

September 2011

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Review was granted in the following cases during the month of September 2011:

Secretary of Labor, MSHA v. Twentymile Coal Company, Docket No. WEST 2009-241, et al. (Judge Manning, August 15, 2011)

Secretary of Labor, MSHA v. Long Branch Energy, Docket No. WEVA 2010-467, et al. (Judge McCarthy, August 22, 2011)

Secretary of Labor, MSHA v. Webster County Coal, LLC., Docket No. KENT 2009-422, et al. (Judge Lesnick, Interlocutory Review of Order Denying Motion to Dismiss, issued September 28, 2010- unpublished)

Secretary of Labor, MSHA v. Jet Materials, Docket No. CENT 2010-702, et al. (Judge Gill, August 24, 2011 - unpublished Default Order)

There were no cases in which Review was denied during the month of September 2011.

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 7, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2011-450
v.	:	A.C. No. 05-03836-230190
	:	
TWENTYMILE COAL, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On January 4, 2011, the Commission received from Twentymile Coal, LLC, a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

September 7, 2011

SECRETARY OF LABOR,	:	Docket No. WEST 2011-617-M
MINE SAFETY AND HEALTH	:	A.C. No. 26-02228-236973
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2011-618-M
v.	:	A.C. No. 26-02228-239871
	:	
BLACK MOUNTAIN INDUSTRIAL	:	
MINERALS, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 15, 2011, the Commission received requests by Black Mountain Industrial Minerals, LLC, seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹ On February 28, 2011, the Commission received a response from the Secretary of Labor stating that she does not oppose the requests to reopen the assessments.

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief 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 2011-617-M and WEST 2011-618-M, both captioned *Black Mountain Industrial Minerals, LLC*, and both 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 the facts and circumstances of this case, the operator’s requests, and the Secretary’s response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 8, 2011

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

v.

ALLIED CUSTOM GYPSUM

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Docket No. CENT 2011-670-M
A.C. No. 41-04758-249511

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 5, 2011, the Commission received from Allied Custom Gypsum (“Allied”) 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 the facts and circumstances of this case, the operator’s request, and the Secretary’s response, we hereby reopen this matter and remand it to the Chief Administrative

Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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Chief Administrative Law Judge Robert J. Lesnick
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601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

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 F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
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/s/ Patrick K. Nakamura
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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September 8, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2011-672-M
v.	:	A.C. No. 14-01277-246620
	:	
NELSON QUARRIES, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 6, 2011, the Commission received from Nelson Quarries, Inc. (“Nelson Quarries”) 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 February 22, 2011, and became a final order of the Commission on March 24, 2011. MSHA received timely full payment on March 11, 2011. Nelson Quarries asserts it intended to contest the citation since it has evidence of meeting regulation requirements, but the penalty was inadvertently paid. The

motion to reopen was filed on April 29, 2011. The Secretary does not oppose the request to reopen.

Having reviewed Nelson Quarries' 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 F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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September 8, 2011

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

v.

DOLET HILLS LIGNITE CO., LLC

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Docket No. CENT 2011-822
A.C. No. 16-01031-246092

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On June 6, 2011, the Commission received from Dolet Hills Lignite Co., LLC (“Dolet Hills”) a motion made by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). 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 the facts and circumstances of this case, the operator’s request, and the Secretary’s response, we hereby reopen this matter and remand it to the Chief Administrative

Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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September 8, 2011

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

v.

MERIDIAN AGGREGATES COMPANY, LP :

:
:
:
:
:
Docket No. CENT 2011-861-M
A.C. No. 34-00460-249297

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On June 21, 2011, the Commission received from Meridian Aggregates Company, LP (“Meridian”) 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 March 22, 2011, and became a final order of the Commission on April 21, 2011. MSHA received a timely payment for the uncontested penalties. Meridian asserts it mailed the contest form on March 25, 2011 and was not aware it was not received by MSHA until it received the delinquency notice. The motion to reopen was filed within 30 days of receiving the delinquency notice. The Secretary does not oppose the request to reopen.

Having reviewed Meridian'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 F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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Chief Administrative Law Judge Robert J. Lesnick
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 8, 2011

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

v.

BLACK PANTHER MINING, LLC

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Docket No. LAKE 2011-698
A.C. No. 12-02394-245315

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 27, 2011, the Commission received from Black Panther Mining, LLC (“Black Panther”) a motion made by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). 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 the facts and circumstances of this case, the operator’s request, and the Secretary’s response, we hereby reopen this matter and remand it to the Chief Administrative

Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 7, 2011

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

v.

GROVE CITY MATERIALS

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Docket No. PENN 2011-352
A.C. No. 36-09697-242921

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 19, 2011, the Commission received from Grove City Materials (“Grove City”) 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).¹ 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

¹ The request to reopen was filed by David C. Lewetag, who identifies himself as a consultant for Grove City. Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall in to one of the categories in Rule 3(b), which includes parties, representatives of miners, an “owner, partner, officer or employee” of certain parties, or “[a]ny other person with the permission of the presiding judge or the Commission.” 29 C.F.R. § 2700.3(b). It is unclear whether Mr. Lewetag satisfied the requirements of Rule 3 when he filed the request on behalf of Grove City. We have determined that, despite this, we will consider the merits of the request in this instance. However, in any future proceeding before the Commission, including further proceedings in this case, Mr. Lewetag may represent Grove City only if he demonstrates to the Commission or the presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seeks permission to practice before the Commission or the judge pursuant to Rule 3(b)(4). Otherwise, Grove City must be represented by an attorney or by an owner, partner, officer, or employee.

penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

September 8, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2011-323-M
v.	:	A.C. No. 01-00003-240259 ACR
	:	
G & R MINERAL SERVICES, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 8, 2011, the Commission received from G & R Mineral Services, Inc. (“G&R”) a motion made by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). 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 the facts and circumstances of this case, the operator’s request, and the Secretary’s response, we hereby reopen this matter and remand it to the Chief Administrative

Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

September 8, 2011

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

v.

