Id.* at 1212-1213. Similarly, in the instant case, the term "coalbed" should not be interpreted narrowly as the coal seam or stratum of coal. Rather, the phrase should be read more broadly as comprehending the mine. As such, developing the coalbed includes the activities of rehabilitating and exploring the mine.

I find the phrase "develop the coalbed" to be synonymous with "develop the mine"; however the Secretary's interpretation would stand even if I found the phrase ambiguous. According to well-established rules of administrative law, if an administrative regulation is ambiguous the Secretary's reasonable interpretation of the regulation is entitled to judicial deference. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). An agency's

[12] The term "coalbed" is not included in the Second Edition of the *Dictionary of Mining, Mineral, and Related Terms* (1996).

interpretation of its own regulation is entitled to "controlling weight," unless the interpretation is "plainly erroneous or inconsistent with the regulation," or unreasonable. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Martin v. Occupational Safety & Health Review Com'n*, 499 U.S. 144, 150-151 (1991). The Secretary's interpretation of a regulation is reasonable where it is 'logically consistent with the language of the regulation[] and … serves a permissible regulatory function.'" *Wolf Run Mining, Co*., 32 FMSHRC 1669, 1679 (Dec. 2010), quoting *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995). The Supreme Court has described the important reasons for giving the agency broad deference in its interpretation of regulations:

> In situations in which "the meaning of [regulatory] language is not free from doubt," the reviewing court should give effect to the agency's interpretation so long as it is "reasonable," that is, so long as the interpretation "sensibly conforms to the purpose and wording of the regulations." Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers.

Martin, 599 U.S. at 150-151 (citations omitted); *See also Energy West Min. Co. v. MSHA*, 40 F.3d 457, 462 (D.C. App. 1994).

The Secretary's interpretation of "develop the coalbed" is reasonable. The Commission has cautioned against reading regulations in a vacuum, and has stated that they should be "harmonized" with the statute and other regulations. *Consolidation Coal Co.*, 14 FMSHRC 956, 969-970 (June 1992); *See also Emery Mining Corp. v. MSHA*, 744 F.2d 1411, 1414 (10th Cir. 1984). The Mine Act states as its first finding that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner." 30 U.S.C. §801(a). The legislative history of the Mine Act indicates that ventilation plans were a chief concern to the drafters in ensuring the health and safety of miners. In the Senate Report accompanying the Act, it states, "In terms then of the safety of miners, the requirement that a mine be adequately ventilated becomes one of the more important safety standards under the Coal Act." S. REP. 95-181, reprinted in 1977 U.S.C.C.A.N. 3401, 3441. The drafters recognized the importance of the plan approval process, stating, "Such individually tailored plans, with a nucleus of commonly accepted practices, are the best method of regulating such complex and potentially multifaceted problems as ventilation, roof control and the like." *Id.* at 3425.

The regulations rely heavily on the plan development and approval process, with numerous regulations in Part 75 alone referencing approved ventilation or roof control plans.[13] Based on the regulations and legislative history, it is clear that the purpose of ventilation plans is to protect miners who might be exposed to the hazards of an improperly ventilated area. Though

[13] These include §§ 75.336, 75.325, 75.337, 75.220, 75.370, 75.338, 75.330, 75.350, 75.326, 75.334, 75.311, 75.333, 75.362, 75.352, 75.380, 75.302, 75.342, 75.364, 75.313, 75.360, 75.351, 75.335, 75.222, 75.323, and 75.310.

actual mining activity would likely involve more miners and machinery, there is no health or safety reason why the drafters would have excluded development of the mine from the requirements of approved ventilation plans. The Secretary's interpretation of the regulation harmonizes well with the language and purpose of 75.1721, as well as the other regulations in Part 75.

No cases have engaged this issue, and the cases cited by the Secretary are either inapposite, irrelevant, or misinterpreted. The Secretary's use of *Stansbury Coal* is premised on the inspector's notice stating that "no coal has yet been mined or taken out of the mine." 1 FMSHRC at 412. However, it appears that the Secretary overlooked a crucial footnote in the case, which states:

> By virtue of a subsequent modification, the last paragraph of the notice was amended (Exh. P-5) to indicate "coal was being mined in that an entry was driven approximately 175 feet for a future belt installation by drilling and blasting method. The coal was then hauled to the surface along with the muck from the slope sinking projects."

Id. at n. 4. This note indicates that both the judge and inspector considered the operator's mining operations in finding a violation of §1721. Therefore, *Stansbury Coal* does not speak to the issue of whether exploration and rehabilitation constitute development of the coalbed.

Similarly, the Secretary's use of *Richard Klippstein & W.O. Pickett, Jr.*, is misplaced. Though the Secretary is correct that the ALJ in *Klippstein & Pickett* found a violation of §1721 for exploratory activities, including drilling and blasting, those violations were of a provision in the regulation that is not at issue in this case. At issue in *Klippstein & Pickett* was the provision in §1721 that requires an operator to provide notice to MSHA prior to reopening a mine. 5 FMSHRC at 1429-1430. The ALJ analyzed these exploratory activities in order to determine that the mine had been reopened, not whether the coal bed was being developed. *Id.*

The Secretary quotes *Klippstein & Pickett* for the proposition that the operator "must submit preliminary mining plans for approval before commencing with mine development." Sec. Post-Hearing Brief, 8. Similarly, she quotes *Apex Minerals* for the proposition that "30 C.F.R. §75.1721 requires 'that MSHA approve any proposal for the rehabilitation of a mine.'" Sec. Post-Hearing Brief, 9. Though both these quoted passages are accurate, they are both unreasoned dicta, briefly mentioning a provision of a regulation that was not at issue in either case. The passage appears in *Apex Minerals* in the context of a discussion of 30 C.F.R. §75.334(b)(2), and says nothing more on the issue beyond the sentence quoted by the Secretary. 19 FMSHRC at 02. In *Klippstein & Pickett*, the quoted passage is the extent of the discussion on that portion of §1721 because that part of the regulation is not at issue in the case. 5 FMSHRC at 1430. As one-sentence pieces of dicta, these quotes have little persuasive authority here.

Though the phrase "develop the coalbed" is not used elsewhere in the Act or the regulations, the phrase "mining operations," which the Contestant argues is synonymous, is used elsewhere in the regulations. Specifically, it is used in a similar regulation concerning the reopening of mines. The regulation states: "After a mine is abandoned or declared inactive, and

before it is reopened, mining operations shall not begin until MSHA has been notified and has completed an inspection." 30 C.F.R. §75.373. The Secretary has stated that "mining operations" occur later in the process than "developing the coalbed." *Safety Standards for Underground Coal Mine Ventilation*, 57 FR 20868-01, Final Rule (May 15, 1992) (Under the rule requiring notification prior to mining operations, "MSHA receives notification of the commencement of mining operations much closer to the actual start of these operations than under § 75.1721.") Had the drafters of §1721 wished to require operators to have approved plans only prior to engaging in mining operations, the regulation would have included the phrase "mining operations," rather than "developing the coalbed."

The citation issued on July 17, 2012 by Inspector Davidovich, alleged that underground activities are being conducted without a ventilation plan. GX-8. The Contestant argues that it is allowed to engage in underground activities without an approved ventilation plan up until the moment when a mining unit is installed and in operation at the mine. Contestant Post-Hearing Brief, 2. However, I find that the Secretary's interpretation of §1721 is correct and reasonable, meaning that Contestant's rehabilitation and exploratory activities require an approved ventilation plan.

The parties stipulated that the High Quality Mine is a gassy mine as defined under Section 103(i) of the Act. Stip. 33. The importance of an approved ventilation plan was emphasized by several of the witnesses that testified at hearing. MSHA engineer Morley testified that without proper ventilation, methane and other hazardous gases can accumulate. Tr. 184. As a result, explosions can occur if there is an explosive mixture of methane and oxygen and an ignition source is introduced. Tr. 126. The ignition can result from a number of sources, including roof bolts snapping off and sparking, lightning, or roof falls. Tr. 126, 146. The Sago mine explosion is a recent example of a mine explosion in an unventilated sealed off area where no ignition source was thought to be present. Tr. 216-217. Morley provided his expertise at the Sago mine following the explosion and testified that it was caused by electromagnetic energy from lightning traveling through the earth and energizing conductors that had been abandoned in the sealed area of the mine. Tr. 180, 217. Morley testified that without proper ventilation, a similar explosion could occur inby the roof fall at the High Quality Mine. Tr. 217-218. Such an explosion inby the roof fall would affect those working outby the roof fall. Tr. 200-201.

Davidovich testified that the Contestant's activities underground include repairing stoppings, patching holes, and setting up posts and jacks. Tr. 162. He also testified that the Contestant replaced mandoors in stoppings, built stoppings, and repaired overcasts. Tr. 162-163. In order to conduct these activities, the Operator must have an approved ventilation plan. Though the Contestant argues that MSHA approval of a plan at this stage is neither "proper [n]or necessary under the applicable regulations," the multiple submissions of plans for approval belie this position. Contestant Post-Hearing Brief, 1. To now contend that approval of plans is not required, just because Contestant cannot obtain approval, is disingenuous.

In this regard, the record contains numerous examples of the Contestant submitting plans for approval, with the District Manager either approving or refusing to approve them. In the July 7, 2011 letter to MSHA accompanying the Mine Exploration Plan, the Contestant wrote, "Please find attached for your approval…" GX-2, 2. District Manager, Thomas Light, responded by

letter dated August 16, 2011, stating that the plan was approved. GX-2, 1. In the October 11, 2011 letter accompanying the addendum to the Mine Exploration Plan, the Contestant wrote, "Please find attached for your approval…" GX-4, 2. In a letter dated October 18, 2011, Light approved the addendum. GX-4, 1. In the October 31, 2011 letter accompanying an addendum to the Mine Exploration Plan, the Contestant wrote, "Please find attached request for your approval." GX-4, 6. It also concluded the letter by writing, "Your prompt attention to this matter is greatly appreciated, please send the approved letter to…" *Id.* In a letter dated November 2, 2011, Light approved the addendum. GX-4, 5. On December 3, 2011, Light sent a letter to the Contestant denying their submitted rehabilitation plan. GX-5, 1. On January 4, 2012, Light sent the Contestant a letter stating that the August 16, 2011 Plan was no longer approved. GX-6, 1. In response to these revocation letters, the Contestant sent a Ventilation Plan on January 13, 2012. The letter accompanying the Ventilation Plan stated, "As required by 30 CFR §75.1721(b)(7) the attached proposed mine ventilation plan containing the information specified in §§75.371 and 75.372; is being submitted for our approval." GX-7, 2. These letters from the Contestant, as well as subsequent approval or disapproval letters from the District Manager, indicate that both sides viewed the Contestant's activities as requiring MSHA approval.

Based on all of the above, I find that 30 C.F.R. §75.1721 required the Contestant to have an approved ventilation plan in accordance with §§ 75.370-75.372.

2. The District Manager Did Not Abuse his Discretion

The Contestant recognizes that it is required to have an approved ventilation plan prior to installing seals in the mine. Tr. 244-245. It argues that the District Manager abused his discretion "by preemptively denying MCMI's seal plan without a corresponding mine ventilation plan simply because the plan that was submitted did not include boreholes or shafts for evaluating atmospheres from the worked-out areas of the mine." Contestant Post-Hearing Brief, 4.

The Commission has held that review of a District Manager's denial of approval of a ventilation plan should be under an "arbitrary, capricious or abuse of discretion" standard. *Mach Mining, LLC*, 2012 WL 4471152, *4 (Aug. 2012). The Commission has stated that "[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." *Id.* at *6, quoting *C.W. Mining*, 18 FMHSRC 1740, 1746 (Oct. 1996). According to this standard, the agency is given broad deference, but it must offer an explanation for its decision. The Commission has explained:

> [The arbitrary and capricious standard] requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made."' The "agency must cogently explain why it has exercised its discretion in a given manner," and that explanation must be "sufficient to enable us to conclude that the agency's action was the product of reasoned decisionmaking."

Twentymile Coal Co., 30 FMSHRC 736, 754-755, *quoting Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The Commission has held that when the Secretary insists on a specific provision in a plan as a condition of approval, the Secretary bears the burden of showing that the provision is "suitable" to the mine in question. *Peabody Coal Co.*, 18 FMSHRC 686, 688 (May 1996). The Commission denied the Respondent's argument that "suitability" required the Secretary to show the existence or likelihood of specific hazards, and instead interpreted the term according to the dictionary, as: "'matching or correspondent,' 'adapted to a use or purpose: fit,' 'appropriate from the viewpoint of ... convenience, or fitness: proper, right,' 'having the necessary qualifications: meeting requirements.'" *Peabody Coal Co.*, 18 FMSHRC at 690. The Commission has found that the Secretary carries her burden when she "identified a specific mine condition not addressed in the previously approved ventilation plan and addressed by the new provision." *Id.* Similarly, Judge Miller has found suitability when MSHA insisted upon a provision that would provide assurance of proper ventilation. *Mach Mining, LLC*, 2010 WL 1145195, *14-16 (Jan. 2010) (ALJ).

In the instant case, the Contestant has not submitted seal plans, so the District Manager has not denied approval of the seal plan. Tr. 277. Murray Energy safety manager Brady testified that if the Contestant is told that it is permitted to construct the seals, it will submit a plan. Tr. 278. He also testified that the Contestant is unable to submit plans because it is not permitted to have contractors enter the mine to give estimates for the seals. Tr. 278-279. The Contestant refers to this situation as a preemptive denial. Contestant Post-Hearing Brief, 4. The Contestant's description of the District Manager's denial is incorrect. If an approved ventilation plan is a prerequisite for an approved seal plan, then the denial of the ventilation plan is just that; it is not a preemptive denial of the seal plan.

With regard to the rehabilitation plan, the District Manager provided sufficient reasons for his denial of the December 3, 2011 plan in the December 7, 2011 letter.

> The plan does not provide a reasonable assurance that areas of the High Quality Mine, inby 1 East through 6 East Longwall panels and inby a roof fall, that extends across 1-Main from #1 entry through #9 entry at cross-cut 18, are adequately being ventilated. To assure adequate ventilation, either an examination of these areas in their entirety, as required by 30 CFR 75.364 or an alternative method of evaluation is required. A request to approve an alternative method would require MSHA District Manager approval.
>
> In addition, the projected water levels, as indicated by your submittal, approved on November 23, 2011, does not provide evidence that supports a water separation isolating inaccessible areas from accessible areas of the mine.

GX-5, 1. Williams and Morley testified that after the massive roof fall was discovered in November 2011, MSHA changed its view as to the acceptability of the ventilation provision in the previously approved exploration plan. Tr. 67, 86, 186-187. The roof fall made further exploration impossible, so the plan could no longer function as an exploration plan. Tr. 87. Inspector Williams testified that this plan was denied because it would require additional miners and energized equipment traveling in an area that MSHA viewed as unsafe. Tr. 92-93. Morley

testified that the submitted plans were inadequate because they did not address the worked-out areas, which comprised the majority of the mine. Tr. 201.

In the January 4, 2012 letter, the District Manager similarly provided sufficient reason for the denial, stating that the plan, approved on August 16, 2011, "depicting the procedures and guidelines to be implemented during mine exploration activities for the High Quality mine, I.D. No. 36 08375, is no longer suitable based on an extensive roof fall across all entries, preventing further exploration and ventilation of the mine as projected." GX-6, 1.

In the February 16, 2012 letter, Light provided specific reasons for denial of the plan submitted on January 13, 2012 (and updated on February 13, 2012).

> The plan, specifically the proposed alternative method of evaluation of the worked out areas, "Item G. Mine Ventilation Monitoring Points" on Page 9 and the mine map as required by CFR 75.372, does not provide a reasonable assurance that areas of the High Quality Mine, inby 1 East through 6 East longwall panels and inby a roof fall that extends across 1 Main from No. 1 entry through No. 9 entry at No. 18 crosscut, are being ventilated.

GX-7, 1. Williams testified that the plan was denied because the areas inby the fall could not be evaluated. Tr. 112-113. MSHA did not feel comfortable with this proposal because there was a chance that the air was entering the 4 through 9 entries and short-circuiting at the roof fall or inby the roof fall and not ventilating the rest of the mine. Tr. 105, 109. Similarly, MSHA was concerned that the air entering the 1 east and 2 east areas of the mine were short-circuiting, and had no idea what paths the air may be taking. Tr. 105. Morley explained that the reason for denial was that MSHA had no way of determining if air or methane was traveling across the roof fall. Tr. 188-189. He reviewed the Contestant's submitted plans and determined that they were inadequate because they provided no assurances of ventilation past crosscut 18.

With regard to "suitability," the instant case is significantly different than *Mach Mining* and *Peabody Coal*, in that it is not clear from the record that MSHA insisted on any specific provision as a condition of approving the ventilation plan. The record reflects discussions between District 2 and the Contestant where MSHA stated that reasonable assurances concerning the atmosphere inby the roof fall would have to be a part of any approved plan. Tr. 91, 247-248. In these discussions, MSHA provided several options that would be acceptable to provide such assurances, including placing a fan on the shaft at the back of the mine and drilling bore holes. Tr. 248-249, 143. Though MSHA stated that bore holes would be an acceptable method of providing assurances, it never stated that bore holes were a prerequisite for approval of the plan. Tr. 116-117. Therefore I conclude that MSHA did not require the Contestant to include bore holes in its plan, but rather suggested it as an example of a suitable option.

Even if one were to find that MSHA required a bore hole provision as a prerequisite to approving the ventilation or seal plan, I find such a requirement suitable under the circumstances. Everyone agrees that the atmosphere inby the roof fall is currently unknown. Tr. 112-113, 186-190, 253-255. This creates a hazard for miners working underground, because dangerous levels of methane inby the roof fall could lead to an explosion. Tr. 200-201, 191-192. Drilling bore

holes into parts of the worked-out areas of the mine would provide the District Manager an alternative means of evaluating the atmosphere in those areas and ensure the safety of miners. Tr. 143, 211, 223. Though the parties have discussed this issue at length, the Contestant has not submitted an alternative plan that offers reasonable assurances of the atmosphere inby the roof fall. Therefore, even if one considers MSHA's discussion of bore holes here as a required provision, I find that it is suitable.

CONCLUSION

The District Manager acted within his discretion in revoking the Contestant's previously approved plan and in declining to approve Contestant's proposed plan. For the foregoing reasons, Citation No. 7023028 is affirmed as issued for violations of 30 C.F.R. §75.370(a)(1) and 30 C.F.R. §75.1721(a).

/s/ Janet G. Harner
Janet G. Harner
Administrative Law Judge

Distribution:

Jennifer L. Klimowicz, Esq., U.S. Dept. of Labor, Suite 630E, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA 19106. Klimowicz.jennifer@dol.gov

Jason D. Witt, Esq., Murray Energy Corp., 46226 National Road, St. Clairsville, OH 43950. jwitt@coalsource.com

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5267/FAX 303-844-5268

May 7, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2012-1163-M A.C. No. 05-00344-291931
v.	:	
CEMEX, INC., Respondent.	:	Mine: Lyons Plant

DECISION

Appearances: Daniel Pietragallo, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Michelle Witter, Jackson Kelly PLLC, Denver, Colorado, 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 Cemex, Inc. ("Cemex") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The docket contains a total of four 104(a) citations, all issued as a result of an electrical accident in which a miner received arc burns to his face and hands. The Secretary has proposed a total penalty of $119,000.00 for the citations in this docket. The parties presented testimony and documentary evidence at a hearing held on February 26, 2013 in Denver, Colorado.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

At hearing the parties submitted a list of seven proposed stipulations. Cemex Prehearing Report 2. Those stipulations were agreed to by all parties and admitted into the record. The stipulations include a statement that Cemex is subject to the jurisdiction of the Mine Act. *Id*. The parties also agreed that the citations were abated in good faith and that the proposed penalties will not affect the Respondent's ability to continue in business. *Id*. The history of assessed violations is admitted as Sec'y Ex. 20. (Tr. 9).

Cemex operates a cement plant located in Boulder County, Colorado, that employs as many as 95 miners. During the evening shift on November 27, 2011, the control room operator at the mine reported a problem with a new compressor. Joshua Jones, an on-call electrician, was called at approximately 9:30 p.m. to come in to the plant to repair the compressor. Jones arrived

around midnight, spoke with the workers in the control room, and proceeded to the compressor to determine what, if any, repairs were necessary. Jones learned that the compressor was not functioning but the control room was not receiving a signal indicating a malfunction. He opened the 120 volt box on the compressor while it was energized, checked fuses, did some troubleshooting and electrical tests, and found no problems. Jones returned to the control room and spoke to an operator who suggested that Jones speak to the mechanics on site. The mechanics offered no help and, as a result, after a further visit to the compressor, Jones returned to the control room and called the on-call manager, Greg Morrissey. Morrissey, who had experience as an electrician, listened to Jones explain the malfunction and his troubleshooting. Jones explained that he had conducted tests, attempted to troubleshoot the problem, and found that the panel fuses were not blown. Morrissey suggested that Jones find the compressor manual and troubleshoot as instructed in the manual. Jones searched for and found a manual, then read the manual, returned to the compressor, and was again unable to find a problem. He called Morrissey at least one more time, and returned to the control room to speak with the operators. (Tr. 94-97). Jones went back and forth between the control room, the compressor and the phone calls with Morrissey a number of times.

Finally, Jones decided that the problem with the compressor was not the compressor's own electrical box, but a malfunction down the line. Accordingly, Jones proceeded to look at the motor control box for the compressor. (Tr. 105). The motor control center, or MCC, for the kiln drive-ins contained a number of electrical units, both 480 volt and 4160 volts. (Tr. 111); Sec'y Ex. 2, p. 1. While the box is one unit, it is divided into two parts, the top being 480 volts and the bottom being 4160 volts. The box had two doors, and the top had a label that indicated 4160 volts. Jones opened the top compartment first, did some troubleshooting, and found no problem with the electrical components. He then opened the bottom portion of the box. He bypassed the safety features that shut down the 4160 voltage motor and used a multi-meter, rated for 1000 volts, to test the energized motor. As he touched the multi-meter to the box, he was blinded by an arc flash, his hands were burned, and a good portion of the plant went dark. Jones, temporarily blinded, eventually made his way back to the control room area where Morrissey administered first aid and then drove Jones to a local hospital. Jones was treated and released for burns to his hands and face. Morrissey, who had come to the plant to assist in troubleshooting the compressor malfunction with Jones, called Royce David Smith, the safety and health director, who, in turn, called MSHA at approximately 8:35 a.m. to report the incident. (Tr. 28).

On November 28, 2011, MSHA Inspector John C. Kalnins, learned of the accident from his supervisor and traveled to the Cemex plant to investigate. Kalinin's has been a mine inspector for four years, and had more than twelve years of mining experience prior to becoming a MSHA inspector. Kalnins traveled to the mine, spoke with Smith, and then traveled to the accident location with Mark Javarone, the electrical supervisor. Javarone appeared upset about the accident and explained to Kalnins that Jones had not been trained to work on anything with 4160 volts when it was energized, and that only Javarone worked on the 4160 equipment at the mine. (Tr. 21). Javarone demonstrated to Kalnins how Jones was able to defeat the safety device on the 4160 box in less than ten minutes. (Tr. 22). Javarone expressed his concern for Jones, indicated that he should not have been working on the box, and that Jones had been instructed not to work on any 4160 volt equipment. I note that, at hearing, Javarone denied making some of these statements to Kalnins, but I find Kalnins to be the more credible witness. Kalnins is

knowledgeable, thorough, and credible and, in resolving disputes of fact in this case, I credit Kalnins' testimony over that of the mine employees. Particularly, I did not find Javarone to be a credible witness.

While at the power center where the accident occurred, Kalnins examined the area, and took a number of photos, Sec'y Ex. 2, including one of the multi-meters used by Jones to test the 4160 control center. Sec'y Ex. 2 p. 5. The meter was marked with a designation that indicated it was to be used for a maximum of 1000 volts.

On November 29, after completing his investigation at the mine, Kalnins, accompanied by Smith, visited Jones at his home to conduct an interview. Kalnins asked Jones about the training he received at Cemex and why he was attempting to test this 4160 volt center. Jones explained that he was not aware that it was 4160 volts and that he was not trained to work on 4160 volts. (Tr. 25). Jones also explained that he was not aware that he should not have used the multi-meter, as it was the only tool he had worked with while at the mine. He indicated that there was no personal protective equipment and that electricians often worked on energized panels to troubleshoot problems. On the night of the accident, Jones felt that, since he was the electrician on call, he had a duty to take all steps necessary to repair the compressor.

Jones' testimony, for the most part, supported what he told Kalnins two days after the accident. He explained that he received new miner training that included some electrical information and two weeks later attended refresher training. He testified that, before working on his own, he followed, observed, and helped other electricians. When he and a co-worker changed out a motor that was connected to 4160 volt center, Javarone de-energized it while Jones and an apprentice watched. There was a lengthy testimony about whether Jones had previously worked on 4160 volt equipment. In resolving the conflict in testimony, I agree that he worked on motors that may have used 4160 volts, but always with supervision and only when Javarone de-energized the 4160 volt motor control centers. Jones at no time, demonstrated his ability to work on 4160 volts. Jones had not used any meter other than the multi-meter he used at the time of the accident, did not realize it was for 1000 volts or less only, but had observed Javarone use a hot-stick in place of the multi-meter on the 4160 motor shortly before the accident. Jones had not used the hot-stick on his own, nor had he demonstrated his ability to use a device other than the multi-meter. Further, Jones had not demonstrated his ability to troubleshoot or work on the 4160 volt motor control center while energized. Jones worked primarily on 480 volt equipment, and had worked on that voltage equipment while energized in order to troubleshoot. Jones was aware of the lock-out, tag-out program at the mine and it was his understanding that he was not required to use any personal protective equipment while working on the 480 volt equipment.

As a general matter, the Mine Act is a strict liability statute. As such, the Mine Act assesses liability without regard to the individual miner's fault. *International Union, UMWA v. FMSHRC*, 840 F.2d 77, 83 (D.C. Cir. 1988). Even if there is no evidence that anyone in authority was aware of the existence of the violative actions, "the Mine Act clearly contemplates that a violation may be found where the wrongful act is performed by someone other than the [mine] operator." *Western Fuels-Utah, Inc. v. FMSHRC*, 870 F.2d 711, 716 (D.C. Cir. 1989). Thus, "the Act's scheme of liability provides that an operator, although faultless itself, may be held liable for the violative acts of its employees.. . . ." *Bulk Transportation Services, Inc.*, 13

FMSHRC 1354, 1359-60 (Sept. 1991); *accord Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1115 (Jul. 1995). Consequently, it makes no difference whether Jones caused the violation, under the Act's scheme of strict liability, the fact that the violation occurred makes Cemex liable for the violation. However, fault may be considered in setting the level of the civil penalties by considering whether the operator, as opposed to the miner who may have been involved in the incident, was negligent. 30 C.F.R. § 100.3. 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*, 17 FMSHRC at 1116; *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (Mar. 1988); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982) (*SOCCO*). The Commission has further held that "where 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 (emphasis in original). Finally, while this standard is normally applied in determining the operator's negligence for penalty purposes, the Commission has confirmed that it also applies in determining whether an operator can be held responsible for a miner's aggravated conduct and, thus, be found to have unwarrantably failed to comply with a regulation. *Whayne Supply Co.*, 19 FMSHRC 447, 452-53 (Mar. 1997).

A. Citation No. 8589547

As a result of his investigation into the accident that involved Jones, Kalnins issued a number of citations, including Citation No. 8589547 on November 30, 2011, pursuant to section 104(a) of the Mine Act. The citation alleges a violation of section 46.7(a) of the Secretary's regulations. The regulation cited requires, in pertinent part, that a mine operator "must provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects of the task to be assigned, including the safe work procedures of such task . . . ." 30 C.F.R. § 46.7(a). A subsequent subsection of the standard provides that no training is necessary if the person has experience performing the task and has demonstrated the necessary skills. 30 C.F.R. § 46.7(c). The training may include practice with a competent person as long as hazard recognition training is provided along with the practice. 30 C.F.R. § 46.7(d). The subject citation was issued because Jones "was not trained to work on 4160 volt equipment." Kalnins determined that an injury or illness was reasonably likely to be sustained, that the injury or illness could reasonably be expected to be fatal, and the violation was S&S. The negligence was originally assessed as moderate but the Secretary modified the violation to high negligence. The Secretary has proposed a specially assessed civil penalty of $38,000.00 for this alleged violation.

Jones, who had prior experience working on electrical components, was hired to troubleshoot and repair electrical equipment as directed in work orders he received. He also agreed to work various shifts and to be on-call. Upon beginning work at the mine, Jones received new miner training by watching a video, listening to Javarone, in person, explain electrical concepts, and learning the locations and equipment at the mine. While Jones did not follow Javarone around daily, he occasional spent time with him to learn about his job. He worked with journeymen electricians, and, while he worked primarily on 480 volt equipment, he changed out motors that involved 4160 volts. His experience with 4160 volts was limited to watching Javarone test with a hot stick and observe Javarone de-energize 4160 power centers. Jones had

no specific training on 4160 volts, had no meter to measure above 1000 volts, and had no record of task training or quizzes for anything related to 4160 volts. Jones testified that he had no specific safety training and certainly had no training on the 4160 volt equipment at the mine. Nor did Jones demonstrate his ability to de-energize, test, or troubleshoot 4160 equipment that was energized.

The mine argues and Javarone explained that he believed Jones to be adequately trained. Jones had experience, he followed other miners, and was shown aspects of 4160 volts by Javarone. Javarone believed that Jones knew his work, and he allowed Jones to be on-call. There are conflicts in the testimony provided by Javarone and Jones, and I question the credibility of both Jones and Javarone regarding whether Jones was or was not proficient in a number of ways and whether he knew he was working on 4160 volts at the time of the incident. It appears that Jones knew how to over-ride the safety device on the 4160 volt control center, but denies knowing the voltage of the center. Still, I find that Jones had some knowledge and experience, and knew more than he indicated. I agree that he felt pushed and was anxious to find the solution to the problem and that factored into his level of care. On the other hand, Javarone insists that Jones had experience with working on the 4160 motor control because he had earlier changed out a motor that operated on 4160 volts. However, the testimony supports that Jones did not have experience working on energized 4160 volt equipment, but instead Javarone had de-energized and demonstrated some part of the process to Jones and others. Neither Jones nor Javarone tells the entire story, but the evidence supports that Jones was not task trained to work on energized 4160 volts and he had not demonstrated his ability to conduct troubleshooting on 4160 volt equipment.

While there was some testimony about what kinds of tasks Jones had completed during his tenure with Cemex, there is nothing to substantiate that he was specifically trained on the task assigned on the night of his injury. Jones was not trained to de-energize 4160 volts, or to use the hot stick. Further, he was not trained to use the correct personal protective equipment when troubleshooting an energized 4160 volt motor. Task training contemplates training and hands-on demonstration of ability before engaging in a new task. While Jones had, on his own, conducted troubleshooting of 480, low voltage equipment, he had not done so on 4160 equipment. Jones testified and there is no evidence to the contrary that Jones had demonstrated such a skill to Javarone. Furthermore, Javarone admitted to Kalnins that Jones had not been trained to troubleshoot the 4160 motor while it was energized. I find that Javarone was aware that Jones was not task trained, and I accept Kalnins' explanation that only Javarone, or perhaps a certified contractor, was trained to troubleshoot a 4160 motor. Still the mine expected Jones to be on call with the expectation that he would have to troubleshoot a motor with voltage beyond his training. The mine reasonably expected Jones to work on 4160 equipment when on call and therefore, he was required to be trained specific to that task, which he was not. Therefore, I affirm the fact of violation as alleged by the Secretary.

I next find that the violation is a significant and substantial one. 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:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). The Commission has 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).

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, a lack of task training, contributes to the discrete safety hazard of an untrained miner coming into contact with energized equipment of 4160 volts, which would in turn result in a serious electrical shock or, as here, an arc flash that resulted in burns. In this instance, Jones was not trained, and opened a box containing 4160 volts. He came in contact with that amount of electricity, and his contact resulted in a serious injury. The fact that Jones was not trained, has a direct correlation between the fact that he was injured because he worked on energized 4160 volts without the knowledge to do so and without the correct equipment. The violation, lack of training, created a reasonable likelihood that Jones would receive a serious injury and therefore I find the violation to be significant and substantial.

I also find the violation to be the result of high negligence. While Jones, in his testimony, understated his knowledge and experience, Javarone overstated it. Javarone did not take adequate care to ascertain that a miner who was expected to be on-call was trained in all aspects of the job that he may face while working alone. While it is true that Jones failed to call Javarone for help when he was uncertain about his next move, he did call Morrissey, who was a supervisor on-call seeking guidance. Morrissey gave Jones some suggestions for troubleshooting, but did not caution or warn him about working on 4160 volts. By the time Morrissey decided to go to the mine to assist Jones, the accident had already occurred. Jones was on-call, without the training or tools to perform the duties expected while on-call, which I find to be the result of high negligence.

Cemex argues that its negligence is less than high because Javarone believed that Jones was well trained and capable of taking an on-call shift. The operator's argument is based upon

evidence that Jones could conduct certain tasks, that he was trained in certain areas, that he had observed Javarone work on 4160 equipment, and had worked with Javarone and others on motors that were powered by 4160 volts. Yet Javarone failed to ascertain that Jones could competently and safely carry out any task that was required while on-call. I find that there is not evidence sufficient to mitigate the high negligence in this case.

Part 100 of the Secretary's regulations sets forth the "criteria and procedures for proposing civil penalties[.]" 30 C.R.F. § 100.1. Section 100.3(d) provides, in pertinent part as follows:

> Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence.

30 C.R.F. § 100.3(d). Table X of the regulation explains the definitions used by MSHA for each level of negligence. *Id*. That section explains that moderate negligence is defined as "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id*. If there are no mitigating circumstances, the citation is designated as high negligence. *Id*.

The only mitigating circumstance that is supported by the testimony is that Javarone may have exercised bad judgment when determining Jones ability to be on-call. Certainly Javarone, as an electrical supervisor, as well as others at the mine, should be aware of the absolute importance of determining if a miner is able to perform a certain task in a safe manner. Here, the mine failed to do that. Hence, I find the negligence to be high and assess a penalty of $35,000.00.

B. Citation No. 8589548

Citation 8589548 was issued as a result of the accident described above, and alleges a violation of section 56.14205 which requires that "[m]achinery, equipment, and tools shall not be used beyond the design capacity intended by the manufacturer where such use may create a hazard to persons." 30 C.F.R. § 56.14205. Kalnins stated, in the body of the citation, that "[t]he electrician that was injured working on the 4160 volt equipment was using a multi-meter that was rated up to 1000 volts. The miner was not trained to use any other tools to check voltage. A miner using a tool beyond its design capacity, could receive fatal injuries." Kalnins designated the violation as S&S and with moderate negligence, but later modified the negligence to high. The Secretary has proposed a $38,000.00 penalty.

The Respondent does not dispute that the multi-meter tool used by Jones was used beyond its design capacity. The multi-meter was designed to be used on electrical equipment powered by 1000 volts or less. The limits of the multi-meter, as demonstrated by the operator,

were indicated on the handle of the device. Since Jones used this meter on 4160 volts, it was used beyond the capacity for which it was designed, the use created a hazard to persons and, therefore, a violation is established.

I find the violation to be S&S. First, a violation has been shown. Second, I find that the violation created a discrete safety hazard, that is, the failure to use the correct tool for this voltage exposes a miner to electrical shock or arc flashes. The electrical shock or the arc flash will lead to a serious or even fatal injury. In this case, the failure to use the correct tool was one of the primary causes of the accident that resulted in the serious injury to Jones.

In examining the negligence of the operator, the Secretary must prove that the company's supervision, training and disciplining of its employees was deficient as to the use of the proper tool. Clearly, Jones was highly negligent, primarily for not understanding the voltage he was working on and accordingly, using the correct tool. I agree that his error was based, in part, on feeling anxious and an urgency to complete the task. In troubleshooting 4160 volts, it is fundamental for an electrician to use the correct tool, given the hazards of working on energized equipment and fundamental that he not only be trained to use the correct tool, but supervised in such an instance.

In this case, the motor control center, consisted of an upper and a lower cabinet with a small sign on the top cabinet that said 4160. The top cabinet was 480 volts, and the bottom was 4160. Sec'y Ex. 2. Jones testified he did not understand that, at the time of the accident he was working on that portion of the motor with 4160 volts. Therefore, even if Jones had been trained to use the tool that is correct for 4160 volts, he may not have known that the circumstance called for that type of tool. Jones had observed Javarone use the hot-stick, the tool designed for this voltage, but had not received training and had not used it. He had used other tools, appropriate for the 480 volts he worked on prior to the accident. Therefore, I find that the training of the mine was lacking, as was the supervision of Jones while on-call.

However, in this case, I find that there are factors that mitigate against assessing high negligence against the operator. First, the multi-meter used successfully by Jones on lower voltage, was labeled on the handle to indicate that its use was limited to 1000 volts or less. Next, I can only guess what tool Jones would have used had he realized he was trouble-shooting an energized 4160 motor, as opposed to a lower voltage. Finally, the operator had made some effort to show the hot-stick and its use to Jones prior to the accident. While I have found the lack of training overall to be the result of high negligence, given the mitigating circumstances as they relate to this particular violation, I find that the Respondent's conduct amounted to moderate negligence and assess a penalty of $20,000.00.

C. Citation No. 8589549

On November 30, 2011, and as a result of the accident involving Jones, MSHA Inspector Kalnins issued Citation No. 8589549, pursuant to section 104(a) of the Mine Act, to Cemex for an alleged violation of section 56.12017 of the Secretary's regulations. The regulation cited requires, in pertinent part, as follows:

> Power circuits shall be de-energized before work is done on such circuits unless hot-line tools are used. Suitable warning signs shall be posted by the individuals who are to do the work. Switches shall be locked out or other measures taken which shall prevent the power circuits from being energized without the knowledge of the individuals working on them.

30 C.F.R. § 56.12017. A violation of this standard is often referred to as a lock out/tag out violation. The citation described the alleged violative condition as follows:

> The electrician that was injured working on the 4160 volt equipment had by passed the safety devices leaving the equipment energized while he was working on it. The electrician was not using hot line tools or personal protection equipment.

Kalnins determined that an injury or illness was reasonably likely to be sustained, and if one were to be sustained it could reasonably be expected to result in a fatal injury. Further, he determined that the violation was significant and substantial and that the negligence was moderate. Prior to hearing, the Secretary moved to modify the negligence to high. The Secretary has proposed a civil penalty in the amount of $38,000.00 for this alleged violation.

Respondent does not dispute that Jones failed to de-energize the equipment and lock and tag it out. Further, the testimony established that while working on the equipment Jones was not using hot line tools or personal protective equipment. Accordingly, I find that a violation has been proven. I also find that the violation is S&S. Jones did not de-energize the equipment prior to working on it or, in the alternative, use hot-line tools designed to allow electricians to work safely on energized equipment, and, accordingly Cemex was appropriately cited for a violation of a mandatory standard that created a safety hazard. The hazard is that the electrician, when working on energized electrical equipment, would receive a shock or arc burn, which would result in a serious injury or death. In the instant case, the failure to lock out, or in the alternative, use appropriate personal protection, resulted in a serious injury.

While attempting to repair the compressor, Jones bypassed the safety devices that automatically shut down the energized 4160 equipment and began to test and troubleshoot, without the use of hot-line tools or any personal protective equipment, including gloves, an insulated mat, face shield or other protective equipment designed for use in this type of task. His failure to either de-energize or use personal protective equipment resulted in an injury when the energized 4160 center arced and caused a burn to his hands and face. In addition, it is likely that Jones could have received an electrical shock of such a magnitude that it would cause damage to vital organs, resulting in death. Cemex argues against the significant and substantial nature of the violation, by asserting that Jones was not seriously injured, receiving only burns to the hands and face. However, the actions of Jones, and in particular his failure to use personal protective equipment when he chose to trouble shoot without de-energizing the motor control unit was likely to result in an injury, and that injury would be a serious, or even fatal one. Therefore, I find the violation to be S&S.

As discussed above, in looking at the negligence of the operator, the Commission has explained that, *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 (emphasis in original). Again, the evidence demonstrates the rank and file miner was extremely negligent when he failed to either de-energize the equipment or use equipment designed to protect him while working on such equipment. The evidence also shows, that he was not trained to work on 4160 volts, was not trained to de-energize equipment while troubleshooting and was not trained to use hot-line tools or personal protective equipment. While working on lower voltage motors, Jones explained, he often did not de-energize in order to trouble shoot, nor did he use protective equipment. Further, Jones was not supervised while on-call. He was able to call for help, but had no real supervision. I do not find any evidence that the operator took any reasonable steps necessary to prevent Jones from working on energized equipment without hot-line tools or personal protective equipment. Therefore, I find that the operator's negligence is high and assess a penalty of $35,000.00.

D. Citation No. 8589550

As a result of the accident, and the mine's failure to immediately notify MSHA of the accident, Kalnins issued Citation No. 8589550 for a violation of section 50.10(b). The cited standard requires that "[t]he operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving: . . . (b) An injury of an individual at the mine which has a reasonable potential to cause death." 30 C.F.R. § 50.10(b). The violation was designated as non-S&S with high negligence. The Secretary has proposed a penalty of $5,000.00.

Inspector Kalnins explained that he issued the citation because the mine did not call MSHA until nearly four hours after the accident occurred and, in his opinion, the accident had a reasonable potential to cause death. Jones was temporarily blinded by the accident and received burns to his face and serious burns to his hands. He was transported to the hospital by Morrissey after Morrissey attempted first aid. Jones was in shock, but he was moving about and talking. There was no indication that he received an electrical shock, but instead the injuries were caused by an arc burn. Kalnins testified, without any evidence to the contrary, that an exposure to 4160 volts, such as the one Jones was exposed to, would likely result in a fatality.

The Secretary takes the position that given the injuries Jones received, the potential for a fatal injury was present, and the accident should have been reported within 15 minutes. Cemex on the other hand, argues that the nature of Jones' injuries are not such that the mine knew or should have known that there was a reasonable potential to cause death.

The Secretary submits that the burns to Jones' hands and face, along with the fact that he was in shock, are evidence of the potential to cause death. Cemex, on the other hand, argues that because Jones did not receive an electrical shock, did not lose consciousness and no CPR was performed, the injury did not have the potential to cause death. While there is some testimony that Jones may have been knocked backwards, or unconscious, Jones testified that he did not lose consciousness and, while blinded by the arc, was able to find his way to the control center where

Morrissey administered first aid. Before going to the hospital, Jones helped other miners find fuses to repair the blackout caused by Jones' accident. Jones was driven to the hospital, treated, and released within a few hours. The Secretary also relies on the fact that Jones was in shock as a result of the incident. However, the Secretary presented no evidence as to the nature of the shock or its relationship to the seriousness of the injuries sustained by Jones.

Cemex argues that the injury sustained by Jones was not a serious one and did not have a reasonable potential to cause death. Cemex further maintains that nothing came to its attention that would have led it to believe that any potential for death existed. The injured miner was walking and talking when he returned to the control room and, although seemingly stunned, he helped the miners find fuses and underwent some first aid in the form of putting his hands under the water. An ambulance was not called, and Jones was driven to the hospital by Morrissey. I agree with Cemex, that while there is some evidence that the burns to Jones were serious, there is insufficient evidence in the record to show that the burns that Jones received were of such a nature that they could be described as having a reasonable potential to cause death.

In addition to the inquiry into the exact nature of Jones injuries, the Secretary maintains that the nature of the events surrounding the accident should be considered when making a determination as to whether an injury has a reasonable potential to cause death. Cemex takes the position that, in determining whether there is a reasonable potential for death, the court should focus on the nature of the injury itself and not the nature of the events that caused the injury. In *Cougar Coal Co.*, 25 FMSHRC 513 (Sept. 2003), a miner was exposed to an electric shock of about 7200 volts, which in turn caused the miner to fall from a height of 18 feet, hit his head during the fall, and lose consciousness. In reversing the judge's decision that immediate notification was not required, the Commission held that the nature of the events surrounding the injury, as well as the actual injury sustained, must be considered when determining whether the accident had a reasonable potential to cause death. *Id.* at 520. In the present case, the Secretary argues that the exposure to 4160 volts can reasonably be expected to result in death. However, the only evidence in the record to that effect, is one statement by the inspector, that a shock from 4160 volts could cause death. I do not find that sufficient to demonstrate that the mine operator knew or should have known of the potential to cause death.

I find that the Secretary failed to establish a violation of section 50.10. The regulation does not require mine operators to immediately report every injury that requires off-site emergency care at a hospital or clinic. Although it is unclear what Jones' initially suffered, it became very apparent within a short time that the worst injuries received by Jones were burns to his hands. Unlike the miner in Cougar Coal who received an electrical shock, fell 18 feet and was resuscitated with CPR, I find Jones' injuries were not life threatening. Although there is some indication, through the opinion of the mine inspector, that a shock from 4160 has the potential to cause death, I must look at both the injury-causing event, as well as the resulting injuries. Here, the Secretary has not sustained his burden of proving a violation of the cited standard. Accordingly, this citation is vacated.

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) 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, "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 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green,* 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence and shows a reasonable history for this mine. The mine employs 95 miners at this location, is a part of the larger Cemex organization and, therefore, I find the size of the operator to be large. The operator has stipulated that the penalties as proposed will not affect its ability to continue in business. The gravity of each violation is discussed above, and, in the three violations, I have found the gravity to be serious, and that the seriousness resulted in the injuries received by Jones. The negligence is also discussed above. The operator demonstrated good faith in abatement. While Cemex takes issue with the special assessments and penalty amounts proposed by the Secretary, I note that I have determined the subject penalty amounts based on my independent analysis of the six factors discussed above. As noted above, I assess the following penalties:

Citation No. 8589547	$35,000.00
Citation No. 8589548	$20,000.00
Citation No. 8589549	$35,000.00
Citation No. 8589550	Vacated

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. 820(i), I assess the penalties listed above for a total penalty of $90,000.00 for the citations and orders decided after hearing. Cemex is hereby **ORDERED** to pay the Secretary of Labor the sum of $90,000.00 within 30 days of the date of this decision.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

Distribution: (by certified mail)

Timothy Turner, Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202

Michelle Witter, Jackson Kelly PLLC, 1099 18th Street Suite 2150, Denver, CO 80202

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5267/FAX 303-844-5268

May 10, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2012-257-M
Petitioner,	:	A.C. No. 04-00167-270917
	:	
v.	:	
	:	
OMYA CALIFORNIA, OMYA INC.,	:	
Respondent	:	Mine: Omya California

Before: Judge Simonton

DECISION

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Omya California, Inc., ("Omya"), at its Lucerne Valley, California mine (the "mine"), hereinafter referred to as Respondent, pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* ("Act" or "Mine Act").[1] On January 22, 2013, a hearing was held in San Bernardino, California. The parties' post-hearing briefs are of record.