BANNER BLUE COAL COMPANY

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Docket No. VA 2011-303
A.C. No. 44-06685-241015

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 22, 2011, the Commission received from Banner Blue Coal Company (“Banner Blue”) a motion made by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment was delivered on December 17, 2010, and became a final order of the Commission on January 18, 2011. MSHA's payment processing center in Saint Louis, MO received a payment for the uncontested amount, along with a marked contest form indicating Banner Blue's intent to contest the citations at issue, on January 20, 2011. The payment center forwarded the contest form to the MSHA Civil Penalty Compliance Office in Arlington, VA, where it was processed as a late contest. Banner Blue's counsel further asserts that it is in the process of implementing new procedures for processing MSHA forms. The Secretary does not oppose the request to reopen. The Secretary's position is based solely on the fact that the contest was submitted only two days late.

Having reviewed Banner Blue'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 F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
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September 8, 2011

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

v.

LEHIGH SOUTHWEST CEMENT CO.

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Docket No. WEST 2011-1151-M
A.C. No. 04-00196-252210

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On June 22, 2011, the Commission received from Lehigh Southwest Cement Co. (“Lehigh”) 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 the facts and circumstances of this case, the operator’s request, and the Secretary’s response, we hereby reopen this matter and remand it to the Chief Administrative

Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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Chief Administrative Law Judge Robert J. Lesnick
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Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 8, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	Docket No. WEST 2011-644-M
v.	:	A.C. No. 04-05701-243003
	:	
CEMEX CALIFORNIA CEMENT, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 18, 2011, the Commission received from Cemex California Cement, LLC (“Cemex”) a motion made by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). 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 the facts and circumstances of this case, the operator’s request, and the Secretary’s response, we hereby reopen this matter and remand it to the Chief Administrative

Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 8, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2011-748-M
v.	:	A.C. No. 02-00137-242182
	:	
CLEAN HARBORS ENVIRONMENTAL	:	
SERVICES, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 17, 2011, the Commission received from Clean Harbors Environmental Services, Inc. (“Clean Harbors”) a motion made by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment was delivered on January 3, 2011, and became a final order of the Commission on February 2, 2011. Clean Harbors asserts that the proposed assessment was addressed to a former employee, which delayed the delivery to the general counsel. Clean Harbors further states that its outside counsel served what the general counsel mistakenly believed to be a timely Notice of Contest on February 14, 2011. Clean Harbors filed a motion to reopen within 30 days of receiving a delinquency letter from MSHA. The Secretary does not oppose the request to reopen. The Secretary notes, however, that all proposed assessments are mailed to the address of record on the Contractor ID Report. It is Clean Harbors’ responsibility to keep MSHA informed of changes in its address of record and contact names on its legal identity report.

Having reviewed Clean Harbors' 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 F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

September 8, 2011

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

v.

ASH GROVE CEMENT COMPANY

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Docket No. WEST 2011-768-M
A.C. No. 45-00359-243596

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 21, 2011, the Commission received from Ash Grove Cement Company (“Ash Grove”) a motion made by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). 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 cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of this case, the operator’s request, and the Secretary’s response, we hereby reopen this matter and remand it to the Chief Administrative

Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 8, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2011-1229
v.	:	A.C. No. 46-03444-241264
	:	
KEYSTONE SERVICE INDUSTRIES, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 21, 2011, the Commission received from Keystone Service Industries, Inc. (“Keystone”) a motion made by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). 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 the facts and circumstances of this case, the operator’s request, and the Secretary’s response, we hereby reopen this matter and remand it to the Chief Administrative

Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

September 8, 2011

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

v.

HINKLE TRUCKING, INC.

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Docket No. WEVA 2011-1595
A.C. No. 46-05823-244729 ROE

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On April 27, 2011, the Commission received from Hinkle Trucking, Inc. (“Hinkle”) 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 the facts and circumstances of this case, the operator’s request, and the Secretary’s response, we hereby reopen this matter and remand it to the Chief Administrative

Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

September 8, 2011

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

v.

CHIEF MINING, INC.

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Docket No. WEVA 2011-1616
A.C. No. 46-08577-244845

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 3, 2011, the Commission received from Chief Mining, Inc. (“Chief Mining”) 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 the facts and circumstances of this case, the operator’s request, and the Secretary’s response, we hereby reopen this matter and remand it to the Chief Administrative

Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 8, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2011-311-M
v.	:	A.C. No. 13-01885-226155 -02
	:	
HIGMAN SAND & GRAVEL, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On January 6, 2011, the Commission received from Higman Sand & Gravel, Inc. a letter from the company’s director of mine safety and permitting seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On January 21, 2011, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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September 8, 2011

SECRETARY OF LABOR,	:	Docket No. LAKE 2010-903-M
MINE SAFETY AND HEALTH	:	A.C. No. 20-02909-208139
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2010-904-M
v.	:	A.C. No. 20-02909-211111
	:	
BYHOLT, INC.	:	

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On August 17, 2010, the Commission received motions by counsel from Byholt, Inc. (“Byholt”) requesting to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

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

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers LAKE 2010-903-M and LAKE 2010-904-M, both captioned *Byholt, Inc.*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

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

On January 7, 2010, and February 11, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000208139 and Proposed Assessment No. 000211111, respectively, to Byholt. On March 31, 2010, MSHA issued a notice to Byholt indicating that Assessment No. 000208139 had become final and now was delinquent. On May 6, 2010, MSHA issued another notice to Byholt indicating that Assessment No. 000211111 was delinquent.

In its motion to reopen, the President of Byholt explains that it did not file timely contests because it had no experience contesting violations previously. Byholt asserts that by the time it sought experienced counsel, the time for contest had passed. The President further states with respect to Assessment No. 000208139 that the operator was under the "mistaken[] belief that all of the [section] 104(d) citations/orders needed to be contested together and in waiting for the other three citations to be assessed, we missed the deadline." Byholt Aff.

The Secretary opposes reopening, contending that the operator's professed misunderstanding of MSHA's contest procedures is particularly inexcusable because the instructions outlining how to contest are contained on the proposed assessment itself. She also submits that ignorance of the rules and the law is not a permissible ground for reopening under Rule 60(b)(1). The Secretary also contends that Byholt failed to explain why it waited over four months in Assessment No. 000208139 (Docket No. LAKE 2010- 903-M) and three months in Assessment No. 000211111 (Docket No. LAKE 2010-904-M) to bring motions to reopen after it had received delinquency notices. The Secretary also provides that because the operator had not responded to the delinquency notices, both matters were referred to the U.S. Department of Treasury for collection.

Having reviewed Byholt's requests to reopen and the Secretary's responses thereto, we determine that the operator has failed to provide a sufficient basis for the Commission to reopen the penalty assessment. The operator's contention that it lacked experience to timely contest the proposed assessments lacks sufficient detail and does not provide adequate grounds for reopening. Significantly, Byholt has also failed to explain why it delayed approximately three and four months in responding to the delinquency notices sent by MSHA. *Pinnacle Mining Co.*, 30 FMSHRC 1071, 1073-74 (Dec. 2008).²

Accordingly, we hereby deny without prejudice Byholt's request to reopen. *Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that Byholt may submit another request to reopen the Assessment Nos. 000208139 and

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

000211111.³ Any amended or renewed request by the operator to reopen these assessments must be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

³ If Byholt submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of “good cause” may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Byholt should include a full description of the facts supporting its claim that its mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. Byholt should also submit copies of supporting documents with its request to reopen. Byholt should further explain and document in similar detail why it delayed in responding to MSHA’s delinquency notice. The Commission would specifically expect Byholt to provide verified and detailed affidavits and documentation substantiating what it did after receiving the notices of contest and the notices of delinquency and why it delayed in seeking reopening.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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September 9, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2011-297-M
v.	:	A.C. No. 21-02848-233783
	:	
STERZINGER CONSTRUCTION	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On January 20, 2011, the Commission received from Sterzinger Construction (“Sterzinger”) a letter from the owner seeking to reopen a penalty assessment that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

On September 29, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Penalty Assessment No. 000233783 to Sterzinger and attempted to deliver it through Federal Express. The record indicates that the proposed assessment was not received by Sterzinger at that time and that a second attempt through the United States Postal Service was also unsuccessful. Sterzinger alleges that it later learned that the assessment had become final and contacted MSHA, which faxed it a copy of the assessment on or about December 15, 2010.

The Secretary states that she does not oppose the reopening of the proposed penalty assessment and confirms that its two delivery attempts to Sterzinger were unsuccessful.

Having reviewed Sterzinger's request and the Secretary's response, we conclude that the proposed penalty assessment has not become a final order of the Commission because it was not received by Sterzinger. 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. The Secretary shall file a petition for assessment of penalty within 45 days of the date of its contest. *See* 29 C.F.R. §§ 2700.26 and 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 7, 2011

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

v.

KEOKEE MINING LLC

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:
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Docket No. VA 2011-225
A.C. No. 44-06947-240206

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On January 25, 2011, the Commission received a motion by Keokee Mining LLC (“Keokee”)¹ seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On February 18, 2011, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

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

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

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

/s/ Mary Lu Jordan

Mary Lu Jordan, Chairman

/s/ Michael F. Duffy

Michael F. Duffy, Commissioner

/s/ Michael G. Young

Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.

Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 9, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2011-566-M
v.	:	A.C. No. 24-01079-239191 Y035
	:	
DRUMLUMMON GOLD CORPORATION	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On January 31, 2011, the Commission received from Drumlummon Gold Corporation (“Drumlummon”) a motion by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

On November 24, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000239191 to Drumlummon for 13 violations that MSHA had issued to the operator in September and October 2010. Drumlummon states that it failed to timely contest the assessments because its safety manager, who is responsible for processing assessments, was out of the office on medical leave for an unexpected extended period. The operator contends that the safety manager took unscheduled leave for health-related issues on November 17, 2010 and initially was scheduled to return on December 15, 2010. The operator explains that due to unanticipated medical complications, the safety manager did not return to work until January 27, 2011. The assessment dated November 24, 2010, was delivered to the operator during the manager's absence, but because the manager's expected return on December 15 was before the date the assessment would become final, it was not acted upon. The operator notes that it filed its request to reopen days after the manager's return to work, when he discovered the delinquency, and about a month after the order became final.

On February 14, 2011, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment. The Secretary urges the operator to adopt procedures to ensure future assessments are timely contested and notes that she may oppose future motions to reopen assessments that are not timely contested.