II. ISSUES FOR ADJUDICATION

Did Respondent violate 30 C.F.R. § 56.14207, which requires that the wheels of mobile equipment parked on a grade be either chocked or turned into a bank? Were the negligence, gravity and penalty determinations appropriately assessed in the citation that was issued? While Respondent admits to the violation of the standard, Respondent asserts that the Secretary has not proven the necessary elements to show that this citation was appropriately designated significant and substantial, and that the gravity of the injury that might occur should be reduced from "fatal" to "lost workdays or restricted duty."

[1] Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Deputy Secretary Seth D. Harris is the Acting Secretary of Labor.

III. FINDINGS OF FACT

A. Stipulations

Pursuant to the parties' January 10, 2013, prehearing submissions, the parties jointly stipulated to the following facts:

Respondent was at all relevant times the operator of the Omya California Mine, Mine ID: 04-00167. Respondent is engaged in mining operations in the United States and its operations affect interstate commerce, which means it is a "mine" under Section 4 of the Mine Act. Thus, respondent is subject to the jurisdiction of the Mine Act, and consequently, the Federal Mine Safety and Health Review Commission has jurisdiction of this matter under the Act. The citation at issue in this matter was issued on the date indicated, and the inspector whose signature appears in block 22 of the citation was acting in his official capacity and acting as an authorized representative of the United States Secretary of Labor. The exhibits to be offered by the parties are stipulated to be authentic but no stipulation is made as to their relevance or as to the truth of the matters asserted therein. Respondent does not dispute the fact that on August 17, 2011 at 7:30 a.m., the Caterpillar 992 Front End Loader (company number 3308) was parked on a 5% grade without its wheels chocked. The Secretary has proposed a penalty for the citation listed in Exhibit 1 and that amount is incorporated by reference herein. The proposed penalty will not affect Respondent's ability to remain in business. The Respondent demonstrated good faith in abating the violation.

a. Factual Background and Testimony

Omya California's mine is located in Lucerne Valley, California, where their primary operations are the mining of calcium carbonate. Tr. 13. On August 17, 2011, MSHA Inspector Eric Wiedeman arrived at the mine to conduct an inspection. Wiedeman works out of the San Bernardino, California field office and has been an MSHA inspector for over four years. Tr. 11. Prior to joining MSHA, Wiedeman had worked at a sand and gravel mine for nine years, and had six months of training at the MSHA Mine Academy in West Virginia. Tr. 12. He conducts inspections at approximately 20 – 40 mines annually, and had inspected the Omya California mine on at least one occasion prior to August 17, 2011. Tr. 12-13.

During the August 17, 2011 inspection, Wiedeman was accompanied by company representatives Stewart Minter and Jay Grisby. Tr. 18, 30. While walking through the mine, Wiedeman noticed a Caterpillar 992 front-end loader parked on the downhill side of a pile. Tr. 15-16. Wiedeman observed the vehicle parked on a grade and noted that its wheels were not chocked or turned into a bank, as required by 30 C.F.R. 56.14207. Tr. 16-17; Exhibits 4a, 4b. Wiedeman asked Mr. Minter to estimate the grade on the pile, and Minter felt that it was approximately 5%. Wiedeman testified that he had estimated the grade to be approximately 5% as well. Tr. 18. Consequently, Wiedeman issued Citation No. 8607661, which states:

> The Caterpillar 992 Front End Loader (company number 3308) was parked on a grade and was not chocked. The loader was parked on an approximate 5% grade. The loader was parked in an area where the haul trucks make there [sic] turn to back up to the secondary dump hopper. Miners exposed to the crushing hazard could receive serious injuries. When parked on a grade mobile equipment shall be chocked or turned into a bank. Standard 56.14207 was cited 2 times in two years at mine 0400167 (2 to the operator, 0 to a contractor).

Exhibit 1. Inspector Wiedeman designated this citation as reasonably likely to cause injury because he observed several haul trucks in the area, which meant that truck drivers could potentially be in the path of an un-chocked vehicle if it started to roll downhill. Tr. 19-20. In particular, Wiedeman thought it was likely that drivers would dismount their vehicles in the area, exposing themselves to the hazard from the un-chocked truck. He testified that he marked the violation as fatal because, if a 992 loader should run into someone, it would cause fatal crushing injuries. *Id.* Wiedeman also noted that there have been several similar crushing fatalities in the past, enough that 30 C.F.R. § 56.14207 was listed as one of MSHA's "Rules to Live By," a list of the top 13 violations that collectively account for 44 percent of the metal/nonmetal fatalities. Tr. 20. The inclusion of this standard on MSHA's "Rules to Live By" was also a factor in Wiedeman' s designation of this violation as moderate negligence, as he testified that operators have been put on notice of the "Rules to Live By." Tr. 20-21. After Inspector Wiedeman issued the citation, the operator located chocks at the mine site and chocked the vehicle, abating the violation. Tr. 26.

At the hearing, Respondent presented the testimony of Mr. Manuel Hernandez, who has been an employee of Omya California for approximately 15 years and has a total of 36 years of mining experience. Tr. 41-42. At the mine, one of his primary responsibilities is mobile maintenance, which includes the purchase and upkeep of mobile equipment. *Id*. His testimony focused on the reliability of the 992 loader's parking brake as a "fail-safe" system, and his lack of personal knowledge of any instances in which a similar loader's parking brake had failed under similar circumstances. Tr. 43-44. Hernandez also testified that during a post-citation discussion with Inspector Wiedeman, he proceeded to turn on the 992 front-end loader in question and release its park brake, and yet the machine did not roll. Rather, it was only after he also cleared the bucket off the ground that the machine started to roll. Tr. 45-46.

During his testimony, Hernandez also commented on an MSHA Fatal Accident report that the Secretary submitted into evidence, in which the driver of a tractor and trailer parked his vehicle on a slight grade (5 – 7.5%) without chocking the vehicle or setting the park brake. Tr. 47-49; Exhibit 7. In that scenario, the vehicle began to roll downhill, and the driver was killed when he ran behind the vehicle and was run over. *Id*. Hernandez noted that the Caterpillar 992 loader was different than the tractor trailer in the fatality described, because the loader's emergency brake system was spring applied and hydraulically released, while the semi-tractor and trailer involved in the fatality had an air supplied and spring released brake system. He

testified that this meant that the brakes on the 992 loader were more fail-safe because they did not depend on air pressure for optimal brake function. Tr. 47-48.

In addition, Hernandez testified about the dimensions and relative sizes of the typical vehicles in the area near the 992 loader, and noted that in a previous accident involving one such loader that backed into a Terex 3311D haul truck, any damage resulting from the collision affected the portion of the vehicle below the cab, not the area in which a driver might be seated. Respondent also presented evidence that the braking system on the Caterpillar 992 loader was functional at the time of the citation, and thus, opined that the totality of the circumstances was such that the probability of injury to drivers was low. Tr. 32-33, 53-55.

IV. APPLICABLE LAW AND ANALYSIS OF EVIDENCE

A. Undisputed Violation of 30 C.F.R. Section 56.14207

Citation No. 8568030 was issued for a violation of 30 C.F.R. § 56.14207, which states:

> Mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank.

Respondent stipulated that "[t]he Caterpillar 992 front end loader #3308 was not chocked while parked on a 5% grade on 17 August 2011, a violation of safety standard 30 CFR, Part 56.14207." *See* Stipulations, Sec'y Prehearing Report at 2-3; Resp. Brief at 1. Thus, the fact of the violation has been established, and the only matters in dispute are whether the gravity, significant and substantial, and moderate negligence designations for Citation No. 8568030 are appropriate.

B. Significant and Substantial Designation

The inspector issued this citation as a "significant and substantial" (S&S) violation, which 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 S&S "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.,* 3 FMSHRC 822, 825 (Apr. 1981). In determining whether a violation is S&S, the Commission has identified four elements that 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, the parties have stipulated that the Caterpillar 992 front-end loader at the Omya mine was parked on a 5% grade without its wheels chocked or turned into a bank, in violation of 30 C.F.R. § 56.14207. Thus, the first *Mathies* factor has been established. With regard to the second *Mathies* factor I find this violation does contribute to a discrete safety hazard, that is, the danger that the un-chocked vehicle will roll and injure those in its path. The Secretary presented evidence of at least once specific incident in which an un-chocked vehicle began to roll; in addition to more general evidence that these types of standards were developed to ensure that mobile equipment did not roll when parked on a grade. Tr. 20-23, Exhibits 5, 7. The Respondent disputed the relevance of the specific accident evidence presented by the Secretary in exhibit 7 noting that the braking system on the cited Caterpillar 992 front-end loader was different than the loader involved in the accident described in Exhibit 7, and that the fatal accident in that example was caused by the loader operator's attempts to run after the loader to get it under control. Tr. 23-25. While I understand Respondent's objections, I note that the chocking standard at issue in this case, 30 C.F.R. § 56.14207, applies to *all* mobile equipment parked on a grade regardless of the specific braking system utilized. The fact that the mobile equipment operator in the example presented at hearing attempted to run after the vehicle merely demonstrates one possible way such an incident can be and was fatal and does not change my finding that the cited violation in the case before me contributed to a discrete safety hazard, thus meeting the second *Mathies* factor.

The third *Mathies* criterion, in which the Secretary must establish that there is a reasonable likelihood that the hazard will result in an injury, has been clarified further by the Commission:

> [T]he 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).

U.S. Steel Mining Co., Inc., 7 FMSHRC 1125, 1129 (Aug. 1985). The question of whether a particular violation is S&S is a circumstantial inquiry that must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988);

Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007 (Dec. 1987). In the present instance, the hazard contributed to is the truck rolling downhill and running into a miner or another vehicle. I must then analyze the likelihood that this event would lead to an injury.

At trial, there was undisputed testimony that the area in which the loader was parked was frequented by haul trucks, and that Inspector Wiedeman observed several vehicles drive through the area during his inspection. Resp. Brief at 1; Tr. 30-32. Wiedeman testified that this influenced his S&S designation, as he saw that this was an often-frequented area of the mine and logically assumed that there would be foot traffic associated with drivers dismounting their vehicles in the area. Tr. 19.

Respondent argues that, in order for this violation to cause a serious injury, there would have to be other mechanical failures under a specific set of factual circumstances, in addition to the absence of chocks on the wheels of the loader. Resp. Brief at 2. In so arguing, Respondent focuses on the fact that the parking brake was engaged at the time the citation was written and that no specific instances of parking brake failure on this particular type of loader were mentioned at trial. In addition, Respondent notes that the bucket on the loader was in a lowered position, which may hinder rolling motion. Tr. 43-46.

However, these arguments are not persuasive, as the third *Mathies* factor may be met without a finding that there is a reasonable likelihood that the violation itself will cause injury. *See Cumberland County Coal,* 33 FMSHRC 2357, 2366 (Oct. 2011) (discussing *Musser Engineering*, 32 FMSHRC 1257). Rather, the Secretary must show a reasonable likelihood that the hazard contributed to by the violation will cause injury. In the present instance, the hazard contributed to by the violation is the truck rolling down the 5% grade in an area of the mine frequently traveled by other trucks and mobile equipment. Despite the presence of a functional parking brake and lowered bucket, the violation of the requirement that vehicles in this condition be chocked contributes to the hazard as defined.

The Commission has already held that an operator's arguments regarding the possibility of additional safety measures preventing the hazard at issue do not prevent an S&S finding. *See Buck Creek,* 52 F.3d 133 at FN 1 (noting that with respect to an identified hazard of a mine fire, the operator's "testimony regarding the likelihood of fire has no bearing on the separate quest of whether such fire would be likely to result in a serious injury."). More generally, arguments that "redundant, mandatory safety protections provide a defense to a finding of S & S would lead to the anomalous result that every protection would have to be nonfunctional before a S&S finding could be made. Such an approach directly contravenes the safety goals of the Act." *Cumberland Coal,* 33 FMSHRC at 2369. In this context, the parking brake on the 992 Caterpillar loader is an independently necessary safety measure that does not alter the requirements of 30 C.F.R. §56.14207, or diminish the contribution of a violation of that standard to the identified hazard.

Finally, to satisfy the fourth *Mathies* element, the Secretary must show that there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. Inspector Wiedeman testified that this violation could lead to fatal crushing injuries. Tr. 18-19. In

drawing this conclusion, he relied on the history of 30 C.F.R. §56.14207 violations that have resulted in crushing fatalities. As noted above, this particular standard has been listed in MSHA's "Rules to Live By," and one specific fatality involving a failure to comply with this standard was discussed at the hearing. *See* Exhibits 5, 7. The Secretary also presented evidence that from 2000 – 2008, 21 fatalities resulted from accidents in which individuals were struck by moving machinery or equipment that were not blocked against motion in metal and nonmetal mines, with 30 C.F.R. § 56.14207 being one of the most often violated standards in those accidents. Enforcement Summary: Blocking Against Motion Fatalities in Metal and Nonmetal Mines, Exhibit S-10. The evidence shows that when heavy machinery of the kind involved in this violation begins to roll and strikes a person, the injury will be serious, and probably fatal. Thus, in light of all the evidence and the four *Mathies* factors, I uphold the significant and substantial designation on this citation.

C. Negligence

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety and health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* Low negligence exists when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* High negligence exists when [t]he operator knew or should have known of the violation, condition or practice and there are no mitigating circumstances. *Id. See also Brody Mining, LLC,* 2011 WL 2745785 (2011) (ALJ). Finally, the operator is guilty of reckless disregard where it "displayed conduct which exhibits the absence of the slightest degree of care." *Id.* MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id.*

In this instance, the inspector determined the negligence level to be moderate. As discussed above, 30 C.F.R. 56.14207 is listed on MSHA's "Rules to Live By," which is a list of the top 13 violations that collectively account for 44 percent of the metal/nonmetal fatalities. Tr. 20. The "Rules to Live By" are made publicly available and it is expected that mine operators know of them and plan accordingly to avoid fatalities. Thus, the operator should have known of the violative condition or practice. However, Inspector Wiedeman found that some mitigating circumstances existed, in that the violation itself was an unforeseen act of one miner that management would not have any control over. I agree with the inspector as to the mitigating circumstances, and uphold the moderate negligence designation.

IV. PENALTY

Commission Administrative Law Judges (ALJs) have the authority to assess penalties under the Mine Act *de novo,* as stated in Section 110(i) of the Mine Act, which 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 requires Commission ALJs to consider the following six penalty criteria when assessing penalties:

> [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 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id* at 294; *Cantera Green* 22 FMSHRC 616, 620 (May 2000).

The Secretary has submitted the operator's history of violations, and, as noted in the citation itself, this mine has been cited twice in two years for a violation of this particular standard. As discussed above, I find that the operator displayed moderate negligence, and upheld the reasonably likely and fatal designations of the citation. I accept the parties' stipulations that the proposed penalties will not affect Respondent's ability to remain in business, and that Respondent demonstrated good faith in abating the violation. Accordingly, I find that the Secretary's proposed penalty of $946.00 is appropriate.

V. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. 820(i), I assess the penalty listed above for a total penalty of $946.00 for the citation decided after hearing. Omya California, Inc., is hereby **ORDERED** to pay to the Secretary of Labor the sum of $946.00 within 30 days from the date of this decision. [2]

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

Distribution: (via certified mail)

Nadia Hafeez, Esq., U.S. Department of Labor, Office of the Solicitor, 1999 Broadway, Suite 800, Denver, CO 80202

Luis Pacheco, Safety & Health Manager, Omya California Inc., 7225 Crystal Creek Road, Lucerne Valley, CA 92356

[2] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

May 14, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2008-737
Petitioner	:	A.C. No. 15-18267-144079
v.	:	
	:	
MANALAPAN MINING COMPANY, INC.,	:	RB No. 10 Mine
Respondent	:	

DECISION ON REMAND

Before: Judge Feldman

The captioned matter has been remanded by the Commission. 35 FMSHRC __, slip op. (Feb. 2013). In its remand, the Commission has directed that I reconsider the initial decision with respect to the deletion of the unwarrantable failure designations for two alleged violations of 30 C.F.R. § 75.400, which prohibits the accumulation of combustible materials. 32 FMSHRC 690 (June 2010) (ALJ). In view of the Commission remand, the parties were encouraged to attempt to settle this matter during an April 26, 2013, telephone conference. The parties subsequently advised that they were unable to reach an agreement.

I. Factual Background

The belt system at Manalapan Mining Company, Inc.'s ("Manalapan's") No. 10 Mine located in Pathfork, Kentucky was inspected on October 7, 2007, by MSHA Inspector Daniel Lewis. 32 FMSHRC at 691. At that time, the mine had four belt lines going from the face to the head drive that were approximately 2,300 feet in total length. *Id.* at 692. The material, consisting of rock, clay and coal, was extracted and transferred onto the No. 4 Belt at the face, then to the No. 3 and No. 2 Belts, and ultimately to the No. 1 Belt nearest the surface. *Id.* At the time of Lewis' inspection, the mine conditions were constantly wet because of percolation of water through old works, the mine floor and ribs, and dust control at the face. *Id.* Despite the presence of water pumps, water was never completely removed, and the mine floor remained muddy at all times. *Id*.

Prior to beginning his inspection, Lewis reviewed the preshift and onshift examination books. Lewis observed notations under the column entitled "Hazardous," from August 30 through October 2, 2007, that reflected wet and muddy conditions on a daily basis along the No. 10 Mine's four belts. *Id.* Lewis then traveled underground to the working face. After inspecting the working face, Lewis traveled outby the conveyor belt entry to inspect the belts. *Id.* at 692-93. Lewis began with Belt No. 4, then traveled outby to Belt Nos. 3, 2, and 1.

Tr. 100, 331-39. Lewis observed accumulations of the extracted material along the full length of the four belts, that became progressively muddier and wetter as he progressed outby towards the head drive. 32 FMSHRC at 700; Tr. 87-88.

Upon completing his examination of the belts, Inspector Lewis issued 104(d)(1) Citation No. 7511467 (for Belt No. 4), and 104(d)(1) Order Nos. 7511472, 7511478 and 7511479 (for Belt Nos. 3, 2 and 1, respectively) for prohibited accumulations in alleged violation of section 75.400. Lewis designated all four areas of the alleged violations as "significant and substantial" ("S&S")[1] and attributable to Manalapan's unwarrantable failure. 32 FMSHRC at 693. The citations were issued after Lewis consulted by telephone with his supervisor, Jim Langley, who obviously did not have personal knowledge with respect to the conditions observed by Lewis. *Id.*

The initial decision: affirmed the S&S and unwarrantable failure designations for Citation No. 7511467 (Belt No. 4); affirmed the S&S designation for Order No. 7511472 (Belt No. 3)
but removed the unwarrantable failure designation, thus modifying the order to a 104(a) citation; deleted the S&S and unwarrantable failure designations for Order No. 7511478 (Belt No. 2), thus also modifying the order to a 104(a) citation; and vacated Order No. 7511479 (Belt No. 1). *Id.* at 699, 702, 704. The Secretary has appealed, and the Commission has directed me to reconsider, the deletion of the unwarrantable failure designations and modifications of the orders pertaining to Belt Nos. 3 and 2. 35 FMSHRC __, slip op. at 5.

II. Disposition

a. Indicia of Unwarrantable Failure

As the Commission noted:

> 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).

[1] Generally, a violation is properly designated as S&S if it is reasonably likely that the hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, Nat'l Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981).

> Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, including (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *See IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). These seven factors need to be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular factual scenario. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Nevertheless, all of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated, or whether mitigating circumstances exist. *Id.*; *IO Coal*, 31 FMSHRC at 1351.

35 FMSHRC __, slip op. at 5.

b. Order No. 7511472 (Belt No. 3)

Regarding the violative accumulation conditions along the 400 foot length of the No. 3 Belt, Lewis noted one to nine-inch deep accumulations, and at least 20 rollers in accumulations. 32 FMSHRC at 699. He noted that the accumulations were damper than those along the No. 4 Belt. *Id.* at 700. Lewis initially denied that the area along the No. 3 Belt was wet and slippery, but ultimately conceded that there was enough water to make it difficult to walk. *Id.* Nevertheless, Lewis testified that the No. 3 Belt accumulations were "combustible enough to cite." *Id.*; 35 FMSHRC __, slip op. at 3.

In its remand, the Commission noted that I did not adequately or explicitly address the factors evidencing an unwarrantable failure such as the duration of the violative condition, its obviousness, and the mine operator's knowledge of its existence. 35 FMSHRC __, slip op. at 9. As delineated by the facts in the initial decision, the relevant criteria for an unwarrantable failure designation were, for the most part, present. The accumulations were obvious, of significant duration, and known to Manalapan, as evidenced by the pertinent notations in the examination book. However, as the Commission has noted, the indicia for unwarrantable failure must be viewed on a case by case basis, "in the context of the factual circumstances of a particular case." 35 FMSHRC __, slip op. at 5*, citing Consolidation Coal*, 22 FMSHRC at 353.

The deletion of the unwarrantable failure designation for Belt No. 3 in the initial decision was based primarily on a determination that although the negligence attributable to Manalapan

may have been high, it did not cross the threshold of aggravated conduct given the facts surrounding the violation. 32 FMSHRC at 701. The difficulty of preventing and removing a soupy mixture of clay and coal, caused by extracted material sprayed for dust suppression that continually spilled off of a series of mobile conveyors onto a wet mine floor saturated by the percolation of water from the floor and ribs and from old works, is self evident. While the daily notations of apparently unresolved wet and muddy conditions along the mine's four belts by belt examiners ordinarily would be viewed as an aggravating factor, when viewed in context, it is significant that the mine floor remained muddy at all times despite the use of water pumps.

The evidence reflects that the accumulations around the belts became progressively wetter from Belt No. 4 to Belt No. 1, to the point that the consistency of the accumulations at the No. 1 Belt with regard to content and viscosity did not constitute a violative condition. The Secretary has not appealed the initial determination vacating 104(d)(1) Order No. 7511479 (Belt No. 1). 35 FMSHRC __, slip op. at 4-5. As the muddy conditions of the mine floor deteriorated along the belt system, outby from the No. 4 to the No. 1 Belt, the initial decision determined that there was a significant reduction in the likelihood of combustion of the cited accumulations the farther they were located from the working face.

Although the existence of a high degree of danger posed by a cited violation is not necessary to support an unwarrantable failure, the degree of hazard posed by a violation is a relevant and important consideration, particularly with respect to whether an operator's inaction constitutes aggravated or unjustified conduct.[2] For it is axiomatic that "[t]he risk reasonably to be perceived defines the duty to be owed." *Palsgraf v. Long Island R.R.*, 248 N.Y. 339 (1928). After all, the standard of care required by a motorist exceeding the posted speed limit is greater when traveling on a city street in proximity to a school where children are present, than the degree of care required by that motorist while traveling on a remote country road.

However, in reconsidering the unwarrantable failure issue, I believe the evidence supports a finding of high negligence sufficient to demonstrate an unwarrantable failure. The combustibility of the accumulations around the No. 3 Belt was not sufficiently reduced from that of the material around the No. 4 Belt, particularly along the inby portion of Belt No. 3, to constitute a meaningful mitigating factor. Although I recognize the difficulty associated with the timely removal of recurrent accumulations from an extremely wet and muddy mine floor, such hardship does not preclude a finding of unwarrantable failure. Consequently, the unwarrantable failure designation for Belt No. 3 shall be reinstated.

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[2] It is worth emphasizing that a high degree of danger is not a prerequisite for unwarrantable failure. For example, violations posing a lesser degree of hazard that are obvious in nature and/or repeated may be deemed unwarrantable absent mitigating factors. In the final analysis, resolution of the unwarrantable failure issue requires an evaluation of the circumstances surrounding the violation.

Turning to the issue of the appropriate civil penalty, section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act requires that, "[i]n assessing civil monetary penalties, the Commission shall consider" six statutory penalty criteria:

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

Douglas R. Rushford Trucking, 22 FMSHRC 598, 600 (May 2000), *citing* 30 U.S.C. § 820(i). Once findings on the statutory criteria have been made, a judge's penalty assessment is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission has noted that the de novo assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

As noted in the initial decision, Manalapan is a large mine operator, although information provided during the April 2013 telephone conference reflects that Manalapan may no longer be actively engaged in mining activities. The potentially serious nature of the cited accumulations at the No. 3 Belt, as well as the relevant notations in the examination book and the violations history, must be viewed in the context of the extremely wet environment at Manalapan's No. 10 Mine. In this regard, the liquid conditions on the belt, as well as on the mine floor, illustrate the difficulty of cleaning muddy conditions around belts caused by chronic spillover. However, as noted in the initial decision, in the final analysis, Manalapan must be held responsible for preventing combustible accumulations. The initial decision imposed a civil penalty of $12,000.00 for 104(d)(1) Order No. 7511472. Given the reinstatement of the unwarrantable failure designation, a civil penalty of $16,000.00 shall be imposed.

c. Order No. 7511478 (Belt No. 2)

Regarding the alleged violative conditions along the 500 foot length of the No. 2 Belt, Lewis observed accumulations that were one to twelve inches deep, with ten bottom rollers touching the accumulations. 32 FMSHRC at 702. Lewis testified that the conditions along Belt No. 2 were so wet and muddy that they constituted a "borderline situation" in terms of establishing a violation. *Id.* Photos of the area depicted a "wet, soupy mixture of mud and water." *Id.* at 703; Resp. Ex. 9.

Reconsidering the issue of unwarrantable failure has caused me to revisit the facts surrounding the cited violation.[3] In order to appreciate the significance of Lewis' characterization of the No. 2 Belt accumulations as a borderline violation, it is instructive to consider Lewis' deposition testimony, which was admitted at the hearing and referenced at the trial. Tr. 150-51. At deposition, Lewis stated:

> Q: [S]ome of these accumulations when you squeezed them in your hands, water came out of them.
>
> A: That is correct.
>
> Q: And those are too wet to propagate an explosion.
>
> A: And that was on Number 1 belt.
>
> Q: Okay. You'd - you'd agree that if that's the case [. . .] at least on Number 1 belt, what you describe as being combustible accumulations running the entire length of the belt [. . .] really weren't combustible.
>
> A: The entire length of the belt was an incorrect statement.
>
> Q: Okay, okay. Thank you. Was it incorrect on any of the other citations or orders?
>
> A: I - I - I feel like trying to reflect back at that time - it's been two years ago -
>
> Q: I understand.
>
> A: -- Number 2 was on the borderline. Number 3 was not. Number 3 was combustible enough to cite.

(Resp. Ex. 13, at 110-112).

[3] I believe I have retained jurisdiction over all elements of Order No. 7511478 since no final decision on its merits has been rendered. Thus, I do not view the Commission's remand of the unwarrantable failure issue as a determination by the Commission concerning the fact of the violation alleged in Order No. 7511478 (Belt No. 2). Nor, as discussed *infra*, can I attribute negligence for a condition that the Secretary has failed to demonstrate as a violation.

The gist of Lewis' deposition testimony is that: the content of the accumulations along the No. 3 Belt with respect to their degree of dampness "was combustible enough to cite;" unlike the No. 3 Belt, the content of the accumulations along the No. 2 Belt with respect to their degree of dampness constituted a "borderline" violation; and the degree of liquidity of the material along the No. 1 Belt essentially rendered the material inert and, therefore, not significant enough to consider a violation.

The Secretary bears the burden of establishing the fact of the violation by a preponderance of the evidence. *See ASARCO Mining Co.*, 15 FMSHRC 1303, 1306-1307 (July 1993) *citing Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). The Commission has noted that the preponderance of the evidence standard requires the trier of fact to believe that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Resources Corp*., 22 FMSHRC 1066, 1070 (Sept. 2000).

The term "borderline," as used by Lewis to qualitatively describe the violative nature of the cited accumulations along the No. 2 Belt, is defined as "not clearly fixed or convincing" and "subject to challenge or debate." *Webster's Third New International Dictionary* 255 (1993). Synonyms include "dubious," "questionable," "ambiguous," "doubtful," and "inconclusive." *Id.; Roget's II: The New Thesaurus* 52, 17 (3rd ed. 1996).

Lewis' characterization of the conditions along the No. 2 Belt as "borderline" is the substantive equivalent of describing the subject violation as inconclusive, if not doubtful. Such characterizations do not satisfy the *RAG Cumberland Resources* test that requires the Secretary to demonstrate that the existence of the cited violative condition was "more probable than its nonexistence." 22 FMSHRC at 1070. In short, affirming the fact of the violation in such circumstances would violate Manalapan's due process.

In reaching this conclusion, I am cognizant of the fact that inspectors should err on the side of caution when citing conditions that they believe may be hazardous. The fact that inspectors must be encouraged to cite conditions they deem to be violations, does not relieve the government of the burden of demonstrating that the cited violation in fact occurred. I am also mindful that the Mine Act is a strict liability statute. However, strict liability is a relevant consideration only after the Secretary has demonstrated the fact of an alleged violation of the statute or mandatory safety regulations.

In addition, it is significant, particularly in view of Lewis' deposition testimony, that Lewis consulted his supervisor, Langley, with respect to the fact of the violation, despite Langley's lack of actual knowledge. In this regard, Lewis' deposition testimony reflects that he was not entirely comfortable with designating all of the accumulations that he observed along the No. 10 Mine belt system as violative in nature. Accordingly, Order No. 7511478 shall be vacated as the Secretary has failed to satisfy her burden of establishing the fact of the cited violation along the No. 2 belt line.

ORDER

In view of the above, **IT IS ORDERED** that:

1. 104(d)(1) Order No. 7511472 (Belt No. 3) **IS AFFIRMED** to reflect that the cited violation was attributed to an unwarrantable failure.

2. Manalapan Mining Company, Inc., **SHALL PAY** a civil penalty of $16,000.00 in satisfaction of Order No. 7511472.

3. 104(d)(1) Order No. 7511478 (Belt No. 2) **IS VACATED**.

IT IS FURTHER ORDERED that Manalapan Mining Company, Inc., shall pay, **within 40 days of the date of this decision, if it has not already done so,**[4] **a total civil penalty of $36,000.00** in satisfaction of the four cited accumulation conditions that are the subject of these proceedings.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

Distribution:

Uche Egemonye, Attorney, U.S. Department of Labor, Office of the Solicitor, 61 Forsyth Street SW, Suite 7T10, Atlanta, GA 30303

John M. Williams, Esq., Rajkovich Williams Kilpatrick & True PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40513

/tmw

[4] The initial decision imposed a total civil penalty of $36,000.00. This remand decision increases the penalty for the conditions along Belt No. 3 by $4,000.00, from $12,000.00 to $16,000.00. This remand decision also deducts the $4,000.00 civil penalty that was initially assessed for 104(d)(1) Order No. 7511478 (Belt No. 2) as this order has now been vacated. Thus, the total liability in this proceeding remains at $36,000.00. During the April 2013 telephone conference, counsel for Manalapan represented that Manalapan has already paid the $36,000.00 civil penalty initially assessed in this matter.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

May 21, 2013

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2010-1256-M A.C. No. 23-00077-230287-01
v.	:	Docket No. CENT 2010-1257-M A.C. No. 23-00077-230287-02
MAGRUDER LIMESTONE COMPANY, INC., Respondent	:	Docket No. CENT 2011-460-M A.C. No. 23-00077-245121
	:	Mine: Portable Plant No. 1

DECISION AND ORDER

Appearances: Jeffrey M. Leake, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner

R. Lance Witcher, Esq., Ogletree, Deakins, Nash, Smoak, & Stewart, St. Louis Missouri, for Respondent

Before: Judge McCarthy

I. Statement of the Case

These cases are before me upon three Petitions for Assessment of Civil Penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).[1] Theases involve two unsettled Dockets No. CENT 2011-460 and CENT 2010-1256.[2] Undisputed facts

[1] Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Deputy Secretary Seth D. Harris is the Acting Secretary of Labor.

[2] Docket No. CENT 2010-1257, involving five citations, was settled prior to the hearing. The parties' joint settlement motion was made on the record. Respondent withdrew its contest regarding Citation Nos. 6575259, 6575262, 6575263, and 6575264. The parties agreed that
(continued...)

establish that a rock jam occurred during an MSHA inspection and rank-and-file plant operator, Harold Nichelson, was observed by MSHA inspector, Lawrence Sherrill, standing on an inclined conveyor belt, ten feet off the ground, using a six-foot breaker bar to clear the jam. Nichelson did not utilize fall protection or follow prescribed lock out/tag out protocol. These alleged violations occurred shortly after the inspector observed plant manager, Tim Stewart, speak to Nichelson about the rock jam near a loud generator.

Specifically, Docket No. CENT 2011-460 involves a single 104(d)(1) citation, Citation No. 6575266. The citation alleges that Respondent unwarrantably failed to comply with the fall protection standard at 30 C.F.R. § 56.15005.[3] The citation ascribes high negligence to Respondent for a violative practice that was "highly likely" to result in an injury that could reasonably be expected to be fatal. The parties stipulated that the actions alleged constituted a violation of the standard and that the citation was correctly characterized as significant and substantial (S&S).[4] The Secretary has proposed a specially assessed penalty of $52,500 for this citation.

Docket No. CENT 2010-1256 involves a single 104(d)(1) order, Order No. 6575267. The Order alleges that Respondent unwarrantably failed to comply with the lock out/tag out standard at 30 C.F.R. § 56.12016.[5] The citation ascribes high negligence to Respondent for a

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[2](...continued)
Citation No. 6575260 and Citation No. 6575261 would remain as issued, but the facts justified a 25% reduction in penalty to $1,579.50 for each citation. The parties further agreed that Citation No. 6575268 be modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," to delete the significant and substantial designation, and to reduce the penalty to $1,400. I approved the parties' settlement agreement on the record as consistent with the criteria set forth in section 110(i) of the Act and in furtherance of the public interest. Tr. 32-36.

[3] 30 C.F.R. § 56.15005 is a mandatory standard which provides that "[s]afety belts and lines shall be worn when persons work where there is a danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered."

[4] The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a coal or other mine safety and health hazard . . ." *See, e.g., Mechanicsville Concrete, Inc., t/a Materials Delivery*, 18 FMSHRC 877, n. 2 (June 1996).

[5] 30 C.F.R. § 56.12016 is a mandatory standard which provides:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the

(continued...)

violative condition that was "highly likely" to result in an injury that could reasonably be expected to be fatal. The parties stipulated that the actions alleged constituted a violation of the standard and that the citation was correctly characterized as significant and substantial (S&S). The Secretary has proposed a penalty of $17,301[6] for this citation in accordance with the part 100.3 criteria. 30 C.F.R. § 100.3.

After numerous conference calls with the undersigned, the parties were unable to settle this matter. Accordingly, an evidentiary hearing was held in Jefferson City, Missouri. The issues remaining in dispute are the unwarrantable failure and high negligence designations, the gravity designations as highly likely to result in a fatal injury, and the appropriateness of the proposed penalties. Tr. 104-05.

The parties introduced testimony and documentary evidence,[7] and witnesses were sequestered. For the reasons set forth herein, I modify Citation No. 6575266 to change the type of action from a section 104(d)(1) citation to a section 104(a) citation and to reduce the level of

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[5](...continued)

> equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventative devices shall be removed only by the persons who installed them or by authorized personnel.

[6] I note that the penalty for Order No. 6575267 may have been calculated incorrectly. The Exhibit A attached to the Secretary's Petition for Assessment of Civil Penalty in Docket No. CENT 2010-1256 indicates that the penalty should be reduced by 10% on account of Respondent's good-faith abatement of the violative condition. This reduction, however, is not reflected in the proposed penalty. Had the proposed penalty reflected the reduction for good faith, the penalty would have been reduced from $17,301 to $15,570.

[7] In this Decision and Order, the Petitioner's or Government's exhibits are designated P. Ex. #, Respondent's exhibits are designated R. Ex. #, and citations to the transcript are designated as Tr. followed by page number(s).

At the hearing, the following exhibits were received into evidence: P. Exs. 1-8, 10-12, 27 28; R. Exs. 1-14; and Joint Exhibit 1, which reflected the stipulated facts as set forth in the pre-hearing reports. Tr. 11, 30-32, 164, 339, 405. The cover page, and pages 3 and 4 of P. Ex 13, were also received into evidence.

negligence from "high" to "moderate." Order No. 6575267 is vacated. Based on the entire record, including the parties' post-hearing briefs and my observation of the demeanor of the witnesses,[8] I find the following:

II. Stipulated Facts

1. The dockets involve a surface, crushed and broken limestone mine known as the Portable Plant No. 1, which is owned and operated by Respondent, Magruder Limestone Company, Incorporated.

2. The mine, MSHA ID No. 23-00077, is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the Mine Act.

3. The administrative law judge has jurisdiction over this proceeding pursuant to section 105 of the Mine Act.

4. Respondent is an operator as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d), at the mine at which the citations and order at issue in this proceeding were issued.

5. The parties stipulated to the authenticity of their exhibits, but not to the relevance or truth of the matters asserted therein.

6. Respondent, Magruder Limestone, is engaged in mining operations in the United States, and its mining operations affect interstate commerce.

7. Lawrence D. Sherrill is an authorized representative of the United States Secretary of Labor, assigned to MSHA's Rolla, Missouri North Field Office, and was acting in an official capacity when the citations and order were issued.

8. The proposed penalties will not affect Respondent's ability to remain in business.

9. The certified copy of the MSHA assessed violations history reflects the history of the mine for fifteen months prior to the date of the citations and order.

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[8] In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, and consistency or lack thereof within the testimony of witnesses and between the testimony of witnesses.

Both counsel for the Secretary and Respondent were admonished multiple times for leading their witnesses. Tr. 78, 89, 118, 125, 144, 145, 147 (admonishing Secretary's counsel); Tr. 345, 353, 361 (admonishing Respondent's counsel). At hearing, it was apparent that Respondent's counsel frequently led Nichelson on direct examination with tightly scripted testimony. Respondent's counsel was admonished that I would give less weight to such testimony.

10. Citation No. 6575266 and Order No. 6575267 constitute significant and substantial violations of 30 C.F.R. § 56.15005 and 30 C.F.R. § 56.12016, respectively.

11. Plant operator Nichelson is a rank-and-file miner for the purpose of imputing negligence.

Tr. 19-20, 94.

III. Findings of Fact

Factual Background

On July 14, 2010, at 8:45 a.m., Inspector Sherrill began a two-day, regular inspection of Magruder Limestone Portable Plant #1, a limestone processing facility, located near Bagnell, Missouri. Tr. 62, 64, 67.[9] Inspector Sherrill was accompanied by his supervisor, Fred Moore, so that Moore could make an annual assessment of Sherrill's job performance. Tr. 67.[10] Sherrill and Moore announced their arrival, met with plant manager Tim Stewart, reviewed the history of the mine's violations, and discussed MSHA's Rules to Live By and SLAM/SMART program to reduce accidents.[11] Plant manager Stewart accompanied inspectors Sherrill and Moore during the inspection. Tr. 77.

About two months before the July 14, 2010 inspection, Stewart had been promoted to plant manager, the sole management official at the mine. Tr. 248-52. When promoted, Stewart

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[9] Sherrill has thirty-one years of mining experience. Tr. 61. He began his career with MSHA in 1997. Tr. 58-60. Before becoming a mine inspector, he was employed by the Doe Run lead mine and rose to the position of mine general foreman. Tr. 56-58.

[10] Moore was hired by MSHA in 1998, after Sherrill was hired in 1997. Moore did not testify. Tr. 68. Counsel for the Secretary explained that Moore was retired and unavailable as a witness because the Secretary had no forwarding information about where Moore lived. Tr. 52; *Cf*. Fed. R. Evid. 804(a)(5). No declaration from Moore has been offered in his case.

On brief, Respondent cites Commission precedent holding that a decision to draw an adverse inference against a party for not calling a material witness lies within the sound discretion of the trier of fact. R. Br. at 5, n.3. In the absence of any specific request for an adverse inference, and in light of the Secretary's reasonable explanation for the failure to call Moore as a witness to corroborate Sherrill, I decline to draw any adverse inference against the Secretary's case here.

[11] Sherrill testified that the acronym SLAM meant stop, look, analyze and manage, but, could not recall what the acronym SMART meant. Tr. 70. I take administrative notice of the fact that S.L.A.M.: Stop, Look, Analyze, Manage, is a risk management/assessment tool for miners, and S.M.A.R.T.: Stop, Measure, Act, Review, Train is a risk management/assessment program for mine operators. *See* MSHA: SAFETY DIRECTOR'S HELP TOPIC - SLAM/SMART PROGRAM, www.msha.gov/SafetyDirectorsHelper/topics/slam.htm (last visited April 19, 2013).

reviewed MSHA's Rules to Live By with his supervisor, Ron Twellman, the superintendent for all of Respondent's facilities.[12] Superintendent Twellman instructed Stewart that he was responsible for leading by example, accompanying MSHA during inspections, and monitoring employees to make sure that they complied with MSHA standards. Tr. 251-53.

Before his promotion to plant manager, Stewart worked for Respondent as a rank-and-file miner for about seven years. Tr. 248, 250. Stewart handled approximately ten rock jams as a rank-and-file miner. Tr. 306. Stewart testified that a rock jam would occur when the "jaw" of the crusher did not crush rock into small enough pieces to fall through the hole in the surge bin and onto the conveyor belt. The surge bin would then jam and the rock jam would need to be cleared with a pry bar or with one's hands. Tr. 270-71. Stewart further testified that the plant supervisor typically clears the rock jams and that Stewart learned how to clear rock jams by watching his supervisors, which he described as a good way to learn. Tr. 267-68, 274, 306. The first time that Stewart cleared a rock jam on his own involved a situation in which Stewart's supervisor was "just busy doing something else and [Stewart] was there" to clear the jam. Tr. 268.

Consistent with prior deposition testimony, Stewart admitted that before he became a supervisor, he handled rock jams on at least two or three occasions without locking out because he was in a hurry. Tr. 296-98, 306. He further admitted that he sometimes accessed elevated positions without using fall protection. Tr. 307. The record establishes that plant operator Nichelson was employed at the small plant at this time, although Nichelson testified that he never observed Stewart clear a rock jam until he became supervisor. Tr. 298-99, 373.

The instant inspection was Stewart's first as plant manager. He was nervous, particularly with two inspectors present, because Stewart did not want to receive a "bunch of citations" on his watch. Tr. 249-51. During the first few hours of the inspection, however, Respondent received several section 104(a) citations. Tr. 254-256.

Thereafter, just prior to the events leading to 104(d)(1) Citation No. 6575266 and Order No. 6575267, the inspection party was examining and testing mobile equipment, including front end loaders and then planned to break for lunch. Tr. 81-82, 171-72, 258-59. Stewart stepped away for a few minutes to meet with a vendor. Tr. 78, 257-58. Inspectors Sherrill and Moore waited for Stewart to return to the area, where he would be asked to perform a brake test on a loader located about thirty feet north of the generator and conveyor belt in question. Tr. 78-80.

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[12] I take administrative notice of the fact that MSHA launched its Rule To Live By fatality-prevention campaign on February 2, 2010, which targeted standards frequently cited in fatal accident investigations in nine accident categories, including falls from elevation and lock and tag out. MSHA - INITIATIVES - FATALITY PREVENTION - RULES TO LIVE BY, http://www.msha.gov/focuson/rulestoliveby.asp (last visited May 15, 2013). Sherrill credibly testified that the Rules to Live By are distributed in various forms to educate operators about frequently cited standards that often result in fatal injuries. The Rules to Live By address, *inter alia*, fall protection and lock out/tag out. Tr. 121-23; P. Ex. 8.

The Brief Exchange Between Stewart and Nichelson

As Stewart was returning, Sherrill observed Stewart emerge from behind the generator trailer and engage in a brief conversation with Nichelson. Tr. 79. Nichelson was standing around with other miners waiting for Stewart so that he could inform Stewart that the Syntron feeder was jammed. The record establishes that prior to leaving the control booth, Nichelson had shut down the jaw feeder, Jaw Belt 1, 2, and 3, and the Syntron feeder. Tr. 343-44.[13] The conversation occurred between the conveyor belt and the generator, located ten to fifteen feet apart. Tr. 79-80.

Nichelson began the conversation by informing Stewart that the "the Syntron feeder is plugged up." Tr. 257. Stewart's response, however, is the subject of controversy. While Stewart offered slightly different, although not necessarily contradictory testimony regarding the conversation, he consistently maintained that he had told Nichelson to shut down the plant and wait. Tr. 309-12. At hearing, Stewart was unsure if he had specifically stated that Nichelson was to wait until Stewart finished with the MSHA inspectors, who were soon leaving for lunch. *Id.* Nichelson, however, testified that he heard Stewart tell him to shut the plant down, but did not recall hearing Stewart tell him to wait. Tr. 344-45. It was not until Nichelson spoke to others in preparation for hearing that he began to believe that Stewart had instructed him to wait. Tr. 346-47.

While inspector Sherrill testified that he had no reason to doubt Stewart's recollection of the conversation, Sherrill suggested that Nichelson was unable to understand Stewart due to the extremely loud diesel generator, near which the conversation took place. Tr. 111-12, 127-29. Although Sherrill did not measure sound levels at the location of the conversation, he estimated the sound levels next to the generator to be about 95 decibels based on his experience and based on other sound levels that he measured at different locations of the plant during the inspection. *Id.* Sherrill testified that verbal communication in such a loud environment would be difficult, if not impossible. *Id.*

On direct, Stewart was asked what his expectations were after he gave instructions to Nichelson. Stewart testified, "I expected he shut the belt down and he was sitting there waiting on me." Tr. 261. On cross, however, when confronted with his deposition testimony, Stewart testified that he believed that Nichelson left in the direction that he did after the conversation so that Nichelson could perform lock out/tag out. Tr. 321. Moreover, previously on direct, Stewart testified that the person who was going to handle the rock jam was the person who needs to lock out and tag out the power source for the equipment. Tr. 287. When asked by the undersigned whether he told Nichelson to lock and tag out the conveyor, Stewart testified, "I just didn't. I was planning on coming back and doing it." Tr. 286. Stewart, however, had previously

[13] On cross examination of Sherrill, it was established that the crusher and conveyors leading to the surge bin had been shut down, but the generator trailer and conveyors after the surge bin had not been shut down. Tr. 180-81.

witnessed Nichelson clear one rock jam and was aware that Nichelson had cleared at least two rock jams, prior to the instant incident on July 14, 2010. Tr. 273.