Although the operator's internal procedures for handling assessments failed in this instance because it did not have a back-up system in place for processing assessments should the safety manager be unavailable, this is the operator's first request to reopen. Moreover, the operator's request was filed promptly upon the safety manager's discovery of the delinquent assessment and about one month after the assessment became final. Under the limited circumstances of this case, we conclude that the operator's failure to timely file a contest amounted to mistake or inadvertence.¹

¹ We note that in the safety manager's affidavit attached to the request to reopen, the safety manager states that he intends to prepare detailed instructions on how to handle assessments in his absence so as to avoid this type of oversight in the future. We agree with the Secretary that the operator should take such precautions. The Commission has held that an inadequate or unreliable internal processing system does not constitute inadvertence, mistake or excusable neglect so as to justify the reopening of an assessment which has become final under section 105(c) of the Mine Act. *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Elk Run Coal Co.*, 32 FMSHRC 1587, 1588 (Dec. 2010).

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

/s/ Mary Lu Jordan

Mary Lu Jordan, Chairman

/s/ Michael F. Duffy

Michael F. Duffy, Commissioner

/s/ Michael G. Young

Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.

Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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September 15, 2011

SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	Docket No. CENT 2011-193-M
v.	:	A.C. No. 23-00078-230288
	:	
CON-AGG OF MO, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On June 30, 2011, the Commission received a renewed request to reopen a penalty assessment issued to Con-Agg of MO, LLC (“Con-Agg”) that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

On August 31, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000230288 to Con-Agg for six citations issued to the operator in July 2010. The operator failed to timely contest the proposed assessment. In its first request to reopen filed November 15, 2010, Con-Agg stated that it first had constructive notice of the "citation" on November 8, 2010, and received actual notice on November 12, 2010. The Secretary opposed the motion on the grounds that the proposed assessment was delivered to Con-Agg and signed for on September 7, 2010, and that the operator failed to explain its failure to timely contest the assessment. The Commission subsequently denied the request without prejudice for Con-Agg's failure to provide a sufficiently detailed explanation for its failure to timely contest the proposed assessment. *See Con-Agg of Mo, LLC*, 33 FMSHRC ____, slip op. at 2, No. CENT 2011-193-M (June 1, 2011).

In its June 30, 2011, renewed request, Con-Agg states that it first became aware of the proposed assessment on November 8, 2010, when Con-Agg's mine manager discovered the proposed assessment while checking MSHA's database system. After an unsuccessful internal search for the proposed assessment, Con-Agg contacted MSHA and on November 12 received a copy of the proposed assessment. The person responsible for receiving packages for Con-Agg at that time maintains that she does not remember receiving a package from MSHA. Con-Agg further states that there was disruption in the company during that time because the mining operation was in the process of being sold and transferred. In addition, the package would have been addressed to and received by one of the prior owners, Larry Moore, who states that he never saw the assessment from MSHA. Con-Agg asserts that to date it has not located the original proposed assessment from MSHA. Con-Agg paid the remaining citations that it did not intend to contest on November 9, 2010, and on November 15, 2010, filed a letter with MSHA attempting to contest the remaining Citation No. 6473993. Con-Agg further states that on January 4, 2011, it previously filed a Motion to Permit Late Contest Filing. This motion, however, was not associated with the proper case file by the Commission.

On July 8, 2011, the Secretary filed a response, stating that she does not oppose the renewed request for reopening.

Having reviewed Con-Agg's requests 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 F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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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 19, 2011, the Commission received from H&D Mining, Inc. (“H&D”) a motion made by counsel seeking to reopen eight 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 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 to the operator over a two-year period, from July 2006 through February 2008. H&D asserts that its failure to contest was due to the fact that the mine was in the process of being shut down. Moreover, H&D claims it was unfamiliar with the contest process since it never filed one before.

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2011-1410, KENT 2011-1411, KENT 2011-1412, KENT 2011-1413, KENT 2011-1414, KENT 2011-1415, KENT 2011-1416 and KENT 2011-1417, all captioned *H&D Mining, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

The Secretary has filed a motion for expedited consideration of this matter on September 9, 2011, along with her response to the motion to reopen.² The Secretary opposes the request to reopen because it was filed three to five years after the proposed assessments became final Commission orders. Moreover, the Secretary notes that H&D makes no showing of exceptional circumstances that warrant reopening. Specifically, there is no explanation as to when the shut-down process occurred or why it prevented the timely filing of contests over a two-year period. Furthermore, the Secretary notes that the courts have held that ignorance of the rules and the law is not a permissible ground for reopening under Rule 60(b)(1). In addition, the Secretary asserts that H&D did not respond to any of the delinquency notices dating from September 2006 through April 2008, and the assessments totaling \$207,278 were forwarded to the U.S. Treasury Department for collection purposes. On April 1, 2011 the United States filed an action in federal district court to compel payment by the operator. Although this reopening request was explicitly invoked in the answer to the district court action, H&D makes no mention of the action in its reopening request to the Commission. Finally, the Secretary states that the operator's delinquency record, which shows that it has repeatedly disregarded final penalty assessments, indicates that it has not acted in good faith. Moreover, the fact that the operator waited until the United States sued it in district court to request reopening, and then omitted any mention of that action in its request, is the antithesis of good faith, and a strategy which the Secretary urges the Commission not to reward.

We have held that a Rule 60(b) motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. Here, the motion to reopen was filed three to five years after the proposed assessments became final Commission orders. Therefore, H&D's motion is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

Additionally, it is well recognized in federal jurisprudence that the issue of whether the movant acted in good faith is an important factor in determining the existence of excusable neglect. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993); *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006). Likewise, the Commission has recognized that a movant's good faith, or lack thereof, is relevant to a determination of whether the movant has demonstrated mistake, inadvertence, surprise or excusable neglect within the meaning of Rule 60(b)(1) of the Federal Rules of Civil Procedure. *M.M. Sundt Constr. Co.*, 8 FMSHRC 1269, 1271 (Sept. 1986); *Easton Constr. Co.*, 3 FMSHRC 314, 315 (Feb. 1981). As pointed out by the Secretary, H&D's delinquency record and its strategy of waiting to file a request to reopen until it was sued for payment collection and then omitting any mention of that action in its request, demonstrates a lack of good faith militating against granting extraordinary relief in this case. *Oak Grove Res., LLC*, 33 FMSHRC _____, slip op. at 3-4, No. SE 2011-16 (June 7, 2011).

² We hereby grant the Secretary's motion and have expedited our consideration.

Having reviewed H&D's request and the Secretary's response, we conclude that H&D has failed to establish good cause for reopening the proposed penalty assessments and deny its motion with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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September 15, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2011-559
ADMINISTRATION (MSHA)	:	A.C. No. 46-09136-218772
	:	
v.	:	Docket No. WEVA 2011-561
	:	A.C. No. 46-09136-221821
BIG RIVER MINING, LLC	:	
	:	Docket No. WEVA 2011-562
	:	A.C. No. 46-09136-225134
	:	

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 13, and December 14, 2010, Big River Mining, LLC, (“Big River”) filed motions requesting that the Commission reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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 the proceedings in Docket Nos. WEVA 2011-559, WEVA 2011-561 and WEVA 2011-562, each captioned *Big River Mining, LLC* 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).

These three proceedings concern a total of 147 enforcement actions issued by the Mine Safety and Health Administration (“MSHA”) and total proposed penalties of \$281,919. Big River alleges that it was unable to timely file the contest forms associated with each proposed assessment due to an unforeseen mistake, inadvertence or excusable neglect. First, the operator states that it has no record of receiving the proposed assessments. Second, Big River contends that each final order should be reopened because the assessments, even if received, did not reach the Broad Run mine’s superintendent or safety director.

On January 14, 2011, the Secretary of Labor (“Secretary”) responded that she opposes each of the motions to reopen. She included the Federal Express “Detailed Results,” which demonstrated that the proposed assessments were delivered to the mine, as an exhibit to each response.

The three proposed assessment were signed for at the mine, upon their delivery. A different person signed for each delivery. Proposed Assessment No. 000218772 was issued on May 4, 2010, and assessed a penalty of \$160,864 for 39 enforcement actions. The Secretary represents that it was delivered to the mine on May 12, and became a final order on June 11. Proposed Assessment No. 000221821 was issued on June 8, 2010, and assessed a penalty of \$74,693 for 82 enforcement actions. The Secretary represents that it was delivered to the mine on June 15, and became a final order on July 23. Proposed Assessment No. 000225134 was issued on July 6, 2010, and assessed a penalty of \$46,362 for 26 enforcement actions. The Secretary represents that it was delivered to the mine on July 12, and became a final order on August 11.

Big River did not reply to the Secretary’s response, despite the Secretary’s inclusion of the Federal Express “Detailed Results.” We construe the operator’s failure to reply and address the delivery confirmations as a tacit confirmation that the proposed assessments were received. Therefore, we instead consider the merits of the operator’s alternative assertion – that a change in the mine’s operating status and reductions in staff prevented the mine’s superintendent and safety director from receiving the proposed assessments.

In its motion to reopen, Big River outlines a series of changes which occurred at the mine during the spring of 2010, and asserts that these changes contributed to its failure to timely file the contest forms. Big River states that on March 23, 2010, a new safety director began at the mine and shortly thereafter on April 9, 2010, the mine became a non-producing facility. The operator also states that over the course of the next two months the number of staff at the mine decreased from over 100 employees to fewer than 10 employees. Furthermore, Big River states that around this time both the superintendent and safety director assumed “expanded roles” at a separate Big River facility.

Chad Carte, the human resource manager, described the mail receipt and distribution process at the mine in an affidavit. BR Ex. 2. He stated that all deliveries at Big River were made to the administrative office, where mail was sorted and placed into the internal mailboxes for the individual addressee. If an item of mail was identified as a safety related matter, standard procedure was to submit that item to the safety director, regardless of the addressee. Although the safety director and superintendent had “expanded roles” at another facility, their mail was regularly placed in their respective internal mailbox, and periodically picked up for their review.

Carte states that he began opening all mail sent to the mine’s address in September 2010, “in light of the continuing non-producing status of the mine, to direct correspondence to the most appropriate office for handling.” *Id.* On or about September 13, Carte opened a notice of delinquency issued by MSHA on September 7 for Case No. 000221821. Carte forwarded this delinquency notice to Barbara Willis, manager of accounts payable, who received it on or about September 16, 2010. On or about November 1, Carte opened a notice of delinquency issued by MSHA on October 26, for Case No. 000225134. Carte forwarded this notice to Willis, who received it on or about November 5. On or about December 1, Carte opened a notice of deficiency issued by the Department of the Treasury on November 27, for Case No. 000218772.² Carte forwarded this notice to Willis, who received it on or about December 4.

Willis states that she internally investigated the delinquent penalties, but “turned up no evidence that the proposed assessment[s] [were] received or returned by the superintendent, safety director, or any personnel at the mine”. BR Ex. 4. On December 9, Big River contacted outside counsel. Outside counsel filed the three subject motions to reopen.

The Secretary responds, in part, that the operator’s inadequate office procedures are not a sufficient basis for reopening the penalty assessments. Additionally she notes that the operator failed to explain the seven month delay between receiving Assessment No. 000218772, and more than four month delay between MSHA’s issuance of the delinquency notice, and its request to reopen. Nor did the operator explain the six month delay between receiving Assessment No. 000221821, and three month delay between MSHA’s issuance of the delinquency notice, and its request to reopen.