Stewart testified that he would have never predicted that Nichelson was going to try and clear the rock jam without first performing lock out/tag out. Tr. 286. Inspector Sherrill confirmed that there was no evidence to suggest that Stewart would doubt Nichelson's compliance with the mandatory safety standards at issue. Tr. 158, 179. Stewart testified that Nichelson had never disregarded one of his directives and that he had no reason to think that Nichelson did not hear him, or that Nichelson was not going to shut the rest of the plant down and wait for him. Tr. 277.

The Alleged Violations

After Stewart and Nichelson conferred near the rock jam at the Syntron feeder, adjacent to the generator trailer, Stewart returned to the loader to perform the brake test for MSHA. Tr. 80-82, 277, 353-54. Stewart first informed the inspectors that there was a rock jam.[14] Stewart then proceeded with the brake test for the loader on the ramp where it was operated. Tr. 84.[15]

Meanwhile, after Stewart left, Nichelson shut down the conveyor belt. Tr. 349. Nichelson testified that he then climbed a ladder with a six-foot breaker bar and attempted to free the rock jam from the ladder. When Nichelson was unable to clear the rock jam from the ladder, he climbed out onto the conveyor belt. *Id.* Nichelson testified that he did not lock and tag out the conveyor belt or use fall protection because he was in a hurry and wanted to get the plant back on line. Tr. 357.[16]

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[14] Sherrill testified that "it was obvious there was a rock jam. The plant had shut down. The rock was not going up the conveyor. The plant operator had [come] down from the control booth and was standing over there between the generator and Syntron feeder." Tr. 84.

[15] Stewart could not have observed what, if anything, Nichelson was doing because Stewart was operating the front end loader. Tr. 170. In fact, Sherrill testified that operating the front end loader should have been Stewart's sole focus. Tr. 168.

[16] Nichelson explained that he thought he could take care of the rock jam himself. "I thought that I could go over there on the ladder and clear the blockage." In response to questioning from the undesigned, Nichelson testified that he tried to get on the ladder to clear the blockage," but "I couldn't get it to do it." Tr. 348. So then he shut the belt off and climbed on the belt to try and dislodge the rock with a six-foot breaker bar. "I had to turn the rock a little bit so it could go in there because it was too wide." Nichelson explained that he was lifting the rock to turn it and he was up on the conveyor belt maybe five seconds. Tr. 349. After this testimony, in a series of leading questions from Respondent's counsel, Nichelson testified that he shut it down from the control booth and only Stewart and Nichelson would have accessed the control booth. Tr. 350.

Nichelson testified that he understood when and how to use fall protection and perform lock out/tag out, and he knew that he should have done so in this instance. Tr. 351-52. Nichelson testified that he knew how to clear a rock jam and that he had received training on fall protection and lock out/tag out, but failed to follow such procedures because "I thought I could hurry up and get it unjammed." Nichelson further testified that he was in a such a hurry "[s]o I could get the plant back on line," and he was nervous around MSHA. Tr. 356-57. Nichelson explained that the MSHA inspection made him nervous because "they are kind of like the police." Tr. 342-43. Nichelson testified that while he has sometimes handled rock jams in the past, he is afraid of heights, and that he normally preferred that Stewart handle the rock jams. Tr. 353. Nichelson further testified that he thought he could quickly clear the jam and then go back to the control booth, where he could work outside the presence of MSHA. Tr. 351-52. Sherrill testified that this was understandable as even veteran miners can be nervous around MSHA, and we all make mistakes and/or act unpredictably when we are nervous. Tr. 197.

Meanwhile, after the successful brake test, as the inspection party returned toward the plant, inspector Sherrill observed Nichelson working on the inclined conveyor belt without fall protection. Tr. 84-85, 87, 349; P. Ex. 1. Although Sherrill did not take actual measurements, he estimated that the rubber conveyor belt was thirty-six to fourty-two inches wide and that Nichelson was ten feet off the ground on about a 30-degree incline. Tr. 84-86, 102. The belt was equipped with troughing idlers and was not flat. Rather, it was rounded up on the sides to keep rock in the middle of the belt. Tr. 86. Sherrill described the area below the conveyor to be flat, hard rock, with some spillage composed of softball-sized limestone rocks. Tr. 87.

After his observation, Sherrill briskly walked over and, based on anecdotal knowledge of falls resulting in fatalities,[17] issued an oral imminent danger order. Sherrill determined that the violation of the fall protection standard created a situation in which a fatal injury from falling was "highly likely" to occur. P. Exs. 1 and 4; Tr. 102. Sherrill testified that based on Nichelson's position on the belt, the most likely scenario would be that Nichelson fell sideways off the side of the belt in an effort to dislodge the rock jam. Tr. 103. Sherrill discounted the risk that Nichelson could fall forward into the surge bin, but testified that, while unlikely, it was possible for Nichelson to fall into the Syntron feeder if the belt was inadvertently started. Tr. 102-103. Sherrill testified that if Nichelson fell off the side of the belt, he could have broken his neck or back upon impact, or been impaled by the breaker bar. Tr. 102-04. Sherrill testified that the need for fall protection would have been "obvious to anyone." Tr. 130.

The oral imminent danger order was converted to a written section 107(a) Order No. 6575265. Tr. 91; P. Ex. 1. That Order was terminated when Nichelson complied with Sherrill's directive to climb down off the conveyor. Tr. 87, 91; P. Ex. 1. Sherrill testified that he observed Nichelson on the conveyor for about twenty to thirty seconds. Tr. 121. Nichelson, however, testified that it was maybe five seconds. Tr. 349.

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[17] Sherrill testified that he is aware of documented MSHA cases in which miners had suffered fatal injuries after falling from heights of less than ten feet. Tr. 89-90.

The inspection party then walked over to Nichelson. Stewart said, "Bones, you can't be up there." Tr. 285. It is noteworthy that Stewart also told inspector Sherrill that he was surprised that Nichelson was up there because Stewart had instructed Nichelson to "shut her down and wait." Tr. 284-85. Significantly, Sherrill conceded on cross examination that Stewart told him, "I don't know why [Nichelson] was doing that. I told him to shut it down and wait for me." Tr. 171, 206.

Upon interviewing Nichelson in Stewart's presence, Sherrill determined that Nichelson had also failed to perform lock out/tag out on the conveyor to prevent it from starting. Tr. 95, 285; P. Ex. 1. Sherrill also determined that the failure to lock out the conveyor belt created a risk that the belt would inadvertently move, causing Nichelson, who was performing work on the belt, to fall. Tr. 135-40. Sherrill testified that another individual could have accidentally started the conveyor belt by touching the start button in the control booth. Tr. 131.[18] Sherrill also testified about a secondary concern of entanglement. Tr. 137-40. Sherrill testified that if the conveyor belt inadvertently moved, Nichelson's extremities likely would have become entangled in a pinch point or crushed by the machinery. *Id.*

Thereafter, Sherrill issued the 104(d)(1) Citation and Order at issue. Sherrill determined that Nichelson's failure to use fall protection and his failure to lock out the power source to the conveyor belt were violations of mandatory safety standards 30 C.F.R. § 56.15005 and 30 C.F.R. § 56.12016, respectively. Sherrill further determined that Stewart's careless instructions in the face of a hazardous rock jam constituted a serious lack of reasonable care and high negligence and was aggravated conduct constituting unwarrantable failure. Tr. 117; P. Exs. 4, 5. Sherrill explained that he met with Stewart and Nichelson and determined that there were no mitigating factors. Tr. 107-115.

The fall protection violation was abated when Sherrill ordered Nichelson to come down to safety. *See* P. Ex. 1. Nichelson was re-instructed on the use of fall protection. P. Ex. 4. Nichelson obtained a lock and properly locked out the conveyor electrical disconnect. P. Ex. 5.

Respondent's History, Training, Supervision, Discipline and Abatement

Respondent's Portable Plant #1 did not have any prior violations of the cited fall protection or lock out/tag out standards. Tr. 145, 210; P. Ex. 13, pp. 3-4. From April 2009 through July 13, 2010, the mine received ten total citations during three inspections, none of which were designated as unwarrantable failures. P. Ex. 13, pp. 3-4. Inspector Sherrill candidly acknowledged that "based upon my experience with the Magruder Limestone Company, they're a good company. They try hard to do the right things . . ." Tr. 213-14.

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[18] Sherrill testified that most conveyors had a jog switch that would have permitted someone to bypass the shut off at the control booth, although he could not recall whether this conveyor had a jog switch. Tr. 131, 218-24. Thus, the Secretary failed to establish that the conveyor had a jog switch.

Sherrill testified on cross examination that Nichelson had been adequately trained on both fall protection and lock out/tag out and that Sherrill had no concerns regarding Respondent's Part 46 training. Tr. 158-59. Sherrill also testified that he had no concerns regarding Stewart's supervision of Respondent's miners. Tr. 160.

At hearing, Respondent provided several records of Nichelson's training. While working at Midwest Stone in 2007, Nichelson received new miner training on February 19-22, 2007. R. Ex. 4. Later that year, Nichelson was hired by Respondent. Tr. 373-74. On May 1, 2007, Nichelson received newly-hired experienced miner training. R. Ex. 5. Respondent also produced records documenting annual refresher training for Nichelson on March 11, 2009 and March 4, 2010. R. Ex. 7, 8.[19] At hearing, Nichelson recalled that the lock out/tag out training and fall protection training was provided as part of the annual training. Tr. 367-69. Stewart's testimony confirmed that lock out/tag out, fall protection, and the Rules to Live By were covered, among other things. Tr. 279, 280-283.

In response to a leading question, "You've trained your employees - - you've talked to your employees during the tool box talks about the necessity of doing [lock out/tag out and wearing fall protection]," Stewart said, "Yes." Tr. 267. Subsequently, on questioning from the undersigned, Stewart had no specific recollection of personally covering lock out/tag out in tool box talks with employees between March and July 2010. Tr. 281. When asked by the undersigned what he did personally to train his employees on lock out/tag out, Stewart responded, "[p]robably did nothing." When similarly asked about fall protection, Stewart testified, "[w]e just talked about it a lot." Tr. 304.

Stewart testified that he had never observed Nichelson fail to use fall protection or perform lock out/tag out before. Tr. 284. On questioning from the undersigned, Nichelson testified that Stewart told him that he should wear fall protection whenever he was above six feet and that this discussion probably occurred in the scale house during a tool box meeting when miners Ron Brown and Ron Butzlaff were also present. When asked what Stewart said, Nichelson stated that Stewart told them "[t]hat any time there's a chance you may fall that you should wear fall protection." Tr. 372.

Nichelson testified, somewhat equivocally, that he "really [did not] remember" whether he saw Stewart clear a rock jam before Stewart became the plant manager. Tr. 373. He further

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[19] Although both Nichelson and Stewart testified that the training was provided by MSHA, Nichelson's training records indicate that the training was provided under the auspices of the Missouri Department of Labor, Division of Labor Standards. R. Ex. 6 pp. 1-2, R. Ex. 7 pp. 1-2. While MSHA does provide limited training to miners through the Mine Health and Safety Academy and the Educational Field Services program, Part 46 training is primarily conducted by operators or though state programs funded in part by federal grants. See MSHA, *Educational Policy and Development's Programs and Services*, http://www.msha.gov/PROGRAMS/ EPDPS.asp (last visited May 15, 2013).

testified that Stewart's predecessor, Eric Denn, trained Nichelson on fall protection and lock out/tag out sometime after 2008. Tr. 373. In response to a series of leading questions, Nichelson confirmed that previously he had always locked out and tied off and has continued to fully comply with those standards since the incident. Tr. 357, 359, 366.

Sherrill, Stewart, and Nichelson testified that Stewart advised Nichelson that he would be discharged if he ever violated the lock out/tag out or fall protection standards again. Tr. 326, 357-58. After the incident, Stewart "chewed" or "cussed" Nichelson out and told him that he would be fired if it ever happened again. Tr. 163, 234, 327. Stewart further told Nichelson, "[y]ou can't be up there with anybody here, much less MSHA." Tr. 326-27. That verbal admonishment was the extent of discipline that Nichelson received. Tr. 234-35. Respondent had no formal disciplinary policy, and no formal written discipline was offered into evidence. Tr. 288.

IV. Positions of the Parties

The Secretary's Arguments

The Secretary's primary argument is that Stewart's actions in the face of a hazardous condition did not meet the heightened standard of care for supervisors. The Secretary argues that cases involving a sudden, yet high degree of danger, are not always suitable for traditional factor-dependent analysis under *Lopke Quarries*, Inc., 23 FMSHRC 705, 711 (July 2001). P. Br. at 13-14, *citing Midwest Material Co.*, 19 FMSHRC 30 (Jan. 1997). That is, where hazardous conditions involve "a high degree of danger," a supervisor is held to a "heightened standard of care." *Lafarge Constr. Materials*, 20 FMSHRC 1140, 1145-48 (Oct. 1988). The Secretary argues that a supervisor's failure to meet that heightened standard of care supports an unwarrantable failure determination. *Id*.

The Secretary further argues that an unwarrantable designation is justified because Stewart failed to approach the handling of the rock jam as a hazardous condition, thus posing a potentially high degree of danger to Nichelson, a miner under his supervision. The Secretary argues that Stewart acted with a "serious lack of reasonable care" when he issued instructions to Nichelson in front of a diesel generator. The Secretary claims that such instructions were easily misunderstood when delivered near the 95 decibels of noise emitted by the diesel generator. Further, the Secretary argues that shouting instructions in front of a diesel generator implicitly conveys a sense of urgency that compelled Nichelson to take immediate action without regard for his own safety.

The Secretary also argues that an unwarrantable failure determination is warranted under a traditional, factor-dependent analysis, which considers aggravated conduct based on the length of time that the violation(s) existed, the extent of the violative condition(s), whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition(s), whether the violation(s) is/are obvious or pose a high degree of danger, and the operator's knowledge of the existence of the violation(s). *See Lopke*

Quarries, Inc., 23 FMSHRC 705, 711 (2001); *see also Mullins & Sons Coal Co*., 16 FMSHRC 192, 195 (1994). The Secretary argues that the alleged violations posed a high degree of danger and that Stewart should have known that a miner may overlook lock out/tag out and fall protection protocol when in a hurry. P. Br. 18. While Nichelson was only exposed to the hazard for a short time, the Secretary argues that the condition was extensive because work was being performed on the elevated belt. P. Br. 17. Regarding notice that greater compliance efforts were necessary, the Secretary proposes that MSHA's Rules to Live By are adequate to put an operator on notice that greater efforts were necessary to achieve compliance with the standards. *Id.*

The Secretary further argues that the alleged violations resulted from Respondent's high negligence because Respondent knew or should have known of them, and there were no mitigating circumstances. P. Br. at 19. Specifically, the Secretary argues that Stewart's response to a highly hazardous condition, the rock jam, constituted high negligence because Stewart should have given effective instructions to Nichelson regarding how to clear the rock jam, or should have ensured that Nichelson used fall protection and followed lock out/tag out procedures. *Id*. at 20. The Secretary notes that Ron Butzlaff was the plant operator in charge of the control booth prior to Nichelson, and that Butzlaff or some other miner could have inadvertently started the conveyor belt, particularly since Stewart testified that one could not see the area involving the rock jam from the control booth. P. Br. at 21-22; Tr. 324.

Accordingly, the Secretary requests that I enforce Citation No. 6575266 and Order No. 6575267 as written, and assess the proposed penalties. P. Br. at 24.

The Respondent's Arguments

Respondent argues that the negligence of a rank-and-file miner (Nichelson) cannot be imputed to it for civil penalty or unwarrantable failure purposes. *See 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*)). The Respondent further highlights Commission precedent that "where 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*, 4 FMSHRC at 1464.

Respondent argues that the Secretary has failed to offer any evidence that Respondent's supervision, training or discipline was inadequate, and therefore cannot demonstrate that its negligence was anything but moderate or low. Respondent emphasizes Sherrill's testimony that he had no concerns about Respondent's supervision, training, or discipline generally, and further notes that Commission judges have rejected "high negligence" under the theory that a supervisor should have given a rank-and-file employee clearer or more intelligible instructions, where the rank-and-file miner was adequately trained and supervised. *See, e.g., Granite Rock Co.*, 34 FMSHRC 261, 267 (Jan. 2012) (ALJ); *CCP Group, Inc.*, 31 FMSHRC 261, 264 (Feb. 2009) (ALJ); *Cf., Blue Diamond Coal Co.*, 2004 WL 2544672, at *11-12 (July 2004) (ALJ). Further,

Respondent states that the Secretary failed to apply his own definition of high negligence because numerous mitigating circumstances are present. *See* R. Br. at 12-15.

Respondent also argues that the Secretary has failed to establish an unwarrantable failure. R. Br. at 15-26. Respondent argues that the extent of the alleged violations were rather limited in scope, since the area on top of the conveyor was only a small section of the processing plant, measuring about 3 to 3.5 feet wide, and Sherrill testified that only falls from the sides of the conveyor would likely result in fatal injuries. Tr. 86, 89. Respondent also notes that Sherrill did not reference any entanglement or crushing hazards in his inspection documentation or during his deposition, and he admitted that the former were remote and the latter were nonexistent. Tr. 139-140, 225-26, 262. Additionally, Respondent says that there is no evidence to suggest that it did not typically use fall protection or perform lock out/tag out. Respondent further asserts that the top of the conveyor was accessed only periodically because rock jams at elevated heights occurred only once a week, and Stewart typically accessed this area and wore a safety belt and lanyard. *See* R. Br. at 17; Tr. 333. Respondent argues that the violative conditions were immediately abated and did not require significant abatement efforts. Respondent also argues that the duration of the alleged violations weighs against an unwarrantable failure finding.

Respondent describes the incident as "isolated." Although Stewart acknowledged a couple of instances as a rank-and-file miner when he did not wear fall protection or when he cleared a rock jam without performing lock out/tag out, Stewart testified that he has always complied with such standards since promotion to plant manager, at which time he was instructed to model safe behavior and monitor employees for compliance. Tr. 251-253. Further, Respondent notes that Nichelson never observed Stewart violate lock out/tag out or fall protection standards. Tr. 251, 357.

Respondent further argues that it was not placed on notice that greater compliance efforts were necessary. Respondent did not have a history of violating 30 C.F.R. § 56.15005 or 30 C.F.R. § 56.12016. Respondent claims that the Secretary failed to present any evidence that MSHA provided warnings that greater compliance was required. Respondent asserts that Sherrill's testimony that Respondent likely was mailed the Rules to Live By, which were discussed generally during the pre-inspection conference, is insufficient to show that Respondent needed improved compliance. R. Br. at 19-20. Since Sherrill conceded that Respondent's training, supervision, and enforcement of lock out/tag out and fall protection was sufficient, and there is no evidence to suggest that Stewart witnessed prior violations by Nichelson, Respondent claims that it was never put on notice that greater compliance efforts were necessary. *See, e.g., Cougar Coal Company, Inc*., 25 FMSHRC 513, 519 (Sept. 2003); *see also* R. Br. at 20.

With regard to the operator's knowledge of the existence of the violation(s), Respondent argues that the lack of knowledge of the operator or its sole agent, Stewart, weighs against a finding of unwarrantable failure. R. Br. at 21-22. Finally, Respondent argues that the level of priority that it placed on abatement is only relevant when it has been placed on notice of a problem. R. Br. at 22; *IO Coal*, 31 FMSHRC at 1356, *citing Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). Hence, Respondent argues that the focus is on abatement efforts

made prior to the Citation/Order at issue. Since there is no evidence that Respondent was ever put on notice that Nichelson violated the cited standards prior to the inspection, Respondent says that abatement is a neutral factor in the analysis. *Id*. In sum, Respondent concludes that the Secretary failed to demonstrate that its conduct constituted unwarrantable failures. Accordingly, Respondent requests that the Citation and Order be modified to 104(a) citations with low or moderate negligence and appropriately revised penalties.

V. Legal Analysis

Order No. 6575267

Order No. 6575267 alleges a violation of 30 C.F.R. § 56.12016, which states in pertinent part:

> Electrical powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it.

The parties stipulated to a violation of this standard and that the Order was properly designated as S&S. Consequently, the Secretary's litigation theory and Respondent's argument on brief was based upon the assumption that lock out/tag out was required while Nichelson was on top of the conveyor belt attempting to clear the rock jam. Based on the weight of well-established precedent, I find that this stipulation is contrary to the plain meaning of the standard. Therefore, I set aside the party's stipulation and vacate Order No. 6575267.

Courts have consistently concluded that parties may not stipulate to issues of law. Issues of law are the province of courts, not of parties to a lawsuit. Accordingly, courts are not bound to accept stipulations as to questions of law. *Estate of Sanford v. Comm'r of IRS*, 308 U.S. 39, 51 (1939); *accord Gander v. Livoti*, 250 F.3d 606, 609 (8th Cir. 2001). Similarly, courts have long held that a party may not stipulate to a legal conclusion. "If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by agreement of counsel on a subsidiary question of law." *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289-90 (1917) *cited approvingly in U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc*., 508 U.S. 439, 448 (1993); *see also Sebold v. Sebold*, 444 F.2d 864, 870, n. 8 (D.C. Cir. 1971).

It is the providence of the judge to make legal conclusions after analyzing and weighing all probative evidence. *Mid–Continent Res., Inc*., 16 FMSHRC 1218, 1222 (June 1994); *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 257 (Feb. 1997). The parties' stipulation may not serve as a means to divest an adjudicator of his or her authority to make conclusions of law. *See Saviano v. Comm'r of IRS*, 765 F.2d 643, 645 (7th Cir. 1985), *quoted in Neuens v. City of Columbus*, 303 F.3d 667, 670 (6th Cir. 2002) (district court erred when it "blindly accepted [a] stipulation

without engaging in an independent review of whether [someone] was acting under color of state law"); *see also Kamen v. Kemper Fin. Servs.* Inc., 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."); *Hankins v. Lyght*, 441 F.3d 96, 104 (2d Cir. 2006) ("We are required to interpret federal statutes as they are written . . . and we are not bound by parties' stipulations of law.")

Here, the parties have stipulated to the fundamental legal conclusion that the facts alleged in Order No. 6575267 constitute a violation of 30 C.F.R. § 56.12016. The regulation, however, does not cover the violative condition the inspector sought to abate in the citation. Although the Secretary has long argued that § 56.12016 covers both hazards associated with electrical shock and mechanical movement, this interpretation is contrary to the clear meaning of the regulation and the context of the standard in the regulatory scheme. *Phelps Dodge Corp*., 681 F.2d 1189, 1192 (9th Cir. 1982); *Northshore Mining Co.*, 209 F.3d 706 (8th Cir. 2013).

Where a regulation is ambiguous, an agency's interpretation of its own regulation should be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *accord Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994); *Auer v. Robbins*, 519 U.S. 452 (1997); *see also Knife River Corp.*, 34 FMSHRC 1109 (May 2012) (ALJ). The Commission has found that "[a]lthough section 56.12016, standing alone, could be viewed as containing a plain and unambiguous lockout requirement, section 56.14105 and the case law interpreting that standard creates uncertainty regarding the scope of that lockout requirement." *Ray, employed by Leo Journagan Constr. Co.*, 20 FMSHRC 1014, 1023 (Sept. 1998); *but see Empire Iron Mining P'ship*, 29 FMSHRC 999, n. 8 (Dec. 2007) (agreeing in dictum that the language of § 56.12016 "is clear and unambiguous.").

Disagreements concerning the scope of lock out/tag out requirements have persisted for decades. In *Phelps Dodge Corp.*, which involved very similar facts to those at issue here, the Ninth Circuit vacated a citation applying the lock out/tag out requirement (30 C.F.R. § 55.12-16 (1979) (now 30 C.F.R. § 56.12016)) when a miner was standing on a panfeeder attempting to clear a rock jam in the drop chute. 681 F.2d 1189 (9th Cir. 1982). Although the miner had turned the panfeeder off at the control panel, he had not deenergized the equipment or followed lock out/tag out procedures. *Phelps Dodge Corp.*, 3 FMSHRC 458, 460 (Feb. 1981) (ALJ). The Ninth Circuit held that the Secretary should have applied the "blocked against hazardous motion" standard (30 C.F.R. § 55.14-29 (1979) (now 30 C.F.R. § 56.14105)) to address the hazard instead of applying a "lock out" requirement, which the court found was intended to protect miners performing mechanical work where there existed a danger of electric shock. *Phelps Dodge Corp.*, *supra*, 681 F.2d at 1190, 1192-93. The court noted that the lock out/tag out standard required equipment to be deenergized, was under the heading "electricity," and was "sandwiched between regulations whose purpose is manifestly to prevent the accidental electrocution of mine workers." *Id.* at 1192. The court concluded that the regulation's emphasis on cutting the flow of electrical current, when read in conjunction with the "blocked against

hazardous motion" standard, strongly suggests that electric shock was the regulation's main concern. *Id.*

The Ninth Circuit's findings in *Phelps Dodge* thirty-four years ago were most recently echoed just this year by the Eighth Circuit in *Northshore Mining Co.*, 709 F.3d 706 (2013). In *Northshore*, the Eighth Circuit vacated a citation issued when a MSHA inspector observed a miner working on the "Dutchman" portion of a shovel bucket that was not completely deenergized. *Id.* at 707. The miner had locked out and deenergized the control power, but had not locked out the main transformer that supplied power to the shovel bucket. *Id.* The Eighth Circuit emphasized that regulatory language cannot be construed in a vacuum. *Id.* at 710 (citing *Davis v. Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989)). Instead, the regulatory language must be read in context and with a view to its place in the overall statutory scheme. *Id.* The court stated:

> Placing § 56.12016 in context resolves any ambiguity raised by this action and leads to the conclusion that MSHA's interpretation of the regulation's reach in this case is inconsistent with its text and placement in the regulatory scheme. The overall thrust of § 56.12016 is unmistakable when placed in context: it is written to abate the risk of electrocution. Section 56.12016 applies to the hazard of electrical shock, not the injuries sought to be avoided here from mechanical movement. We thus disagree with MSHA's conclusion that § 56.12016 was designed to target both mechanical movement and electrocution.

Id. at 710 (citations omitted).

The Eighth Circuit further noted that although MSHA had the opportunity to amend the standard in the thirty years since *Phelps Dodge,* MSHA has failed to propose any amendments to § 56.12016 to respond to "longstanding judicial interpretation and ongoing discussion in administrative cases regarding the regulation's applicability in these circumstances." *Id.* at 711. While not dispositive, the court found that this fact weighed against deference to MSHA's interpretation of the standard. *Id.*

I find the reasoning of the majority's decision in *Phelps Dodge* and the unanimous decision in *Northshore* to be persuasive. Nichelson's actions, while placing him in danger of falling or entanglement, did not present a hazard of electric shock or electrocution. The Secretary offered no evidence to the contrary, failed to plead in the alternative a violation of § 56.14105, and assumed the risks of litigation.[20] The cited standard imposed no duty on

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[20] As noted, the Secretary did not move to plead in the alternative a violation of § 56.14105. Nor was there any testimony or evidence, including the wording of the citation narrative section, that put Respondent on notice that the belt on which Nichelson was standing

(continued...)

Respondent to lock and tag out the belt while Nichelson was clearing the rock jam. Accordingly, I find that the actions alleged in Order No. 6575267 do not constitute a violation of § 56.12016.

Citation No. 6575266

A) Negligence

When assessing penalties, section 110(i) of the Mine Act requires the Commission to consider, *inter alia*, whether the operator was negligent. 30 U.S.C. § 820(i). Each mandatory standard carries with it an accompanying duty of care to avoid violations of the standard. If a violation of the standard occurs, an operator's failure to meet the appropriate duty can lead to a finding of negligence. The fact that a violation was committed by a rank-and-file miner does not necessarily shield an operator from being deemed negligent. Where a rank-and-file miner's conduct is deemed violative, one must look to such considerations as the foreseeability of the miner's conduct, and the operator's supervision, training, and disciplining of its employees to prevent violations of the standard(s) at issue. *SOCCO*, *supra*, 4 FMSHRC at 1463-64; s*ee also Nacco Mining Co.*, 3 FMSHRC at 848, 850-51 (Apr. 1981) (construing the analogous penalty provision in the 1969 Coal Act where a foreman committed a violation), *cited in A. H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983).

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required . . . to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* "MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices." *Id.* High negligence is when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew of should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Low negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* No negligence is when "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.*

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[20](...continued)
was required to be blocked against motion. *See generally Empire Iron Mining P'ship*, *supra*, 29 FMSHRC 999 (Secretary plead a violation of section 56.14105 in the alternative to avoid being left without an enforcement action if the judge followed *Phelps Dodge*); *Island Creek Coal Co.*, 22 FMSHRC 823 (July 2000) (Secretary argued that lock out/tag out was required, but the citation and testimony stated that the machine was not blocked against motion). As the Secretary has not raised the alternative claim of § 56.14105, I need not address the validity of such a hypothetical. *Consolidation Coal Co.*, 20 FMSHRC 227, 236 (Mar. 1998).

After close examination of the record, I find that some circumstances mitigate Respondent's negligence. Inspector Sherrill testified that there was no evidence to suggest that Stewart should have expected Nichelson to fail to use fall protection. Tr. 158. Stewart testified that he had seen Nichelson use fall protection at the mine and never observed any instances in which Nichelson failed to use fall protection when there was a danger of falling. Tr. 281, 284. Further, both Sherrill and Stewart agree that it was impossible for Stewart to see Nichelson from Stewart's position at the time of the violative conduct. Tr. 170, 261.[21]

On the other hand, I reject Respondent's argument that Nichelson's Part 46 training mitigates Respondent's negligence. The record establishes that although Nichelson was up to date on the basic level of training that MSHA requires of all miners, Respondent did not take any significant additional steps to reinforce the importance of fall protection.[22] Similarly, the fact that Respondent provided fall protection at the mine site does not mitigate the negligence of the violation. Operators are required to comply with all relevant safety regulations and are not to be accorded leniency because they have met minimal expectations.

I further reject the notion that Stewart's discipline of Nichelson following the discovery of the violative practice mitigated Respondent's negligence. Stewart's discipline was not commensurate with the high level of danger that the violation posed to Nichelson. After the incident, Stewart "chewed" or "cussed" Nichelson out and told him that he would be fired if it ever happened again. Tr. 163, 234, 327. As Respondent had no formal disciplinary policy, the verbal admonishment was the extent of discipline that Nichelson received. Tr. 234-35; 288. Despite the seriousness of his conduct, Nichelson's transgressions were resolved with no more than the proverbial slap on the wrist.

The Secretary alleges that the violation is attributable to Respondent's high negligence because the mine's sole supervisor, Stewart, failed to approach the handling of the rock jam as a hazardous condition posing a potentially high degree of danger to a miner under his supervision.

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[21] While Sherrill testified that Respondent's lack of knowledge of the violation was a mitigating factor, he argued that this fact was *not* enough to warrant a decrease in negligence. Tr. 208. Sherrill's testimony, however, reflects a fundamental misunderstanding of the Secretary's own definition of high negligence. Pursuant to 30 C.F.R. § 100.3(d), a violation is said to be the result of "high negligence" if *no* mitigating factors exist. The line between high and moderate negligence is not controlled by the inspector's subjective determination of the importance of the mitigating factor. Thus, if no mitigating factors exist, the violation is attributable to high negligence. Otherwise, the inspector must find moderate, low, or no negligence. *See Excel Mining LLC*, 497 F. App'x 78, 79 (D.C. Cir. 2013).

[22] When asked by the undersigned what he did personally to train his employees on fall protection, Stewart testified, "[w]e just talked about it a lot." Tr. 304. Stewart's weak testimony indicates that he did not take steps to demonstrate safety procedures or to apply safety training to actual conditions at the plant. Thus, it appears that Stewart relied primarily on the state-provided training to instruct his employees in matters of mine safety.

P. Br. at 14. More specifically, the Secretary contends that Stewart should have known that his instructions would be easily misunderstood when delivered beside the loud diesel generator. *Id.* Even if Stewart had instructed Nichelson to clear the rock jam himself, the Secretary has failed to show that Stewart was obligated to remind Nichelson to follow all relevant safety procedures when giving instructions. Sherrill credibly testified that the need for fall protection was obvious and that Nichelson had been adequately trained in the use of fall protection. Tr. 130, 158. Further, Sherrill testified that Stewart was not required to observe every instance in which a miner dons fall protection. Tr. 157-58. Stewart's reliance on the fact that Nichelson would abide by his training and follow fall protection procedures, does not display negligence on the part of Respondent when, as Sherrill testified, there is no evidence suggesting that Stewart should have expected Nichelson to violate safety protocols. Tr. 158; *see also Glenn, employed by Climax Molybdenum Co.*, 6 FMSHRC 1583, 1588-89 (July 1984) (corporate operators do not have a duty to instruct experienced rank-and-file miners to follow safety procedures when they do not know or have reason to know that the rank-and-file miners will engage in violative conduct).

Nevertheless, Stewart's decision to provide instructions near the diesel generator is not without consequence. In most cases, if a rank-and-file miner disobeys the direct instructions of a supervisor, such an action would serve as a significant mitigating factor in the negligence analysis. *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 258-262 (Mar. 1988) (affirming judge's finding of no operator negligence when miner disobeyed an order of a supervisor and caused a violation of the Mine Act). Where the supervisor should have known that verbal communication would be ineffective, however, such instruction may not serve to mitigate the operator's negligence. Inspector Sherrill credibly testified that the sound level near the generator was approximately 95 decibels. Tr. 129. Given Stewart's familiarity with the mine, he should have been aware that the loud noise emitted from the generator could result in a communication failure.

Accordingly, I find that Citation No. 6575266 was a product of moderate negligence on the part of the Respondent.

B) Unwarrantable Failure Principles

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

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal* Co., 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*"); *Cyprus Emerald Res. Corp*., 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 43 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992). A judge may determine, in his/her discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

Additionally, "because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation." *Lopke Quarries, supra,* 23 FMSHRC at 711. An operator's supervisors are held to a high standard of care, and a foreman's involvement by failing to recognize the violation and take reasonable precautionary measures may be a factor supporting an unwarrantable failure finding. *Pine Ridge Coal Co.*, 33 FMSHRC 987, 1021 (Apr. 2011) *citing Lafarge Constr. Materials*, 20 FMSHRC 1140, 1145-1148 (Oct. 1988), *citing Midwest Material Co.*, 19 FMSHRC 30, 34-35 (Jan. 1997).

The Secretary bears the burden of proving all elements of an unwarrantable failure order under section 104(d) by a preponderance of the evidence. Having duly considered each factor below, I find that the Secretary has failed to establish an unwarrantable failure for either violative practice.

1) The Extent of the Violative Practice

The Commission has viewed the extent of a violative practice as an important element in the unwarrantable failure analysis. *IO Coal Co.*, 31 FMSHRC 1346, 1351-52 (Dec. 2009). This factor considers the scope or magnitude of the violation. *See Eastern Associated Coal*, 32 FMSHRC at 1195, *citing Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 708 (June 1988). In accessing the scope of a hazard, the Commission has found that the aggregate size of the area affected by the hazard must be examined independent of the percentage of the mine that said area occupies. *See Eastern Associated Coal*, 32 FMSHRC at 1194-95. Here, the violation was limited in scope. The area affected by the violative conduct was small, i.e., the lower section of a three-foot wide conveyor belt. It is undisputed that only one miner was at risk. Further, there is no evidence that lock out/tag out procedures were not followed or that fall protection was not used in other parts of the plant.

In examining the extent of a violative practice, rather than a violative condition, the frequency at which miners perform the unsafe practice is an important factor in the unwarrantable analysis. Stewart admitted to similar actions in the past as a rank-and-file miner. Specifically, Stewart testified that during his seven years as a rank-and-file miner, he "sometimes" failed to use fall protection when accessing elevated positions. Tr. 298, 307. While such a practice cannot be condoned and is particularly troubling, the Secretary has not suggested or provided any evidence to indicate that similar violative conduct was more than just an infrequent occurrence in the past that has since been corrected. Furthermore, there is no evidence of an unlawful practice after Stewart was promoted to plant manager. Thus, while I am particularly troubled by Stewart's admission of similar past violations and the fact that Nichelson was employed at the time of such violations,[23] when viewed in the context of the totality of the record evidence, I decline to find that this past practice sufficiently tilts the extensiveness factor in favor of an unwarrantable failure finding.

Another relevant consideration in determining whether the violation is extensive is the abatement measures taken to terminate the violative condition or practice. *See, e.g.*, *Eastern Associated Coal* Corp., 32 FMSHRC 1189, 1196 (Oct. 2010); *Peabody Coal Co.*, 14 FMSHRC 1258, 1263 (Aug. 1992). Citation No. 6575266 did not require significant efforts on the part of the Respondent to abate. The violation was abated once Sherrill ordered Nichelson down from the elevated position and Nichelson was re-instructed in the use of fall protection. P. Ex. 4. Respondent was not required to provide any additional belts or lanyards and was not required to make any modifications to the belt structure for miners to tie off fall protection. *See* Tr. 323; R. Ex. 13.

When questioned by the undersigned, Inspector Sherrill stated that the basis for determining that the violation was extensive in nature was the fact that Nichelson was engaged in dangerous work on the inclined belt. Tr. 125. The Secretary's brief provides no further insight as to the extent of the violation. P. Br. 17-18. The fact that Nichelson was performing a dangerous task, however, does not speak to the extent or scope of the violation. The degree of danger of the violative practice is a separate factor in the unwarrantable failure analysis, and thus should be examined independently of the extensiveness factor. Accordingly, on balance, I find that the extensiveness factor essentially is neutral in the unwarrantable failure analysis.

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[23] The Secretary failed to establish that Nichelson was aware of Stewart's past violations as a rank-and-file miner and under the circumstances of this case, I decline to impute such knowledge on account of the small size of the workforce employed at the mine. *Cf. LaGloria Oil & Gas Co.*, 337 NLRB 1120, 1123 (2002), *aff'd. mem.*, 71 Fed. Appx. 441 (5th Cir. 2003); (NLRB's "small plant doctrine" provides that when employees carry out protected activities at work and the employer has a small work force, an inference may be drawn that the employer is aware of such activity); *D & D Distribution Co.*, 277 NLRB 909 (1985), *enforced*, 801 F.2d 636 (3d Cir. 1986); *Wiese Plow Welding Co.*, 123 NLRB 616 (1959).

2) The Duration of the Violative Practice

The Commission has emphasized that the duration of a violative condition must be considered in the unwarrantable failure analysis. *See, e.g.*, *Windsor Coal Co.*, 21 FMSHRC 997, 1001-04 (Sept. 1999) (remanding for consideration of duration evidence of cited conditions). I conclude that the duration factor weighs against the finding of an unwarrantable failure.

Nichelson was exposed to the dangerous condition for a brief period of time, perhaps seconds. While Nichelson testified that he had been on the belt for only five seconds, I do not find this to be a credible account of the time he spent attempting to dislodge the rock with the breaker bar. Tr. 329. Inspector Sherrill credibly testified that he had observed Nichelson on top of the belt for twenty to thirty seconds and estimated that the total time that it would take to undo the rock jam was approximately three minutes. Tr. 120-121. Even assuming a three-minute exposure, the duration of the violation was brief, albeit very dangerous.

3) Whether Respondent Was Placed on Notice that Greater Efforts Were Necessary for Compliance with § 56.15005

The Commission has stated that repeated, similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *IO Coal*, *supra*, 31 FMSHRC at 1353-55; *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997); *see also Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001). The purpose of evaluating the number of past violations is to determine the degree to which those violations have "engendered in the operator a heightened awareness of a serious . . . problem." *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007), *citing Mid-Continent Res., Inc*., 16 FMSHRC 1226, 1232 (June 1994). The Commission has also recognized that "past discussions with MSHA" about a problem "serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard." *Id., citing Consolidation Coal*, 23 FMSHRC at 595.

Respondent's Portable Plant #1 did not have any prior violations of the cited fall protection standard. Tr. 210; P. Ex. 13, pp. 3-4. From April 2009 through July 13, 2010, the mine received ten total citations during three inspections, none of which were designated as unwarrantable failures. P. Ex. 13, pp. 3-4. Inspector Sherrill candidly acknowledged that "based upon my experience with the Magruder Limestone Company, they're a good company. They try hard to do the right things . . . ." Tr. 213-14. Given Respondent's general history of compliance, I find that this factor weighs against an unwarrantable failure finding.

In the circumstances of this case, I reject the Secretary's contention that receipt of the Rules to Live By alone is sufficient to establish that MSHA informed Respondent that greater efforts were necessary for compliance with the fall protection standard. During the pre-inspection conference, the inspectors generally discussed with Stewart the mine's violation history, the Rules to Live By, and the SLAM/SMART programs. Tr. 70. Inspector Sherrill testified that when

reviewing the Rules to Live By, he only pointed out the fall protection standard, but did not go into details. Tr. 142. Given Respondent's general history of compliance with the standard, and the apparent brevity of the Rules To Live By discussion, there was no opportunity for Sherrill to relate any particular standard to past conditions at the mine.

Furthermore, the Rules to Live By documentation provided to Stewart appears to have been very basic. *See* P. Ex. 8. The Rules, exemplified by Petitioner's Exhibit 8, are simply a listing of MSHA standards that are frequently cited in fatal accidents. They do not provide any information regarding best practices, safety guidance, or suggestions concerning what operators can do to achieve greater compliance with the listed standards. The Secretary did not provide any evidence that Respondent was provided with any further guidance from MSHA prior to the present inspection, other than a generic mailing that was sent to all mine operators in the state. Tr. 117-18.

Finally, it is important to note that at the time of the inspection, the Rules to Live By program was still in its infancy. *See* Press Release, MSHA, MSHA Fatality Prevention Program Will Include Outreach, Enforcement (Feb. 2, 2010), http://www.msha.gov/MEDIA/PRESS/2010/NR100202.pdf (announcing start to the Rules to Live By program only five months prior to the current inspection). Respondent held its last Part 46 annual refresher training only weeks after MSHA formally began the program. *See* R. Ex. 6. There is no evidence that anyone at Portable Plant No. 1 had been in violation of the Rules to Live By standards until the present inspection.

Based on the above, I find that Respondent was never given actual notice that greater efforts were necessary to achieve compliance with the standard at issue. Accordingly, I find that this factor weighs against a finding of an unwarrantable failure.

4) Whether the Violation Posed a High Degree of Danger

The high degree of danger posed by a violation supports an unwarrantable failure finding. *See, e.g., Beth Energy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering the area); *Quinland Coals*, 10 FMSHRC at 709 (finding unwarrantable failure where roof conditions were "highly dangerous"). For purposes of evaluating whether violative conditions pose a high degree of danger, it is often necessary to consider the same facts already considered as part of the gravity evaluation in an S&S analysis. *See San Juan Coal, supra*, 29 FMSHRC at 132-33 (Mar. 2007) (remanding because judge failed to apply S&S factual findings to danger factor for unwarrantable failure analysis).

Respondent concedes that the fall protection violation was S&S. It is undisputed that Nichelson was standing on a rubber conveyor belt, ten feet off the ground, at a thirty degree gradient. Tr. 86. The belt was elevated on the sides because of the troughing idlers, which kept the rocks in the middle of the belt. *Id.* Nichelson was using a six-foot breaker bar to clear a rock jam by attempting to use leverage to dislodge or break up the rock bridge. Tr. 87. In addition to the aforementioned conditions that contribute to the hazard of falling off the conveyor belt, there is also a risk that someone could restart the plant. There were two miners at the plant with

experience operating the plant controls: Stewart and Ron Butzlaff, a former plant operator. Tr. 339.[24] Given the considerable hazards that might contribute to Nichelson tripping or losing his balance, in addition to the added risk that the conveyor may be inadvertently reenergized, I find that the failure to use fall protection was highly likely to result in an injury.

As for the type of injury that may result, I find that the violation contributed to a fall hazard that was reasonably likely to result in fatal injuries. The ground below Nichelson's position was muddy, but mostly composed of rock with small softball-sized limestone spillage. Tr. 86; *see* P. Ex. 7. Aside from the ladder used to access the top of the belt, there were no other tools, machinery, or other objects near the base of the belt support structure. Nichelson, however, was working with a breaker bar to dislodge the rock jam, and Sherrill credibly testified that if he fell, Nichelson could impale himself with the breaker bar. Tr. 102-04.

As stated above, I find that Citation No. 6575266 was highly likely to result in an injury. The violation contributed to a hazard that could reasonably be expected to result in a miner's death or permanent disability. Accordingly, the danger factor weighs in favor of an unwarrantable failure finding.

5) The Operator's Knowledge of the Existence of the Violation and Whether the Violation was Obvious

An operator's knowledge of the existence of a violation and whether the violation is obvious are important elements of an unwarrantable failure analysis. *IO Coal*, *supra*, 31 FMSHRC at 1353-55; *Emery Mining Corp*., 9 FMSHRC 1997, 2002 (Dec. 1987). The Commission has found that where an agent of the operator has knowledge or should have knowledge of a safety violation, such knowledge should be attributed to the operator. *See Martin Marietta Aggregates*, 22 FMSHRC 633, 637 (May 2000); *Pocahontas Fuel Co.*, 8 IBMA 136, 147 (Sept. 1977), *aff'd*, 590 F.2d 95 (4th Cir. 1979). In addition, a mine supervisor or foreman is held to a high standard of care and the Commission has found that his involvement in a violation is an important factor in the unwarrantable failure analysis. *REB Enters., Inc*., 20 FMSHRC 203, 225 (Mar. 1998).

Neither party has suggested that Stewart had actual knowledge that Nichelson was going to violate the fall protection standard, nor that Stewart instructed Nichelson to attempt to clear the rock jam without following relevant safety procedures. Tr. 204-05. Sherrill testified that he found out about the fall protection violation before Respondent found out about it. *Id.* Further, apart

[24] While there was a reasonable chance that someone may have re-energized the plant, particularly Ron Butzlaff the former plant operator who was present that day, there was no particular reason for either of the two miners with experience operating the plant to have accessed the control room and restart the plant. Both men were aware of the rock jam and Butzlaff's current duties did not require him to enter the control booth. Tr. 276, 339-40. Further, the Secretary failed to establish that there was an alternate means of restarting the conveyor (i.e., jog switch) from a location other than the control booth. Tr. 131, 218-24.

from Stewart's own past violations as a rank-and-file miner, there is little evidence to show that Stewart should have known of the violation, or expected Nichelson to disregard his instructions and training and violate safety protocols. As discussed in the negligence analysis, *supra*, Sherrill's testimony supports the argument that mitigating factors were present with regard to the foreseeability of Nichelson's actions.

Additionally, the Secretary failed to establish that the condition was particularly obvious to Stewart, the only agent of the Respondent present on the day of the violation. It is clear from the pictures provided by the Secretary and the Respondent that the area accessed by Nichelson was not high in comparison with the other structures at the plant. P. Ex. 7; R. Ex. 9. As such, it is entirely possible that Nichelson's position could have been obscured from view by the plant's other structures. Further, Sherrill testified that Stewart was operating the loader at the time Nichelson climbed onto the belt and was unable to see Nichelson. Tr. 170. Stewart also testified that some parts of the plant were located on a hill, where the belt is not visible. Tr. 323. Given these facts, the Secretary has failed to establish that a reasonably attentive supervisor would have observed Nichelson's brief time on the elevated conveyor belt.

Accordingly, I find that the operator's knowledge of the existence of the violation and the obviousness of the violation are both factors that weigh against an unwarrantable failure finding.

6) The Operator's Efforts in Abating the Violation

An operator's efforts to abate a violation are relevant to an unwarrantable failure determination. The level of priority that the operator places on abatement of the problem is relevant once an operator has been placed on notice of the problem. *IO Coal*, 31 FMSHRC at 1356, *citing Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). Having found that Respondent had no actual knowledge of the violation and that MSHA had not put Respondent on notice that greater efforts were needed for compliance, this factor weighs against an unwarrantable failure finding.

C. Conclusion Regarding the Unwarrantable Failure Factors

I conclude that the Secretary has failed establish an unwarrantable failure for the fall protection violation. Citation No. 6575266 was of a very serious nature and placed Nichelson in a high degree of danger. I strongly concur with the parties' stipulation that the fall protection violation was properly designated significant and substantial. Nichelson's failure to don fall protection as described in Citation No. 6575266 was highly likely to result in an injury and there is sufficient evidence to show that such an injury was reasonably likely to be fatal.

Despite the high risk of danger, however, the other unwarrantable factors are either neutral or weigh against an unwarrantable failure finding. The Secretary's own witness testified that Stewart did not have knowledge of the violation and there was no evidence that Stewart should have expected Nichelson to violate safety protocols. Respondent was not placed on notice that greater efforts were needed to achieve compliance with the standard, and the violation was not

obvious to Stewart given the location of the belt and the short duration of the hazard. Although the scope of the hazardous practice was limited in terms of area and the number of miners affected, Stewart's testimony of past violations suggests that the violative practice may have been more extensive and signaled a possible culture of disregard for safety standards when miners were in a hurry. This is troubling and I take this into account in assessing a penalty for the violation. Nevertheless, I find that the totality of the factors weigh against a finding of unwarrantable failure for Citation No. 6575266.

VI. Penalty Assessment

Section 110(i) of the Mine Act sets forth the following criteria to be considered in determining an appropriate civil penalty:

> 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 and violation.

The Secretary has proposed a total penalty of $69,801 for the two unsettled violations that were litigated. The $52,500 proposed penalty for Citation No. 6575266 was specially assessed and thus did not reflect a penalty assessment under 30 C.F.R. § 100.3 criteria. Had the regular point-based assessment formula been applied, the Secretary would have proposed a penalty of about $18,271 for Citation No. 6575266. While a specially assessed penalty may have been appropriate given the danger posed by the hazard, the Secretary has failed to provide any evidence concerning the justification for special assessment. The Secretary did not provide the Narrative Findings for a Special Assessment at hearing, nor were the findings attached to the Petition for Assessment of Civil Penalty. Similarly, the Secretary's sole witness, inspector Sherrill, did not offer any testimony regarding the appropriateness of the specially assessed proposed penalty. Furthermore, I have reversed the unwarrantable failure designation and vacated Order No. 6575267. In these circumstances, I decline to assess a penalty consistent with the special assessment formula. *See generally,* MSHA, *Special Assessment Guidelines* (2011), www.msha.gov/PROGRAMS/assess/SpecialAssess/SpecialAssessments2011.pdf.

Although the Commission is not bound by the Secretary's proposed penalty or the § 100.3 point scheme, I find that the regulations at least provide a helpful guide for assessing an appropriate penalty that can be applied consistently. Applying the 100.3 assessment formula to the findings above, Citation No. 6575266 would be assessed a penalty of $5,503.

As set forth above, I have found that Citation No. 6575266 was a result of Respondent's moderate negligence and was highly likely to result in an injury. The violation contributed to a hazard that could reasonably be expected to result in a miner's death. Further, the parties have stipulated that the penalty will not affect the Respondent's ability to remain in business.

Respondent has a minimal violation history and the violations that were cited during the present inspection were abated rapidly in good faith. On the other hand, I find Stewart's admission of past violations troubling and indicative of a past practice of disregarding fall protection when miners were in a hurry. In order to effectuate the deterrent purposes of the Act, I find that a penalty of $16,509 is appropriate under section 110(i) for Citation No. 6565266.

VII. Order

WHEREFORE, the motion for approval of partial settlement, as set forth in footnote 1 above, is **GRANTED**. It is **ORDERED** that Citation 6575266 be **MODIFIED** to change the type of action from a section 104(d)(1) citation/order to a section 104(a) citation and to reduce the level of negligence from "high" to "moderate," and that Order No. 6575267 be **VACATED**. It is **ORDERED** that Citation No. 6575268 be **MODIFIED** to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation. It is further **ORDERED** that the operator pay a total penalty of $22,702 for all settled and litigated citations, within thirty days of this order.[25] *See* note 1, *supra*.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

Distribution:

Jeffery Leake, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202-5710

R. Lance Witcher, Esq., Ogletree, Deakins, Nash, Smoak, & Steward, P.C., 7700 Bonhomme Ave., Suite 650, St. Louis, MO 63105

/tjr

[25] 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
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9987 / FAX: 202-434-9949
May 23, 2013

WARRIOR COAL, LLC,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. KENT 2009-662-R
v.	:	A.C. No. 8492059; 01/06/2009
	:	
SECRETARY OF LABOR	:	Mine ID: 15-14335
MINE SAFETY AND HEALTH	:	Mine: Warrior Preparation Plant
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2009-870
Petitioner	:	A.C. No. 15-14335-177226
	:	
v.	:	
	:	
WARRIOR COAL, LLC,	:	Mine: Warrior Preparation Plant
Respondent	:	

SUMMARY DECISION

Before: Judge Bulluck

These cases are before me upon a Notice of Contest filed by Warrior Coal, LLC ("Warrior"), and a Petition for Assessment of Civil Penalty filed by the Secretary of Labor on behalf of her Mine Safety and Health Administration ("MSHA") against Warrior, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815.[1] The Secretary seeks a civil penalty in the amount of $3,405.00 for one alleged violation of her mandatory safety standard.

The parties have filed Cross-Motions for Summary Decision and Reply Briefs. The following are issues for resolution in this case: (1) whether Warrior violated 30 C.F.R.

[1] Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Deputy Secretary Seth D. Harris is the Acting Secretary of Labor.

§ 77.205(d); (2) whether the violation was significant and substantial; and (3) whether Warrior was moderately negligent in violating the standard.

Pursuant to Commission Rule 67(b), "[a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions and affidavits, 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." 29 C.F.R. § 2700.67.

It is well settled that summary decision is an extraordinary measure and the Commission has analogized it to Rule 56 of the Federal Rules of Civil Procedure, which the Supreme Court has construed to authorize summary judgment only "upon proper showings of the lack of a genuine, triable issue of material fact." *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (citations omitted). When considering a motion for summary decision, the Commission has noted that, "the Supreme Court has stated that 'we look at the record on summary judgment in the light most favorable to . . . the party opposing the motion,' and that 'the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.'" *Hanson Aggregates New York*, 29 FMSHRC 9 (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962) and *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

Based on the uncontested facts represented by the parties, I find that there is no genuine issue as to any material fact. For the reasons set forth below, I conclude that the Secretary is entitled to summary decision as a matter of law, **AFFIRM** the citation, as modified, and assess a penalty against Respondent.

I. Stipulations

The parties stipulated as follows:

1. Warrior is subject to the Federal Mine Safety and Health Act of 1977.

2. Warrior and its Preparation Plant have an effect upon interstate commerce within the meaning of the Act.

3. Warrior and its Preparation Plant are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the Administrative Law Judge has the authority to issue a decision in this case.

4. The civil penalty assessed in this case will not affect the ability of Warrior and its Preparation Plant to remain in business.

Ex. J-1.[2]

II. Factual Background

Warrior operates the Warrior Preparation Plant ("Plant") in Hopkins County, Kentucky. Sec'y Br. at 2. On April 7, 2008, Jamie Woodruff, Plant safety director, notified MSHA inspector Ray Cartwright that Warrior miner Michael Rickard had died on April 4, 2008.[3] Ex. 2 at 1. On April 9, MSHA began an accident investigation to determine whether Rickard's death should be charged to the mining industry. On May 12, information from that investigation was forwarded to MSHA's Fatality Review Committee ("Committee"). Ex. 2 at 1. On May 22, Kevin Stricklin, Administrator for Coal Mine Safety and Health, requested a chargeability determination from the Committee. Ex. 6 at 1. On November 24, the Committee determined that Rickard's death should be charged to the mining industry "because his death was due to complications of a surgical procedure that was performed to remedy a work related injury." Ex. 7 at 1-2. On January 6, 2009, MSHA Inspector William L. Barnwell issued a citation to Warrior for its failure to maintain the walkway outside of the warehouse adjacent to the loading dock free of snow and ice. Ex. E at 1.

III. MSHA's Chargeability Decision and Accident Investigation Report

As a preliminary matter, Warrior has requested that I review the Committee's decision to charge Rickard's death to the mining industry. However, Warrior has not provided, nor can I find, any authority which would enable the Commission to review the Committee's charging decision. The decision of that Committee, like all charging decisions made by the Secretary, is solely within her enforcement authority granted by Congress, and is unreviewable. *SOL v. Twentymile Coal Co*., 456 F.3d 151, 158-161 (D.C. Cir. 2006).

Warrior has also requested, under § 105(d) of the Act, which provides that the Commission may "direct other appropriate relief" when an operator contests the issuance of a citation or order, that I revise MSHA's Accident Investigation Report. However, the authority to direct other appropriate relief, in addition to "affirming, modifying, or vacating" citations and orders under section 105(d), relates to the charging documents, themselves, and does not extend to MSHA's investigations or the findings and conclusions of reports that are generated therefrom. Consequently, because MSHA's investigation and its Accident Investigation Report are beyond the purview of my jurisdiction, I am without authority to revise the Report.

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[2] The Secretary's filing of the parties' Stipulations has been marked as a joint exhibit, J-1.

[3] The Secretary's exhibits are lettered. Warrior's exhibits are numbered.

IV. Findings of Fact and Conclusions of Law

Inspector Barnwell issued 104(a) Citation No. 8492059 alleging that a "fatality" "occurred" as a result of a violation of section 77.205(d), that was due to Warrior's "moderate" negligence, and that the violation was "significant and substantial."[4] The "Condition or Practice" is described as follows:

> The walkway outside the warehouse adjacent to the loading dock was not maintained free of snow and ice. Black ice had formed and an employee slipped and fell breaking his right fibula and tibia on 3-9-2008. The employee later died on April 4, 2008, due to complications of the surgical procedure that was performed to remedy the injury.

Ex. E at 1.

1. Fact of Violation

In order to establish a violation of one of her mandatory safety standards, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.,* 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

On March 9, 2008, Plant superintendent Frank Roberts and equipment operators Greg Lykens, Chuck Mitchell and Michael Rickard met at the warehouse to discuss their forthcoming task of loading a unit train with coal. Ex. B at 3-4, C at 3, D at 2-3. As they heard the train approaching the Plant, the men left the warehouse and drove to the train load-out where they checked-in the train. Ex. B at 5, D at 3-4. After they finished, Lykens and Mitchell drove back towards the warehouse in order to get the bulldozers to load the train. Ex. B at 8, C at 5. As they turned into the warehouse parking lot, they saw Rickard lying on the ground beside the passenger side of his company truck. Ex. B at 8, C at 5. Rickard told Lykens that he had slipped on ice and either sprained or broken his ankle. Ex. B at 9. Lykens called Roberts on the CB radio and informed him that Rickard had fallen and was lying on the ground. Ex. B at 10, D at 5. When Roberts arrived on the scene, Rickard told him that he had slipped and fallen and that his ankle was hurting. Ex. D at 5. The men lifted Rickard into the passenger seat of his truck, and called 9-1-1. Ex. D at 7. Subsequently, an ambulance arrived and transported Rickard to Regional Medical Center ("RMC") in Madisonville, Kentucky. Ex. A at 2.

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[4] 30 C.F.R. § 77.205(d) provides that, "[r]egularly used travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable."

At 7:41 a.m., Rickard was admitted to RMC for a possible broken ankle. Ex. H at 1. Rickard underwent surgery to repair his ankle but, postoperatively, suffered severe respiratory failure. Ex. H at 3. On March 25, Rickard was discharged from RMC with a discharge diagnosis of a fractured right tibia/fibula with the complication of respiratory failure and idiopathic interstitial pulmonary fibrosis. Ex. H at 2. On April 3, Rickard was re-admitted to RMC in respiratory distress. Ex. H at 79. The next day, Rickard died as a result of respiratory failure, pulmonary fibrosis and other causes. Ex. H at 80. Neither the Discharge Summary nor the Certificate of Death lists Rickard's broken ankle as a cause of death. Ex. H at 80, I.

Inspector Barnwell pointed out in deposition testimony that Warrior did not have a written policy or procedure in place to address snow or ice removal, and only provides snow melt and calcium chloride for use at the discretion of its employees. Ex. A at 2. He opined that Warrior had not removed ice from the walkway prior to miners traveling, and that Rickard fell as a result. Ex. A at 3. Superintendent Roberts stated in his deposition that as the daylight increased, he could see that snow had accumulated by the warehouse building. Ex. D at 5-6. He opined that the snow had melted during the day, run down the walkway, and frozen into black ice at night. While Roberts claimed that he could not see the ice at night, he admitted that there was a light in operational condition over the area. Ex. D at 6.

The testimony establishes that Warrior did not have effective procedures in place to maintain the walkway free of ice. Warrior could have sanded, salted, chemically removed or otherwise cleared the ice from the walkway on either the previous day or before the load-out crews began their work that morning, and has proffered no explanation for not having done so expeditiously. Therefore, I conclude that Warrior's failure to clear ice from the walkway adjacent to the warehouse violated section 77.205(d).[5]

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[5] Warrior argues that the citation should be vacated because it was not issued with "reasonable promptness," as described in Section 104(a) of the Act, and that the delay was prejudicial. Resp't Br. at 7-8. Warrior points out that Rickard's fall occurred on March 9, 2008, yet the citation was not issued until January 6, 2009. During nearly this entire period, MSHA was conducting its fatality investigation, an acceptable basis for the delay considering the analyses of medical reports and deposition testimony. *See Southern Ohio Coal Company*, 14 FMSHRC 928, 935 (May 1992) (ALJ Broderick). It is from the culmination of the investigation to the issuance of the citation by which "reasonableness" is determined. *SOL v. Twentymile Coal Co.*, 411 F. 3d 256, 262 (D.C. Cir. 2005). In addition to failing to show unreasonable delay, Warrior has also failed to demonstrate any prejudicial effect due to the delay in issuing this citation. The delay has not diminished the availability of testimonial evidence, nor has it prevented Warrior from a full and fair opportunity to participate in all stages of this proceeding. Ex. B, C, D. *See Southern Ohio* at 938; *Old Dominion Power Co.*, 6 FMSHRC 1886, 1894 (Aug. 1984), *rev'd on other grounds sub nom. Old Dominion Power Co. v. Donovan*, 772 F. 2d 92 (4th Cir. 1985).

Given that the evidence also indicates that snow had been accumulating for several days, Warrior should have checked the condition of the walkways, especially since they were used at least every weekend by load-out crews to access their vehicles. Moreover, because the area was illuminated at night, the operator was not restricted to daylight hours in maintaining the walkway in safe condition. Therefore, I find that Warrior was moderately negligent in violating the standard.

2. Gravity

According to the Secretary, since Rickard's death was the ultimate injury that resulted from his fall, the citation was properly designated "fatal." The Secretary supports her argument by proposing that the Commission determine the level of gravity for violations that result in injuries differently from those that do not. According to the Secretary, for a violation that does not result in an injury, the Commission should determine whether the violation was reasonably likely to result in an injury and then determine the reasonably likely type of injury that would occur. Sec'y Br. at 15, n. 5. Where an injury actually occurs, however, the Secretary argues that the Commission must only determine the nature of the resulting "ultimate injury," regardless of the likelihood of that injury occurring. Sec'y Br. at 14-15. Therefore, applying this analysis, although Rickard's death was unlikely as a result of his fall, he did, indeed, die, and thus the citation was properly marked "fatal," and a substantial penalty reflective of the severity of that outcome should be imposed. In contrast, Warrior contends that a determination of gravity must be reflective only of injuries sustained when an accident occurs, in this case, a broken ankle. Resp't Br. at 9.

Although Warrior is not contesting the "significant and substantial" ("S&S") designation of the violation, it is helpful to consider a *Mathies* analysis in arriving at an assessment of the appropriate level of injury for which Warrior is liable, because *Mathies* focuses on the reasonable likelihood of injury as a result of a hazard. In *Mathies Coal Company*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*, 3 FMSHRC 822 (Apr. 1981): 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. 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'd*. 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation."

Texasgulf, Inc., 10 FMSHRC 498, 501 (Apr. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987). In *U.S. Steel Mining Company*, the Commission provided further guidance on the third element:

> 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." (citation omitted). 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., 7 FMSHRC 1125, 1129 (Aug. 1985) (emphasis added).

Under Mathies and its progeny, the Commission does not address causative chains of events and their ultimate effects. The distinction advanced by the Secretary between violations involving no injury and those in which injury occurs is reasonable. As she points out, analysis of the reasonable likelihood of injury is entirely different from identifying an injury that has already occurred. Where the Secretary goes out on an unsupported limb, however, is on her "ultimate injury" theory. Indeed, the Secretary has cited no authority for what is, essentially, a tort analysis. Furthermore, her reliance on tort law is misplaced, since the Commission has recognized that the principles underlying tort law, directed toward compensation of individuals for losses, are inherently different from the concepts underlying governmental regulation such as the Act. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1277-78 (Oct. 2010) (citing *Prosser and Keeton on Torts*, § 1, at 5-6, § 43 at 280 (5th ed. 1984). On the other hand, Warrior's "actual injury" approach is persuasive, since it provides an accurate account of an injury when an accident has occurred, rather than a reasonable projection of likely injuries when it has not.

The question raised by the parties' dispute over gravity boils down to whether the citation accurately reflects the injury that resulted from the hazard, or whether it holds the operator liable for any and all consequences that may have some causal connection to the hazard, no matter how tangential or remote. Resolution of the question considers simple identification of the injury resulting from Rickard's slip and fall on ice, rather than a tort analysis as to causation and forseeability of his death. The evidence establishes that Rickard sustained a broken ankle when he slipped and fell, and the citation should be reflective of that fact. A legal conclusion as to causation of Rickard's death is beyond the reach permissible under the Act. This finding recognizes that "fatal" may be an appropriate assessment where a hazard results in a death that is directly linked to the initial inquiry, e.g., where a pedestrian struck by a bulldozer dies a month later from crush injuries. However, this is simply not the case here.

No reasonable interpretation of the Act's safety goals imposes liability on operators for consequences of events beyond the realm of their control in providing and maintaining safe workplaces. It follows that the bite of the Act's deterrent effect is compromised where it is

applied unfairly or unrealistically. Therefore, the Secretary's attempt to hold Warrior liable for consequences beyond his broken ankle must not prevail. Accordingly, I find that Rickard's fall was a "permanently disabling" injury.

V. Penalty

While the Secretary has proposed a civil penalty of $3,405.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 20 U.S.C. § 820(j). *See Sellersburg Co.,* 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 763 F. 2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Warrior is a large operator, with an overall record that is not an aggravating factor in assessing an appropriate penalty. As stipulated, the proposed civil penalty will not affect Warrior's ability to continue in business. Ex. J-1, Stip. 4. The remaining criteria involve consideration of the gravity of the violation and Warrior's negligence in committing it. These factors have been discussed fully. Therefore, considering my findings as to the six penalty criteria, the penalty is set forth below.

It has been established that, as a result of this S&S violation of section 77.205(d), a permanently disabling injury occurred, that Warrior was moderately negligent, and that the violation was timely abated. While the Secretary has proposed a penalty of $3,405.00, consistent with my findings of lower gravity, I find that a penalty of $2,500.00 is appropriate.

ORDER

ACCORDINGLY, Respondent's Motion For Summary Decision is **DENIED**, the Secretary's Motion for Summary Decision is **GRANTED**, and it is **ORDERED** that the Secretary **MODIFY** Citation No. 8492059 to reduce the level of gravity to "permanently disabling," and that Warrior Coal, LLC, **PAY** a civil penalty of $2,500.00 within 30 days of the date of this Decision.[6]

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

Distribution:

Donna E. Sonner, Esq., U.S. Dept. of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219-2440

Marco M. Rajkovich, Jr., Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40513

/ss

[6] 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. Please include Docket number and A.C. number.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
WASHINGTON, DC 20004
TELEPHONE: 202-434-9987 / FAX: 202-434-9949
May 23, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of BURDETTE BILLINGS, Complainant v. FTS INTERNATIONAL PROPPANTS, LLC, Respondent	: : : : : : : : : : : : :	DISCRIMINATION PROCEEDING Docket No. LAKE 2012-34-DM A.C. No. NC-MD-2011-08 Mine: Oakdale Wet Plant Mine ID: 47-03569

DECISION

Appearances: Eileen R. Hurley, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, IL, on behalf of Complainant;

Mark N. Savit, Esq., Marci M. Fulton, Esq., Patton Boggs, Denver, CO, for Respondent.

Before: Judge Bulluck

This case is before me upon a Discrimination Complaint brought by the Secretary of Labor on behalf of Burdette Billings ("Billings") against FTS International Proppants ("FTS") pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c).[1] The Secretary contends that Billings was unlawfully discharged by FTS from its Oakdale plant in Tomah, Wisconsin on April 28, 2011. The Secretary alleges that Billings' termination was motivated by FTS's discriminatory animus towards his protected activities, which consisted of reporting safety issues to his supervisors and making a hazard complaint to MSHA in April 2011.[2] FTS denies that it discriminated against Billings, and asserts that he was discharged for multiple instances of misconduct that occurred between April 25 and April 28, 2011.

[1] Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Deputy Secretary Seth D. Harris is the Acting Secretary of Labor.

[2] The Secretary also contends that FTS wrongly suspected Billings of making a hazard complaint in March 2011.

On May 13, 2011, Burdette Billings filed a Discrimination Complaint with MSHA under section 105(c) of the Mine Act.[3] Upon receipt of his Complaint, MSHA Special Investigator Thomas Pavlat conducted a special investigation and, consequently, the Secretary determined that a violation of section 105(c) had occurred.[4] On October 14, 2011, the Secretary filed a Discrimination Complaint on behalf of Billings, alleging that FTS illegally terminated him for engaging in activities protected under section 105(c) of the Act. A hearing was held in Madison, Wisconsin.

For the reasons set forth below, I conclude that while the Secretary has established a *prima facie* case of discrimination under the Mine Act, FTS successfully defended its actions by proving that it would have terminated Billings for his unprotected activity alone.

Stipulations

The parties stipulated to the following:

1. FTS International Proppants, LLC ("FTS International Proppants"), formerly known as Proppant Specialists, LLC, is an operator as defined in section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"), 30 U.S.C. § 801, *et seq*.

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[3] 30 U.S.C. § 815(c)(1) states, in relevant part:

> No person shall discharge or in any manner discriminate . . . against any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act . . . or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act.

[4] 30 U.S.C. § 815(c)(2) states, in relevant part:

> Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate.

2. Operations of FTS International Proppants at the Oakdale Wet Plant (Oakdale Plant) in Tomah, Wisconsin are subject to the jurisdiction of the Mine Act.

3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge pursuant to sections 105 and 113 of the Mine Act.

4. Prior to his termination by FTS International Proppants, Burdette Billings was a miner as defined in section 3(g) of the Mine Act.

5. On or about April 22, 2011, FTS International Proppants transferred Mr. Billings from the night shift to the day shift at the Oakdale Plant.

6. From April 25, 2011 to April 27, 2011, Robert Marincel, MSHA safety inspector, performed a complaint investigation at the Oakdale Plant.

7. In each of the four citations he issued on April 27, 2011, Inspector Marincel charges regional manager Crawford with having "engaged in aggravated conduct constituting more than ordinary negligence."

8. On April 28, 2011, Respondent issued an Employee Counseling/Disciplinary Form to Mr. Billings and discharged him on that date.

9. Both Mr. Crawford and Chris E. Cummins signed the Employee Counseling/Disciplinary Action Form discharging Mr. Billings.

10. On May 13, 2011, Mr. Billings filed a Discrimination Complaint with MSHA. He supplemented the complaint on May 17, 2011 in his interview with MSHA Special Investigator Thomas Pavlat.

Tr. 9-11.

Factual Background

The Oakdale plant is a surface mine that processes high quality sand for industrial use, and is divided into a wet and dry section. Tr. 54, 66. The wet section receives deliveries of sand by dump trucks, and processes them using a hydrosizer. The hydrosizer wets the sand in order to separate "good sand" from "garbage sand." The good sand is conveyed to the dry section, while the garbage sand is sold or given away to the local township of Byron. In the dry section of the plant, the sand is dried in a large revolving dryer drum. Tr. 66-69, 163.

In the dryer drum, the sand is sometimes heated to extreme temperatures of up to 600 degrees. When the sand is heated to over 400 degrees, the over-heated sand needs discharging to prevent it from going to the next phase of the drying process and damaging equipment. Tr. 69.

The dryer drum contains a sand reject conveyor that safely discharges over-heated sand to an exterior location. However, during the time period from January to April 2011, the tail shaft bearings on the sand reject conveyor were damaged, rendering the reject conveyor inoperable. Ex C-4. Therefore, FTS elected to use the dryer drum's diverter valve ("K-valve") to discharge over-heated sand onto the ground below. Ex. C-2.

Between January and April 2011, several times during each 12 hour shift, miners were required to open the K-valve to release over-heated sand from the dryer drum, and take temperature readings of the exiting sand with a hand-held heat gun. Ex. C-2. Miners reportedly stood in the hot sand for up to five minutes until the over-heated sand had been fully discharged. If the hot sand did not impede production, it remained on the floor until miners finished higher priority tasks. The hot sand was present during both day and night shifts, and had been known to form piles in excess of four feet high. Tr. 93, 204-05. Miners were only provided leather gloves, leaving their bare arms exposed to hot sand and hot equipment. Ex. C-3. On February 27, miner Travis Fries suffered burn injuries to his feet when hot sand burned through his work boots, although he finished his shift and worked the next day. Tr. 205-06. Although Fries notified management of his injury, the dryer drum's reject conveyor was not repaired until sometime after the MSHA inspection of April 25-27. Tr. 206-07.

Burdette Billings was hired as a plant operator by John Rice, former plant manager, and worked at the Oakdale plant from December 2010 to April 2011. Tr. 54. He swept floors, shoveled snow, welded equipment, installed guards, drove loaders and skid steers (small loaders), and filled dump trucks and hoppers with sand. Tr. 57-66. On April 22, Billings was transferred from the night shift to the day shift, where he primarily operated loaders.[5] Tr. 317-18.

Beginning sometime in January or February 2011, Billings began complaining to management that using the K-valve to discharge over-heated sand onto the work floor exposed miners to hot sand, which damaged their boots. Therefore, he requested a boot allowance from FTS. Tr. 87-89. He testified that he continued to complain and make suggestions about ways to alleviate the hot sand hazard until his termination on April 28. He notified numerous management officials of the hot sand hazard including the regional manager, Brandon Crawford, and the production supervisor, Todd Rainey. Tr. 86, 90.

Sometime in March 2011, an anonymous caller made a hazard complaint to MSHA regarding a cracked windshield on a front-end loader at the Oakdale plant. MSHA Inspector Robert Marincel investigated the complaint on March 28 and issued a citation to FTS for the condition of the windshield. Ex. C-7; Tr. 36-37. Billings emphatically denied making this complaint. Tr. 92.

[5] A loader is a mechanical shovel or other machine for loading coal, ore, mineral or rock. *Dictionary of Mining, Mineral and Related Terms* 316 (2d ed. 1997).

On April 23, Billings made a hazard complaint to MSHA alleging that miners were required to walk in hot sand to access the K-valve. Ex. C-1; Tr. 26-28. From April 25 to 27, Marincel inspected the Oakdale plant in response to Billings' hazard complaint, and issued one citation and two orders for violations involving the hot sand hazard. Tr. 24-25. The citation was issued for lack of safe access to the K-valve of the dryer drum, and charged that miners were required to open the K-valve to release over-heated sand onto the ground, stand in the hot sand while taking its temperature, and walk back over the hot sand to exit the area. Ex. C-2. One order detailed miners' lack of protective clothing while working near the K-valve; the other cited the defects on the sand reject conveyor which necessitated use of the K-valve. Ex. C-3, C-4. In the citation and orders, Marincel identified Brandon Crawford as having engaged in aggravated conduct, in that he directed miners to use the K-valve to release the sand onto the ground. Ex. C-2. Marincel was unaware of who had made the complaint when he issued the citation, and did not ask anyone at the plant for the Complainant's identity. Tr. 39-40.

The Secretary alleges that Brandon Crawford and Todd Rainey were hostile towards Billings' April 23 hazard complaint. In this regard, the Secretary relies on a statement made by Travis Fries during MSHA's investigation of Billings' complaint.[6] Ex. C-13 at 5. In his statement, Fries stated that he met with Crawford and Rainey one or two days after the April MSHA inspection:

> During the meeting with Crawford and Rainey I was asked by Crawford and Rainey if I knew who made the hazard complaint to MSHA. Crawford or Rainey stated that they knew Billings or I made the hazard complaint. They stated it was a process of elimination and they knew Billings or I made the hazard complaint. At that time I told them that I did not make the hazard complaint and was not taking the blame for making the hazard complaint. I got somewhat loud and mad about being named as making the hazard complaint, and just insisted that I did not make the hazard complaint. At that time Crawford said that if I did not make the hazard complaint then we know who it was. I believed that they thought Billings or I made the hazard complaint was [sic] because we both got our feet burnt in hot sand from the K-valve in the dryer and the hot sand was part of the hazard complaint. Crawford and Rainey threatened they would fire me if I didn't tell them who made the hazard complaint. I was not going to take the blame for something that I did not do. I did not tell them that Billings made the hazard complaint. I just told them that I did not

[6] Complainant's Exhibit 13 consists of two statements attributed to Travis Fries. The first, unsigned, recounts his interview with Pavlat on May 17 (Ex. C-13 at 1-3); the second, signed by Fries on June 20, recounts his interview with Pavlat on June 8 (Ex. C-13 at 4-5). Any reference to "Fries' statement" refers to the second statement.

> make the complaint. I had a tape recording of the meeting, but the tape recorder got damaged and [I] could not provide the tape.

Ex. C-13 at 5.[7]

At hearing, Fries testified that he did not remember making this statement, but recalled meeting with Pavlat, and verified his signature on the written statement. Tr. 207-10. Rainey denied that such meeting ever occurred, claiming that he never talked to anyone regarding the identity of the individual who had triggered the April inspection; he also denied being present for any conversation in which Crawford accused a miner of making the April hazard complaint. Tr. 345-50. Crawford was not called as a witness.

In mid April 2011, Crawford met with Billings for 1½ hours. Tr. 115-17, 121-25. Billings was accompanied by Fries, and Rainey was also present. Billings admitted that during this period, he had been experiencing significant personal problems unrelated to his job that were causing him stress. Tr. 116-17, 184. He testified that at this meeting, Crawford "more or less [said] if there's something wrong with one of [his] employees, [he'd] like to know what's going on." Tr. 122. According to Billings, Crawford asked him why he had failed to perform one of his job duties and why he had a poor work attitude, and the meeting ended with Billings crying and revealing personal information unrelated to his employment. Tr. 121-24.

On April 25, the township of Byron, near the Oakdale plant, held a meeting of its board. Crawford represented FTS before the board, and made a presentation addressing the town's concerns with the Oakdale plant's operations. Tr. 365. Ralea Rainey, an administrative assistant at FTS and wife of Todd Rainey, took notes at the meeting. Ex. C-21 at 11; Tr. 363-65. Billings came to the meeting late and sat next to Chad Gerke, an employee of independent contractor Gerke Excavating, who was attending the meeting on behalf of Hi-Crush, a competitor of FTS. Tr. 103-04, 366-67. Billings' remarks to Gerke are disputed. Billings testified that he asked only whether Gerke was hiring, while Gerke testified that Billings asked him if he, Gerke, would give him a job if Billings publicly maligned Crawford at the meeting. Tr. 106, 389-90. After this exchange with Gerke, Billings stood up and interrupted Crawford's presentation to the board, instead of waiting for the subsequent question and answer session. Tr. 107. The following description of Billings' confrontation with Crawford by Raley Rainey (Rainey refers to Billings as "Bart") is not disputed by the Secretary:

> Bart Billings stated to Brandon, in front of all meeting attendees, "Brandon do you remember what you said to me last week when I asked about giving away free sand? You said if you give them [an] inch they will take a mile." Brandon corrected Bart and stated

[7] It is unclear whether this meeting occurred before or after Billings' termination on April 28, since Fries could have been referring to meeting with Crawford and Rainey one or two days after the inspection began on April 25, or one or two days after the inspection ended on April 27. Tr. 24-25.

> that he never said that to him and redirected the conversation to noise reduction. Part of the noise reduction plan is to move fuel barrels closer to the dry plant area so that our loader equipment can fuel away from the neighbors at nighttime reducing equipment noise. Bart then asked why a fuel barrel was not moved down by the dry plant over a month ago when he suggested it. Brandon stated that you can't just put a fuel barrel anywhere, you must follow DNR and MSHA regulations and that those are both being researched. As I sat in the crowd I then heard Bart state to Chad Gerke sitting next to him that MSHA was at our plant today and proceeded to whisper to him about our facility. Bart did not present himself in the manner during the meeting that he was supporting the company; his manner and demeanor was more that he was on the attack against Brandon and the company he works for.

Ex. C-21 at 11; Sec'y Br. at 21.

Billings admitted that his behavior was confrontational, antagonistic, and detrimental to Crawford and FTS. Tr. 147-48. He claimed that he was provoked by Crawford's "interrogation" of him at the meeting in mid April, which ended when Billings broke down in tears. Billings explained that he sought to expose Crawford by revealing his lack of integrity to the townspeople. Tr. 129, 147. However, Billings also testified that he regrets his actions and was not aware at the time that his behavior could harm FTS, but only later learned of the board's regulatory authority over the sand plant:

> At the time I was talking to Brandon Crawford. It wasn't about the company. It was about him and how he spoke to me. I think the company provides jobs for the employees, and I didn't know the power that the township had until lately, but back then, I didn't know what kind of power they have over the township [sic].
>
> * * *
>
> I didn't know how much power the township had over the plant until lately, but during that meeting I was ignorant to the fact of how much power the township has. And I've learned a lot.

Tr. 147-48.

On April 26, Todd Rainey prepared an Employee Counseling/ Disciplinary Form ("written discipline") for Billings for failing to chock his loader on April 25 and April 26.[8] Ex. R-4, R-6; Tr. 329-33. Rainey testified that company policy since December 2010 dictates that all vehicles be chocked whenever parked, and that miners were made aware of this policy by word of mouth. Tr. 321-22. Billings admitted that he was aware of company policy, and that he knowingly disregarded it on multiple occasions. Tr. 165. On April 26, Rainey also prepared a written discipline for Billings for property damage, i.e., for driving a loader into a ladder after he had been signaled to stop. Ex. R-5; Tr. 338-41. Billings admitted the property damage. Tr. 140-41. Billings was not provided with copies of the written disciplines prior to his termination on April 28. Tr. 96, 327-40. During the morning of April 28, Billings, who was off-duty at the time, was sighted on mine property for approximately 1½ hours. Billings claimed that he was at the mine to get his work schedule. He admitted, however, that he had talked to numerous employees while he was on-site. Tr. 142-45.

The senior vice-president of Proppants (a division of FTS), Chris Cummins, oversees approximately 200 employees, and has the power to hire, terminate and discipline employees based solely on his own authority. Tr. 397-98. In April 2011, Cummins, then in Proppants' Fort Worth, Texas office, learned of the April 25 to 27 inspection at the Oakdale plant which had resulted in the citation and orders. At the same time, Cummins learned that an employee had disrupted FTS's presentation at the Byron town board meeting, but was unaware of the employee's identity. Tr. 399-401. In an effort to address these issues, Cummins traveled to the Oakdale plant on April 28. Resp't Br. at 9.

Upon arriving at the Oakdale plant, Cummins spoke to Crawford about the MSHA violations and the disruption of the town board meeting. During this conversation, Crawford identified Billings as the employee who had caused the disruption. Tr. 403-05. Cummins then spoke to Ralea Rainey, who corroborated Crawford's account of Billings' harassment of Crawford at the town board meeting. Tr. 405-06. Cummins also questioned Todd Rainey and learned about Billings' other misconduct, i.e., his repeated failure to chock his loader and damaging the ladder. Tr. 406-08. According to Cummins, when he interviewed Billings about the incident at the town board meeting, Billings stated that he had a right to attend the meeting as a resident of the area. Tr. 410. Cummins also asked Billings about his repeated failure to chock his loader, the damaged ladder, and his off-duty visit to the mine, and Billings responded that he could not find chocks and urgently needed to use the bathroom, and that he was not at fault for damaging the ladder because he had not been signaled to stop. Tr. 411-12.

Later that day, Cummins prepared and issued an Employee Counseling/ Disciplinary Form to Billings ("notice of termination") which gave four reasons for Billings' termination: 1) failing to chock a loader on two occasions; 2) damaging property by driving a loader into a ladder; 3) intentionally making material misrepresentations and statements detrimental to FTS at

[8] A chock is a block or wedge placed under something else, such as a wheel, to keep it from moving. *The American Heritage dictionary* 327 (4th ed. 2009).

the town board meeting; and 4) visiting mine property while off-duty.[9] Ex. C-9 at 1-3; Tr. 132. Cummins emphasized that he terminated Billings solely on his own authority, and that he was unaware of Billings' protected activity at the time. Each reason given in the notice of termination referenced policies in the Employee Handbook prohibiting specified misconduct. While both Cummins and Crawford signed the notice of termination, Cummins testified that Crawford had no input in Billings' termination, and that Billings' written notice would have been issued without Crawford's signature. Tr. 417-19, 424.

Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under section 105(c)(1) of the Mine Act, a miner must prove by a preponderance of the evidence "(1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity." *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.,* 2 FMSHRC 2786, 2799-2800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). The Commission has noted 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 (Nov. 1981), *rev. on other grounds sub nom. Donovan v. Phelps Dodge Corp.,* 709 F.2d 86 (D.C. Cir. 1983). Circumstantial evidence may include: 1) coincidence in time between the protected activity and the adverse action; 2) knowledge of protected activity; 3) hostility or animus toward the protected activity; and 4) disparate treatment. The more that hostility or animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Id* at 2510.

Once the complainant has established a *prima facie* case, "[t]he operator may attempt to rebut [the] *prima facie* case by showing either that the complainant did not engage in protected activity or that the adverse action was in no part motivated by protected activity." *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n.20 (Apr. 1981). The operator may also affirmatively defend by proving by a preponderance of the evidence that it was motivated by both the miner's protected and unprotected activities and would have taken the adverse action for the unprotected activity alone. *Robinette*, 3 FMSHRC at 818. The Commission has explained that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed."

[9] The Secretary alleges that Billings was subject to disparate treatment since other employees who committed similar misconduct, i.e., failing to chock loaders, damaging property, and appearing on mine property while off-duty, were not disciplined. As will be fully discussed, since Billings' disruption of the town board meeting is independently sufficient to motivate termination, it is unnecessary to determine the sufficiency of this allegation as a basis for determining whether he was discriminatorily terminated. See Sec'y Br. at 19-22.

Bradley v. Belva Coal Co., 4 FMSHRC 982, 993 (June 1982). The Commission has explained that "pretext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.,* 12 FMSHRC 1521, 1534 (Aug. 1990). However, the Commission has also stated that "[its] judges should not substitute for the operator's business judgment [its] views of "good" business practice." 3 FMSHRC at 2516.

Prima Facie Case

For the reasons set forth below, I find that the Secretary has successfully made out a *prima facie* case by showing that Billings engaged in protected activity and was terminated, in part, for his protected activity.

The Secretary asserts that Billings engaged in protected activity on three separate occasions: 1) between January and April 2011 when he complained to plant management about working in hot sand; 2) in March 2011 when he was erroneously suspected of making a hazard complaint to MSHA regarding a broken windshield; and 3) on April 23, 2011 when he made a hazard complaint to MSHA regarding the hot sand. FTS concedes that Billings engaged in protected activity when he complained to management regarding the hot sand, and when he made the April hazard complaint to MSHA. Resp't Br. at 16-18. It is unnecessary to resolve whether Billings was suspected of making the March hazard complaint about the cracked windshield, since the Secretary made out a *prima facie* case based on the April hazard complaint.

Since there is no direct evidence of discriminatory intent, the Secretary relies upon circumstantial evidence to prove that FTS discriminatorily terminated Billings because of his April 23 hazard complaint. As will be discussed fully, I find that the Secretary has established a temporal nexus between the April hazard complaint and Billings' termination, that plant management knew that Billings had made the April hazard complaint, and that plant management was hostile towards that complaint.

The Commission has found that a discharge occurring approximately two weeks after protected activity is sufficiently coincidental in time to support a finding of discriminatory motive. *Secretary of Labor on behalf of Clay Baier v. Durango Gravel*, 21 FMSHRC 953, 959 (Sept. 1999). This case presents an even stronger causal connection, since Billings was terminated on April 28, a mere five days after he had made the hazard complaint to MSHA on April 23. Ex. C-1, C-9 at 3. Therefore, I find that the five day interval is sufficiently close in time to establish a causal connection between the April hazard complaint and Billings' termination.

The Commission has recognized that an operator's knowledge of protected activity "is probably the single most important aspect of a circumstantial case." *Chacon,* 3 FMSHRC at 2510. It has also cautioned that "an operator may not escape responsibility by pleading ignorance due to the division of company personnel functions," and that a supervisor's knowledge of an employee's protected activity can be imputed to an upper-level decision-maker

if the supervisor influenced the decision-maker's termination decision. *Metric Constructors,* 6 FMSHRC 226 (Feb. 1984); *Turner v. National Cement,* 33 FMSHRC 1059 (May 2011). The evidence establishes that the regional manager, Brandon Crawford, and the production supervisor, Todd Rainey, suspected that Billings had made the April 23 hazard complaint to MSHA. After the MSHA inspection had begun on April 25, Crawford and Rainey questioned Travis Fries about the identity of the miner who had made the hazard complaint, and accused Fries or, alternatively, Billings of having made it. When Fries denied culpability, Crawford and Rainey intimated that they knew who had made the complaint. In reaching this conclusion, I have credited Fries' statement to the MSHA investigator, rather than Rainey's testimony that he had no part in the conversation.

Cummins credibly testified that he was solely responsible for terminating Billings, and that he was unaware of Billings' protected activity when he issued the notice of termination. Tr. 417-19, 424. However, it is clear from the evidence that Cummins' decision was influenced by Crawford and Rainey. Cummins testified that upon arrival at the Oakdale plant on April 28, he had separate conversations with Crawford and Rainey about misconduct on the part of Billings, including the Byron town board confrontation, failure to chock the loader, and damage to the ladder. Tr. 403-08.

Given that the record establishes that the manager and supervisor who knew of Billings' protected activity directly reported to the upper-level decision-maker at least some of the reasons given for Billings' termination, it is reasonable to assume that Crawford's and Rainey's conversations with Cummins influenced Cummins' decision to terminate Billings. I note that this factual scenario is very similar to that in *Metric Constructors,* where the Commission imputed the supervisor's knowledge of the employee's protected activity to the upper-level decision-maker, where that supervisor had reported the misconduct used as the basis for the miner's termination. 6 FMSHRC at 228. As is the case here, the upper-level decision-maker was unaware of the employee's protected activity, and was solely responsible for terminating him. *Id.* at 230 n.4. Accordingly, I find that Crawford's and Rainey's knowledge of Billings' protected activity is imputable to Cummins.

The Commission has also recognized that a supervisor's animus towards an employee's protected activity can be imputed to an upper-level decision-maker if that supervisor influenced the decision-maker's termination decision. *Turner,* 33 FMSHRC at 1068-69. Fries' account of his meeting with Crawford and Rainey clearly establishes their animus towards Billings' April hazard complaint. Moreover, Fries contended that Crawford and Rainey had threatened to fire him if he refused to divulge who had made the hazard complaint. Ex. C-13 at 5. Based on Crawford's and Rainey's knowledge of and animus towards Billings' protected activity, and considering that they influenced Cummins' decision to terminate Billings, I find that their animus towards Billings' hazard complaint is also imputable to Cummins.

Therefore, the Secretary has established that FTS's termination of Billings was motivated, in part, by his hazard complaint to MSHA. I also find that FTS has not proven that it

was in no way motivated by Billings' protected activity and, therefore, that it has failed to rebut the Secretary's *prima facie* case.