The record indicates that the operator received and signed for the proposed assessments. It is unclear what became of the assessments after receipt, but their resulting failure to reach either the superintendent or safety director makes it obvious that the assessments were not handled in a diligent manner. It is inconsequential, for the purposes of reopening a final order, that the mine was idled and was operating with a reduced staff. The Commission has held that the idling of a mine does not relieve an operator of its obligation to open and deal with the mail it receives. *Elk Run Coal Co.*, 32 FMSHRC 1587, 1588 (Dec. 2010).

² The Department of Treasury’s delinquency notice was not the first delinquency notice issued to Big River for Case No. 000218772. Included with the Secretary’s response was a notice of delinquency issued by MSHA on July 29, 2010, for this case. Big River made no mention of this correspondence in its motion to reopen.

The record also indicates that the operator did not have a reliable internal procedure for receiving and distributing mail at the time the proposed assessments were received. A failure to contest a proposed assessment that results from an inadequate or unreliable internal processing system is not grounds for reopening the assessment. *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008).

In addition, the operator failed to explain why it delayed in responding to MSHA's issuance of a delinquency notice for more than four months (000218772), three months (000221821), and more than one month (000225134).³ Having reviewed Big River's motions to reopen, and the Secretary's responses, we agree that the operator has failed to provide a sufficient basis for the Commission to reopen the penalty assessments.

³ In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of the notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is ground for the Commission to deny the motion).

The Secretary's response raised the issue, and Big River did not file a reply providing an explanation. We encourage parties seeking reopening to provide further information in response to pertinent questions raised in the Secretary's response. *Highland*, 31 FMSHRC at 1316 n.3 (citation omitted). "Accordingly, where the Secretary raises the issue of the delay between receipt of a delinquency letter and the filing of the request to reopen, an operator who does not explain why, after it was informed of a delinquency, it took as long as it did to request reopening, does so at its peril." *Id.*

For the reasons stated herein, we conclude that these motions have failed to make a showing of circumstances that warrant reopening of the penalty assessments. Accordingly, the motions are denied.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 15, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2011-560
v.	:	A.C. No. 46-08194-231276
	:	
CARTER ROAG COAL COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 13, 2010, the Commission received from Carter Roag Coal Company (“Carter Roag”), a motion requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On January 19, 2011, the Commission received a response from the Secretary of labor stating that she does not oppose the request to reopen the assessment.

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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September 26, 2011

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. CENT 2011-935-M
 : A.C. No. 41-04586-254171
 :
LUMINANT MINING COMPANY, LLC :

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On July 15, 2011, the Commission received from Luminant Mining Company, LLC (“Luminant”) a motion submitted by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). 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 Luminant'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 F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen
Robert F. Cohen, Jr., Commissioner

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

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Falk asserts the penalty assessment form was mailed to the address of Lafarge Elburn, Inc. and then forwarded to Lafarge Utica, Inc., Falk's employer. Falk further asserts the form was never received by Falk or Lafarge Utica, Inc. The Secretary does not oppose the request to reopen. However, the Secretary notes that the proposed assessment was mailed to Mr. Falk at the operator's address of record, after Falk declined a request to provide a mailing address. Moreover, the Secretary asserts that she will oppose further requests to reopen unless Falk provides a correct mailing address to which MSHA may send documents.

Having reviewed Falk'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 2700.¹ 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 F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

¹ While we note that Falk did not receive the proposed assessment, this failure may have been caused by Falk's refusal to provide a valid address for service upon MSHA's request. Falk concedes that the assessment was delivered to Lafarge Elburn, Inc., and MSHA asserts that this is his employer's address of record. An operator who refuses delivery is deemed to have accepted certified mail under Section 105 of the Mine Act. Falk did not refuse delivery of certified mail; however, there may be some question as to whether the assessment was constructively delivered, under the circumstances. We need not resolve that issue, because the Secretary has not opposed reopening, but we have determined that it would not be appropriate to dismiss this matter as moot due to failure of service.

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601 NEW JERSEY AVENUE, NW

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September 26, 2011

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

v.

PARSONS ELECTRIC COMPANY, INC.

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Docket No. LAKE 2011-733-M
A.C. No. 21-00820-249870

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On June 3, 2011, the Commission received from Parsons Electric Company, Inc. (“Parsons”) 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 to Parsons’ address of record and signed for by E. Peterson on March 29, 2011. The proposed assessment became a

final order of the Commission on April 28, 2011. Parsons asserts it never received the proposed assessment. Parsons further asserts it first discovered the citation was listed as a “final order” while reviewing its Contractor ID on the MSHA website. After contacting the MSHA office, Parsons received a copy of the proposed assessment by email on May 31, 2011. The motion to reopen was filed the next day, on June 1, 2011.

The Secretary opposes the request to reopen and states that the operator offers no explanation for its assertion that it never received the proposed assessment, which is contradicted by MSHA records.¹ However, in considering an operator’s request to reopen a final Commission order we find relevant the amount of time that has passed between the date the operator first learned the penalty was not timely contested and the operator’s filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 10-11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316 (Nov. 2009). Here, Parsons did not wait to receive a delinquency notice from MSHA, contacted the office to receive a copy of the assessment, and filed a motion to reopen immediately thereafter.

¹ We encourage parties seeking reopening to provide further information in response to pertinent questions raised in the Secretary’s response. *See, e.g., Climax Molybdenum Co.*, 30 FMSHRC 439, 440 n.1 (June 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1316 n.3 (Nov. 2009).

Having reviewed Parsons' 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 F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 26, 2011

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

v.

BIG RIDGE, INC.