Affirmative Defense

FTS contends that even if Billings' termination were partially motivated by his protected activity, Billings would have been terminated for his unprotected activity alone. The notice of termination provides four reasons for Billings' termination: failing to chock his loader, property damage, misconduct at a town board meeting, and presence on mine property while off duty. Ex. C-9 at 1-3. FTS argues that Billings' conduct at the town board meeting was alternative and independent of the other reasons for his termination, and that his disruptive behavior, by itself, motivated his termination. Resp't Br. at 23. For the reasons set forth below, I find that FTS affirmatively defended its decision to terminate Billings.

The U.S. Court of Appeals for the Sixth Circuit's seminal decision in *Pendley v. FMSHRC* has required that when an operator has provided multiple reasons for termination, a distinction must be made between cumulative reasons and alternative and independent reasons. 601 F.3d 417 (6th Cir. 2010). An operator's reasons are cumulative when the operator based its decision on all the reasons listed in the notice of termination. Alternatively, an operator may have viewed each enumerated reason as an alternative and independent basis for termination. Whether the reasons are cumulative or alternative and independent is determined by considering the viewpoint of the decision-maker responsible for the termination; if that individual viewed a reason as alternative and independent, that reason can be considered independent of the other reasons. *Id.* at 425-26 n.4.

In *Pendley,* the Sixth Circuit provided a framework for analysis. The court explained that when reasons for termination are cumulative, each reason must be a credible basis for discipline. In contrast, when the reasons are alternative and independent, "the falsity or incorrectness of one may not impeach the credibility of the remaining articulated reason(s)." *Id.* at 426 n.4 (citing *Cooley v. Carmike Cinemas, Inc.,* 25 F.3d 1325, 1329 (6th Cir. 1994)). In providing practical guidance as to how to distinguish between the two categories of reasons, the court stated that the structure of the termination notice and the decision-maker's testimony are probative. *Id.* at 425-26 n.4. In this case, the testimony of the decision-maker is especially crucial in determining the category into which the reasons fall, since the notice of termination is FTS's generic personnel form used for all disciplinary actions.

Cummins testified that in his view, Billings' misconduct at the town board meeting was independent of the other reasons for his termination. Cummins stated that even before his arrival at the Oakdale plant, he was considering terminating the employee who had caused the ruckus at the town board meeting. Tr. 418-19. Cummins later asserted that Billings' conduct at the town board meeting, by itself, would have been sufficient to justify Billings' termination, emphasizing that had he not been made aware of Billings' other misconduct, he would have, nevertheless, terminated him for insubordination at the town board meeting. Tr. 424-25. He stated that he considered Billings' conduct to be a very serious offense because it damaged FTS's reputation

and, therefore, he would have terminated Billings regardless of any apology made by him. Tr. 443-46. Furthermore, Cummins testified, he would have terminated Billings even if Billings had explained that his disruptive behavior was due to his frustration over management's failure to correct safety hazards at FTS. Tr. 446. I credit Cummins' testimony and, therefore, find that Billings' disruptive conduct at the town board meeting was an alternative and independent basis for his termination.

In considering whether Billings' insubordination at the town board meeting would have, by itself, motivated Billings' termination, I note that the Secretary has declined to address Billings' behavior at the town board meeting, but has focused on discrediting the other reasons for his termination. In fact, the Secretary takes the position that she "does not dispute the description of Mr. Billings' appearance at the Byron Township meeting that Ralea Rainey prepared . . . . Whether Mr. Billings' conduct at that meeting alone, absent his protected activity, would have been sufficient to support his termination is a determination that the Court will make." Sec'y Br. at 21. Assuming, *arguendo*, that the Secretary had challenged the credibility of terminating Billings solely for his misconduct at the town board meeting, based on the available evidence, she would not have been successful in discrediting FTS's affirmative defense.

In the *Turner* discrimination case, the Commission set forth three ways in which a complainant may challenge the credibility of an operator's affirmative defense. First, a complainant may establish that the operator's proffered reasons have no basis in fact, i.e., they are factually false. 33 FMSHRC at 1073. Second, a complainant may show that the proffered reasons did not actually motivate the discharge, i.e., a complainant admits the factual basis underlying the employer's proffered reasons and that such conduct could motivate dismissal, but attacks the credibility of the proffered reasons indirectly by showing circumstances which tend to prove that an illegal motivation was more likely than the legitimate business reasons proffered by the employer. Third, a complainant may show that the employer's proffered reasons were insufficient to motivate termination, i.e., other employees were not terminated even though they engaged in conduct substantially similar to the conduct which formed the basis of the complainant's termination. *Id.*

The Secretary concedes that Ralea Rainey's description of Billings' conduct at the town board meeting was accurate and, therefore, she has failed to show that FTS's proffered affirmative defense is factually false. Sec'y Br. at 21. The Secretary also has failed to show that other employees were not terminated for engaging in conduct substantially similar to that of Billings. Finally, there is no circumstantial evidence which would indicate that Billings' combative behavior at the town board meeting was not sufficient motivation to justify his termination. On the contrary, the evidence suggests otherwise, that his conduct was egregious enough, standing alone, to motivate his termination. Billings, himself, acknowledged that he sought to expose Crawford by showing the townspeople "what they're dealing with." Tr. 129. He also admitted that if he had known the breadth of the town board's influence respecting FTS's business operations, he would have never publicly confronted Crawford. Tr. 147-48. In this regard, Chad Gerke, the independent contractor who was sitting next to Billings, testified

that the town board can restrict sand plant operations in Oakdale by recommending to the county board that a mine permit be denied to an operator. According to Gerke, the county board gives great weight to the recommendations of the town board regarding issuance of mine permits. Tr. 387-88. Cummins had these same concerns in mind when he terminated Billings for his misconduct at the town board meeting. Cummins testified that "getting along with the people is too important to us." Tr. 446. Consequently, Billings' public confrontation with Crawford, by his own admission intended to cast Crawford in a bad light, was clearly serious enough, standing alone, to motivate his termination.

Since FTS's alternative and independent reason, Billings' disruption of the town board meeting, motivated his termination, it is unnecessary to assess the credibility of the remaining reasons given for Billings' termination.[10] Therefore, I find that FTS affirmatively defended its actions, by proving that Billings was terminated for a legitimate business-related reason.

Provocation

The Secretary attempts to rebut FTS's affirmative defense by alleging that Crawford's "interrogation" of Billings in mid April 2011, which resulted in Billings' tearful breakdown, provoked Billings' misconduct at the town board meeting. Sec'y Resp. to Resp't Br. at 3-4. Billings testified that "[Crawford] made these comments to [him], so . . . that's why [he] had this conversation back and forth with him at the town hall meeting." Tr. 125. In this regard, the Commission has recognized that wrongful provocation by an employer may be grounds for excusing misconduct of an employee:

> Even if the judge determines that Reading has established the elements of its affirmative defense, the question remains whether that defense must nevertheless fail because Bernardyn's conduct was provoked. Although we have recognized that cursing is opprobrious conduct unprotected by the Mine Act, *Cooley*, 6 FMSHRC at 520-21, and would find threats all the more opprobrious, in many cases decided under the National Labor Relations Act, 29 U.S.C. § 141 et seq. (1994) ("NLRA"), courts have recognized that an employer cannot provoke an employee into an indiscretion and then rely on that indiscretion as grounds for discipline . . . . The question thus remains for the judge to determine on remand whether Bernardyn's cursing (including the alleged threat) was provoked by Reading's response to his protected refusal to drive faster. The judge must also determine whether the particular facts and circumstances of this case, when viewed in their totality, place Bernardyn's conduct within the

[10] The Secretary contests the factual accuracy of the three remaining reasons for Billings' termination. Since I have decided the ultimate question of discrimination on another basis, the disruption of the Byron town board meeting, it is unnecessary to analyze these issues.

> scope of the "leeway" the courts grant employees whose "behavior takes place in response to [an] employer's wrongful provocation."

Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite, 22 FMSHRC 298 (Mar. 2000) (citing *Trustees of Boston Univ. v. NLRB,* 548 F.2d 391, 393 (1st Cir. 1977)).

Crediting Billings' account of his meeting with Crawford, I find that the Secretary has failed to provide any evidence that Crawford's conduct was provocative or in any way wrongful. Billings, by his own account, was suffering from stress caused by personal problems unrelated to his job, which may explain his poor work attitude in general, and his emotional breakdown. Crawford's questions to Billings about his poor performance and work attitude were based on legitimate business related concerns. Furthermore, also by Billings' own account, he was not threatened during this meeting, and no mention was made of his safety complaints whatsoever. Tr. 185-86. Consequently, I am unable to find any basis upon which Billings' conduct at the town board meeting is justified or otherwise excusable. Therefore, I find that FTS's affirmative defense survives the Secretary's allegation of wrongful provocation.

In conclusion, I find that the Secretary has established a *prima facie* case of discrimination under section 105(c) of the Mine Act. I also find that FTS affirmatively defended its termination of Billings. Therefore, based on a thorough review of the record, I conclude that the Secretary has failed to prove, by a preponderance of the evidence, that FTS discriminatorily terminated Billings in violation of section 105(c) of the Act.

ORDER

ACCORDINGLY, it is **ORDERED** that Burdette Billings' Discrimination Complaint against FTS International Proppants, LLC, is **DISMISSED**.

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

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

Marci M. Fulton, Esq., Patton Boggs, 1801 California Street, Suite 4900, Denver, CO, 80202

Eileen R. Hurley, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, Suite 844, Chicago, IL 60604

Burdette Billings, 12353 Grover Road, Camp Douglas, WI 54618

/dm

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
WASHINGTON, DC 20004

May 28, 2013

EASTERN ASSOCIATED COAL, LLC,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. WEVA 2008-942-R
	:	Citation No. 6606813-04/05/2008
v.	:	
	:	Docket No. WEVA 2008-943-R
SECRETARY OF LABOR	:	Citation No. 6606814-04/05/2008
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2008-1310-R
Respondent	:	Citation No. 6607269-05/15/2008
	:	
	:	Mine Name: Federal No. 2
	:	Mine ID: 46-01456
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2009-97
Petitioner,	:	A.C. No. 46-01456-163283
	:	
v.	:	
	:	
EASTERN ASSOCIATED COAL, LLC,	:	Mine: Federal No. 2
Respondent	:	

DECISION

Appearances: John A. Nocito, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;

Todd C. Myers, Esq., Rebecca J. Oblak, Esq., Bowles, Rice, McDavid, Graff, & Love, LLP, Morgantown, West Virginia, for Respondent.

Before: Judge Bulluck

These cases are before me upon Notices of Contest and a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Eastern Associated Coal ("Eastern Associated"), pursuant to

section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 ("Act").[1] The parties have reached settlement on Citation No. 6604657 and Order No. 6607269. Regarding remaining Citation No. 6606813 and Order No. 6606814, the Secretary seeks civil penalties totaling $9,951.00 for two violations of her mandatory safety standards.

The following are issues for resolution in this case: (1) whether Eastern Associated violated 30 C.F.R. §§ 75.400 and 75.360(f); (2) whether the violations were significant and substantial; and (3) whether the violations were attributable to Eastern Associated's high negligence and unwarrantable failure to comply with the standards.

A formal hearing was held in Fairmont, West Virginia. At hearing, Petitioner's Exhibits (P-1 through P-9), Respondent's Exhibit (R-1), and the parties' Joint Stipulations (J-1) were admitted into evidence. The parties' Post-hearing Briefs are of record. For the reasons set forth below, I **AFFIRM** the citation and order, as issued, and assess penalties against Respondent.

I. Stipulations

The parties stipulate as follows:

1. Respondent is an "operator," as defined by section 3(d) of the Mine Act, of the coal mine at which the citation and orders in this proceeding were issued.

2. Operations at the Federal No. 2 mine are subject to the jurisdiction of the Mine Act.

3. The Federal No. 2 mine is owned and operated by Respondent, Eastern Associated Coal, LLC.

4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge pursuant to sections 104, 105, and 113 of the Mine Act.

5. The individual whose signature appears in Section IV, No. 22 of the citation and orders at issue in this proceeding was acting in his official capacity as an authorized representative of the Secretary of Labor when the orders were issued.

6. The subject citation, orders and terminations were properly served by duly authorized representatives of the Secretary upon agents for Respondent on the dates and times and at the places stated therein, and may be admitted into evidence for the purpose of establishing their issuance.

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[1] Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Deputy Secretary Seth D. Harris is the Acting Secretary of Labor.

7. The citation and orders contained in Exhibit "A" attached to the Secretary's Petition are authentic copies of the citation and orders at issue in this proceeding.

8. The R-17 Assessed Violation History Report is an authentic copy and may be admitted as a business record of the Mine Safety and Health Administration.

9. The MSHA computer printouts reflecting Respondent's history of previous violations are authentic copies and may be admitted as business records of the Mine Safety and Health Administration.

10. Payment of the total proposed civil penalty in this matter will have no effect on Respondent's ability to remain in business.

11. The parties stipulate to the authenticity of their exhibits but not to the relevancy or the truth of the matters asserted therein.

12. Respondent demonstrated good faith in attaining compliance after issuance of the subject citation and orders.

13. Respondent mined approximately 3,093,227 tons of coal at the Federal No. 2 mine in 2008.

14. The entity controlling Respondent, Patriot Coal Corporation, produced more than 10,000,000 tons of coal in 2008.

15. At the time of the issuance of the citation and orders at issue in this proceeding, the Federal No. 2 mine was subject to spot methane inspections at a minimum of every five working days pursuant to section 103(i) of the Mine Act.

Ex. J-1

II. Factual Background

Federal No. 2 is an underground bituminous coal mine located near Fairview, West Virginia. On April 5, 2008, Inspector Robert Radosevich conducted a regular quarterly inspection of the mine. Tr. 41. Federal No. 2 is considered a gassy mine which requires regular testing of methane samples at a minimum of every five working days. Tr. 41; Ex. J-1, Stip. 1. When Radosevich arrived at the mine, he reviewed the pre-shift examination books and he encountered a West Virginia state electrical inspector, John Hall, who was at the mine to check the fire suppression system on the belt-line. Tr. 44.

Radosevich was accompanied on inspection by Eastern Associated section supervisor Bob Phillips and miners' representative John Palmer. Tr. 46. Radosevich and Hall traveled simultaneously to the Right Longwall Belt in separate vehicles to check the fire suppression

system together. Tr. 46. When Radosevich arrived at the longwall belt take-up storage unit between 8:30 and 8:45 a.m., the belt was not running.[2] Tr. 61. After Radosevich and Hall had Phillips energize the belt, Radosevich walked the tight side to the back end of the take-up storage unit, where he could activate the hose and visually inspect the sprinkler system above. Tr. 62, 66-69, 76. Both inspectors checked to ensure that the fire suppression system shut down the belt, and were satisfied that it was operating properly. Tr. 69.

Upon walking out of the area along the tight side of the belt, Radosevich noticed coal accumulations on the side of the take-up storage unit between the framework and the belt in what he described as a five-inch "channel." Tr. 69, 80. Radosevich either got down on his knees to get a better look at the coal in the channel or was alerted by Palmer to take a look, and he observed that the accumulations extended underneath the belt. Tr. 83, 261-62. At the front of the take-up storage unit Radosevich observed a hold-up roller laying on the ground beside it that was not turning, and that the belt was rubbing but was not warm to the touch. Tr. 81-83, 84-85, 88. He saw three additional rollers within the take-up storage unit that were compacted with coal. Tr. 85. Based on his observations, at 9:00 that morning, Radosevich issued Citation No. 6604657 to Eastern Associated for coal accumulations in violation of section 75.400. Tr. 85.

After Phillips energized the belt a second time, Radosevich counted 14 rollers turning in coal accumulations and three frozen rollers. Tr. 92. He observed that the moving belt was in contact with the accumulations underneath, which caused them to become compacted with coal. Tr. 93. Radosevich walked the full length of the take-up storage unit and determined that there were coal accumulations under the entire length of the unit. Tr. 93-94, 104-06. He also saw loose coal accumulations around the two bank rollers located at the tail of the take-up storage unit. Tr. 104, 106-07. Thereafter, Phillips took the belt out of service, and it took seven miners approximately three hours to clean up the accumulations. Tr. 95, 283-84.

While the miners cleaned, Radosevich measured the accumulations around the rollers to range from 4 to 16 inches deep, extending from the tight side of the take-up to 14 inches under the belt. Tr. 121. The top of the coal accumulations that extended 14 inches under the belt was consistently wet, while deeper beneath the top some portions were wet and others were dry. Tr. 121, 225-27. After the clean up, the miners started the belt, Radosevich ensured that the three frozen rollers were turning, and he terminated the citation around 12:30 that afternoon. Tr. 97-99. Radosevich then issued Order No. 6606814 to Eastern Associated for an inadequate pre-shift examination in violation of section 75.360(f), based upon his observation that the coal accumulations at the belt take-up storage unit had not been recorded in the pre-shift examination book. Tr. 132, 140.

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[2] A belt take-up storage unit loops the belt on its rollers and keeps it tight during the mining process. Tr. 48-49. It also stores the belt by lacing it back and forth over the moveable rollers. Tr. 328.

III. Findings of Fact and Conclusions of Law

A. Citation No. 6606813

As a result of finding coal accumulations under the belt and around 14 rollers of the take-up storage unit, Radosevich issued 104(d)(1) Citation No. 6606813, alleging a significant and substantial violation of section 75.400 that was "reasonably likely" to result in an injury or illness that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Eastern's "high" negligence and "unwarrantable failure" to comply with the standard.[3] The "Condition or Practice" is described as follows:

> The belt take-up storage unit for the 3 Right Longwall section (MMU058-0) is not being kept free of combustible accumulations under the belt. Gobs of grease are located at the hold up roller. Fourteen of the bottom return rollers are turning in combustible material which is packed around the rollers. The accumulations around these rollers measure 4 inches to 16 inches deep, extends [*sic*] from the tight side of the take-up to 14 inches under the belt. The accumulations are in contact with the moving belt at the location where the packed coal is against the rollers. Loose coal is also accumulated around the 2 bank rollers located at the tail of the storage unit. These accumulations were 8 feet long, 4 feet wide and 24 to 36 inches deep. Three of the rollers were frozen by the compaction of the accumulations and began to turn when the accumulations were removed. Seven miners shoveled for 3 hours to remove the accumulations from under the belt. The take-up unit is 250 feet long and the rollers are installed at 10 foot intervals. This constitutes an unwarrantable failure by the operator to maintain the belt in a safe condition and free of combustible accumulations.

Ex. P-7.

1. Fact of Violation

Eastern Associated concedes the violation but contests the "significant and substantial," "high negligence," and "unwarrantable failure" allegations. Resp't Br. at 23. Accordingly, I find that Eastern Associated violated 30 C.F.R. § 75.400.

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[3] 30 C.F.R. § 75.400 requires 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."

2. Significant and Substantial

Citation No. 6606813 alleges a "significant and substantial" ("S&S") violation, as defined in section 104(d)(1) of the Act. In *Mathies Coal Company*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard - - that is, a measure of danger to safety - - contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power*, *Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The Commission has also emphasized that 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*., 6 FMSHRC 1834, 1836 (Aug. 1984).

In addition, the Commission has noted that "the relevant legislative history demonstrates that Congress recognized that experience has proven that loose coal can propagate an explosion and must therefore be kept to a minimum." *Utah Power & Light Co., Mining Div*., 12 FMSHRC 965, 970 (May 1990), *aff'd*, 951 F.2d 292 (10th Cir. 1991). When examining the likelihood of a fire, ignition, or explosion, the Commission examines whether a "confluence of factors" was present on the particular facts surrounding the violation, including the extent of the accumulations and the presence of possible ignition sources. *Amax Coal Co.*, 19 FMSHRC 846, 848 (May 1997) (quoting *Texasgulf, Inc.*, 10 FMSHRC 498, 500-01(Apr. 1988)).

Further, the Commission has flatly rejected the argument that wet coal accumulations are not combustible by recognizing that accumulations of damp or wet coal, if not cleaned up, can dry out and ignite. *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120-21 (Aug. 1985); *Utah Power & Light*, 12 FMSHRC at 969. "A construction of section 75.400 that excludes wet coal defeats Congress' intent to remove fuel sources from mines and permits potentially dangerous conditions to exist." *Black Diamond*, 7 FMSHRC at 1121; *see also Utah Power & Light*, 12 FMSHRC at 970.

The fact of violation has been established. Respecting the second *Mathies* criterion, the discrete safety hazard here that was contributed to by the accumulations was the risk of a belt fire or an explosion. Here, the accumulations were extensive, extending along the entire distance of the take-up storage unit, and measuring 4 to 16 inches deep around the bottom rollers, and eight feet long, four feet wide, and 24 to 36 inches deep around the two bank rollers at the tail of the take-up storage unit. Tr. 106, 97. Palmer described the "mess" and emphasized that it took seven "heavy hitters" three hours to clean it up. Tr. 283. Further, the accumulations were black and consisted of coal, loose coal, coal fines, and wet "carryback" coal. Tr. 103, 107, 228. Moreover, Radosevich identified three sources of frictional heat: (1) the belt rubbing the rollers; (2) the rollers turning in compacted accumulations; and (3) the belt coming into contact with the

accumulations underneath it. Tr. 110. The Commission has established that a coal accumulation violation is S&S where potential ignition sources are posed by, among other things, frictional contact between belt rollers and accumulations. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994); *see also Amax*, 19 FMSHRC at 849. Furthermore, as the Commission recognized in *Alabama-By Products Corporation*, "the danger posed in underground coal mining by a friction source that will lead to a heat buildup in an area where coal accumulations could occur is obvious." 4 FMSHRC 2128, 2131 (Dec. 1982).

Eastern Associated contends that the violation was not S&S because the "carry back" material was "damp to wet," the belt was not running at the time of the violation, the fire suppression system was working properly, there were no ignition sources present at the time, and the rollers were not warm. In addition, Eastern Associated argues that there were water sprays all along the belt, the crusher, and the tailpiece which made the coal and belt wet, that the belt and the take-up were equipped with a carbon monoxide monitoring system, that the belt was being firebossed each of the three shifts by certified pre-shift examiners, that there was no methane nor carbon dioxide present at the time of the examination, and the operator did not have any reportable belt fires in its history. Resp't Br. at 21-22.

Phillips, Eastern Associated's witness, testified that he did not believe that the violation was S&S because he did not see the confluence of factors that would sustain an ignition or explosion, and he did not see a heat source. Tr. 347. In addition, although he saw some frozen rollers, he did not believe that they were a hazard, and he did not see any heat coming off of them. Tr. 350.

Although the belt was not running at the time of the violation, an evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. The evidence is clear that Eastern Associated intended to mine coal during the shift. Tr. 357-58. The fact that there were safety measures in place along the belt does not detract from the reasonable likelihood that the potential hazard, a belt fire or explosion, would occur in a gassy mine, subject to five-day spot inspections, with sizeable accumulations under and around the take-up storage unit. Even though there was no methane in the area and the oxygen levels were within MSHA parameters when the citation was issued, it is undisputed that methane levels can change quickly in a mine. Tr. 275-76.

Furthermore, the U.S. Court of Appeals for the Seventh Circuit has rejected arguments that after-the-fact safety measures, such as fire suppression systems, reduce the likelihood of serious injury. In *Buck Creek*, the mine operator argued that the combination of carbon monoxide detectors, a fire-retardant belt, a fire suppression system, a fire brigade team, a rescue team, fire fighting equipment, and adequate ventilation in the mine all undermined the likelihood of a serious injury that would result from a coal accumulation violation. The Seventh Circuit, in upholding the decision of the ALJ regarding the serious nature of the accumulations, determined that the existence of other safety measures does not mean that fires are not a serious safety hazard since the precautions are in place because of the "significant dangers associated with coal mine fires." *Buck Creek*, 52 F.3d at 136; *see also Amax Coal Co.*, 18 FMSHRC 1355, 1359 n.8

(Aug. 1996) (rejecting operator's contention that its redundant fire suppressions system reduced the likelihood of serious injury); *Amax*, 19 FMSHRC at 850 (same). As the Commission noted recently, making a determination that "mandatory safety protections provide a defense to a finding of S&S would lead to the anomalous result that every protection would have to be nonfunctional before an S&S finding could be made. Such an approach directly contravenes the safety goals of the Act." *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2369 (Oct. 2011).

The likelihood of a fire or explosion occurring was elevated because of the time that the condition was permitted to exist. The evidence establishes that the accumulations had existed for several shifts, as had the compacted and frozen rollers, and had not been reported in five prior pre-shift examinations. In the course of continuing mining operations, it can reasonably be inferred that the accumulations would have continued to accumulate with the ignition sources present and, therefore, that a fire was reasonably likely to occur. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997); *Texasgulf,* 10 FMSHRC at 501. Thus, I find that the second element of the *Mathies* test has been satisfied.

The third and fourth *Mathies* criteria require a reasonable likelihood that the hazard contributed to will result in an injury and that the injury be of a serious nature. It is not required that the Secretary establish that it is more probable than not that an injury would have occurred as a result of the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 2009). The Commission has emphasized that the test under the third prong of *Mathies* is whether the hazard fostered by the violation is reasonably likely to cause injury, not whether the violation, itself, is reasonably likely to cause injury. *Cumberland Coal*, 33 FMSHRC at 2365. Here, a belt fire or explosion caused by the coal accumulations would be reasonably likely to result in serious injuries, i.e., burns, smoke inhalation, or even death. Indeed, the Commission recognizes that "ignitions and explosions are major causes of death and injury to miners." *Black Diamond*, 7 FMSHRC at 1120. Therefore, I find that the violation of section 75.400 was S&S.

3. High Negligence and Unwarrantable Failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.,* 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek*, 52 F.3d at 136. The Commission has recognized the relevance of several factors in determining whether conduct is "aggravated" in the context of unwarrantable failure, such as the extensiveness of the violation, the length of time that the violation existed, the operator's efforts in eliminating the violative condition, and whether the operator had been put on notice that greater efforts are necessary for compliance. *See Consolidation Coal Co*., 22 FMSHRC 328, 331 (Mar. 2000); *Mullins & Sons Coal Co.,* 16 FMSHRC 192, 195 (Feb. 1994). The Commission has also considered whether the violative condition is obvious or poses a high degree of danger. *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999) (citing *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992);

Warren Steen Construction, Inc., 14 FMSHRC 1125, 1129 (July 1992); *Quinland Coals, Inc*., 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp*., 6 FMSHRC 1596, 1603 (July 1984)). Each case must be examined to determine whether an actor's conduct is aggravated, or whether mitigating circumstances exist. *Eagle Energy Inc.*, 23 FMSHRC 829, 834 (Aug. 2001) (citing *Consol*, 22 FMSHRC at 353).

Here, extensive accumulations of coal were permitted to accumulate under the belt and around the rollers of the take-up storage unit. The Secretary contends that the coal accumulations were obvious, extensive, existed for a significant length of time, and posed a high degree of danger. In addition, the Secretary asserts that Eastern Associated had been placed on notice that greater efforts were necessary to prevent such accumulations. Sec'y Br. at 11. Eastern Associated argues that it is not guilty of high negligence or unwarrantable failure because it was not aware of the accumulations until the belt was raised. Resp't Br. at 11, 23. It further contends that since it had no notice of the accumulations, it is not guilty of more than ordinary negligence. Resp't Br. at 23.

Radosevich opined that the coal accumulations had been under the belt and around the rollers for at least a couple weeks based upon the manner in which the coal was compacted, and that it was impossible for the accumulations to have occurred between the pre-shift examination and his inspection. Tr. 268, 153. Eastern Associated did not rebut Radosevich's assessment and Phillips, the safety manager, was not aware of how long the accumulations had existed. Tr. 361. Indeed, Palmer's description of the "mess" and the manpower it took to clean it up lends credence to Radosevich's contention that the accumulations occurred over a period of at least several days.

As has been discussed, the accumulations were quite extensive and several rollers were either compacted and turning in coal or frozen. Although Phillips testified that the view of the accumulations was blocked by guarding and the framework of the take-up storage unit, I find Eastern Associated's argument that it was unaware of the condition unconvincing, because an adequate pre-shift examination would have exposed it. Although the accumulations were less obvious when walking the wide side, the pre-shift examiner would have seen them if he had bent down and looked under the belt, which is required. In addition, the guarding was constructed with see-through holes and was lightweight and easy to remove. Tr. 125. Indeed, the accumulations were obvious to Radosevich when he walked the tight side, and he bent down only to observe the extensiveness of the accumulations under the belt. Even assuming that Palmer had alerted Radosevich to the accumulations first, as Eastern Associated contends, Palmer did nothing more than is required, at minimum, during a thorough pre-shift examination.

Repeated similar violations may be relevant to an unwarrantable determination to the extent that they serve to put the operator on notice that greater efforts are necessary for compliance with a standard. *Amax*, 19 FMSHRC at 851; *see also Consol*, 23 FMSHRC at 595 ("a high number of past violations of section 75.400 serves to put an operator on notice that it has a recurring safety problem in need of correction.") (citations omitted.). 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 properly be considered when determining whether a violation is unwarrantable. *Peabody Coal Co*., 14 FMSHRC 1258, 1263 (Aug. 1992). Here, Eastern Associated had 50 prior citations for section 75.400 violations that had become final orders in its relevant violation history. Ex. P-1 at 2, P-5, P-6. This history is significant and shows that greater efforts were necessary to comply with the standard.

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.'"). Furthermore, the Commission has found that where an agent of an operator has knowledge or should have knowledge of a safety hazard, such knowledge should be imputed to the operator. *See Martin Marietta Aggregates*, 22 FMSHRC 633, 637 (May 2000); *Pocohontas Fuel Co*., 8 IBMA 136, 147 (Sept. 1977) *aff'd* 590 F.2d 95 (4th Cir. 1979) (Coal Act case) (adopting the common law principle that acts or knowledge of an agent are attributable to a principal). Requiring actual knowledge on the part of an operator where an inadequate pre-shift examination fails to properly put the operator on notice of a hazard would undermine the strict liability principles of the Act. *See Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 156 (2d Cir. 1999) (holding that Mine Act regulation "imposes strict liability on mine operators . . . regardless of whether the operator has knowledge" of the hazard).

Eastern Associated should have known of the extensive accumulations under the belt and around the rollers because the conditions were obvious and the certified pre-shift examiner, the operator's agent, was required to conduct a thorough exam and record the hazard in the pre-shift examination book. The operator removed the accumulations once it was made aware of them by Radosevich, although post-citation efforts are not relevant to a determination of whether an operator engaged in aggravated conduct in allowing a violation to occur. *Enlow Fork*, 19 FMSHRC at 17; *U.S. Steel Corp.,* 6 FMSHRC 1423, 1437 (June 1984) (unwarrantable failure may be proved by a showing that the violative condition was not corrected or remedied prior to issuance of a citation or order). Here, Eastern Associated should have known of the accumulations problem, having been on notice that greater vigilance was required, but it took no steps to abate the condition until it was cited.

Based on a thorough review of the record, I make the following findings: the accumulations were extensive and existed for a significant period of time; the operator had been placed on notice that greater efforts were necessary for compliance; the violation posed a high degree of danger; the operator should have known about the existence of the violation; and the operator did not abate the violation in a timely manner. Therefore, I find that the Secretary has met her burden of establishing that the violation was a result of Eastern Associated's high negligence and unwarrantable failure to comply with the standard.

B. Order No. 6606814

Order No. 6606814 alleges an S&S violation of section 75.360(f) that was "reasonably likely" to result in an injury or illness that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Eastern Associated's "high" negligence and "unwarrantable failure" to comply with the standard.[4] The "Condition or Practice" is as follows:

> The preshift exam conducted on the 3 Right Longwall Belt (MMU 058-0) is inadequate. The exam was conducted on the midnight shift from 5:10 a.m. to 5:50 a.m. and the report phoned outside recorded no violations observed at the belt take-up area. A d-1 citation was issued at 8:55 a.m. for extensive accumulations under the belt and rollers of the take-up unit. The d-1 citation number is 6606813. The accumulations were packed under 14 of the bottom return rollers and under the belt. Mine examiners are required to examine areas of the mine for violations and hazards and record these findings in the book for that exam. No record is in the book indicated these accumulations for the past 5 pre-shift exams [*sic*]. This order will terminate when the operator documents that all mine examiners at the mine have been retrained in the proper conducting of exams.

Ex. P-8.

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[4] 30 C.F.R. § 75.360(f) (subsequently codified in December 2008 as 30 C.F.R. § 75.360(g)) states: "A record of the results of each preshift examination, including a record of hazardous conditions and their locations found by the examiner during each examination and of the results and locations of air and methane measurements, shall be made on the surface before any persons, other than certified persons conducting examinations required by this subpart, enter any underground area of the mine. The results of methane tests shall be recorded as the percentage of methane measured by the examiner. The record shall be made by the certified person who made the examination or by a person designated by the operator. If the record is made by someone other than the examiner, the examiner shall verify the record by initials and date by or at the end of the shift for which the examination was made. A record shall also be made by a certified person of the action taken to correct hazardous conditions found during the preshift examination. All preshift and corrective action records shall be countersigned by the mine foreman or equivalent mine official by the end of the mine foreman's or equivalent mine official's next regularly scheduled working shift. The records required by this section shall be made in a secure book that is not susceptible to alteration or electronically in a computer system so as to be secure and not susceptible to alteration."

1. Fact of Violation

The Commission has recognized that the pre-shift examination requirements are "of fundamental importance in assuring a safe working environment underground." *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995). Here, the pre-shift examination on the tight side of the 3 Right Longwall Belt was conducted on April 5, 2008 by Robert Shingleton on the midnight shift from 5:10 to 5:50 a.m. The report was phoned outside sometime before 7:30 a.m., that no violations were observed at the belt take-up area. Ex. P-8; Tr. 138-39. However, as has been fully discussed, extensive accumulations were later observed under the belt and around the rollers of the take-up storage unit by Radosevich, Palmer, and Phillips. Tr. 105-06 (Radosevich); Tr. 281-82 (Palmer); Tr. 359-61 (Phillips).

Eastern Associated argues that since the pre-shift examiner did not record any hazards, the cited conditions were not present at the time of the examination. Resp't Br. at 11. However, the evidence indicates that the accumulations were simply too extensive and compacted to have occurred in the scant three hours between the pre-shift examination and the inspection. An adequate pre-shift examination requires looking under the bottom belt and take-up storage unit, as well as looking at the rollers to ensure that they are operating properly. Two examiners travel the wide side and one examiner travels the tight side within a 24 hour period. If an adequate pre-shift examination were conducted in this case, the examiner, like the inspector, would have seen the flat spots on the rollers and the coal accumulations, then recorded the hazards for correction. However, considering the extensiveness and duration of the cited condition, it is reasonable to conclude that an inadequate pre-shift examination was conducted at the 3 Right Longwall Belt, and that Eastern Associated violated section 75.360(f).

2. Significant and Substantial

The first and second elements of the *Mathies* test have been established. The failure to identify and record the accumulations so that they could be addressed by the operator contributed to the risk of a mine explosion or belt fire. Thus, the focus of the S&S analysis is on the remaining two elements of the *Mathies* test.

The third and fourth elements of *Mathies* require a reasonable likelihood that the hazard contributed to will result in an injury, and that the injury will be serious. As discussed previously, the accumulations were extensive and had existed for at least several days, which exposed the miners to a heightened risk of injury since the hazard was not corrected and three potential ignition sources existed. There is also credible evidence that Eastern Associated intended to produce coal during the shift, and no plans had been made to remove the combustible accumulations since management had not been alerted to the hazard by the pre-shift examinations. These factors, in combination, created a dangerous situation that had a reasonable likelihood of resulting in an injury and, a potentially serious one. As discussed previously, a belt fire or an explosion can cause smoke inhalation, burns, and even death. Therefore, I find that the violation of section 75.360(f) was S&S.

3. Unwarrantable Failure

The coal accumulations existed for at least several days, possibly weeks, and no examiner recorded the hazard in the five prior pre-shift examinations. The accumulations extended along the entire 220-foot expanse of the take-up storage unit, were packed around the rollers at depths of 4 to 16 inches, and took seven miners three hours to clean up. Moreover, as previously noted, the operator had been placed on notice that greater efforts were necessary to address coal accumulations in this gassy mine, as evidenced by the significant history of section 75.400 violations. However, the fact that there were also five violations of section 75.360 is not an aggravating factor, since the Secretary did not proffer any evidence specifying the affected areas of the mine or deficiencies in the pre-shift examinations. The violations could have involved a wide range of issues, and five violations within a 15 month period, without more, is not significant, especially in a large mine such as Federal No. 2.

The operator effectively abated the violation by holding a safety meeting addressing proper procedures for conducting pre-shift examinations with its mine examiners. Ex. P-8; Tr. 119. To reiterate, the accumulations were obvious and should have been seen by the pre-shift examiners had adequate examinations been conducted, especially considering that in a 24 hour period one of three would have traveled along the tight side of the belt. The accumulations also posed a high degree of danger to miners due to the risk of a belt fire or explosion.

The pre-shift examiners' failure to recognize and report this extensive, obvious coal accumulations hazard to management over several shifts constitutes high negligence that is imputable to Eastern Associated and, considering the danger posed by this condition, rises to a heightened level of indifference or neglect that also constitutes an unwarrantable failure to comply with the standard.

IV. Civil Penalty

While the Secretary has proposed a total civil penalty of $9,951.00 for the two violations, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 20 U.S.C. § 820(j). *See Sellersburg Co*., 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 763 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Eastern Associated is a large operator with a significant history of section 75.400 violations, and that its history of section 75.360 violations is not an aggravating factor in assessing an appropriate penalty. As stipulated by the parties, the total proposed penalty will not effect Eastern Associated's ability to continue in business, and the operator demonstrated good faith in abating the citation and order. Ex. J-1, Stip. 10, 12. As has been fully discussed respecting each violation, the operator was highly negligent in committing both violations. Therefore, considering my findings as to the six penalty criteria, the following penalties are appropriate:

A. Citation No. 6606813

The Secretary has established a serious S&S violation of section 75.400, that was caused by Eastern Associated's high negligence and unwarrantable failure to comply with the standard. Applying the civil penalty criteria, I find that a penalty of $6,458.00, as proposed by the Secretary, is appropriate.

B. Order No. 6606814

The Secretary has established a serious S&S violation of section 75.360, that was caused by Eastern Associated's high negligence and unwarrantable failure to comply with the standard. Applying the civil penalty criteria, I find that a penalty of $3,458.00, as proposed by the Secretary, is appropriate.

V. Approval of Settlement

The Secretary has filed a Motion to Approve Partial Settlement of this docket. A reduction in the penalty from $56,336.00 to $10,800.00 is proposed. The citations, initial assessments, and the proposed settlement amounts are as follows:

Citation/Order No.		Proposed	Settlement
6604657		$53,800.00	$10,000.00
6607269		$2,536.00	$800.00
	Total:	$56,336.00	$10,800.00

I have considered the representations and documentation submitted by the parties. Specifically, respecting Citation No. 6604657, the Secretary has credited Eastern Associated's contention that the bleeder system was not connected to an active longwall section, reducing the likelihood of an accident in the absence of an immediate or potential ignition source, and there was no methane found in the explosive range within the area. The Secretary proposes modification of 104(d)(1) Order No. 6607269 because the underlying order, 104(d)(1) Order No. 6607268, has been vacated. I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

ORDER

WHEREFORE, it is **ORDERED** that Citation No. 6606813 and Order No. 6606814 are **AFFIRMED**, as issued; that the Secretary **MODIFY** Citation No. 6604657 to reduce the level of gravity to "reasonably likely," and Order No. 6607269 to a citation issued under section 104(a) of the Act with the degree of negligence reduced to "moderate," and that Eastern Associated Coal, LLC, **PAY** a civil penalty of $20,751.00 within 30 days of this Decision.[5]

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

John A. Nocito, Esq., Office of the Solicitor, U.S. Department of Labor, The Curtis Center, Suite 630E, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

Todd C. Myers, Esq. and Rebecca J. Oblak, Esq., Bowles Rice McDavid Graff & Love, LLP, 7000 Hampton Center, Suite K, Morgantown, WV 26505-1720

/lo

[5] Payment may be sent to: 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
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

May 31, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2012-510-M
Petitioner	:	A.C. No. 31-02167-000287638 C5A
	:	
v.	:	
	:	
DRILLING & BLASTING	:	
SYSTEMS, INC.,	:	Mine: Pittsboro Plant
Respondent.	:	

DECISION

Appearances: Breyana A. Penn, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, on behalf of the Secretary of Labor;
Tina M. Stanczewski, Esq., Law Office of Adele Abrams, P.C., Beltsville, Maryland, on behalf of Drilling and Blasting Systems, Inc.

Before: Judge Rae

This case is before me on a Petition for Assessment of 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. §815(d). The petition alleges two violations of the Secretary's Safety and Health Standards for Surface Metal and Nonmetal Mines, 30 C.F.R. § 56.7012, and proposes civil penalties in the amount of $1,080.00. A hearing was held in Atlanta, Georgia on March 26, 2013, and the parties filed post-hearing briefs following receipt of the transcript. For the reasons set forth below, I vacate the two citations and dismiss the proceedings.

BACKGROUND

Drilling & Blasting Systems, Inc., (D&B) is a drilling contractor operating at approximately 47 sites in North Carolina, South Carolina and Georgia. It employs 39 people and has 22 drills in its fleet. Tr. 252-53. The company has been in business for over 42 years with Brent Taylor as its President since 1998. Tr. 252. The company works almost exclusively in drilling blast holes for quarries such as the Pittsboro Plant. Tr. 253. Pittsboro is a crushed and broken granite quarry owned by Lucky Stone Corporation located in North Carolina.

The drill in question in the instant citations is an Ingersoll-Rand model DM30. It is a relatively large hydraulically operated piece of equipment that trams on tracks similar to a bulldozer and is approximately 12 feet in length. Tr. 112, Ex. S-4. The drill steel (the "steel") is contained in a mast structure in front of the cab and is approximately 30 to 40 feet in height. Tr. 209, Ex. S-4. Located at the rear of the drill is the enclosed cab in which the control levers are located. Ex. R-17. Once the machine reaches the location in which the hole will be drilled, the lever is set to raise the tracks off the ground and lower the hydraulic jacks which support the drill. The feed and rotation speed controls are then set. Tr. 168-69. The controls are not used again by the operator until the rods need to be changed. Tr. 214. The drill is equipped with an emergency stop control which shuts off the drill automatically in the event of an emergency. There is also one on the control panel in the cab. Tr. 210, Ex. R-17.

During a regular inspection conducted by Mine Safety and Health Administration (MSHA) Inspector Cecil Worrell, Jr., D&B was cited with two alleged violations of mandatory standard 30 C.F.R. § 56.7012. The first was on March 14, 2012 at 8:05 p.m. and the second on March 15, 2012 at 8:10 a.m. Exs. S-1, S-3. The facts surrounding both of the alleged violations are essentially identical for the purposes of discussion here. On the evening of the 14th as Inspector Worrell was approaching the drill, he saw the drill operator at a distance of approximately 18 feet from the drill walking towards it. Tr. 26, 28. The next morning as he approached the drill, he saw the same operator inside the cab of a pickup truck located approximately 20 feet from the drill. Tr. 70. In both instances the drill was in operation. The area in which he saw the operator was within the blasting area. The mandatory standard Worrell cited requires that "while in operation, drills shall be attended at all times." 30 C.F.R. § 56.7012 (2013). Based upon his observations, he issued these two citations.

Summary of Testimony of Inspector Worrell

Worrell has been an inspector for MSHA for just over five years. He has a mining history spanning 13 years in various positions including safety director and quality control manager. He has no experience in operating a drill. Tr. 14-16. On the evening of the 14th of March, he issued a citation to D&B when he saw the drill operator located approximately 18 feet from the drill. On the morning of the 15th, he saw the same operator sitting in the cab of a pickup truck located in the blasting area but approximately 20 feet from the drill while it was in operation. In his opinion, the operator had left the drill unattended when he was not at the controls in the cab of the machine. Tr. 28. He knew of no program policy publications, PIBs, statutory or other authority for his opinion that the operator had to remain at the controls of the drill at all times. However, it was his opinion that the standard (referring to 30 C.F.R. § 56.2 defining the term "attended,") requires the operator to remain within arm's reach of the controls at all times.[1] Tr. 29, 52. He stated that the definition of attended is designed to prevent

[1] 30 C.F.R. §56.2 defines "attended" as "presence of an individual or continuous monitoring to prevent unauthorized entry or access."

"unauthorized injury or accidents." Tr. 89. He further referred to 30 C.F.R. § 56.7052 "Drilling Positions" which states that "persons shall not drill from positions which hinder their access to the control levers" in support of his position. He stated that in order to be in compliance with this standard, the operator must shut down the drill if he needs to exit the cab. Tr. 29-30, 52-53. The hazard he cited in both violations, although unlikely, was that "a miner may suffer fatal injuries in the event the steel and/or bit becomes hung in a hole causing the steel to fragment under pressure while the drill is in operation" and the drill is unattended. Ex. S-1, S-3. He testified that when there is a change in strata, "the steel or bit could get hung [up] in the hole causing the steel to fragment under pressure…something gives, it can explode." Tr. 32. He saw the "aftermath" of such an occurrence at Ararat[2] which formed the basis of his assessment of these two citations. Tr. 32, 33, 50, 59, 60, 62, 88.

Worrell stated that he was unaware of any reasons why a drill operator would need to be positioned outside the cab of the drill while it was in operation. Tr. 30-31. He was not able to question the drill operator about his actions due to a language barrier and did not ask the foreman, Solin Hernandez, for any explanation either. Tr. 42-43.

Summary of Testimony of Solin Hernandez

Mr. Hernandez is the foreman for D&B. He has been a drill operator for eight years, three of which has been for D&B. Tr. 100, 108. He testified that at the time these citations were written, D&B was engaged in stripping, or taking off, the aggregate to widen the quarry. Tr. 105-07. The area in which they were drilling was soft dirt which poses a risk of destabilizing the supporting jacks from the vibration caused by drilling. Tr. 110-11. The jacks must remain level to stabilize the drill. Monitoring ground conditions throughout the drilling process is an essential safety measure undertaken by the drill operator to ensure the jacks do not sink or become otherwise unstable. The composition of the ground, the vibration of the drill and even the presence of rain can affect the ground conditions rather rapidly. Tr. 110, 144-45. If the ground were to give out, the drill and the operator, if he is inside the cab, could go over the high wall with fatal results. Tr. 113. In addition to constantly monitoring ground conditions for changes, the drill operator must repeatedly check the engine and compressor for leaks and other problems

[2] Worrell repeated eight times that he saw the "aftermath" of the fragmenting and exploding of a steel which he feared would occur in this instance. However, he admitted that he was not present when the incident happened at Ararat. Despite being asked repeatedly to explain what he knew of the specific facts regarding that incident, he simply repeated that he saw the "aftermath." The Secretary offered no evidence of the Ararat accident but instead provided one Fatalgram dated November 1, 2012 that involved the entangling of clothing while threading of a new steel which is a completely unrelated type of incident. Ex. S-7. Worrel stated numerous times that he has no experience in drilling. Tr. 14, 32, 34. I find Worrell's opinion based upon the incident at Ararat Mine unfounded and his failure to expound upon the facts involved as evasive.

which cannot be done while located inside the cab. Tr. 106,144. The operator normally works alone and is solely responsible for these functions. Tr. 130-31.