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Docket No. LAKE 2011-812
A.C. No. 11-03054-242336

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On June 29, 2011, the Commission received from Big Ridge, Inc. (“Big Ridge”) a motion submitted by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Big Ridge asserts that even though the underlying citation is the subject of a contest case before the Commission, it had mistakenly paid the penalty. Big Ridge states that due to the relatively low amount of \$212 and lack of aggravating allegations, its Compliance Manager failed to recognize this contested citation among sixty-one other citations and orders on the assessment sheet. The Secretary does not oppose the request to reopen.

Having reviewed Big Ridge'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 F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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Chief Administrative Law Judge Robert J. Lesnick
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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September 26, 2011

SECRETARY OF LABOR,	:	Docket No. PENN 2009-326
MINE SAFETY AND HEALTH	:	A.C. No. 36-00958-173884
ADMINISTRATION (MSHA)	:	
	:	
	:	Docket No. PENN 2009-381
v.	:	A.C. No. 36-00958-176449
	:	
	:	
	:	Docket No. PENN 2009-526
EIGHTY FOUR MINING COMPANY	:	A.C. No. 36-00958-184691

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 22, 2011, the Commission received from Eighty Four Mining Company (“Eighty Four”) motions made by counsel seeking to reopen three penalty assessment proceedings and relieve it from the orders of default entered against it.¹

On November 12, 2010 and November 15, 2010, Chief Judge Lesnick issued three Orders to Show Cause and Orders of Default in response to Eighty Four’s failure to answer the Secretary’s March 18, 2010, April 7, 2010 and April 22, 2010 Petitions for Assessment of Civil Penalty. The judge ordered the operator to file its answers within 30 days or it would be in default.

Eighty Four asserts it did not receive the Orders to Show Cause or the Secretary’s previously filed Petitions for Assessment of Civil Penalty because the mine portal to which they were mailed has been closed, vacated and locked since 2009. The Secretary does not oppose the Motions to Lift Default Orders and notes that the Mine Safety and Health Administration (“MSHA”) records show that the penalty petitions were returned “undelivered.”

Having reviewed Eighty Four’s request and the Secretary’s response, in the interest of justice, we conclude that the Orders of Default have not become final orders of the Commission

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers PENN 2009-326, PENN 2009-381 and PENN 2009-526, all captioned *Eighty Four Mining Company*, and all involving similar procedural issues. 29 C.F.R. § 2700.12.

because the Orders to Show Cause were never received by Eighty Four. Accordingly, this case is remanded 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. Eighty Four shall file an Answer to the Show Cause Orders within 30 days of the date of this order.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 26, 2011

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

v.

INDUSTRIAL MINERALS, INC.

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Docket No. SE 2008-671-M
A.C. No. 38-00388-147374

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 24, 2011, the Commission received from Industrial Minerals, Inc. (“Industrial”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

On August 3, 2010, Chief Judge Lesnick issued an Order to Show Cause in response to Industrial’s request for a hearing and failure to answer the Secretary’s May 30, 2008 Petition for Assessment of Civil Penalty. In it, he ordered the operator to file its answer within 30 days or it would be in default. On December 2, 2010, Judge Lesnick issued an Order of Default for failing to comply with his Show Cause Order.

Industrial asserts it filed a timely response to the Show Cause Order and provides a certified mail receipt signed by the Commission’s Docket Office on August 23, 2010. Moreover, Industrial states it also responded to the Default Order and provides another certified mail receipt signed for by the Docket Office on December 9, 2010. The Secretary does not oppose the request to reopen.

Having reviewed Industrial's request and the Secretary's response, in the interest of justice, we conclude that Industrial was not in default under the terms of the Show Cause Order, as it timely complied with the Order. Hence, the Order of Default was issued in error. Accordingly, this case is remanded 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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September 26, 2011

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

v.

CARBO CERAMICS, INC.

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Docket No. SE 2009-381-M
A.C. No. 09-01164-176801

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 25, 2011, the Commission received from Carbo Ceramics, Inc. (“Carbo”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

On October 6, 2010, Chief Judge Lesnick issued an Order to Show Cause and Order of Default in response to Carbo’s failure to answer the Secretary’s May 15, 2009 Petition for Assessment of Civil Penalty. In it, he ordered the operator to file its answer within 30 days or it would be in default. The Commission has no record of receiving a copy of Carbo’s answer within 30 days, so the order of default became effective on November 8, 2010.

Carbo asserts that it timely responded to the Order to Show Cause by submitting its answer to the Secretary’s Petition on October 27, 2010. The Secretary does not oppose the request to reopen and notes that the attorney handling this case in the Atlanta Regional Solicitor’s Office confirms he received a timely answer in response to the Show Cause Order.

The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. §2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the judge's order here has become a final decision of the Commission.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). 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 Carbo's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Order of Default. Accordingly, this case is remanded 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 26, 2011

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

v.

JACKSON ENTERPRISES, INC.

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Docket No. SE 2009-420-M
A.C. No. 40-01153-180427 VRG

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 18, 2011, the Commission received from Jackson Enterprises, Inc. (“Jackson”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

On October 6, 2010, Chief Judge Lesnick issued an Order to Show Cause and Order of Default in response to Jackson’s failure to answer the Secretary’s July 22, 2009 Petition for Assessment of Civil Penalty. In it, he ordered the operator to file its answer within 30 days or it would be in default. The Commission did not receive Jackson’s answer within 30 days, so the order of default became effective on November 8, 2010.

Jackson asserts it submitted a timely answer to the Secretary’s Petition for Assessment and did not receive the Order to Show Cause. However, it appears as if it mailed its answer to the Secretary but not to the Commission. The Secretary does not oppose the request to reopen and notes that the attorney handling this case in the Nashville Regional Solicitor’s Office confirms she received a timely answer to the penalty petition in this case.