Hernandez testified that the drill operator, as a matter of standard practice, would be located outside the cab anywhere within the blasting zone. As long as the operator stays within this zone, it would not be possible for an unauthorized person to access the area. Tr. 118. This drilling zone, or area, is where the holes are being drilled. The pickup truck was located within this area and it was likely that the operator was in the cab getting a drink of water or he could have been pumping the water from the tank located on the truck to fill the water tank on the drill. Tr. 117-18, 143, 152-54. Water must be sprayed while the drill is operating to keep the dust down to prevent inhalation of silica. Tr. 117.

According to Hernandez, if a bit or the drill gets hung up underground, the drill will stop rotating automatically. If it were to explode somehow, the fragments would be contained underground. Additionally, there is a metal table that the drill passes through that would contain any fragments and prevent them from becoming projectiles above ground. In his years of drilling, he has never seen a drill fragment. Tr. 118-121, 148.

Summary of Testimony of Kirt Murray

Mr. Murray is a 16-year employee of D&B. He has held positions as a drill operator, director of operations and safety manager. Tr. 155-56. In this last position, he was responsible for training the drillers and conducting toolbox safety talks. Tr. 156.

In his opinion, "attendance" as used in the standard means the driller shall remain in the shot or blasting area. Tr. 160. The driller is responsible for looking for changing ground conditions, oil leaks, hydraulic line leaks, compressor problems and the like. In order to properly monitor these conditions, the drill must be running so that the lines are pressurized. Tr. 180-81. The drill operator walks around the entire drill and would need to be 18 to 20 feet away from the drill in order to gain a proper vantage point. Part of D&B's training includes instructing the driller to get out of the cab to continually monitor the ground conditions to ensure stability is maintained as the drill penetrates the solid rock. This is done for the safety of the driller because if the ground breaks away beneath the drill, the drill can fall off the wall and take the driller with it if he is located in the cab. Tr. 160-65. The driller can hear changes in the strata by the sound the drill makes. He can also hear the pumps and belts functioning but being inside the cab, where the noise of the drill is louder, all of these sounds are more difficult to hear. Tr. 174-75.

The drill is locked in place and barred from movement when drilling is underway. The drill rests on its jacks rather than the tracks it uses for tramming. Tr. 169-70. There is an automatic shut-off that activates when temperature or pressure becomes too high. Tr. 177-78.

Murray testified that Policy Instruction Bulletin 31 instructs drillers to exit their drill in order to monitor ground conditions while the drill is operating. Tr. 184-85. Under Best

Practices, drillers are instructed to constantly monitor ground conditions during all phases of drilling. Tr. 192. It also explains that the meaning of 30 C.F.R. § 56.7052, referred to by Worrell regarding not drilling from positions which hinder their access to the control levers, means that the drill shall not be positioned where the miner would have to pass between the high wall and the drill to get to the controls or travel through an unsafe area. It does not mean the driller must be in the cab. Tr. 208.

The driller could be located as far as 20 to 30 feet away from the drill in performance of his duties because the mast is 30 to 40 high. In order to get a good look at it, one is required to back up a significant distance. Tr. 210. Once the controls are set in the cab, the operator does not need to remain in it. Tr. 209. He will remain in the drill area which is defined by a berm around the shot area. Tr. 214. In the event of an emergency, the safety switch turns the drill off automatically without the driller having to access the controls. Tr. 210. It is not necessary for the driller to access the controls once set for drilling until the steel requires changing. Tr. 214.

In December 2010, D&B was cited for violation of the same standard as is involved here at the Greenwood Quarry in South Carolina. Ex. R-18.[3] After discussing the citation with the Field Office Supervisor in Columbia, South Carolina, the supervisor determined that D&B's practice of having the drill operator outside the cab when the drill was in operation was proper and the drill was "attended." The citation was vacated by the Field Office Supervisor. D&B has continued this practice since then believing that MSHA approved of the practice. Because the South Carolina site is within the same MSHA region as Pittsboro, they did not expect to be cited for this violation. Tr. 189-90.

Murray surmised that the drill operator may have been in the pickup truck because the drillers may keep their drill log in the truck as well as drinking water and sandwiches. The drill log must be filled out during the drilling of each hole to indicate the amount of material broken up, the geology encountered and any other information required by the mine operator. It is then provided to the blaster to assist him in determining how to properly load the explosives. Because it must be filled out for every hole drilled, it is common practice to fill it out while the drill is in operation. Tr. 195, 214-15.

The first time Murray had ever heard of a steel getting hung up and fragmenting was when this citation was issued. Tr. 197.

[3] The narrative section of this citation indicates the driller was not attending the controls while holes were being drilled. The risk identified was the he would not be able to quickly make adjustments to the feed rate, pulldown force and rotation speed which could cause the drill to become unstable. It did not cite possible fragmentation or explosion of the steel. Ex. R-18.

Summary of Testimony of Expert Witness Paul Earl, Jr.

Mr. Earl was offered and accepted as an expert witness in mechanical engineering and drilling. Tr. 219-20. He earned his degree in mechanical engineering from the University of Tulsa in 1962. He spent his career designing and building drilling machines used in the oil industry. He designed a built a drill for Ingersoll-Rand substantially the same as the DM30 involved here; the only difference is that the oil rigs are bigger and not track mounted. The controls are similar and they operate in much the same way. Tr. 220-25.

Prior to appearing in court, Earl made a site visit to one of D&B's drilling sites to observe their drills. The one he observed was not a DM30 but was of similar design and function. Tr. 229-30.

He explained that once the machine is in place, it is lifted off the ground and rests on its hydraulic jacks which keep it level. It cannot be moved when drilling is underway. Drills are not designed with the intention that the operator remain in the cab at the controls once the load or pressure has been set and the drill starts to rotate. Tr. 235-36. At that point, it is necessary for the driller to exit the cab and start monitoring the ground conditions to ensure fissures or cracks are not developing. Tr. 237. He likened the drilling to using a jackhammer. The pressure and vibration caused by the drilling literally shakes the ground and can cause the cracks to open up which could result in the drill going over the wall. Tr. 239. The driller also needs to monitor the hydraulics, fluid levels and the like to ensure the drill is operating properly. These observations need to be done while the drill is in operation and the driller is outside the cab. A miner is properly attending the drill when he is performing all of these tasks. Tr. 242.

Never in the 50 years being in the industry, has he known of a steel to fragment. Tr. 248. In fact, when asked his opinion of the allegations contained in the citation of the steel hanging and fragmenting, his response was "completely erroneous." Tr. 239.

Summary of testimony of Brent Taylor

Mr. Taylor is the owner/CEO of D&B and has been a driller since age 15. Tr. 251. He testified that it is industry practice across the United States for drillers to remain outside the control cab of the drill when it is in operation. Tr. 254. Over the past 20 years, D&B has had MSHA inspectors at its drilling sites on a weekly basis. The mine operators also inspect their practices routinely. Tr. 254-55. D&B is part of state mining associations in multiple states whose function is to discuss safety issues and study Part 46 of the Code.[4] Taylor attends all of the conferences. Tr. 256. In discussing the meaning of "attended" it has been determined that D&B's practices are in line with those associations' interpretations of the standard. Tr. 260-62.

[4] 30 C.F.R. Subchapter H Part 46 is concerned with training and retraining of miners engaged in shell dredging or employed at sand, gravel, surface stone, surface clay, colloidal phosphate or surface limestone mines.

The industry definition of "attended" is "being in the vicinity of the machine; being able to check out the ground issues." Tr. 258.

Taylor pointed out that the fatalgram referred to by the Secretary involved loading drill steel which is very different from drilling holes. Changing the steel requires someone to hold the steel while it is being threaded which poses a distinct hazard to the miner which is not present when drilling. Tr. 259-60. D&B never loads steel during normal working hours and uses two people to reduce the risk. Tr. 261. In over 42 years of D&B being in business, drilling and average of 41,000 feet per week, it has never had an incident of a steel fragmenting. *Ibid.*

Taylor reiterated the need for the driller to monitor ground conditions while the drill is operating because as the pounding of the drill starts, the rocks start falling. He recounted an incident as an example of the danger as follows: "We've also had, again, two drills that were drilling in this situation where everybody thinks it's safe, that all of a sudden, a slit that you couldn't see back in there, from all this drilling and vibration, a whole 50 foot section just slid off and took the drill with it." The wall just "evaporates." Tr. 266-67. This occurred after the high wall was inspected by the plant manager due to the vibration caused by the drilling. If the drillers had not been outside the cab, they would have been lost as well, he said. Tr. 258-59.

Taylor made the decision to contest this interpretation of the standard, not because of the penalty involved but because he believes "that making my drillers stay in the cab was the most dangerous thing in the world to do." Tr. 262.

DISCUSSION AND ANALYSIS

At issue in this case is the proper definition of "attended" as it applies to the cited standard. The Secretary maintains that the proper interpretation is that the driller must remain within arm's reach of the control levers located inside the cab of the drill. In that way, should a drill steel become hung up and fragment, the driller could turn off the drill quickly. The Respondent's position is that "attended" means being within the area where the drilling is being done so that the drill operator can monitor the area for changing ground conditions destabilizing the drill jacks, malfunctioning of the pressurized hoses, overheating, leaking or other complications.

With regard to interpreting the language of a regulation, the language of the regulation is the "starting point." *Dyer v. United States,* 832 F.2d 1062, 1066 (9th Cir. 1987). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Utah Power & Light Co*., 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co*., 15 FMSHRC 1555, 1557 (Aug. 1993). If the regulation is ambiguous, however, the agency's interpretation is given controlling deference unless it is "plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945). Where an agency's interpretation is not entitled to

controlling deference, it may still be entitled to some deference, the level of which is dependent upon the circumstances such as the agency's care, its consistency, formality, and relative expertness, and the persuasiveness of the agency's position." *United States v. Mead Corp.,* 533 U.S. 218, 221 (2001).

I find the term "attended" in Section 56.7012 is ambiguous on its face. Either of the interpretations proposed by the Secretary or the Respondent could be envisioned here. There is no guidance from legislative history nor are there controlling Program Information Bulletins or other instructional materials issued by MSHA to reflect the agency's considered interpretation of the meaning. Section 56.2 is the only definition of the term "attended" which is stated as in the "presence of an individual" or under "continuous monitoring" which in itself is ambiguous and dependent upon circumstances.

I find, however, that the Secretary's interpretation is erroneous and not worthy of deference. There are two reasons for this determination. First, it appears that the Secretary's interpretation of the standard with regard to these two citations has been rejected by a higher authority within MSHA in the same region against the same operator just one year prior to these citations being issued. The Field Office Supervisor in South Carolina, after discussing with Taylor the risks and hazards attendant with drilling on high walls, determined that D&B's practice was within the meaning of the standard and vacated the one and only previously issued citation under this standard. Worrell is admittedly unfamiliar and inexperienced in drilling. His only source of information for believing "attended" meant within arm's reach of the controls was his recollection of being told that when he attended the Mine Academy five years ago. His lack of expertise in this area is also evident from his determination that the hazard associated with the driller being outside the cab was that the steel could hang up in a hole and fragment. His only frame of reference for this belief was that he saw the "aftermath" of an incident involving a drill. He was admittedly not present at the time; he could give no details as to its cause or describe any of the facts surrounding the event. The fatalgram provided by the Secretary to support his testimony involved an accident which occurred while threading a new steel on a drill which is a very different situation than here. In contrast, each one of the highly experienced witnesses for the Respondent testified credibly that such a fragmenting could not happen and has never been seen by any of them.

Secondly, the Secretary's interpretation would lead to extraordinarily dangerous results. Hernandez, Murray and Taylor have over 46 years of drilling experience with a company that specializes in the field. Their testimony makes it unquestionably clear that the driller's most important duties are to ensure the ground conditions remain stable, the hydraulics, water pressure, temperature, compressor and other components of the drill continue to work properly. These tasks can only be accomplished while the drill is running and require the driller to move freely about the entire blasting area. The stability of the drill depends upon conditions that can change rapidly as a result of vibrations, cracks, weather, and ground composition. Should the drill become unstable or the wall give way beneath the drill, it can easily result in being lost to

the bench below. In addition to the testimony of these three highly experienced D&B miners, Earl, an expert in mechanical engineering and drilling with 50 years' experience in the industry designing and building similar drills for the oil industry, confirmed the same. In his words, the drills are not designed for the driller to remain in the cab at the controls. It is critical for the driller to monitor the ground conditions as the vibrations from the drill can cause fissures or cracks to open causing the ground to give out. It is also essential that the driller monitor every aspect of the performance of the drill while it is in operation. This can only be done outside the cab of the drill. Once the drill is set for load and pressure and the steel starts to turn, there is no reason for the driller to be at the controls. In the event of an emergency, the automatic cut-off switch will stop the revolutions of the drill.

The witnesses for the Respondent were in harmony in their opinion that the area in which the driller should be to attend the drill is within the blasting area where the holes are being drilled. It is also in accord with industry standards according to Taylor who is a member of various associations that study and discuss Part 46 on safety and training. I find their testimony to be persuasive and the Respondent's interpretation of "attended" to be logical. It is the driller's "continuous monitoring" of the conditions surrounding the drill that prevents catastrophic events such as the wall beneath it from "evaporating" taking the drill and the operator with it should he be forced to remain in the cab. If I accepted the Secretary's interpretation here, "it would be the most dangerous thing in the world to do."

The Secretary has presented no evidence that the driller was not attending to his drill on either occasion cited here within the meaning of the standard as I have found. In the first instance the evidence is solely that he was 18 feet away from the drill walking towards it. There is nothing that can be gleaned from that information indicating he was not observing the functioning of the drill or monitoring the ground conditions. Likewise, there was an adequate explanation provided by the Respondent as to why he would be in the pickup truck located within the blasting zone during drilling operations. By contrast the Secretary offered no evidence that he was not doing so.

I find the Secretary has not met his burden of proof that the mandatory standard has been violated as set forth above.

ORDER

I hereby **VACATE** Citation No. 8720235 and Citation No. 8720237 and **DISMISS** this case.

/s/ Priscilla M. Rae

Priscilla M. Rae
Administrative Law Judge

Distribution:

Breyana A. Penn, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Ste. 800, Denver, Colorado 80202-5708

Tina M. Stanczewski, Esq., Law Office of Adele Abrams, P.C., 4740 Corridor Place, Ste. D, Beltsville, Maryland 20705

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
WASHINGTON, DC 20004-1710

May 7, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),[1] Petitioner,	:	CIVIL PENALTY PROCEEDINGS Docket No. SE 2012-340-M A.C. No. 09-00121-00281645 A
v.	:	
CHRISTOPHER BRINSON, employed by KENTUCKY-TENNESSEE CLAY CO. Respondent.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	Docket No. SE 2012-370-M A.C. No. 09-00121-00281644 A
v.	:	
GERALD HASTINGS, employed by KENTUCKY-TENNESSEE CLAY CO. Respondent.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	Docket No. SE 2012-378-M A.C. No. 09-00121-00281643 A
v.	:	
RONALD COLSON, employed by KENTUCKY-TENNESSEE CLAY COMPANY, Respondent.	:	Mine: Kentucky-Tennessee Clay Company

[1] Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Deputy Secretary Seth D. Harris is the Acting Secretary of Labor.

ORDER DENYING MOTIONS TO DISMISS

Before: Judge Tureck

These three cases are proceedings under § 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820 (" Mine Act"). The Respondents, through counsel, have moved to dismiss the respective petitions for assessment of civil penalty brought against them by the Secretary of Labor. The Secretary opposes the motions. For the reasons set forth below, the motions to dismiss are denied.

According to Respondents' motions to dismiss, which are substantively identical in most respects,[2] on August 27, 2009, a Kentucky-Tennessee Clay Company ("K-T Clay") employee was cleaning the inside of a rail car when another rail car struck the car in which the K-T Clay employee was working. Resp't Mot. 1. The impact knocked the employee down and bruised his lower back. Resp't Mot. at 2.

The Mine Safety and Health Administration ("MSHA") investigated the accident on September 1, 2009, and issued a citation against K-T Clay on September 4, 2009. The citation alleged that "[t]he management of the company was allowing persons to work inside the rail tank cars without having a second person tend the lifeline." *Id*.; Ex. 2. MSHA also commenced a § 110(c) investigation to determine if penalties should be sought against any director, officer or agent of K-T Clay. Resp't Mot. at 2.

Ronald Colson was employed by K-T Clay as its Safety Environmental Director on August 27, 2009. He retired from K-T Clay's employ in October, 2010. MSHA issued a petition for a penalty assessment of $3,200 against him on February 28, 2012, almost two and a half years after the citation to K-T Clay was issued.

Christopher Brinson is the production manager at K-T Clay, the position he held at the time of the accident. MSHA issued a petition for a penalty assessment of $2,900 against him on February 28, 2012.

Gerald Hastings is employed as the Senior Engineering Manager at K-T Clay. On August 27, 2009, he was filling in as the Kaolin Operations Manager. MSHA issued a petition for penalty assessment of $2,800 against him on February 29, 2012.

The Respondents, in their motions to dismiss, argue that the § 110(c) cases against them should be dismissed on the ground that the penalty assessments were untimely. Specifically, the Respondents argue that: (1) the Mine Act requires that penalties be assessed within a "reasonable

[2] For the sake of convenience, because these motions are substantively identical, unless a fact relates solely to one of the miners, the citations to the record in this *Order* will be limited to Hastings's motion

time"; (2) ALJs have held that the Administrative Procedure Act requires timely agency action in § 110(c) cases; (3) the Secretary's own Program Policy Manual defines timely assessments as occurring within 18 months of the issuance of a citation or order; (4) an ALJ may vacate a citation if a penalty is not assessed within a reasonable time; (5) MSHA did not issue a penalty assessment against them within a reasonable time; (6) there was no adequate cause for the delay in assessing the penalties; (7) Respondents are prejudiced by the delay; and (8) public policy concerns favor dismissal.

The Secretary, in response, argues that: (1) MSHA issued its assessments against the Respondents within a reasonable time; (2) there is adequate cause for the alleged unreasonable delay; (3) the Secretary is entitled to *Chevron* deference; (4) the *Secretary of Labor v. Twentymile Coal Company* precludes dismissal of this case; and (5) the Respondents have been unable to show actual prejudice.

The Secretary concludes his response to the motions to dismiss by stating that "the Commission does not have the authority to dismiss this case for failure to comply with the timeliness requirements set forth in Section 105(a) of the Act." Sec'y Resp. at 9. No authority is cited for this audacious statement, and none is known to me. Nevertheless, for the reasons set out below, Respondents' motions to dismiss the above-captioned cases are denied.

DISCUSSION

Section 105(a) of the Act provides that "[i]f, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, *within a reasonable time after the termination of such inspection or investigation*, notify the operator . . . of the civil penalty proposed to be assessed . . . for the violation cited . . . ." (Emphasis added.) Section 110(c) is silent regarding when an individual respondent must be notified of a proposed penalty assessment. However, since penalty assessments against individuals brought under § 110(c) arise from the same inspections as penalty assessments against operators, it would logically follow that the reasonable time requirement of § 105(a) should apply to penalty assessments brought under § 110(c). Consistent with this rationale, the "reasonable time" requirement has been held to apply to § 110(c) cases by Commission administrative law judges. *See*, *e.g.*, *Reasor*, 34 FMSHRC 943 (April 2012) (ALJ); *Wayne Jones*, 20 FMSHRC 1267 (Nov. 1998)(ALJ); *James Lee Hancock*, 17 FMSHRC 1671 (Sept. 1995) (ALJ). Moreover, none of the parties here dispute the application of § 105(c)'s "reasonable time" standard to these § 110(c) cases. Accordingly, the issue to be decided here is whether the filing of the petitions for the assessment of penalties against the three Respondents were issued within a reasonable time.

I

The primary issue on which the parties focused was whether the almost two and a half year period between the issuance of the citation to K-T Clay and the notices of proposed assessed penalties served on the parties constituted a "reasonable time." In this regard, the Respondents spent virtually all of their motions to dismiss arguing that these actions were precluded because under § 105(a), proposed penalty assessments must be issued within a "reasonable time" after a citation or order is issued; this requirement applies to cases brought under § 110(c); and the two and a half years between the issuance of the citation to K-T Clay and the notices of assessed penalties was unreasonable. The Secretary focused on this aspect of the case as well, primarily relying on *Salt Lake County Road Department*, 3 FMSHRC 1714 (July 1981), to support his position.

Alternatively, the Secretary argues that there was no unreasonable delay, contending that whether the proposed assessed penalties were issued within a reasonable time should be measured from the date the special investigation conducted pursuant to § 110(c) ended, not from the date the citation was issued to K-T Clay. The Secretary points out that the parties here received their respective proposed penalty assessments on February 28 and 29, 2012, and the special investigations concluded on February 17, 2012, when the matters were referred to MSHA's Office of Assessments. Sec'y Resp. at 4. The notices of proposed assessed penalties were issued to Colson and Brinson on February 28, 2012, and to Hastings on February 29, 2012. If the Secretary's position is accepted, then the notices of proposed assessed penalties were issued within two weeks after the investigation ended, which clearly would have been within a reasonable time.

In *Secretary of Labor v. Twentymile Coal Co., 411 F.3d 256* (D.C.Cir. 2005), a case involving "serious, but non-fatal, head injuries . . .", the court held that the requirement in § 105(a) that notices of proposed penalty assessments be issued "within a reasonable time" does not start running when the underlying citation or order is issued. *Id*. at 261. The court stated that the period cannot start running "before the mine had an opportunity to respond to the order," since one of the factors to be considered in assessing a penalty against a respondent is how the mine abated the citation. *Id.* at 262. Instead, the court held that the period starts running when MSHA completes its investigation. The court gave deference to the Secretary's position in that litigation that the investigation ended when an accident investigation report was issued. *Id*. at 261.[3]

Applying the D.C. Circuit's decision in *Twentymile* to this case, it is the date the special investigation ended rather than the date the citation to K-T Clay was issued from which

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[3] In his response to the motions to dismiss, the Secretary erroneously states the holding in *Twentymile* to be that his interpretation of "reasonable time" was entitled to deference. Sec'y Resp. at 5. In fact, the court's decision was more narrowly focused. What the court gave deference to was the Secretary's interpretation of when it terminated the investigation. Based on that date, the court held that there was no unreasonable delay.

"reasonable time" is to be measured. Further, I must give deference to the Secretary's contention that the special investigation ended on February 17, 2012. As was pointed out above, the notices of proposed assessed penalties were issued on February 28 and 29, 2012. Accordingly, there was no delay at all in the issuance of the notices of proposed assessed penalties, and they were issued within a reasonable time.

Therefore, the Respondents' motions to dismiss these penalty proceedings are denied.

II

Alternatively, assuming, *arguendo*, that "reasonable time" should be measured from the issuance of the citation, the motion to dismiss would still be denied.

The Senate Committee that drafted the Mine Act commented on the Secretary's statutory responsibility to act "within a reasonable time"and noted that "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." S. Rep. No. 95-181, 95th Cong., 1st Sess. 34 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 622 (1978).

In *Salt Lake County, supra,* the Commission established a two-part test for determining whether a case should be dismissed when the 45 day deadline for the Secretary to file a petition for the assessment of a penalty with the Commission, as is required by 29 C.F.R. § 29.2700.28(a), was violated. The case held that the Secretary bears the initial burden of establishing that there was adequate cause for the late filing of the notice of the proposed penalty petition. If that burden is met, the Respondent must show actual prejudice due to the late filing. *Id*. at 1716. Recently, in *Long Branch Energy*, 34 FMSHRC 1984 (Aug. 2012), the Commission stated that adequate cause should be found to exist when the Secretary provides a non-frivolous explanation for the delay. *Id*. at 1991. Once the Secretary meets this burden, an operator must show at least some actual prejudice from the delay. *Id*. Mere allegations of potential prejudice or inherent prejudice should be rejected. *Id*. If prejudice is proven, the judge must weigh the prejudice caused by the delay against the public interest in upholding the enforcement purpose of the Mine Act. *Id*. Commission enforcement of the filing time limits is a secondary consideration to the primary purpose of ensuring prompt enforcement of the Act's penalty scheme. *Id*. at 1990.[4]

[4] Both the Secretary and the Respondent framed their arguments under *Salt Lake County*, since *Long Branch* had not been issued at the time their motions were filed. The parties have not been disadvantaged since the Commission's decision in *Long Branch* is consistent with its decision in *Salt Lake County*. In addition, none of the parties requested to amend or supplement their motions after *Long Branch* was issued.

Salt Lake County and *Long Branch* do not concern the period to notify respondents of proposed penalties under § 105(a) of the Mine Act. *See Salt Lake County*, at 1715; *Long Branch*, at 1985. Nevertheless, these decisions are applicable here because they concern the length of time it is reasonable to permit the Secretary to delay an action and the legal standard to apply in making this analysis, the precise issue these cases raise. In *Salt Lake County*, the petition for the assessment of the civil penalty was filed with the Commission two months late; in *Long Branch*, the seven penalty petitions were filed from 7-1/2 to 11 months late. *Id*.

The only citation issued in connection with these three § 110(c) cases is the September 4, 2009 citation issued to K-T Clay. Therefore, assuming the clock started running when the citation issued, the reasonable time requirement for notifying the Respondents of the proposed penalties began on September 4, 2009. From September 4, 2009, it took until February 29, 2012 - almost two and a half years - for MSHA to complete its investigations and issue the penalty assessments. Sec'y Resp. at 1. The question to be addressed is whether taking close to two and a half years to complete the investigations was reasonable.

MSHA's Program Policy Manual ("PPM") provides information regarding what is considered a "reasonable time" for assessing civil penalties under § 110(c):

> Investigative timeframes have been established to help ensure the timely assessment of civil penalties against corporate directors, officers, and agents. Normally, such assessments will be issued within 18 months from the date of issuance of the subject citation or order. However, if the 18 month timeframe is exceeded, TCIO will review the case and decide whether to refer it to the Office of Special Assessments for penalty proposal. In such cases, the referral memorandum to the Office of Special Assessments will be signed by the Administrator.

I MSHA, U.S. Dep't of Labor, *Program Policy Manual*, § 110 (1996). Although the PPM is not binding on the Secretary,[5] it does show MSHA's expectation regarding how long it should take to complete a §110(c) investigation from the issuance of a citation or order. By taking two and a half years instead of 18 months, MSHA failed to meet its own standard for a timely investigation in these cases.

The Secretary argues that there is adequate cause for why MSHA took two and a half years to complete its special investigations and issue the proposed penalty assessments against the Respondents. Specifically, MSHA has enhanced its enforcement efforts over the past five years, including increasing the number of inspectors employed nationally, which has caused the number of citations issued to rise substantially. Sec'y Resp. at 3; *Long Branch* at 1994. The rate

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[5] *See D.H. Blattner & Sons*, 18 FMSHRC 1580, 1586 (Sept. 1996)(*quoting King Knob Coal Co*., 3 FMSHRC 1417, 1420 (June 1981)).

at which operators contest these citations has also increased. *Id*. Thus, MSHA is now evaluating and processing civil penalties for an "unprecedented number of violations." Sec'y Resp. at 3. That MSHA's workload has dramatically increased in recent years was the basis for the Commission's holding in *Long Branch* that adequate cause for the delay in that case was established. *Long Branch* at 1995.[6] The Secretary further argues that taking two and a half years to complete an investigation is reasonable given the number of citations that MSHA must process, the need for a deliberate and careful investigation in § 110(c) investigations, and that this investigation involves three management employees and relates to an injury. *Id*. at 4.

Thus, the relevant question now is whether the Secretary has met the burden to show that there was an adequate cause for taking two and a half years to issue the penalty petitions against the Respondents. As stated above, the Secretary offered several reasons for the undue delay. First, § 110(c) cases are similar to criminal investigations since they have higher stakes than a regular § 105(a) civil penalty petition. They affect individual rights and may lead to civil money penalties, fines, or criminal prosecution. However, I would argue that § 110(c) are no more important - may even be less important - in achieving the Mine Act's overall goal of mine safety than cases brought against operators. Second, the Secretary contends that the investigation in this case may have been complicated because an injury occurred and at least three agents needed to be investigated. *Id*. at 4. But no evidence was presented to support this contention.

Third, the Secretary argues that the increase in citations issued over the past five years and the resulting increase in the number of contests by operators naturally has expanded the burden upon the offices involved in a special investigation.

Although it is hard to comprehend why the Secretary has set up such a cumbersome procedure for determining whether penalties should be assessed against individuals,[7] there is no doubt that MSHA's workload has dramatically increased in recent years. I take judicial notice that the total number of citations and orders issued by MSHA to both coal and non-metal mines increased 49 percent from calender year 2002 to calendar year 2011.[8] In addition, the total number of citations and orders issued by MSHA to both coal and non-metal mines increased 13 percent from calendar year 2006 to calendar year 2011. *Id*. Although this data shows that there was an increase in citations and orders in 2009, it is unclear whether this increase in citations and

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[6] In this regard, it should be kept in mind that the PPM was issued in 1996, a decade before the vast increase in citations.

[7] The Secretary outlined in his Response that there are various offices involved in the special investigation. The investigation starts with the District office, which makes a preliminary determination; the Technical Compliance and Investigation Office continues the special investigation; and the Solicitor's Office provides a legal analysis. Sec'y Resp. at 2. The investigation then returns back to MSHA where a final determination is made. *Id*.

[8] See http://www.msha.gov/MSHAINFO/FactSheets/MSHAbytheNumbers/CalendarYear/Citations%20and%20Orders%20Issued.pdf.

orders also led to a direct increase in § 110(c) special investigations. The Secretary did not explain whether this occurred in his Response nor if the number of employees working on § 110(c) cases was reduced to handle the influx of other work. Nevertheless, it is clear that MSHA's workload has gone up dramatically in recent years.

The delay of two and a half years was significant, and may be near the breaking point for what should be considered acceptable delay. In this respect, it should be noted that the longest delay in *Long Branch* was 11 months, although it should be kept in mind that the deadline which was not met in that case was only 45 days. Missing a 45 day deadline by about 335 days may be more significant than missing an amorphous "reasonable time" deadline by two and a half years. In any event, courts have been reluctant to dismiss cases involving non-jurisdictional deadlines when important public rights are at stake. For example, *Brock v. Pierce County*, 476 U.S. 253 (1986), concerned a requirement under the Comprehensive Employment and Training Act that the Secretary of Labor issue a final determination within 120 days of receiving a complaint that funds were being misused. *Id*. at 255-56. The Secretary failed to make two final determinations within the requisite 120 day period; as in these three cases, the Secretary took two and a half years to make those determinations. Therefore, the respondent county argued that it could not be ordered to repay the allegedly misspent funds. *Id*. at 257. However, the Supreme Court held that Congress did not intend to impose a jurisdictional limitation on the Secretary's enforcement powers by the 120 day provision. The Court opined that it would be "most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act." *Id*. at 260. The D.C. Circuit cited this case in *Twentymile* in holding that the Secretary's delay was not unreasonable. *Twentymile* at 261-62.

The Secretary's action in *Brock*, which the Court allowed to stand, was a dispute solely about a relatively small amount of money under two grants (less than $500,000) and, accordingly, limited public interest. The three cases at issue here concern protecting the health and safety of miners, a matter of great public interest. That the Court allowed the actions brought by the Secretary in *Brock* to stand leads to the conclusion that the Secretary's actions against Hastings, Colson and Brinson should not be dismissed just for missing a procedural deadline, even if missing that deadline resulted in a two and a half year delay.

Moreover, as discussed by the Commission in *Long Branch*, there is a presumption that the Secretary's agents generally act in good faith to uphold the timely enforcement of penalties assessed under the Act. *Long Branch* at 1991 n. 11 (*quoting Kalvar Corp. v. United States*, 543 F.2d 1298, 1299 (Ct. Cl. 1976)). The presumption can be rebutted through evidence that the delay was willful or a result of intentional misconduct or bad faith. *Id*. The Respondents have not presented any such evidence.

The Respondents urge that I dismiss these cases, and cite to cases where other administrative law judges have dismissed § 110(c) cases for failure to file a penalty petition in a timely manner. Resp't Mot. at 6. However, the ALJ decisions cited by the Respondents occurred during the 1990s and early 2000s, when MSHA was not facing the large influx of violations and associated contests it is facing at this time. Further, the cases relied on by Respondents are distinguishable. In *Doyal Morgan et al*, 20 FMSHRC 38 (Jan. 1998)(ALJ), the § 110(c) proceedings were dismissed by the judge because the Solicitor failed to give detailed information with respect to what transpired to cause a 22 month delay. In *Raymond P. Ernst*, 18 FMSHRC 1674 (Sept. 1996)(ALJ), the § 110(c) action was dismissed based on the failure of the Secretary to explain the cause of the delay beyond providing general and vague reasons.

Here, in contrast, the Secretary has provided more than a *pro forma* explanation regarding what occurred to cause the delay in the special investigations. Furthermore, dismissal, in the absence of prejudice, is a harsh remedy that may prevent the Secretary from adequately enforcing his standards to protect miners' health and safety under the statutory scheme of the Mine Act. Consequently, I conclude that the delay at issue here, while regrettable, was adequately explained by the unusual circumstances that existed during the relevant time period.

Since I find that the Secretary has shown adequate cause for the undue delay, I must now evaluate whether the Respondents have suffered actual prejudice due to this delay. The Commission has provided guidance that prejudice means more than "a danger of prejudice." *Long Branch* at 7. The prejudice must, instead, be "real and substantial and demonstrated by a specific showing by the [Respondent]." *Id*. The Respondents argue that the delay is fundamentally unfair and that public policy concerns warrant dismissal. Resp't Mot. at 8, 10-11. But delay is fundamentally unfair only if it results in prejudice to the affected parties; and, as the cases discussed above indicate, public policy concerns argue against dismissal.

Hastings points out he that was moved from his temporary position as Kaolin Operations Manager back to his original position as Engineering Manager, and was relocated from the city where the accident occurred to another city. Hasting's Mot. at 9. He contends that due to these changes in position and work site his memory and knowledge of the day-to-day activities will have faded with time. *Id*. 8-9. I fail to see how either of these changes will prejudice his defense of the allegations against him. For one thing, Hastings has not explained how the 50 or so miles between Monticello and Sandersville creates a significant impediment to presenting his defense. Further, it is not apparent why changing jobs sometime after the incident in question should have an impact on Hastings's memory of what occurred that day, and he provides no explanation for this contention. Colson argues that since he is retired and has not worked with the regulations and standards for one and a half years he does not have the same command of the subject matter as he would have absent the inordinate delay. Colson's Mot. at 9-10. But this is a purely hypothetical argument, not proof of actual prejudice. Brinson does not point to any specific factors leading to prejudice, only the general contention that the delay in his case is *per se* prejudicial. This is not the proof of prejudice the cases demand.

Although it is possible that the Respondents' knowledge of the events of August 27, 2009 have faded somewhat in the more than three years since the incident, it is not uncommon for litigation to occur several years after the events at issue. None of the Respondents here have alleged anything other than a hypothetical fading of memory, and I will not infer prejudice from the passage of time alone. Thus, the Respondents have not demonstrated actual prejudice due to the delay in issuing the petitions for assessment of penalties. Accordingly, the motions to dismiss these proceedings are denied.

ORDER

IT IS ORDERED that the motions to dismiss are **DENIED**.

/s/ Jeffrey Tureck
Jeffrey Tureck
Administrative Law Judge

Distribution (Certified Mail):

Rolesia Butler Dancy, Esq., Office of the Solicitor, U.S. Department of Labor, 61 Forsyth Street, Suite 7T10, Atlanta, GA 30303

Willa B. Perlmutter, Esq., Crowell & Moring, LLP, 1001 Pennsylvania Ave., NW, Washington, DC 20004.

Karen L. Johnston, Esq., Jackson Kelly, 1099 18th Street, Suite 2150, Denver, CO 80202.

Jason M. Nutzman, Esq., Dinsmore & Shohl, 900 Lee Street, Suite 600, Charleston, WV 25301.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

May 8, 2013

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. KENT 2013-116 A.C. No. 15-18889-302324
v.	:	
FOUR STAR RESOURCES, LLC, Respondent	:	Mine: Harlan Strip #1
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. SE 2012-698 A.C. No. 40-03320-299945
v.	:	Mine: No. 1 Surface
PREMIUM COAL COMPANY, INC., Respondent	:	
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. VA 2011-583 A.C. No. 44-07283-260200
v.	:	Mine: Exterior Gob Pile
VIRGINIA FUEL CORPORATION, Respondent	:	

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. VA 2011-650 A.C. No. 44-07034-263145
v.	:	Mine: No. 1 Strip
VIRGINIA FUEL CORPORATION, Respondent	:	
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. VA 2012-82 A.C. No. 44-06947-270590
v.	:	Mine: Wilson Deep Mine #1
VIRGINIA FUEL CORPORATION, Respondent	:	
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. VA 2012-97 A.C. No. 44-07283-271855
v.	:	Mine: Exeter Gob Pile
VIRGINIA FUEL CORPORATION, Respondent.	:	
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEVA 2012-109 A.C. No. 46-09020-267973
v.	:	Mine: No. 65
DOUBLE BONUS COAL COMPANY, Respondent	:	
SECRETARY OF LABOR	:	Docket No. WEVA 2012-243

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	A.C. No. 46-09020-270867-02
v.	:	Mine: No. 65
DOUBLE BONUS COAL COMPANY, Respondent	:	
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEVA 2012-799 A.C. No. 46-08577-280271
v.	:	Mine: Jim's Branch No. 2
CHIEF MINING INC., Respondent	:	
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEVA 2012-1049 A.C. No. 46-09020-284854 Mine: No. 65
v.	:	
DOUBLE BONUS COAL COMPANY, Respondent	:	
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEVA 2012-1053 A.C. No. 46-03303-285612
v.	:	Mine: Superior Cleaning Plant
SUPERIOR PROCESSING INC., Respondent	:	

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEVA 2012-1477 A.C. No. 46-08577-293251
v.	:	
CHIEF MINING INC., Respondent	:	Mine: Jims Branch No. 2
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEVA 2012-1482 A.C. No. 46-09020-293520
v.	:	
DOUBLE BONUS COAL COMPANY, Respondent	:	Mine: No. 65
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEVA 2013-212 A.C. No. 46-03303-302798
v.	:	
SUPERIOR PROCESSING, INC., Respondent	:	Mine: Superior Cleaning Plant
	:	CONTEST PROCEEDINGS
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEVA 2012-551-R Order No. 8080745; 01/10/2012 Docket No. WEVA 2012-552-R Order No. 8080746; 01/10/2012
v.	:	
	:	Docket No. WEVA 2012-553-R

SUPERIOR PROCESSING, INC., Respondent	: :	Order No. 8080747; 01/10/2012
	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 2012-1496
	:	A.C. No. 46-03303-294254
	:	Mine: Superior Cleaning Plant

ORDER TO REQUEST PERMISSION TO PRACTICE AND FILE NOTICE OF APPEARANCE

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).[1]

On March 4, 2013, Mr. Bowman, a non-attorney representative filed a Notice of Appearance on dockets KENT 2012-390, 772 and 773. I denied his Entry of Appearance on March 25, 2013 under Commission Rule 29 C.F.R.§ 2700.3(b) which requires non-attorneys to seek permission from the presiding judge to appear before him/her, which he had not done. He was given 20 days in which to respond, which he did, submitting documentary evidence of his experience as a former Conference Litigation Representative and MSHA inspector. On April 23, 2013, I then issued an Order granting permission to Mr. Bowman to appear before me on these three dockets. However, the Order also required he file a request for permission to appear and a Notice of Appearance on all other dockets he had pending before me. He has not done so.

Mr. Bowman currently has the 18 dockets set forth in the above caption in which he has not filed a Request for Permission to Practice or a Notice of Appearance. He is therefore ordered to do so within 15 calendar days from the date of this Order. Failure to do so may result in a denial of such permission to practice before me.

It is so **ORDERED** this eighth day of May, 2013.

/s/ Priscilla M. Rae
Priscilla Rae
Administrative Law Judge

[1] Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Deputy Secretary Seth D. Harris is the Acting Secretary of Labor.

Distribution:

James F. Bowman, P.O. Box 99, Midway, WV 25878

Peggy Langley, Conference Litigation Representative, U.S. Department of Labor, MSHA, 3837 S US Hwy 25E, Barbourville, KY 40906-0000

Emily K. Hargrove, Attorney, U.S. Department of Labor, Office of the Regional Solicitor, 1100 Wilson Boulevard, 22nd Floor West, Arlington, VA 22209

Matthew R. Epstein, Attorney, U.S. Department of Labor, Office of the Solicitor, 170 S. Independence Mall West, Suite 630E, The Curtis Center, Philadelphia, PA 19106

Kelly S. Acord, Supervisory CLR, Mine Safety and Health Administration, 1301 Airport Road, Beaver, WV 25813

George W. Nelson, Conference Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, 1301 Airport Rd., Beaver, WV 25813-1384

Matthew N. Babington, Attorney, U.S. Department of Labor, Office of the Solicitor, 1100 Wilson Boulevard, 22nd Floor West, Arlington, VA 22209

/mep

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710
Telephone: (202) 434-9950
Fax: (202) 434-9949

May 10, 2013

SETH D. HARRIS, Acting Secretary of Labor, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 2012-630 A.C. No. 01-02901-293555-02
v.	:	
	:	Mine: Shoal Creek Mine
DRUMMOND CO., INC., Respondent	:	

ORDER OF NON-ACCEPTANCE

On May 3, 2013, the parties submitted a *Joint Motion to Approve Settlement* and a draft *Decision Approving Settlement* ("DAS"). Because neither document provides all the pertinent information required by 29 C.F.R. §2700.31 for a motion to approve a settlement, the motion and proposed DAS cannot be accepted for filing. *See* §2700.31(f).

The Secretary originally assessed a total of $31,488 in penalties for the 18 citations comprising this docket. Nine of the citations with their respective assessed penalties were accepted as issued by the Respondent, and another was vacated. Of the eight remaining citations, the Secretary agreed to remove the S&S designation in each; reduce the likelihood of injury to unlikely in seven; reduce the level of negligence in three; and reduce the number of people affected from six to five in one. For each citation, after stating the Respondent's position, the motion declares that "[t]he Secretary states that he recognizes that they raise factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence, or both." However, he provides no concrete explanations for why he has agreed to lower the penalties and significantly reduce the severity of these violations.

Further, comparing the citations with Respondent's position regarding Citations 8521830 and 8522191, there do not appear to be any factual issues in contention. Moreover, the discussion of Citation 8521830 makes it appear that the MSHA inspector acted arbitrarily in requiring the tag to list the name of each person working on the equipment when this is what the cited regulation requires. In addition, Citation 8521830 initially was issued non-S&S, injury unlikely, and moderate negligence, but was amended to S&S, injury likely and high negligence less than two weeks later. Now the Secretary has agreed to revert to his initial determinations. It is essential that he provide a credible explanation for this turnaround. Finally, the discussion of Respondent's position regarding Citation 8521831 is at best confusing and at worst

incomprehensible; and the statement in the discussion of Citation 8523527 that there was no fire hazard because "the flashpoint of oil is not hot" appears nonsensical.

Accordingly, the *Joint Motion to Approve Settlement* cannot be accepted. The parties may modify the motion and the draft DAS in accordance with this order and resubmit it for approval not later than June 17, 2013.

/s/ Jeffrey Tureck
Jeffrey Tureck
Administrative Law Judge

Distribution:

C. Renita Hollins, Esq., U.S. Department of Labor, Office of the Solicitor, 211 7th Avenue North, Suite 420, Nashville, TN 37219

Damon J. Boiles, Esq., Drummond Company, Inc., P.O. Box 10246, Birmingham, AL 35202

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19th Street, Suite 443
Denver, CO 80202-2536
303-844-5267/ FAX 303-844-5268

May 13, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2013-388-M
Petitioner,	:	A.C. No. 48-00007-310681 A
	:	
v.	:	
	:	Mountain Cement Company
STEVE ADKINS, employed by Mountain	:	
Cement Company,	:	
Respondent.	:	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

Before: Judge Manning

This case is before me under section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c) (the "Mine Act"). Steve Adkins ("Respondent"), who was a safety manager for Mountain Cement Company ("MCC"), contested the proposed penalty filed by the Secretary of Labor. Respondent filed a Motion to Dismiss due to the Secretary's delay in proposing a penalty for the alleged violation and the Secretary filed a reply in opposition to the motion. For the reasons set forth below, I deny Respondent's motion to dismiss the proceeding.

On February 11, 2010, MSHA issued 104(d)(1) Order No. 6447118 to MCC alleging a violation of section 56.14107(a). Section 56.14107(a) mandates that moving machine parts must be guarded to prevent miners from contacting those parts. 30 C.F.R. § 56.14107(a). Order No. 6447118 states, in part, that the guard for a shuttle belt was not in place and that Adkins authorized the removal of the guard but did not verify that the guard was replaced. (Ex. R-A).

On April 5, 2011, MSHA informed Respondent that it intended to file a 110(c) proceeding against him as an agent of MCC. MSHA conducted a 110(c) conference call with Respondent on May 6, 2011, to discuss the issues. On June 6, 2011, I was informed that the 110(c) investigation had been forwarded to MSHA headquarters for a decision.[1] On January 3, 2013, MSHA issued its proposed penalty under section 110(c) to Respondent for $3,500.00. MSHA alleges that Respondent knowingly authorized, ordered, or carried out MCC's violation of section 56.14107(a). Respondent contested the penalty on January 17, 2013. The Secretary filed his petition for assessment of civil penalty on March 1, 2013, and Respondent filed a Motion to Dismiss on March 28, 2013.

Respondent argues that the Secretary of Labor's Petition for Assessment of Civil Penalty should be dismissed because it was untimely filed. The Secretary filed the petition 35 months

[1] This information was provided in response to an inquiry I made in the penalty case brought against MCC as to the status of the section 110(c) investigation.

after issuing the underlying section 104(d)(1) order to MCC, 21 months after the Secretary's 110(c) investigation ended, and 20 months after Respondent conferenced with MSHA officials concerning the 110(c) investigation. Numerous Commission judges have applied the law developed under section 105(a) to alleged 110(c) violations, holding that penalties must be proposed in a reasonable period of time. The period of time in question in this case is the period between the issuance of the underlying 104(d)(1) order and the date when the section 110(c) penalty was first proposed. Respondent contends that the Secretary's delay is unreasonable and the extraordinary length of that delay prejudices Respondent.

The Secretary argues that the Secretary's Petition should not be dismissed because it was not filed late, was not filed in unreasonable time, and did not prejudice Respondent. The Secretary also argues that Congress did not intend to authorize the Commission to dismiss penalties as the result of procedural delays. The Secretary filed his petition within 45 days of the notice of contest and within five years of the issuance of the underlying order.

I find that the "reasonable time" standard in section 105(a) applies to section 110(c). Section 105(a) of the Mine Act states that the Secretary "shall, within a *reasonable time* after the *termination of such inspection or investigation* notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a)." 30 U.S.C. § 815(a) (emphasis added). Neither party argues that 105(a) should not apply to 110(c) and Commission administrative law judges have consistently agreed that it should. *Christopher Brinson, Gerald Hastings, Ronald Colson*, 35 FMSHRC __, slip op. at 4, SE 12-340M (May 7, 2013); *Dyno Nobel East-Central Region*, 35 FMSHRC __, slip op. at 1, LAKE 11-13 (Jan. 2, 2013) (ALJ); *Stephen Reasor*, 34 FMSHRC 920, 924 (Apr. 2012) (ALJ); *Doyal Morgan*, 20 FMSHRC 40 (Jan. 1998) (ALJ).

Application of the 105(a) reasonable time requirement requires evaluating and balancing the competing interests of respondents and the Secretary. Procedural fairness is a substantial concern under the Mine Act. *Salt Lake County Road Department*, 3 FMSHRC 1714, 1716 (July 1981). The overriding purpose of the Mine Act, however, is addressing the public interest to protect miners by enforcing the Secretary's safety and health standards. When an important public interest is at issue, "the great principle of public policy" dictates that procedural failures by an agency do not automatically void subsequent agency action. *Brock v. Pierce County*, 476 U.S. 253, 260 (1986). It is, however, a "basic principle of administrative law that substantive agency proceedings" may be overturned upon a showing prejudice. *Salt Lake*, 3 FMSHRC at 1716. Without a respondent's showing of prejudice, it is "inappropriate" to dismiss a citation or order based upon the Secretary's delay. *Twentymile Coal Co.*, 411 F.3d 256, 262 (2005).

I deny Respondent's Motion to Dismiss because Respondent failed to show prejudice. Effectuating the substantive goals of the Mine Act to protect the health and safety of miners is the primary purpose of the Mine Act, which is why the operator must show prejudice before the dismissal of its case. Respondent cites the length of the delay as the cause of prejudice, stating that there "will inevitably arise difficulties with locating evidence and witnesses." (R. Mot. at 7). I hold, however, that Respondent's showing of prejudice must be "real or substantial" and "mere allegations of potential prejudice or inherent prejudice should be rejected." *Long Branch Energy*, 34 FMSHRC 1984, 1991-93 (Aug. 2012). Respondent claims that prejudice is inevitable and that the delay placed a burden upon Respondent's personal and professional life. Respondent

does not cite specific instances of prejudice or difficulties of locating evidence or witnesses. Respondent references the burden upon the personal and professional life of Respondent caused by the Secretary's delay, but cites no actual or specific facts. Furthermore, Respondent undermines its own claims of prejudice when it states that the facts in this case are simple and straightforward and that there are only a few relevant witnesses and documents. (R. Mot. at 5). Respondent shows no real or substantial prejudice and does not provide specific facts in an attempt to show prejudice.

I disagree with Respondent's argument that the Commission's test in *Long Branch Energy* controls in this instance. There is no specific procedural rule that governs 110(c) and the current case does not involve a violation of Procedural Rule 28(a).[2] Although the Secretary must act within reasonable time, no period of delay shorter than the five year limitation cited by the Secretary is *per se* unreasonable.[3] *See Gabelli v. S.E.C.*, 133 S.Ct. 1216, 1219 (U.S. 2013). Considering that the Mine Act's main concern is mine safety, I do not believe that the initial burden should be placed upon the Secretary in this instance because there was no violation of the Commission's procedural rules. Respondent, therefore, must show that it was actually and meaningfully prejudiced by the Secretary's delay in filing the penalty proposal. *See Twentymile Coal Co.*, 411 F.3d at 262. The burden is also on Respondent because he is the moving party.

[2] *Long Branch* concerns the application of 105(a) to 110(a) and a respondent's motion to dismiss due to the procedural delay of the Secretary. Section 110(a) and section 110(c) violations are subject to the Commission's Procedural Rule at 29 C.F.R § 2700.28. *Long Branch* addresses a violation of Procedural Rule 28(a), which states "[w]ithin 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for assessment of penalty." 29 C.F.R § 2700.28(a). The Secretary violates Rule 28(a) if he files his petition for assessment of civil penalty more than 45 days after the respondent contests the penalty proposal. The initial burden of proof, therefore, falls upon the Secretary to show adequate cause for the delay if he violates Rule 28(a). 34 FMSHRC at 1992. Cases under the *Long Branch* test can be decided "solely on the adequacy of the cause provided by the Secretary[,]" without a respondent's showing of prejudice. *Id*. It is important to recognize that the present case involves the period of time between the "termination of [the] inspection or investigation" and Respondent's notification of the proposed penalty. The Secretary timely filed his petition for assessment of civil penalty 43 days after Respondent contested the penalty proposal. Thus, Rule 28(a) was not violated by the Secretary.

[3] The parties' arguments concerning which time period should be considered in the "reasonable time" analysis is not controlling under the facts in this case. I hold, however, that the relevant time period commenced at the conclusion of MSHA's section 110(c) investigation. *See Twentymile Coal Co.*, 411 F.3d at 261-62.

I hold that the Secretary's petition for penalty should not be dismissed at this stage of the proceeding because there was no showing of actual prejudice by Respondent.[4]

Respondent's Motion to Dismiss this proceeding his hereby **DENIED** and he is ordered to file his answer to the Secretary's petition for assessment of civil penalty within 30 days of the date of this order.

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

Distribution:

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

Margaret S. Lopez, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Suite 1000, 1909 K Street, NW, Washington DC 20006

RWM/bjr

[4] Commission Judge Jeffrey Tureck, in a recent order involving similar issues, acknowledged that *Long Branch* did not concern the period of time to notify a respondent of the penalty proposal. *Christopher Brinson et al*. 35 FMSHRC ____, Slip Op. at 6, No. SE 2012-340-M (May 7, 2013). He denied the respondents' motions to dismiss several section 110(c) proceedings because there was no substantial delay between the time the Secretary concluded his special investigation and he proposed penalties under section 110(c). *Id.* at 5. Judge Tureck went on to apply the principles of *Long Branch* assuming *arguendo* that the relevant time period commenced with the issuance of the citation and he applied the two part test set forth in that decision and in *Salt Lake County*. He applied those decisions because "they concern the length of time it is reasonable to permit the Secretary to delay an action and the legal standard to apply in making this analysis. . . ." *Id.* at 6. In that respect, Judge Tureck' s analysis of the legal issues differs from mine.

Furthermore, I find that the Secretary presented "adequate cause" for his delay. The Secretary fulfilled his burden in *Long Brach* because he proffered an adequate cause or non-frivolous explanation for his delay: the increased workload of MSHA during the relevant time period, which delayed the issuance of 110(c) penalties. *Id*. at 1992. Under my analysis such a showing was not necessary, however.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19th Street, Suite 443
Denver, CO 80202-2536
303-844-5267/ FAX 303-844-5268

May 13, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2013-389-M A.C. No. 48-00007-310682 A
v.	:	
	:	Mountain Cement Company
DINO TRUJILLO, employed by Mountain Cement Company, Respondent.	:	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

Before: Judge Manning

This case is before me under section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c) (the "Mine Act"). Dino Trujillo ("Respondent"), who was a maintenance supervisor for Mountain Cement Company ("MCC"), contested the proposed penalty filed by the Secretary of Labor. Respondent filed a Motion to Dismiss due to the Secretary's delay in proposing a penalty for the alleged violation and the Secretary filed a reply in opposition to the motion. For the reasons set forth below, I deny Respondent's motion to dismiss the proceeding.

On February 11, 2010, MSHA issued 104(d)(1) Order No. 6447118 to MCC alleging a violation of section 56.14107(a). Section 56.14107(a) mandates that moving machine parts must be guarded to prevent miners from contacting those parts. 30 C.F.R. § 56.14107(a). Order No. 6447118 states, in part, that Respondent removed the guard for a shuttle belt. (Ex. R-A).

On April 5, 2011, MSHA informed Respondent that it intended to file a 110(c) proceeding against him as an agent of MCC. MSHA conducted a 110(c) conference call with Respondent on May 6, 2011, to discuss the issues. On June 6, 2011, I was informed that the 110(c) investigation had been forwarded to MSHA headquarters for a decision.[1] On January 3, 2013, MSHA issued its proposed penalty under section 110(c) to Respondent for $3,500.00. MSHA alleges that Respondent knowingly authorized, ordered, or carried out MCC's violation of section 56.14107(a). Respondent contested the penalty on January 17, 2013. The Secretary filed his petition for assessment of civil penalty on March 1, 2013, and Respondent filed a Motion to Dismiss on March 28, 2013.

Respondent argues that this proceeding should be dismissed because the Secretary failed to show adequate cause for an unreasonable delay that prejudiced Respondent. Section 554(b) of

[1] This information was provided in response to an inquiry I made in the penalty case brought against MCC as to the status of the section 110(c) investigation.

the Administrative Procedure Act requires that the Secretary file a petition for penalty in a timely fashion and section 105(a) of the Mine Act requires that the length of time to do so be reasonable. Numerous Commission judges have applied the law developed under section 105(a) to alleged 110(c) violations. The Secretary did not file his petition in a reasonable or timely fashion and he did not show adequate cause for his delay. The Secretary's delay also prejudiced Respondent, which means that the proceeding should be dismissed even if the Secretary had shown adequate cause. The Secretary's delay was 1,057 days long, which fundamentally causes prejudice because it violates Respondent's due process and causes the memory of witnesses to fade. Respondent also argues that public policy favors dismissal of this proceeding.

The Secretary argues that the Secretary's Petition should not be dismissed because it was not filed late, was not filed in unreasonable time, and did not prejudice Respondent. The Secretary also argues that Congress did not intend to authorize the Commission to dismiss penalties as the result of procedural delays. The Secretary filed his petition within 45 days of the notice of contest and within five years of the issuance of the underlying order.

I find that the "reasonable time" standard in section 105(a) applies to section 110(c).[2] Section 105(a) of the Mine Act states that the Secretary "shall, within a *reasonable time* after the *termination of such inspection or investigation* notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a)." 30 U.S.C. § 815(a) (emphasis added). Neither party argues that 105(a) should not apply to 110(c) and Commission administrative law judges have consistently agreed that it should. *Christopher Brinson, Gerald Hastings, Ronald Colson*, 35 FMSHRC __, slip op. at 4, SE 12-340M (May 7, 2013); *Dyno Nobel East-Central Region*, 35 FMSHRC __, slip op. at 1, LAKE 11-13 (Jan. 2, 2013) (ALJ); *Stephen Reasor*, 34 FMSHRC 920, 924 (Apr. 2012) (ALJ); *Doyal Morgan*, 20 FMSHRC 40 (Jan. 1998) (ALJ).

Application of the 105(a) reasonable time requirement requires evaluating and balancing the competing interests of respondents and the Secretary. Procedural fairness is a substantial concern under the Mine Act. *Salt Lake County Road Department*, 3 FMSHRC 1714, 1716 (July 1981). The expeditious resolution of penalty cases is also a public interest. *Buck Creek Coal*, 17 FMSHRC 500, 503 (Apr. 1995); *Scotia Coal Mining Co.*, 2 FMSHRC 633, 635 (Mar. 1980). The overriding purpose of the Mine Act, however, is addressing the public interest to protect miners by enforcing the Secretary's safety and health standards. When an important public interest is at issue, "the great principle of public policy" dictates that procedural failures by an agency do not automatically void subsequent agency action. *Brock v. Pierce County*, 476 U.S. 253, 260 (1986). It is, however, a "basic principle of administrative law that substantive agency proceedings" may be overturned upon a showing prejudice. *Salt Lake*, 3 FMSHRC at 1716. Without a respondent's showing of prejudice, it is "inappropriate" to dismiss a citation or order based upon the Secretary's delay. *Twentymile Coal Co.*, 411 F.3d 256, 262 (2005).

[2] Respondent argues that the proceeding should be dismissed because Secretary violated the "timely" requirement of the Administrative Procedure Act. 5 U.S.C § 554(b). For the purposes of 110(c) proceedings, timely filing is defined by section 105(a) of the Mine Act. The timely requirement in section 554(b), therefore, is met by the Secretary if he complies with section 105(a) of the Mine Act.

I deny Respondent's Motion to Dismiss because Respondent failed to show prejudice. Effectuating the substantive goals of the Mine Act to protect the health and safety of miners is the primary purpose of the Mine Act, which is why the operator must show prejudice before the dismissal of its case. Respondent cites the length of the delay as the cause of prejudice, stating that "the delay alone is fundamentally unfair" and the memory of defense witnesses will have faded. (R. Mot. at 11). I hold, however, that Respondent's showing of prejudice must be "real or substantial" and "mere allegations of potential prejudice or inherent prejudice should be rejected." *Long Branch Energy*, 34 FMSHRC 1984, 1991-93 (Aug. 2012). Respondent claims that prejudice is inevitable due to the length of the delay. Respondent does not cite specific instances of prejudice or difficulties of locating evidence or witnesses. Respondent shows no real or substantial prejudice and does not provide specific facts in an attempt to show prejudice.

I disagree with Respondent's argument that the Commission's test in *Long Branch Energy* controls in this instance. There is no specific procedural rule that governs 110(c) and the current case does not involve a violation of Procedural Rule 28(a).[3] Although the Secretary must act within reasonable time, no period of delay shorter than the five year limitation cited by the Secretary is *per se* unreasonable.[4] *See Gabelli v. S.E.C.*, 133 S.Ct. 1216, 1219 (U.S. 2013). Considering that the Mine Act's main concern is mine safety, I do not believe that the initial burden should be placed upon the Secretary in this instance because there was no violation of the Commission's procedural rules. Respondent, therefore, must show that it was actually and meaningfully prejudiced by the Secretary's delay in filing the penalty proposal. *See Twentymile Coal Co.*, 411 F.3d at 262. The burden is also upon Respondent because he is the moving party.

[3] *Long Branch* concerns the application of 105(a) to 110(a) and a respondent's motion to dismiss due to the procedural delay of the Secretary. Section 110(a) and section 110(c) violations are subject to the Commission's Procedural Rule at 29 C.F.R § 2700.28. *Long Branch* addresses a violation of Procedural Rule 28(a), which states "[w]ithin 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for assessment of penalty." 29 C.F.R § 2700.28(a). The Secretary violates Rule 28(a) if he files his petition for assessment of civil penalty more than 45 days after the respondent contests the penalty proposal. The initial burden of proof, therefore, falls upon the Secretary to show adequate cause for the delay if he violates Rule 28(a). 34 FMSHRC at 1992. Cases under the *Long Branch* test can be decided "solely on the adequacy of the cause provided by the Secretary[,]" without a respondent's showing of prejudice. *Id*. It is important to recognize that the present case involves the period of time between the "termination of [the] inspection or investigation" and Respondent's notification of the proposed penalty. The Secretary timely filed his petition for assessment of civil penalty 43 days after Respondent contested the penalty proposal. Thus, Rule 28(a) was not violated by the Secretary.

[4] Which time period should be considered in the "reasonable time" analysis is not controlling under the facts in this case. I hold, however, that the relevant time period commenced at the conclusion of MSHA's section 110(c) investigation. *See Twentymile Coal Co.*, 411 F.3d at 261-62.

I hold that the Secretary's petition for penalty should not be dismissed at this stage of the proceeding because there was no showing of actual prejudice by Respondent.[5]

Respondent's Motion to Dismiss this proceeding his hereby **DENIED** and he is ordered to file his answer to the Secretary's petition for assessment of civil penalty within 30 days of the date of this order.

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

Distribution:

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

Jason Nutzman, Esq., Dinsmore & Shohl, LLP, Huntington Square, 900 Lee Street, Suite 600, Charleston, WV 25301

RWM/bjr

[5] Commission Judge Jeffrey Tureck, in a recent order involving similar issues, acknowledged that *Long Branch* did not concern the period of time to notify a respondent of the penalty proposal. *Christopher Brinson et al*. 35 FMSHRC ____, Slip Op. at 6, No. SE 2012-340-M (May 7, 2013). He denied the respondents' motions to dismiss several section 110(c) proceedings because there was no substantial delay between the time the Secretary concluded his special investigation and when he proposed penalties under section 110(c). *Id.* at 5. Judge Tureck went on to apply the principles of *Long Branch* assuming *arguendo* that the relevant time period commenced with the issuance of the citation and he applied the two part test set forth in that decision and in *Salt Lake County*. He applied those decisions because "they concern the length of time it is reasonable to permit the Secretary to delay an action and the legal standard to apply in making this analysis. . . ." *Id.* at 6. In that respect, Judge Tureck' s analysis of the legal issues differs from mine.

Furthermore, I find that the Secretary presented "adequate cause" for his delay. The Secretary fulfilled his burden in *Long Brach* because he proffered an adequate cause or non-frivolous explanation for his delay: the increased workload of MSHA during the relevant time period, which delayed the issuance of 110(c) penalties. *Id*. at 1992. Under my analysis such a showing was not necessary, however.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
WASHINGTON, DC 20004
TELEPHONE: 202-434-9953 / FAX: 202-434-9949

May 13, 2013

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of MICHAEL L. BARLOW, Complainant,	:	DISCRIMINATION PROCEEDING Docket No. WEST 2013-459-DM MSHA Case No. WE-MD 2012-23
v.	:	
	:	Mine: Celatom Mine
GEORGE'S SHOP & ROCK, INC., Respondent.	:	

ORDER DENYING MOTION TO DISMISS
AND
NOTICE OF HEARING

In this case the Secretary of Labor ("Secretary") alleges that on May 11, 2012 George's Shop & Rock, Inc. ("George's") illegally discharged its employee, Matthew Barlow. The Secretary asserts that Barlow's termination was motivated by Barlow's protected activity, including but not limited to, his complaining about health conditions at the mine and his participation in an inspection of the mine conducted by the Secretary's Mine Safety and Health Administration ("MSHA").[1] On August 1, 2012 – 81 days after he was fired – Barlow filed a complaint with the Secretary alleging that his (*i.e.*, Barlow's) termination was discriminatory and in violation of the Federal Mine Safety and Health Act of 1977 ("Mine Act or Act").[2] 30 U.S.C. §801 *et seq.* The Secretary investigated Barlow's complaint and concluded that Barlow's allegations had merit. As a result, on February 6, 2013, the Secretary filed the subject complaint with the Commission alleging that Barlow was fired in violation of section 105(c)(1) of the Act.

[1] The Secretary's complaint states that the events in question occurred at the Celatom Mine (Mine ID No. 50-01545). Complaint 1. George's answer admits that its operations at the Celatom Mine come within the jurisdiction of the Act, but denies operations at the "Eagle Picher Plant" are covered by the Act. Answer 1. Based on the pleadings file thus far, the relevance of the "Eagle Picher Plant" to the subject discrimination complaint is not clear.

[2] In its answer Georges states that Barlow filed his complaint with MSHA on August 2, 2012 (Answer 2), but a copy of the complaint attached to the Secretary's response to the company's motion to dismiss is stamped as received by MSHA on August 1. Sec's Response, Exh. C The discrepancy is not material to the ruling set forth herein.

30 U.S.C. § 815(c)(1). The Secretary requests, among other things, Barlow's reinstatement, the restoration to Barlow of all lost benefits, back pay and interest, expenses, expungement of Barlow's employment records, and a requirement that George's post a notice stating it will not violate section 105(c)(1) in the future. Complaint 3-4.

On March 7, 2013, George's answered the Secretary's complaint admitting that it terminated Barlow's employment as an ore truck driver on May 11, 2012, but denying that its action was in any way discriminatory and in violation of the Act. Answer 1-2. George's further denies that Barlow engaged in protected activity under the Act, or if he did George's asserts that he was not terminated because of such activity. George's contends that all actions taken with respect to Barlow's employment were for legitimate, non-discriminatory business reasons. *Id.* 3.

In addition, George's moves to dismiss the Secretary's complaint asserting that although the Mine Act requires a miner to file a complaint of discrimination with the Secretary within 60 days of the alleged adverse action, Barlow filed his complaint 83 days after his employment was ended, 23 days after the expiration of the 60 day limit. Motion 2. George's recognizes that late filed claims may be excused on the basis of "justifiable circumstance." *Id., citing Hollis v. Consolidation Coal Company*, 6 FMSHRC 21 (January, 1984). But, according to George's, no such circumstances exist here. On the contrary, George's asserts that Barlow fully understood his rights and knew that his complaint had to be submitted within 60 days of his termination. He simply failed to file it on time. *Id.* 3-5.

The Secretary responds that a miner's "genuine ignorance of applicable time limits may excuse a late filed . . . complaint" (Sec's Response 2, *quoting Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1386 (Dec. 1999)), that absent an allegation of prejudice a short dely in the filing of a complaint warrants an extension of the time limit (*Id.* 3*, citing Smith v. Jim Walters Resources*, 21 FMSHRC 359 (March 1999 (ALJ Melick); *Secretary obo Franco v. W.A. Morris Sand & Gravel, Inc*. 18 FMSHRC 278 (February 1996) (ALJ Manning)), and that the time for filing the complaint may be extended if the miner learns the facts justifying the complaint after the alleged adverse action has occurred. *Id*., *citing Fulmer v. Mettiki Coal Corp*. 30 FMSHRC 523, 529 & n.10 (ALJ Zielinski) (June 2008). The Secretary argues that George's has not shown it was prejudiced, that the delay is a short one, that Barlow did not sleep on his rights and, most persuasively, that the complaint was based on information acquired after his termination. The Secretary states:

> Barlow initially believed that his termination was unjustified but not necessarily because he had made safety complaints. On the day he was terminated, his supervisor . . . presented him with his last pay check and told him that "things were not working out." . . . . Barlow wanted to proceed cautiously and sought legal advice to learn his options. He did not want to file a claim or bring a lawsuit which was patently frivolous. If he did, he believed that he would be 'blackballed' in his small rural community where employment

> opportunities were limited. When he learned that [Richard] Paget, a fellow employee who had also made safety complaints, was terminated at the end of June 2012, [Barlow] concluded that [George's] had engaged in a pattern of discrimination which included him[,] and [Barlow] immediately sought the assistance of MSHA. Under these facts, the 60 day period should be deemed to have begun on June 29th, the date he learned that [Georges] terminated Paget. In addition, Barlow should be deemed to have filed his discrimination complaint on the 33rd day after he discovered the adverse action.
>
> The fact that the delay was caused by Barlow's objective of insuring that he had adequate grounds for filing a discrimination complaint should not be used to defeat his claim.

Sec's Response 5 (*citation and note omitted*).

RULING

Section 105(c)(2) of the Act states that:

> Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this . . . subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination.

30 U.S.C. § 815(c)(2).

As the parties agree, the Commission has held that the 60 day time limit is not jurisdictional and non-compliance may be excused on the basis of justifiable circumstances. *Hollis*, 6 FMSHRC at 24-25. The Secretary accurately notes that there is no claim of prejudice by Georges. Sec's Response 3-4. Further, the undersigned agrees with Commission Administrative law Judge Michael Zielinski that the principals applicable to the equitable tolling of limitations periods apply to the Mine Act when, after the adverse action, the complainant

reasonably comes to believe the company was wrongfully motivated.[3] In such a case, the filing period should be deemed to begin upon the complainant's reasonable conclusion that the company's conduct was wrongful under the Act.

The Secretary's statement of facts detailing the complainant's discovery of what he believed to be company conduct violative of the Mine Act is based on Barlow's sworn declaration. Sec's Response, Exh. A. For the purposes of deciding the motion, I accept the declaration as true, and I find that it when Rick Paget was discharged on June 29, Barlow came to believe that his own termination was based on his (*i.e.,* Barlow's) exercise of protected rights. After reaching this conclusion, Barlow quickly began the process leading to the August 1 filing of his complaint with MSHA. Sec's Response, Exh A 2. Because the undersigned concludes that the time period set forth in section 105(c)(2) should begin on June 29, rather than on May 11, he deems Barlow's complaint timely filed with MSHA, and he **DENIES** George's motion to dismiss.

NOTICE OF HEARING

Counsels are advised that a hearing in this matter will be convened beginning at **8:30 a.m.**, in **Boise, Idaho**, on **September 5, 2013**.[4] The issues include whether Barlow engaged in protected activity, and if so whether George's fired him in whole or in part because of that activity. Also at issue may be whether George's was motivated to fire Barlow because of his unprotected activity and would have fired him for the unprotected activity alone.

/s/ David Barbour
David Barbour
Administrative Law Judge
202-434-9953

[3] As Judge Zielinski summarized the court's holding in *Wegar v. Shell Oil Co.*, 966 F.2d 216, 218 (7th Cir. 1992), the limitations period is tolled until the complainant "reasonably should know injury was wrongfully caused." *Fulmer v. Mettiki* 30 FMSHRC 523, 529 n. 10.

[4] The case involving Richard Paget, *Secretary obo Richard A. Paget v. George's Shop & Rock, Inc.,* Docket No. WEST 2013-468-DM, is assigned to me and has been scheduled to be heard the previous day. Judicial economy may warrant the consolidation of the cases or some other arrangement that will allow overlapping witnesses to testify once.

Distribution: (Certified Mail)

Matthew Vadnal, Esq., Department of Labor, Office of the Solicitor, 300 Fifth Avenue, Suite 1120, Seattle, WA 98104

Austin E. Smith, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., 1700 Lincoln Street, Suite 4650, Denver, Colorado 80203

Michael L. Barlow, 3807 West Cedar Drive, Vale, Oregon 97918

/sa

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
WASHINGTON, DC 20004

May 28, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2011-1580
Petitioner,	:	A.C. No. 15-02132-264085
	:	
v.	:	Mine: Dotiki Mine
	:	
WEBSTER COUNTY COAL,	:	
Respondent.	:	
	:	
	:	
SECRETARY OF LABOR,	:	Docket No. KENT 2012-27
MINE SAFETY AND HEALTH	:	A.C. No. 15-17216-267090
ADMINISTRATION (MSHA),	:	
Petitioner,	:	Mine: Cardinal
	:	
v.	:	
	:	
WARRIOR COAL, LLC,	:	
Respondent.	:	
	:	
	:	
SECRETARY OF LABOR,	:	Docket No. KENT 2012-446
MINE SAFETY AND HEALTH	:	A.C. No. 15-18826-275031
ADMINISTRATION (MSHA),	:	
Petitioner,	:	Mine: Elk Creek
	:	
v.	:	Docket No. KENT 2012-861
	:	A.C. No. 15-18826-284552
HOPKINS COUNTY COAL, LLC,	:	
Respondent.	:	Mine: Elk Creek
	:	
	:	
SECRETARY OF LABOR,	:	Docket No. KENT 2012-661
MINE SAFETY AND HEALTH	:	A.C. No. 15-19374-280614
ADMINISTRATION (MSHA),	:	
Petitioner	:	Mine: River View
	:	
v.	:	
	:	
RIVER VIEW COAL, LLC,	:	
Respondent	:	

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AND DENYING SECRETARY'S MOTION FOR SUMMARY DECISION.

Procedural History and Summary of Facts

These dockets are before me on petitions for penalties filed by the Secretary pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 et seq. (2000) (the "Act"). On March 7, 2013 upon request by counsel, I consolidated these dockets for submission of motions for partial summary decision in accordance with Section 2700.67 of the Federal Mine Safety and Health Review Commission's Procedural Rules, 30 C.F.R. § 27.00.67. Each of these operators is a subsidiary of Alliance Coal, LLC ("Respondent") and is located in the Commonwealth of Kentucky.

Each of these dockets contains violations issued against the operators during regular inspections conducted by a Mine Safety and Health Administration (MSHA) inspector for violations of three mandatory standards involving oil and gas wells located within the coal mine. The predicate standard cited is 30 C.F.R. § 75.1700 which states:

> Each operator of a coal mine shall take reasonable measures to locate oil and gas wells penetrating coalbeds or any underground area of a coal mine. When located, such operator shall establish and maintain barriers around such oil and gas wells in
>
> accordance with State laws and regulations, except that such barriers shall not be less than 300 feet in diameter, unless the Secretary or his authorized representative permits a lesser barrier consistent with applicable State laws and regulations against hazards for such wells to the miners in such mine, or unless the Secretary or his authorized representative requires a greater barrier where the depth of the mine, other geological conditions, or other factors warrant such a greater barrier.

The Secretary alleges that in each of these cited mines, the operator mined within the 300 foot barrier without seeking MSHA approval. There are a total of five cited violations of this mandatory standard among these five dockets related to 117 permits issued by the Commonwealth of Kentucky.

Believing that the bore holes were not either gas or oil wells under Kentucky law, the Respondent did not so label them on the mine maps. This resulted in the issuance of five violations under Section 75.1200 and four violations of Section 75.372. These two closely related mandatory standards require, in relevant part, that the certified mine maps show either producing or abandoned oil and gas wells located within 500 feet of such mine; and, the ventilation maps contain the location of all known oil and gas wells and other drill holes that penetrate the coalbed, respectively. 30 C.F.R. § 75.1200(k) and § 75.372(b)(5).

The parties have stipulated that the MSHA inspectors relied upon information gathered from the Commonwealth of Kentucky Department for Natural Resources Office of Mine Safety and Licensing to determine that the holes were oil and/or gas wells. They have further stipulated

that no advisory statements were provided to these mines that these holes were considered oil or gas wells prior to the issuance of these citations and orders. Based upon information obtained from MSHA's data retrieval system, each of these mines has been inspected by MSHA since 2006 between 1,127 and 4,358 inspection days after the holes were drilled.[1] If these holes are not considered oil and gas wells, the Secretary agrees that the Respondent's maps are correct. (Joint Exhibit A.)

The Joint Stipulations submitted by counsel also provide a chart of each of the wells at issue here listed by mine name, record and permit number. Beside each permit number is the date drilling of the hole commenced, date completed and date plugged, the geological survey designation and whether any production of oil or gas resulted. The earliest one drilled was in 1944 and last one in 1998, the majority of them being drilled between 1960 and 1987. Of the 117 bore holes listed, not one of them produced any oil or gas. All of them were listed as "dry and abandoned" and were plugged the same day drilling was completed or very shortly thereafter. (Joint Exhibit A.)[2]

Summary Decision Standards

Commission Rule 67 sets forth the guidelines for granting summary decision:
(b) 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.

29 C.F.R. §2700.67(b).

The Commission "has long recognized that [ ] 'summary decision is an extraordinary procedure,' and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which the Supreme Court has indicated that summary judgment is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact.'" *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007)(quoting *Energy West Mining Co*., 16 FMSHRC 1414, 1419 (July 1994)). In reviewing the record on summary judgment, the court must evaluate the evidence in "the light most favorable to…the party opposing the motion." *Hanson Aggregates* at 9 (quoting *Poller v. Columbia Broad. Sys*., 368 U.S. 464, 473 (1962). Any inferences "drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motions.'" *Hanson Aggregates* at 9 (quoting *Unites States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

[1] Data prior to 2006 is no longer available. The number of inspection days is as follows: Dotiki Mine, 4,358 days; Cardinal Mine, 3,014 days; Elk Creek Mine, 2,737 days; River View Mine, 1,127 days.

[2] There was one permit, number 11087, issued to Elk Creek Mine in 1964 not at issue in these proceedings, which produced oil for some period of time. By letter dated April 11, 2006, MSHA approved the operator's request to mine within 70 feet of the coal barrier.

The issues presented in this penalty proceeding are whether the bore holes identified by their corresponding permit numbers are oil and gas wells as contemplated within mandatory standard 75.1700, and if so, was Respondent provided fair notice of MSHA's interpretation of the terms to assess penalties against it.

The parties have not provided any conflicting material facts which would prevent issuance of summary decision on the issue of fair notice. However, as set forth in more detail below, the issue of whether the bore holes come within the definition of oil and gas wells contemplated by the MSHA regulation is not appropriately decided here by summary decision.[3]

ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS

Definition of Oil and Gas Wells

Both parties agree that the definition of oil and gas wells is not defined within the MSHA regulations. They have asked that the terms be defined by me herein. I decline to do so. The Secretary has not provided a proposed definition for the terms while the Respondent suggests MSHA should follow State law. The issue, however, is not simply a question of choice of law between State and Federal statutes or defining an ambiguous term found in a Federal regulation as counsel proposes.

The Commonwealth of Kentucky defines a "well" as any "bore hole drilled or proposed to be drilled for the purpose of producing natural gas or petroleum or one through which natural gas or petroleum is being produced." KY. REV. STAT. ANN. § 353.010(19) (West 2012). It then goes on to define a "gas well" as any well that produces natural gas not blended with oil or producing more than 10,000 cubic feet of gas to every barrel of oil. KY. REV. STAT. ANN. § 353.010(10)(West 2012). An "oil well" is defined as any well that produces at least one barrel of oil in conjunction with producing natural gas. KY. REV. STAT. ANN. § 353.010(14) (West 2012). The "Dictionary of Mining, Minerals, and Related Terms," Second Edition, U.S. Dept. of the Interior, 1996 defines a "well" as a borehole sunk in the ground for the purpose of obtaining oil, gas, water etc. There is no separate definition of a gas or oil well in this source. 17 C.F.R. § 229.1205 ("Drilling and other exploratory and development activities") separates the definitions of wells into categories depending upon their production. A "dry well" is one that cannot provide sufficient quantities to make completion as an oil or gas well economically justifiable. Similarly, Pennsylvania, West Virginia, Texas, Tennessee and Alaska, to name a few states, define oil and gas wells based upon productivity in terms of cubic feet of gas produced to the number of barrels of oil. (*See generally,* 58 PA. CONS. STAT. § 502 (2011); W. VA. CODE § 35-4-

[3] Had the Secretary of Labor taken this case to hearing and presented expert witness testimony to address the issues discussed below and proposed an interpretation of the mandatory standard on behalf of MSHA, this issue could well have been resolved at hearing. However, I would not have changed my decision on the issue of fair notice as discussed in this decision. The citations and orders herein would still have been vacated.

2 (2013); TEX. NAT. RES. CODE ANN.§ 86.002 (West 1977); TENN. COMP. R. & REGS. 1040-02-09-.04 (2013); and, ALASKA ADMIN. CODE tit. 20, § 25.990 (2013).

Reading the various statutes and regulations as well as general discussions on dry wells and their reclamation, it becomes abundantly clear that wells in the general sense transition into oil or gas wells when a sufficient quantity of the mineral is found to make it economically worth the cost of completion of the well by installing ejection equipment and factoring in associated costs of production compared to market value. A well may have been categorized as "dry" even when a reservoir of oil or gas is present if the cost of completion outweighed the expected profit (or loss) at the time it was drilled. A dry well may be re-entered and re-completed many years after it has been labeled as "dry" when the market factors change – the price of the product goes up or the costs of production goes down due to better surveying techniques or lower equipment costs. Thus, relying on any one State's terminology is misdirected. It could produce wildly differing definitions across the country causing more ambiguity and confusion. More significantly, however, it would impose upon MSHA, whose purpose under the Act is to protect the health and safety of miners, definitions based upon commercial considerations. The legislative purpose of Section 75.1700 is to prevent inundations of gas and oil in the mines which could lead to potential fatalities. *Leg. Hist., Federal Coal Mine Health and Safety Act of 1969 (Comm. Print, 1970), pp. 83-84.* Taking note of the fact that coal mines produce methane, some in great quantities, it is conceivable that a well labeled as "dry" could still produce a sufficient amount of methane to cause an inundation or other safety hazards and still be less than an amount commercially viable for production.

I would surmise that there are other important considerations involved in crafting a definition of oil and gas wells to address the health and safety issues of concern to MSHA besides those I have mentioned herein. It appears to me that the matter should be addressed through either rule making proceedings or at the least through meaningful discussion between technical experts and regulatory authorities leading to promulgation of agency-wide informational bulletins or other directives providing the mine operators with a clear meaning of the terms used in this mandatory standard. Summary decision is not the appropriate vehicle by which to do so particularly with the paucity of facts and absent a well-reasoned and clearly stated proposed definition provided by the Secretary.

Fair Notice

The Respondent's position with respect to lack of fair notice is well taken. It has been stipulated that the wells were drilled between 1944 and 1998. Since 2006, there have been between 1,127 and 4,358 inspection days spent at these mines with no previous citations issued under this standard. By regulation, the mine and ventilation maps have been submitted and approved by MSHA's district office every year with the same designations as they appear currently. It has also been stipulated by the Secretary that no advisory statements were provided to these mines advising them that the drill holes were considered oil or gas wells. The Respondent, in the absence of MSHA guidance, relied upon Kentucky's statutes and the letter from the Commonwealth's Commissioner of the Department of Natural Resources as the basis of their belief that the dry wells are not contemplated within the meaning of oil and gas wells. I find

their reliance is understandable and reasonable and that the Secretary has not met her burden of proving fair notice was provided to Respondent that a different definition should apply. By the Secretary's own admission, there is no definition of the terms. It would be patently unfair to hold the Respondent accountable 15 years later without warning for violation of a standard, the meaning of which the Secretary cannot articulate.

The citations and orders issued for violations of mandatory standard 30 C.F.R. § 75.1700 in these five dockets must be vacated. The citations and orders issued under mandatory standards 30 C.F.R. § 75. 1200 and § 75.372 must also be vacated for the reasons set forth herein.

ORDER

The Secretary's motion for partial summary decision is **DENIED**. The Respondent's motion for partial summary decision is **GRANTED**. I further **ORDER**

1. Citation Nos. 8502461, 8502462 and 8502463 in Docket No. KENT 2011-1580 are **VACATED**.
2. Citations Nos. 8502423, 8502424 and 8502425 in Docket No. KENT 2012-27 are **VACATED**.
3. Citation Nos. 8502319 and 8502320 in Docket No. KENT 2012-446 are **VACATED**.
4. Order Nos. 8502375, 8502376 and 8502377 in Docket No. KENT 2012-861 are **VACATED** and this case is **DISMISSED**.
5. Citation No. 8502378 and Order Nos. 8502379 and 8502380 in Docket No. KENT 2012-661 are **VACATED** and this case is **DISMISSED**.

The parties are further **ORDERED** to confer for the purposes of settlement negotiations. Should settlement not be reached within 30 days, they are directed to contact the court for the purpose of setting a hearing date.

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

Distribution:

Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Ste. 230, Nashville, TN 37219

Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Centre Circle, Ste. 375, Lexington, KY 40514

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER
875 GREENTREE ROAD, SUITE 290
PITTSBURGH, PA 15220
TELEPHONE: (412) 920-2682
FAX: (412) 928-8689

May 29, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. PENN 2009-585
Petitioner,	:	A.C. No. 36-03328-187277-01
	:	
v.	:	
	:	
PBS COALS, INC.,	:	
Respondent.	:	Mine: Mine No. 1

ORDER

Appearances: Joshua T. Shaw, Esq., and Matthew R. Epstein, Esq., Office of the Solicitor, U.S. Department of Labor, for the Secretary of Labor

Vincent J. Barbera, Esq., and Melanie R. Barbera, Esq., Barbera, Clapper, Beener, Rullo & Melvin, LLP, for Respondent

Before: Judge Lewis

STATEMENT OF THE CASE

This case is before the undersigned based upon the petition for assessment of civil penalty filed by the Secretary of Labor (the "Secretary"), acting through the Mine Safety and Health Administration ("MSHA") against PBS Coals, Inc., ("Respondent" or "PBS") pursuant to Section 104(g)(1) of the Federal Mine Safety and Health Act of 1977, 30 USC § 801 *et seq*. (the "Act" or "Mine Act").

A hearing was held in Pittsburgh, Pennsylvania on February 12, 2013, where the parties participated fully therein. After the hearing, the parties filed post hearing briefs and supplemental briefs.

ISSUES

The general issue is whether the Secretary's petition for assessment of civil penalty ("Petition") under Rule 28, 29 CFR § 2700.28, should be dismissed due to untimely filing.

Specific issues include: whether the Secretary can establish adequate cause for his late filing and, if so, whether Respondent can establish actual prejudice. If Respondent can establish actual prejudice, the question becomes whether, pursuant to Commission holdings in *Salt Lake Road Department*, 3 FMSHRC 1714 (July 1981)("*Salt Lake*") and *Long Branch Energy*, 34 FMSHRC 1984 (Aug. 2012) ("*Long Branch II*"), a balancing of the public interest and harm to each party would require dismissal.

PROCEDURAL HISTORY

Given the prehearing agreement that the February 12, 2013 hearing would be limited to the issue of untimeliness of the Secretary's Petition and given the thorny procedural history associated with the instant case, the undersigned shall review the procedural history at length.

On November 19, 2008, an accident had occurred at Respondent's Mine No. 1 ("Mine"). After an investigation of the circumstances surrounding the accident, Donald Foster ("Foster"), employed in MSHA's Coal District No. 2 ("District 2"), concluded that Respondent had violated 30 CFR § 48.27(a)(3), involving the mandatory health and safety training of miners as to tasks in which they have had no previous experience. Order No. 7021450, associated with Docket No. PENN 2009-585, was issued by Foster on November 24, 2008.

The Order was subsequently forwarded to MSHA's Office of Assessments. On June 9, 2009, the Office of Assessments issued its proposed civil penalty. Ex. R-2.[1] On June 26, 2009, Respondent contested the proposed assessment. Ex. R-3. The Secretary received mail service of such on July 1, 2009. Ex. R-3. The Office of Assessments thereupon forwarded this matter to District 2. Tr. 27, 55, 56, 102-103.

Pursuant to 29 CFR § 2700.28, the Secretary shall file a petition for the assessment of civil penalty with the Commission within forty-five days of receipt of a timely contest. Forty-five days from July 1, 2009 was August 15, 2009. However, as the deadline fell on a Saturday, the Petition was due on the following Monday.[2]

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[1] "Ex." corresponds to trial exhibits. Respondent's exhibits are notated as "R" followed by the exhibit number. The Secretary's are labeled as "S" followed by the exhibit number. Finally, "Tr." followed by numbers refers to the hearing transcript.

[2] 29 CFR § 2708(c), "Computation of Time" provides, in pertinent part, that is a due date falls on Saturday, Sunday, federal holiday, or other date on which the Commission's offices are not open, the due date shall be the next day which is not one of the aforementioned days.

On August 7, 2009, within said extended forty-five day period, Edward Lewetag ("Lewetag"), Supervisory Conference and Litigation Representative ("CLR") of the Secretary's District 2 office in Mount Pleasant, Pennsylvania filed a request for a ninety day extension of time to file a petition. Chief Administrative Law Judge Robert Lesnick ("Chief Judge Lesnick") granted the extension on October 8, 2009. On November 13, 2009, the Secretary filed a second request for a ninety day extension to file a petition, which was granted on November 13, 2009 by Chief Judge Lesnick. Ex. S-8-01; *See also* Tr. 95.

On February 9, 2010, the Secretary filed his third request for extension of time, which was granted by Chief Judge Lesnick on March 11, 2010. With the granting of the third extension request, the due date for filing the Petition was *May 10, 2010* (emphasis added). On November 9, 2011,[3] the Secretary filed his Petition in the instant case together with a motion for leave to file a late petition. Ex. R-4.

On November 15, 2011, Respondent filed a response in opposition to the Secretary's motion for leave to file a late petition, as well as a motion to dismiss late filed petition. On January 25, 2012, Chief Judge Lesnick issued an order accepting the Secretary's Petition and denying Respondent's request for dismissal.

On March 2, 2012, Chief Judge Lesnick certified this matter for interlocutory appeal. On March 15, 2012, the Commission ordered interlocutory review. Following the Commission's August 20, 2012 decision in *Long Branch II*, supra, this matter was remanded to Chief Judge Lesnick for further proceedings. *See Pocahontas Coal Company, et al.*, 34 FMSHRC 2561, 2563 (Oct. 2012). According to *Pocahontas Coal Company*, the Commission allowed Respondent to renew its motion to dismiss. *Id*. On October 23, 2012, Chief Judge Lesnick assigned this matter to the undersigned.

After prehearing conferences, it was agreed by the parties that this Court would bifurcate the case, initially holding a hearing solely limited to the issue of whether the Secretary's Petition should be dismissed due to untimely filing. As noted supra, the hearing was accordingly held on February 2, 2013. This decision is based upon said hearing testimony and the parties' post-hearing and reply briefs.

SUMMARY OF THE TESTIMONY

I. Rebecca Kollar

At hearing, Rebecca Kollar ("Kollar") appeared and testified on behalf of the Secretary. Kollar testified that she worked for MSHA in its District 2 Mt. Pleasant office. Tr. 25-26. She started with MSHA in October 2006, and her original position was Mine Safety and Health Assistant SI. Tr. 26. Kollar later became an assistant for the CLRs in March 2008. Tr. 26.

[3] As shall be discussed *infra*, the Secretary indicates that the case file was inadvertently lost for a time period prior to its filing.

According to Kollar, due to the increase in paperwork and the civil penalty cases, it had become necessary to create separate positions: one assistant for special investigations and one for conference and litigation. Tr. 26.

During the time period between 2009-2010, Kollar was responsible for all of the administrative work associated with litigation. Tr. 27. When a new case came into the office, she would receive it from the Office of Assessments, "telling (her) it was a docket." Tr. 27. She would request notes from the field office and citations, set up the folder and enter the information into a spreadsheet that she used to keep track of the dockets. Tr. 27.

After creating the case file, Kollar assisted the CLRs with their active cases in the following ways. She would send out ninety-day extension letters. Tr. 27. When necessary, she would mail cases to the Solicitor's office, or possibly another district. Tr. 27. Whatever her supervisor requested, she would perform, including keeping track of statistics on the caseload in the office by maintaining a spreadsheet. Tr. 27-28. Each month, she submitted a report to headquarters, providing a "snapshot of what was in the District office at that time." Tr. 28.

Referring to the Secretary's Exhibit 1, Kollar identified the document as the monthly report submitted to headquarters in February 2009. *See also* Tr. 28. In preparing monthly reports, she stated that she would review her spreadsheet, including the caseload in the office, to compile the numbers "to give [...] an idea of what needs to be worked on in the district." Tr. 28. On page 1 of Secretary's Exhibit 1, the Conference Backlog referred to safety and health conferences, also possibly including penalty cases that were set up in conferences. Tr. 29. Civil penalty cases were cases in which the penalty had already been assessed; safety and health conferences were cases where the penalty had not yet been assessed. Tr. 29. "Enhanced" safety and health conferences signified cases where the penalty had already been assessed. Tr. 29.

Under "Contested Cases," the cases were broken down into ones in which a petition had been filed and ones in which a petition had not yet been filed. Tr. 29; Ex. S-1. There was some overlap between the cases where petitions had not been filed and the conference backlog because not every civil penalty cases listed in the report was in a conference at that time. Tr. 29. Since the cases were not all set up in an enhanced conference, there could be some overlapping in the numbers. Tr. 29-30.

The total of 140 in the conference backlog signified that there were 140 conferences that needed to be worked on; the number of violations, 571, stood for the amount of citations involved in the 140 conferences. Tr. 30.; Ex. S-1, pg. 1. The number 186 reflected the number of civil penalty cases in the office that were awaiting petitions to be filed, and the number 719 indicated the number of violations/citations associated with such. Tr. 31; Ex. S-1, pg. 1. The number 59 indicated the number of cases in which the civil penalty petition had been filed, and the number 144 indicated the number of citations/violations involved. Tr. 30; Ex. S-1, pg. 1.

Kollar kept track of the cases in which petitions had been filed on her spreadsheets. Tr. 30; Ex. S-1.

Further referring to the Secretary's exhibit, Kollar stated in May 2009, there were 302 conferences involving 1,200 citations in the conference backlog. Tr. 31; Ex. S-1, pg. 4. The number of CLR contested cases in which no petition had been filed was 309, which involved 1,245 violations. Tr. 31; S-1, pg. 4. There were also 34 pending CLR cases in which a petition had been filed involving 62 violations. Tr. 32; S-1, pg. 4.

Kollar testified that in August 2009, there were 449 conferences with 1,869 violations in the backlog. Tr. 32; Ex. S-1, pg. 7. The CLR contested cases in which a petition had not been filed numbered 414 with 1,728 violations. Tr. 32, Ex. S-1, pg. 7. Pending contested cases in which a petitions had been filed numbered 15 with 32 violations. Tr. 32; Ex. S-1, pg. 7.

Kollar stated that in November 2009, there were 470 conferences involving 1,966 violations in the backlog. Tr. 32-33; Ex. S-1, pg. 10. The number of cases where a petition had not been filed was 512 with 2,086 violations, and 4 cases with 7 violations had been filed. Tr. 33; Ex. S-1, pg. 10.

Finally, Kollar testified that in February 2010, there were 454 conferences with 1,899 violations in the backlog. Tr. 33, Ex. S-1, pg. 13. The number of cases where a petition had not been filed was 543 with 2,194 violations. Tr. 33, Ex. S-1, pg. 13. There were 26 cases involving 126 violations where petitions had been filed. Tr. 33; Ex. S-1, pg. 13.

Kollar indicated that during her tenure as a CLR assistant, the number of backlog cases grew on a monthly basis. Tr. 33-34. There were three CLRs dealing with the influx – Edward Lewetag, Joseph Hardy and Eugene Kelly. Tr. 34. However, Kollar was the only CLR assistant. Tr. 34. In an effort to deal with the increasing backlog, Kollar, at the direction of headquarters or Lewetag, began submitting ninety-day extension letters to the Commission to extend the date for filing a petition for civil penalty. Tr. 34. She further prepared her spreadsheet so that she could be reminded when a petition was due, and a request for extension of time had to be made and/or when re-extension of time had to be made. Tr. 35. She usually checked the spreadsheet on a daily basis. Tr. 35. If she had spare time, she would draft letters requesting extensions in advance, sometimes a week or more in advance. Tr. 35. Lewetag would sign the extension requests and Kollar would mail them to the Commission; however, she would wait for Commission approval to notify the operators. Tr. 35-36.

Kollar could not remember specifically how often the Commission approved the extension of time requests nor could she remember having received any denials of the request. Tr. 36. The approval time typically ranged from "a couple every day" to a few weeks. Tr. 36. She would then usually deal with Susan Jordan ("Jordan") in the Solicitor's office, and Lewetag would direct her as to what cases need to be sent to the Solicitor's office. Tr. 36-37.

Once Kollar was directed to forward a case to the Solicitor's office, she would pull the case out of the filing drawer and double check "to make sure it had everything in it that it needed." Tr. 37. She would then package it and mail it to the Solicitor by certified mail. Tr. 37. She noted in a separate tab of her spreadsheet the date she had mailed the case file so that she would know what happened to the case. Tr. 37. She would also normally contact Jordan by email that a particular case was being sent. Tr. 37. The cases sent would remain on Kollar's spreadsheet until she "received the green card back that the docket was actually signed for." Tr. 38. She identified Secretary's Exhibit 2 to be a copy of the certified receipt card, which was on a package mailed to Jordan that contained five cases. Tr. 38. Kollar also identified her email advising Susan Jordan of the mailing. Tr. 39, Ex. S-1, pg. 2. The instant case was included in the mailing, and the return receipt card was dated January 30, 2010. Tr. 39; Ex. S-2, pg. 2. Kollar submitted an extension letter for this docket in February 2010, which was linked to Docket No. PENN 2009-586, another PBS Coals docket with the same assessment control number. Tr. 40.[4]

In October 2011, Kollar received an email "looking for some petitions that were not filed with the Commission." Tr. 41. The instant case was one of the dockets being inquired about. Tr. 41. Kollar tried to determine where the docket was by searching the office and double-checking boxes. Tr. 41. She eventually "realized" that this case had been sent to Jordan. Tr. 41. Kollar contacted Jordan to inform her that the docket had been mailed to her; however, Jordan responded that she did not have the file. Tr. 41. Kollar then recreated the file by gathering "the citations and the notes the best of my ability" and mailed the recreated file to Jordan. Tr. 41-42.
Kollar estimated that the length of time from being notified regarding the missing case to recreating and mailing such to the Solicitor's office was three to four days. Tr. 42.

Kollar further testified that her CLR office no longer requests extensions of time for filing civil penalty petitions. Tr. 42. Because of this, her spreadsheet has changed, and the columns were "now gone because we do not have extension letters anymore." Tr. 42-43. This policy change occurred because of a decrease in dockets due to the creation of and forwarding of cases to the backlog groups. Tr. 43. The CLR office could now handle cases more easily because of the reduced docket size. Tr. 43.

On cross-examination, Kollar testified regarding the actual number of enhanced conferences held in District 2 in 2009. In February, there were three conferences, involving four violations. Tr. 45. In March, there were two conferences, involving three violations. Tr. 45. In April, there were no conferences held. Tr. 45. In May, there were three conferences, involving nine violations. Tr. 45. In June, there were four conferences, involving nine violations. Tr. 45. In July, there were two conferences, involving two violations. Tr. 45. In August, there was one conference, involving five violations. Tr. 46. In September, there were two conferences, involving six violations. Tr. 46. In October, there were fifteen conferences, involving sixty-two violations. Tr. 46. In November, there were seven conferences, involving

[4] Docket No. 585 appears interposed in the transcript as 558.

twenty-one violations. Tr. 46. And, in December, there were three conferences, involving twenty-six violations. Tr. 46; *See also* Ex. S-1, pgs. 2-10. Kollar testified that in January 2010, there were eleven conferences held, involving twenty violations. Tr. 46; Ex. S-1, pg. 12.

As to the number of referrals to the Solicitor's office in 2009, Kollar testified that there were no cases referred from March to May 2009, in August 2009, and from November to December 2009. Tr. 47-48. There was one case involving one violation referred in June 2009. Tr. 47. There were two cases with nine violations referred in July 2009, and one case with two violations referred in September 2009. Tr. 47. Ex. S-1, pgs. 1-11. From February 2009 to January 2010, there was a total twelve cases referred to the Solicitor's office, which Kollar acknowledged was not a "huge" number. Tr. 48-49.

As to Docket No. PENN 2009-585, Kollar testified no conference had been held regarding such during the time the case had been in District 2 from when the Order was issued on November 19, 2008 until the end of January 2010. Tr. 49. She again confirmed that she had sent the case by certified mail to the Regional Solicitor's office, emailing notice of such. Tr. 49. Although she had checked the return receipt card to assure that it had been received, Kollar did not personally know who the individual was who had signed the receipt. Tr. 48-51; Ex. S-1, pg. 1.

Kollar testified that she had filed a request for extension of time to file a petition for assessment of civil penalty in February 2010 for both Docket No. PENN 2009-585 and 2009-586.[5] Tr. 52. However, she could not remember how many extensions had been filed for the docket(s). Tr. 52. Kollar testified that it took approximately twenty to thirty minutes to physically prepare the petition for assessment for Docket No. PENN 2009-585. Tr. 54. She could not remember from whom the inquiry regarding the missing docket was sent from. Tr. 54.

On redirect examination, Kollar explained that cases come in daily to the CLR office. Tr. 55. After 2010, approximately 550 cases were transferred from District 2 to the Solicitor's office backlog group. Tr. 56.

II. Edward J. Lewetag

At hearing, Edward J. Lewetag also appeared and testified on behalf of the Secretary. He stated that he worked for MSHA at the Northeast Metal/Nonmetal District Headquarters as a CLR. Tr. 57. He had joined MSHA in December 1992 as a surface and underground coal mine inspector, working in this position until August 2004 when a ventilation specialist job opened, which Lewetag was qualified to perform. Tr. 57-58. He was also awarded a collateral duty accident investigation position while maintaining his coal mine inspector's position. Tr. 58.

[5] There was some question raised as to whether the filing for Docket No. PENN 2009-585 was inadvertent. Tr. 52.

In October 2006, the district conference and litigation representative, Ron Miller, announced his retirement. Tr. 58. Lewetag applied for and received this position. Tr. 58. When Miller retired, there was only one CLR in District 2. Tr. 59. Lewetag stated that he had seen a dramatic increase in contested citations after the 2006 revisions to Part 100 that "substantially increased the amount of fines of the citation, the assessments and the citations." Tr. 59. By the spring of 2008, he felt that he could no longer handle the workload in District 2 by himself. Tr. 59. He was informed by the district manager that one, and possibly two, more CLR(s) were going to be hired, plus a Secretary. Tr. 59.

Lewetag applied and was approved for the position of supervisor in the enlarged office in March or April of 2008. Tr. 60. His responsibilities as District 2's Supervisory CLR included supervising the two other CLRs and Kollar, as well as managing case development, including assigning the cases. Tr. 61-62. Because of the "enormous" number of cases that arose within the prior two-year period, Lewetag had to come up with a tracking system to keep up with the incoming dockets. Tr. 61. He also continued his own workload of litigating cases. Tr. 61.

Indicating that he was not a trained attorney, Lewetag testified that twenty dockets containing seventy to eighty citations was his limit. Tr. 61-62. He stated that trying to maintain more than twenty dockets was "too cumbersome" and involved "too much paperwork to keep track of." Tr. 62. He testified that the first CLR who was hired, though an excellent electrical specialist, did not work out as a representative. Tr. 62. Eventually, two other individuals were retained as CLRS. Tr. 62. Lewetag advised them to start out with five dockets with possibly fifteen to thirty citations, until they became "comfortable with the program." Tr. 62. The average number of dockets that he and the other two CLRs would work on was probably fifteen. Tr. 63.

With respect to litigating cases and developing a case, Lewetag would speak with the inspectors who issued the citations and check as to whether the issued citation complied with the safety standard cited. Tr. 63. Once familiar with the facts of the case, Lewetag would contact the cited company's representative, who could be a safety director or attorney, to explore the company's positions, compare facts and attempt to negotiate an amicable settlement. Tr. 63. While he was uncertain regarding the actual process of deciding which cases were sent to the Solicitor's office, he believed that cases involving accidents or fatalities were assigned to the appropriate Regional Solicitor by the Office of Assessments. Tr. 63.

If Lewetag or his fellow CLRs were unable to reach a settlement, Lewetag would contact Jordan in the Philadelphia Regional Solicitor's office and advise her that the docket in question could not be settled. Tr. 64. Lewetag ultimately made the decision to release the case to the Solicitor's office. Tr. 64.

Lewetag described Kollar as an "excellent" secretary who was "exceedingly organized." Tr. 64. Kollar helped set up the District 2 office's docket tracking system, starting with an Excel spreadsheet. Tr. 65. Within two and a half years, the docket had increased from thirty to

three hundred cases. Tr. 65. When downloads would come in from MSHA, they would be entered into District 2's own database so that the forty-five day window to file petitions was kept track of.[6] Tr. 65.

Although unsure of the specific time period, Lewetag indicated that there was a time frame during which the Commission had allowed the District 2 office to file ninety-day extension requests. Tr. 65. The office had to keep track of these extension requests as well. Tr. 65. Lewetag utilized office overtime for the staff to prepare the requests, which were usually to be sent out a week before the forty-five day time period for filing a petition for assessment of civil penalty had expired. Tr. 65.

Lewetag stated that District 2 was sometimes receiving forty to fifty dockets monthly in addition to the five hundred dockets that were already in the office. Tr. 66. There were "literally hundreds of ninety-day extensions requests that (District 2) was applying for." Tr. 66. The requests for extension were being sent to Chief Judge Lesnick for approval. Tr. 66. When Ron Miller had retired, there were only approximately thirty dockets with about sixty to seventy citations in the office. Tr. 66. By the time Lewetag had become the office supervisor, there were over 2,000 citations and orders. Tr. 66. In Lewetag's opinion, the "astronomical" increase in caseload had "overwhelmed" the Commission, the companies and the MSHA attorneys as well. Tr. 66. He further testified that the increase in the office caseload leveled off in the spring of 2011, at which time it had become "somewhat more manageable." Tr. 67. He left the office in October 2011. Tr. 67.

[6] *See* Commission Rule 2700.28(a) providing that "within 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for assessment of penalty." 29 CFR § 2700.28(a).

During his stay as the Supervisory CLR, Lewetag only had a maximum of three CLRs, including himself in District 2. Tr. 68. He never had more than one administrator. Tr. 68. He further never had the authority to hire more staff. Tr. 68. He attempted to deal with the increasing caseload by suggesting global settlements. Tr. 68. After participating in his first global settlement,[7] Lewetag approached his district manager about exploring this method with other companies. Tr. 68. Within eight to ten months, nearly three hundred dockets were settled by District 2 CLRs with the assistance of the Philadelphia Regional Solicitor's office. Tr. 68-69.

As a supervisor, Lewetag was always concerned that, due to a lack of sufficient personnel and the "enormous" caseload, the office would "default" on cases. Tr. 70. Commencing in approximately 2009, office procedures changed to avoid the redundant effect of holding conferences on both the contest and penalty aspects of the citation. Tr. 70-73. At this time, the Commission and MSHA "came up" with health and safety conferences. Tr. 71-72.

To keep up the filing of civil penalty petitions, Lewetag utilized MSHA templates. Tr. 73. After the Part 100 revisions, the option of extensions was offered to the CLRs, which would buy them up to ninety days. Tr. 74. Lewetag estimated that his office filed ninety-day extension requests in forty percent of the dockets. Tr. 74. He had first learned of the extension policy through conference litigation conference calls. Tr. 74-75. Once the requests were authorized by MSHA headquarters, Lewetag had discussions with Kollar as to how to keep track of the extension requests, including the use of an Excel database or spreadsheet. Tr. 75.

The dockets were handled chronologically. Tr. 76. Those dockets that were in the office the longest were the first ones to have an extension request applied for because they were the first ones to be potentially assigned to an ALJ or a prehearing. Tr. 76. Lewetag had directed Kollar to start at the top of the list with the oldest dockets. Tr. 76. However, he did not discuss each individual docket extension request with Kollar. Tr. 76. Though Kollar had excellent organizational skills, she had no background in coal or in the office's "process legally." Tr. 76-77. A template, created between the Commission and MSHA, was utilized for the extension requests. Tr. 76.

[7] Lewetag was uncertain as to the actual starting date of the global settlements, which may have been 2008. *See* Tr. 70.

After Kollar was informed to prepare extension requests on a group of dockets and completed such, she would bring them to Lewetag's office for his signature. Tr. 77. During his time as Supervisory CLR in District 2, Lewetag would usually contact the major coal operators[8] by phone and request their agreement with the Secretary as to a ninety-day extension on filing a petition for civil penalty. Tr. 77-78. After a few weeks, Lewetag found that he was making thirty to forty phone calls, sometimes to the same operator, within a week's time. Tr. 78. After a conference call, it was suggested that a blanket approval for extension requests be obtained from the operators' representatives, who could be an attorney or someone else designated by the company. Tr. 78. Lewetag accordingly proceeded to call or email companies regarding this revised procedure for obtaining approval for extensions. Tr. 78. He could only recall one company that refused to give the blanket approvals.[9] Tr. 78.

Lewetag followed up his communications with the operators with an email so that he could provide some documentation to the Commission if any questions arose. Tr. 80. He specifically named the following operators and representatives that had agreed to the blanket approval procedure: Cumberland and Emerald Coal companies, representated by Hank Moore, Esq.; Rosebud Mining Company, represented by Joseph Yuhas, Esq.; and PBS Coals, Inc., represented by Tom Todd ("Todd"). Tr. 80-81; Ex. S-9, pgs. 1-2. The email sent to Todd was sent on April 6, 2009 at 10:13 A.M., and by return email on April 6, 2009 at 4:51 P.M., Todd agreed to the extensions. Tr. 81; Ex. S-9, pg. 1. Lewetag forwarded the emails to Kollar, and he kept a folder for each company with the "email traffic," as did Kollar. Tr. 81-82. Lewetag testified that he always had "very professional, very good" interactions with Todd and Respondent's counsel, Melanie and Vincent Barbera during 2009 and 2010 and had never received any complaints regarding the filing times of civil penalty petitions. Tr. 82.

After a certain period of time, Lewetag testified that MSHA realized that the policy of requesting civil penalty filing time extensions was no longer viable. Tr. 83. At this time, MSHA reached out to the Regional Solicitors' offices to request assistance for the CLRs. Tr. 83. Eventually, about the time that he was up to requesting his fifth ninety-day extension, Lewetag was told to stop. Tr. 83. A significant portion of District 2 dockets was then transferred to the Philadelphia Regional Solicitor's office. Tr. 84.

Given that there were only three CLRs in District 2, each of whom was working on possibly twenty dockets at a time, and given the five hundred plus docket workload, Lewetag testified that the "program" would have failed but for utilization of the extension requests. Tr. 84-85. Without the extension requests, the available personnel in District 2 would have been overwhelmed. Tr. 85. On cross-examination, Lewetag agreed with Respondent's counsel that

[8] Lewetag indicated that five or six coal companies generated sixty to seventy percent of all of the dockets in District 2. Tr. 77.

[9] As best as Lewetag could recollect, only a small operator, Dana Mining Company (not Respondent), had refused the blanket extension request proposal. Tr. 79.

the only responsible way to handle cases, whether one was an attorney or non-attorney, was to have a good case filing and tracking system. Tr. 86-87. He further agreed that, since memory fades over time, a good case tracking system was necessary. Tr. 88.

Referring to his April 6, 2009 email to Todd, Lewetag agreed that the subject line of the email was entitled "conference extension." Tr. 89-90; Ex. S-9, pgs. 1-2. He further agreed that the email did not specifically reference ninety-day extensions for filing petitions for civil penalty. Tr. 92. Lewetag asserted, however, that he had verbally explained the blanket extension request process to Todd. Tr. 92-93.

Lewetag also testified that he did not have a conference with Todd on the docket at issue. Tr. 93. After Respondent had filed its notice of contest on June 26, 2009, Lewetag filed his first ninety-day extension request on August 7, 2009, subsequently filing a second ninety-day extension request on November 13, 2009.[10] Tr. 94. Lewetag was uncertain as to how he received the extension order from the Commission, but believed that the Commission had faxed a copy to District 2. Tr. 94.

Lewetag confirmed that any docket sent out of District 2 by Kollar to the Solicitor's office, including Docket No. PENN 2009-585, would have only been sent with his approval. Tr. 98. As to the date in January 2010 that the five dockets had been transferred out, no petition for the docket at issue had been filed. Tr. 99. Approximately ten to eleven days after this docket had been transferred to the Solicitor's office, Lewetag filed a third extension request as a "professional courtesy" in order to give the Solicitor's office more "breathing room" to file the petition. Tr. 100.

On redirect examination, Lewetag testified that the proposed penalty assessment in the instant case was generated in the Office of Assessments in Arlington. Tr. 102. If a case had a scheduled enhanced health and safety conference, the civil penalty petition would not have been filed. Tr. 104. It was Lewetag's concern that if all of the three hundred plus dockets in District 2 had their petitions for civil penalty filed at the same time, the Commission would have been "overloaded." Tr. 105. With only three CLRs working, he believed he would have been forced to approach Chief Judge Lesnick to advise him that District 2 could not comply with a significant portion of the prehearing orders issued by the Commission Administrative Law Judges. Tr. 105. He stated that "[i]t would have been the end of the program." Tr. 105.

Lewetag further testified that the Secretary's Exhibit 2 reflected only one transfer of dockets in 2010 out of a number of such transfers. Tr. 105-106. Referring to the November 17, 2009 order of Chief Judge Lesnick granting an extension of time to file petitions for assessment of civil penalty in Docket Nos. PENN 2009-585 and PENN 2009-586, Lewetag notes multiple other dockets included in the order. Tr. 107; Ex. S-8, pg. 1.

[10] There was originally some question as to whether the November 13, 2009 request had been filed. The parties only confirmed the existence of such shortly before the hearing. Tr. 95.

On re-cross examination, Lewetag again asserted that District 2 could not have timely filed all of the petitions for assessment with only three CLRs without submitting extension of time requests. Tr. 109-110. He conceded that he did not specifically know how the Commission and its administrative law judges would have handled the situation if District 2 had filed all of the petitions at once. Tr. 111.

III. Thomas Todd

At hearing, Thomas Todd appeared and testified on behalf of Respondent. Todd has been employed by Respondent for four years, commencing in January 2009. Tr. 117-118. Todd has a Bachelor of Science degree in Mining Engineering from the University of Pittsburgh. Tr. 118. After graduation, he worked as a blasting consultant, then as a service mine consultant. Tr. 118. He worked for MSHA for twenty-one years, commencing in 1987. Tr. 118. He started as a general engineer and later became an inspector. Tr. 118. Throughout his time with MSHA, he was an accident investigator, mine rescue member, ventilation specialist, health specialist, assistant district manager, staff assistant and field office manager. Tr. 118.

When Todd began at PBS, he had the position of vice president in charge of safety. Tr. 119. As such, his duties included: oversight of all safety programs at underground mines, surface mines and cleaning plants; oversight of citations and orders issued; consideration of whether citations and orders should be paid or contested and tracking such through the system. Tr. 119. Todd testified that when he started with PBS, he was responsible for approximately eighty dockets with multiple citations. Tr. 119. He oversaw the contests of all dockets, including cases which were vacated, settled or pursued to decision. Tr. 119-120. He indicated that the number of citations issued and fines assessed at PBS had remained consistent; although, there might have been a slight increase in 2009. Tr. 120. There had been a steady inflow of citations with no increase in staff. Tr. 121.

Todd testified that, after the proposed assessment for Order No. 7021450 was filed on June 9, 2009, he never had any negotiations with Lewetag or any other CLR regarding this particular Order. Tr. 122. However, he did have negotiations with Lewetag and other CLRs that led to the successful resolution of other citations. Tr. 122.

Referring to the email exchange between himself and Lewetag, Todd stated that he believed that the email extension request was referring only to cases that he and Lewetag were having conferences on. Tr. 123; Ex. S-9. Todd had not intended to agree to blanket extensions on the filing of civil penalty petitions on non-conferenced cases, including the Order at issue. Tr. 123. He further testified that he did not know that the case at issue had been transferred to the Solicitor's office. Tr. 124. He never agreed to any kind of "unlimited extension" on the case. Tr. 125. He further stated that he did not agree to any extension of time for a filing the Petition from May 12, 2011 to the actual filing date of November 9, 2011. Tr. 125.

Referring to the cover letter from the Secretary informing Respondent that the Petition had been filed in this docket, Todd confirmed that the date on the cover letter erroneously stated

November 9, 2010, rather than November 9, 2011.[11] Tr. 126; Ex. R-4. He further confirmed that Respondent had actually filed a timely contest, despite the Secretary's wording in the Petition and motion for leave to file a late petition that the Order at issue may not have been, in fact, as yet contested. Tr. 128-129; Ex. R-4.

Todd testified that four of Respondent's employees who were witnesses to facts relevant to the case where no longer employed by Respondent: John Matsko ("Matsko"), Larry Heist ("Heist"), Michael Merringer ("Merringer") and Michael Reilly ("Reilly"). Matsko was safety director of the surface mines in 2008 when the Order was issued. Tr. 130. He had reportedly retired due to "failing health." Tr. 130-131. Todd indicated that "sometimes (Matsko) can get around and sometimes he can't." Tr. 131. Heist was supervisor of the miner that was involved in the Order and supervised the mechanics and welders. Tr. 131. He had gone on short-term disability due to his failing health and, eventually, had left employment due to such. Tr. 131. He had difficulty coming out of his house on a regular basis. Tr. 131. Merringer was a mechanic for Respondent, working very near the scene where the accident took place; and Reilly was also a mechanic employed by Respondent at the time that the Order was issued. Tr. 132. Todd also expressed concern that the passage of time might affect the memories of those who would testify in this case.[12] Tr. 132-133.

On cross-examination, Todd conceded that he had not identified Reilly as missing fact witness in a prior affidavit dated November 12, 2012. Tr. 133-134; Ex. R-B. He further conceded that, as of January 11, 2013, the accident victim, Chad Younkin, was available to testify. Tr. 135. Finally, Todd admitted that Matsko and Heist had contributed to multiple answers in Respondent's reply to the Secretary's discovery request. Tr. 138. Though not knowing the exact number, Todd admitted that Respondent had not objected to multiple requests by the Secretary in 2009 and 2010 to extend the deadlines for filing petitions for assessment of civil penalty. Tr. 139.

Referring to Docket No. PENN 2009-586, also assessment control number 187277, Todd confirmed that the decision approving settlement had not been issued until May 18, 2011. He agreed that, in response to the Secretary's August 7, 2009 request for extension of time to file the petition for assessment of civil penalty for Docket Nos. PENN 2009-585 and PENN 2009-586, Chief Judge Lesnick had granted such request on October 8, 2009. Tr. 143-144; *See also* Ex. R-A, pgs. 15-17. In response to a second request for a ninety-day extension filed on November 13, 2009, Todd agreed that Chief Judge Lesnick had granted the extension on November 13, 2009. Tr. 144-145; Ex. R-A, pgs. 13-14. He also agreed that there were some violations dating to the time of this matter that still had not been resolved. Tr. 150-151.

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[11] The Petition itself was dated November 9, 2011.

[12] The undersigned is reminded of William Gibson's observation, "Time moves in one direction, memory in another."

In response to questioning by the undersigned, Todd testified that he actually had not spoken with the witnesses, Matsko, Heist, Merringer or Reilly, regarding the accident and Order at issue. Tr. 151-153.

IV. Donald R. Foster

Donald R. Foster appeared and testified as a rebuttal witness on behalf of the Secretary. Foster had worked for MSHA in District 2 since June 2006. Tr. 156. He had been hired as an electrical specialist and worked as such until 2011. Tr. 156. He is currently the staff assistant for the district manager. Tr. 156.

Foster testified that he had investigated the accident on November 24, 2008. Tr. 157. This investigation had led to his issuance of Order No. 7021450. Tr. 157. He had interviewed Respondent's employees Matsko, David Flick, Butch Demich, Merringer, Reilly and Heist. Tr. 157-158. He also had spoken with Mr. Barbera on that day. Tr. 158.

V. John Stepanic

John Stepanic ("Stepanic") also appeared and testified as a rebuttal witness on behalf of the Secretary. He testified that he had worked as a supervisory special investigator for MSHA in District 2. Tr. 160. Stepanic had contacted Merringer to find out if Merringer was available to attend a trial within the next six months. Tr. 160-161. According to Stepanic, Merringer indicated that he would have "no problem" showing up for trial so long as he was given ample notice. Tr. 161.

FINDING OF FACT AND CONCLUSIONS OF LAW

I. Respondent's argument that it has no burden to establish prejudice if the Secretary fails to demonstrate adequate cause is accepted by the undersigned as a correct interpretation of the Commission's ruling in *Long Branch II*, *supra*.

At hearing and in its post-hearing memoranda, Respondent has argued that in the absence of a finding of adequate cause, it would have no burden to establish prejudice and that, accordingly, this Court would not be required to balance the public interest in the enforcement of the Act and the harm to each party. Tr. 20-21; *See also* PBS Coals, Inc.'s Closing Statement. The undersigned finds that Respondent's position is the proper interpretation of *Long Branch II*.

Footnote 12 of *Long Branch II* states:

> While the *Salt Lake* formulation may operate as a two-part test in some cases, it is more precisely understood as a requirement that each party bear the burden of production on the respective issues of adequate cause and prejudice, with the judge required to balance the public interest and the harm to each party if both adequate case and prejudice are shown. Thus, if the Secretary fails to demonstrate adequate cause, the operator has no burden to establish prejudice, and there is no "two-part test." Similarly, if both are established, the "two-part test" does not resolve the issue in and of itself, because the judge would be required to resolve the tension among competing interests. Our decision today, like those in *Medicine Bow* and *Rhone-Poulenc* reasserts, and is consistent with, this framework constructed in *Salt Lake*. (Emphasis added).

34 FMSHRC at 1991 (Aug. 2012).

Contrary to the Secretary's assertion that, even in the absence of a finding of adequate cause for late filing, the operator would still have a burden to establish prejudice, the Commission's express language in *Long Branch II* clearly and plainly establishes no such burden. Accordingly, if the Secretary had failed to establish adequate cause for its untimely filing in the case *sub judice*, no burden would be imposed on Respondent to establish prejudice. However, as discussed *infra*, this Court does find that adequate cause has been established by the Secretary, thus rendering this issue of case law construction essentially moot.

II. The Secretary has established adequate cause for his late filing.

In *Long Branch II*, the Commission essentially reaffirmed its decision in *Salt Lake* that the Secretary must establish "adequate cause" for delayed filing of petitions for assessment of civil penalty. The Commission states, "[i]n order to help strike a proper balance and to insure (sic) that the Secretary does not ignore Section 105(d)'s injunction to act 'immediately,' we hold that if the Secretary does seek permission to file late, he must predicate his request upon adequate cause." *Id*., 34 FMSHRC at 1990 (citing *Salt Lake*, 3 FMSHRC at 1716).

In assessing whether the Secretary has established "adequate cause," the Commission further set for the following considerations in *Long Branch II*:

> In sum, pursuant to *Salt Lake*, the Secretary may not, on a "mere caprice," ignore the Commission's procedural rule regarding deadlines for filing penalty petitions. At the same time, we must adhere to the basic administrative law principle that, where the government can be said to have acted reasonably – i.e., not on a whim or in dereliction of its duties to uphold the law – an overarching interest in prompt and efficient enforcement precludes the dismissal of substantive proceedings on procedural grounds in the absence of prejudice. *Id*. Thus, regardless of how

> important procedural regularity may be, it is subservient to the substantive purpose of the Mine Act in protecting miners' health and safety. As stated in *Salt Lake*, "[w]e do not mean to intimate that insuring procedural fairness is not an important concern under the Mine Act. However effectuation of the Mine Act's substantive scheme, in furtherance of the public interest, is more crucial." *Id*. We therefore balance concerns for procedural regularity against the severe impact of a dismissal on the Mine Act's penalty scheme.
>
> In order to achieve this balance, we clarify that "adequate cause" may be found to exist where the Secretary provides a non-frivolous explanation for the delay. The Secretary's excuse may not be facially implausible, and should be supported by evidence sufficient to establish that the delay did not result from "mere caprice" or through willful delay, intentional misconduct, or bad faith. This ensures that the Secretary is upholding her commitment to the public interest, while recognizing that dedicated public servants may stumble in the performance of their duties.

Id., 34 FMSHRC at 1991.

Here, the Secretary presented testimony that the Department of Labor had faced a substantial increase in civil penalty proceedings during the time period that the instant Petition was due. Tr. 59. Supervisory CLR Lewetag testified regarding the "dramatically" increasing caseload in District 2, and the exponential growth in dockets from 30 involving 60-70 citations and orders to 300-500 dockets involving 2,000 citations and orders. Tr. 59, 65-66. Lewetag further described the various measures taken by MSHA District 2 to deal with the burgeoning caseload, including the hiring of two additional CLRs, the hiring of Kollar as an administrative assistant, and the use of (blanket) extension requests. Tr. 26, 62, 78.

Given the District 2 caseload and his multiple conference, litigation, administrative and supervisory duties outlined in his testimony, *supra*, Lewetag was clearly a busy individual with multiple responsibilities during the time period that the instant Petition was due to be filed. Likewise, Kollar, the only administrative assistant in District 2, would have had a demanding workday during the same period. Further, the declaration of Jordan, MSHA Regional Counsel in the Philadelphia Solicitor's office, reasonably described the time period during which the case file was possibly lost in transit or at the Solicitor's office as one involving a large volume of incoming cases. Ex. S-7.

The undersigned accepts the arguments advanced by Respondent to the extent that the Secretary's explanation regarding the missing case file was less than compelling. However, *Long Branch II* only requires that the Secretary's excuse "not be facially implausible." Given the large volume of cases coming into the Regional Solicitor's office – not only from MSHA, but also from FLSA, OSHA, Black Lung and ERISA – the undersigned finds it at least plausible that one case file "could have been lost in the shuffle." As the Commission recognized in *Long Branch II,* "[...] dedicated public servants may stumble in the performance of their duties." *Id*. at

1991. Further, the undersigned notes that the Commission presumes that the Secretary's agents generally act in good faith to uphold the timely enforcement of penalties under the Act. *Id*. at 1991, Footnote 11.

The undersigned accepts Respondent's arguments in its post-hearing brief to the extent that the Secretary could have presented more detailed evidence as to the Solicitor's office's procedures to ensure that cases are properly tracked and deadlines followed once files are transferred into the Regional office. *See* Respondent's Post-Hearing Brief, pgs. 2-3. If the burden of proof were beyond a reasonable doubt, the Secretary would have failed to carry such in this matter. Indeed, as noted infra, if this case involved a minor technical violation, the minimal (albeit legally sufficient) showing of adequate cause by the Secretary would have been another factor favoring the granting of dismissal for untimely filing. However, not withstanding Respondent's arguments, the undersigned found nothing in the documentary and testimonial evidence presented to suggest that the late filing of the Petition and/or loss of the case file was due to "mere caprice,[13] willful delay, intentional misconduct or bad faith" on the part of any individual in MSHA District 2 and/or the Philadelphia Regional Solicitor's office.

The undersigned recognizes Respondent's frustration over the untimeliness of the Petition. Moreover, he accepts that Respondent may have not, in fact, consented to the extensions of time filed by MSHA and the Solicitor and that the wording of Lewetag's above discussed email may have been confusing and poorly phrased. However, the undersigned finds that any miscommunication and resultant misunderstanding regarding MSHA or the Solicitor's requests for extension of time were not because of any bad faith scheme to willfully delay the requisite filing.

Similarly, the undersigned accepts that Respondent also had a large caseload during the time period in question and may have had a better case management and/or case tracking system than District2 and/or the Solicitor's office. However, the issue is not whether Respondent may have been able to handle a large docket in 2009 and 2010 without resorting to multiple requests for extensions of time to file pleadings and/or without experiencing loss or misplacement of a case file.

The issue ultimately is whether the Secretary offered a non-frivolous explanation for the late filing. There certainly may have been more efficient and effective ways of dealing with the backlog and/or managing and tracking cases than those utilized by MSHA and the Solicitor's office. However, the undersigned found the Secretary's excuse to be facially plausible. Therefore, the undersigned finds that the Secretary has managed to hurdle – albeit a low bar – the requirement of establishing adequate cause in the within matter.

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[13] *See also* definition of "caprice" in *Merriam-Webster* dictionary: "A sudden, impulsive, and seemingly unmotivated motion or action." Again, the undersigned finds that the record, in *toto*, does not support a finding that MSHA or DOL officials had acted on arbitrary, impulsive whims in this matter.

III. Respondent failed to establish actual prejudice.

In *Long Branch II*, the Commission emphasized that "mere allegations of potential prejudice or inherent prejudice should be rejected." *Id*. at 1991. The Commission specifically rejected the ALJ's suggestion in *Long Branch* that "a danger of prejudice" due to the Secretary's untimely filings would be sufficient proof. *Id*. at 1992(citing *Long Branch Energy*, 33 FMSHRC 1960, 1976 (Aug. 2011)(ALJ)("*Long Branch I*")).

In the case *sub judice*, Respondent indicated that it would be prejudiced because of the untimely filing due to the unavailability of four witnesses, listed above. No affidavits or written statements or declarations, however, were offered by Respondent from any of the witnesses to support this contention. Nor were there any medical reports from any treating health provider offered into evidence to establish unavailability. The only testimony presented was from Vice President of Safety Todd who – upon questioning from the undersigned – admitted that he had not actually spoken to any of the witnesses in question. Tr. 152-153. Offering, at best, hearsay on hearsay[14] testimony, Todd stated that Heist, Younkin's foreman at the time of the accident, could not attend a hearing "because of his health." Tr. 131. Todd did not describe the specific nature of Heist's underlying medical condition and/or why the symptoms associated with such would prevent travel and/or testimony. Likewise, as to Matsko, Respondent's safety director of surface mines at the time of the accident, Todd only offered that "one of the reasons" Matsko retired was due to his health. Tr. 130-131. Again, no further testimony or evidence was offered regarding Matsko's alleged inability to attend a hearing. As to Merringer and Reilly, the witnesses to the accident, Todd only indicated that both had left PBS Coals' employ and that, consequently, "Respondent no longer had the ability as an employer to required them to come to a hearing." Tr. 132.

[14] Todd testified that he had spoken with Younkin, who indicated that he had received training from Heist. Tr. 152. As to the other witnesses, he had reviewed answers to interrogatories and requests for admissions, as well as speaking to Respondent's counsel regarding such. Tr. 153.

The undersigned has carefully considered the Commission's discussion in *Long Branch II* regarding the proof required to establish prejudice. While not fully articulating what must be demonstrated specifically by a mine operator, the Commission did observe that there must be more than merely a "danger of prejudice," and the prejudice must be "real" or "substantial."[15] In many areas of the law, the "real" and "substantial" nature of the prejudice cause by delay is patent. If an accused cannot post bail and the State is dilatory in bringing his case to trial, the actual prejudice of incarceration is obvious. Hence, speedy trial rules calling for dismissal of charges or nominal bond.

In the context of the Mine Act cases, actual prejudice is not always so clear. When critical witnesses are still available for trial and/or evidentiary deposition for use at trial, this Court would, absent very exceptional circumstances, not find "actual," "real" or "substantial" prejudice. Given the foregoing, the undersigned found Respondent's proferred evidence regarding the unavailability of the four witnesses to be too thin ice upon which to base a finding of "substantial prejudice." Considering the contradictory evidence presented by the Secretary that Merringer was, in fact, willing to attend a hearing if given adequate notice[16] and that Reilly had only left Respondent's employ in December 2012, the undersigned finds that Respondent did not establish actual prejudice due to the late filing.

IV. Balancing the public interest and harm to each party, the within Petition should not be dismissed for untimely filing.

As noted supra, the Commission in *Long Branch II* held that, generally, each party bears the burden of production on the issues of adequate cause and prejudice with the judge required to balance the public interest and the harm to each party. If both burdens are carried, the judge

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[15] See *Long Branch* at 1993, Footnote 13:

> These cases include *Alumbaugh Coal*, 635 F.2d at 1383-84 ("Unless required by law, this court will not set aside a Board decision in the absence of a showing that the alleged procedural defect *substantially prejudiced the rights of the complaining party*.")(emphasis added); *Jensen Constr. Co. v. OSHRC*, 597 F.2d 246, 247-48 (10th Cir. 1979)("absent a more specific showing that [the employer] suffered *real prejudice* due to the delay of some 28 days [in filing the complaint], and in light of the potentially serious nature of the offenses...the Judge did not abuse his discretion in refusing to dismiss the complaint.")(emphasis added); and *Todd Shipyards Corp. v. Sec'y of Labor*, 566 F.2d 1327, 1330 (9th Cir. 1997)(recognizing merit in OSHRC rule that delay in issuance of citation to employer will only result in vacature of citation "if delay in issuance has result in *demonstrable prejudice* to the employer.")(emphasis added).

[16] See testimony of John Stepanic that Merringer had reportedly stated that he "had no problem showing up for trial." Tr. 160.

would be required to resolve the tension among competing interests. *Id*. at 1996. Even assuming, *arguendo*, that Respondent had sufficiently established actual prejudice, the undersigned still concludes that a balancing of the public interest and harm to each party would not warrant a dismissal on the basis of untimely filing.

In its closing statement, Respondent rightfully points out that the length of delay in filing would be a critical factor in determining whether dismissal is warranted. Moreover, the undersigned agrees that the length of delay in filing the instant Petition was disturbingly protracted: 270 days, even granting that all three extensions were properly obtained; and additional one and a half years, even granting the case file was excusably lost. The undersigned further would accept as a general proposition that the longer the delay, the stronger the argument for dismissal.[17] In his original opinion in *Long Branch I*, respected jurist, ALJ McCarthy, compellingly set forth the harms caused by lengthy filing delays.[18] *Id*. at 1972-1973 (ALJ).

However, the undersigned specifically rejects Respondent's argument that length of delay, standing alone, may dictate dismissal. The length of delay, albeit a critical factor, is only one factor in any proper balancing test of the competing interests discussed by *Long Branch II*. The undersigned observes that other factors must be considered, including: the type of violation involved, whether it was a minor or technical breach or a major violation of a mandatory health or safety standard, whether there was an accident involved, whether death or injury were involved, and whether the violation was designated as significant and substantial ("S&S") or an unwarrantable failure.

Given the exceedingly protracted delay in the instant matter, if only a minor violation had been involved with no accident or injury, this Court may have concluded that the length of delay would have outweighed other considerations and would probably have ruled in Respondent's favor. However, the within matter stems from the investigation of an accident in which a miner, Chad Younkin, was seriously injured while operating a truck-mounted boom. The failure to provide adequate training under 30 CFR § 48.27(a)(3), if proven to be true, would constitute a serious mandatory health and safety violation. Given the issuance of a Section 104(g)(1) order indicating a high degree of negligence and a highly likely risk of fatality, the determination by the investigation of S&S, the public interest embodied in the Mine Act of protecting miners from unsafe conditions and practices would outweigh the procedural fairness to the operator in allowing this case to go forward.

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[17] The undersigned is reminded of the old Latin proverb – "Tardinas et procrastinatio odiosa est" – Delay in the law is hateful.

[18] ALJ McCarthy warned of the deleterious effect on prompt and expeditious resolution of civil penalty petitions, as well as the languishing of the adjudicatory process creating a backlog at each level of review. *Id*. Importantly, he noted that reason for delay was within the reasonable control of MSHA, which could have more effectively allocated resources as the backlog of contested citations grew. *Id*.

In reaching this decision, the undersigned has again considered the guidance of the Commission in *Long Branch II* in balancing the competing interests discussed infra. The Commission noted:

> Distilled to its essence...*Salt Lake* identifies and prioritizes the interests implicated...and provides guidance for determining how judges should proceed when those interests collide. At is core, the decision reflects an "overriding concern with enforcement"...the Senate Committee did not "expect the failure to propose a penalty with promptness shall vitiate any proposed proceeding..."
>
> Although we recognized the value of fairness inherent in prompt filing of penalty petitions...Commission Rule 28(a)'s requirement that a penalty petition shall be filed within 45 days, while effectively ensuring the prompt filing of a penalty petition, is not a statute of limitations.

Id. at 1989(emphasis added).

In balancing the consideration of procedural fairness to Respondent against the severe impact of dismissal of the penalty proposed upon the substantive scheme of the statute, the undersigned again notes the somewhat speculative nature of the mine operator's actual prejudice in the instant case. Chad Younkin, the injured miner who operated the truck-mounted boom crane, is still available for trial at which he could be subject to vigorous examination and cross-examination as to the issue of this training or lack thereof. As discussed *supra*, the record is unclear whether certain of the witnesses identified by Respondent as unavailable are, in fact, unavailable for trial and/or deposition for use at trial. Further, the record is also unclear whether these purported witnesses, even if unavailable, would in fact have given testimony necessarily favorable to Respondent.

CONCLUSION

Given the specific circumstances of the within matter, the undersigned accordingly **DENIES** Respondent's request for dismissal on the basis of untimely filing.[19] It is **ORDERED** that this case **PROCEED** for hearing on the underlying merits.

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

Distribution:

Joshua T. Shaw, Esq., and Matthew R. Epstein, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 630E, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA 19106

Vincent J. Barbera, Esq., and Melanie R. Barbera, Esq., Barbera, Clapper, Beener, Rullo & Melvin, LLP, 146 West Main Street, P.O. Box 775, Somerset, PA 15501

[19] The Commission's denial of a motion to dismiss is not a final order subject to judicial review. *See Webster County Coal, LLC*, No. 12-1388 (D.C. Cir. Jan. 8, 2013)(Unpublished).