The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the judge's order here has become a final decision of the Commission.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). 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 Jackson's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Order of Default. Accordingly, this case is remanded 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 26, 2011

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

v.

VULCAN CONSTRUCTION
MATERIALS, LP

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Docket No. SE 2009-845-M
A.C. No. 40-00020-193999

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 19, 2011, the Commission received from Vulcan Construction Materials, LP (“Vulcan”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

On February 2, 2011, Chief Judge Lesnick issued an Order to Show Cause and Order of Default in response to Vulcan’s failure to answer the Secretary’s September 30, 2009 Petition for Assessment of Civil Penalty. In it, he ordered the operator to file its answer within 30 days or it would be in default.

Vulcan asserts it filed a timely response to the Show Cause Order and has provided copies of the FedEx tracking document, indicating it was received and signed for by the Commission. The Secretary does not oppose the request to reopen.

Having reviewed Vulcan's request and the Secretary's response, in the interest of justice, we conclude that Vulcan was not in default under the terms of the Show Cause Order, as it timely complied with the Order. Accordingly, this case is remanded 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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September 26, 2011

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

v.

SCABTRON

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Docket No. WEST 2011-1001-M
A.C. No. 50-01614-242769

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 19, 2011, the Commission received from Scabtron a motion seeking to reopen a penalty assessment that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

Scabtron asserts it did not receive the proposed assessment although it changed its address of record to facilitate FedEx deliveries. It further notes that upon receiving a delinquency letter from the Department of Treasury, it paid the penalties in full, including fees and interest, since it never received instructions on how to contest. The Secretary does not oppose the request to reopen and notes that the proposed assessment was returned undelivered. The Secretary submits that a change of address was reported to MSHA, but was not made official by the operator on its Legal ID Report’s Address of Record (MSHA Legal ID form 2000-7). As the Secretary states, it is Scabtron’s responsibility to make official changes to its address of record on its Legal Identity Report.

Having reviewed Scabtron's 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 Scabtron. Accordingly, we deny the request to reopen as moot¹ and remand this matter² 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 F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

¹ We deny the operator's request as moot because it no longer needs the Commission to grant the relief it had initially requested (by reopening these orders), since the orders never became final, as Scabtron never received the proposed assessments.

² As explained by the Secretary in her response, given changes to the original proposed assessment, No. 000242769, citations 8554703, 8554694, 8554706, 8554708, 8554709, 8554710 and 8554714 are now the remaining underlying citations in this penalty case.

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WASHINGTON, DC 20001

September 26, 2011

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

v.

ALPHA EXPLOSIVES

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Docket No. WEST 2011-1002-M
A.C. No. 04-05276-214576 DPB

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 19, 2011, the Commission received from Alpha Explosives (“Alpha”) a motion seeking to reopen a penalty assessment that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

The operator received a delinquency letter from MSHA dated June 30, 2010. It asserts it never received the penalty assessment at issue since it was mailed to an incorrect address. Alpha further asserts it corrected the address on its Legal ID Report. The Secretary does not oppose the request to reopen and notes that the proposed assessment was returned undelivered. However, the Secretary submits that the address on the Contractor’s ID Report was changed on September 28, 2010, more than four months after the proposed assessment was mailed to the address of record. As the Secretary states, it is Alpha’s responsibility to keep MSHA informed of changes to its address of record on its Legal Identity Report.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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September 26, 2011

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

v.

ROBINSON NEVADA MINING CO.

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Docket No. WEST 2011-1154-M
A.C. No. 26-01916-255278

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On July 5, 2011, the Commission received from Robinson Nevada Mining Co. (“Robinson”) a motion submitted by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). 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 Robinson’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 F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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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).

This case involves a motion to reopen three assessments which have become final orders, No. 000226900 dated July 29, 2010, No. 000215365 dated March 31, 2010, and No. 000198804 dated September 30, 2009.

The record indicates that proposed assessment No. 000226900 was delivered on August 3, 2010, signed for by M. Hall, and became a final order of the Commission on September 2, 2010. Notice of delinquency was mailed on October 26, 2010, and the case was referred to the U.S. Treasury for collection on February 3, 2011.

Proposed assessment No. 000215365 was delivered on April 7, 2010, signed for by S. Hart, and became a final order of the Commission on May 7, 2010. Notice of delinquency was mailed on June 30, 2010, and the case was referred to the U.S. Treasury for collection on October 21, 2010.

Proposed assessment No. 000198804 was delivered on October 7, 2009, signed for by T. Davis, and became a final order of the Commission on November 6, 2009. Notice of delinquency was mailed on December 23, 2009, and the case was referred to the U.S. Treasury for collection on April 8, 2010.

H&B asserts it did not receive these three proposed penalty assessments because they were mailed not to its business address but to a restaurant in Cascade, Idaho. H&B further asserts it only became aware that final orders were issued in these cases when it received a different proposed assessment, No. 000230518, dated September 1, 2010, which listed these case numbers as outstanding balances. The motion to reopen was filed on April 19, 2011.

The Secretary opposes the request to reopen and notes that these proposed assessments were mailed to the operator’s address of record in Cascade, Idaho, the same address that appears on all of the proposed assessments sent to H&B in the past three years. The Secretary states it is H&B’s responsibility to file an updated address of record and H&B’s failure to fulfill its legal responsibilities does not constitute excusable neglect warranting reopening. Moreover, the Secretary notes that these assessments appeared as outstanding balances on a contest form for another assessment, No. 000230518, filed by H&B on September 27, 2010. The Secretary further questions why H&B made no attempt to explain the long delay between receiving the delinquency notices and filing its motion to reopen, ranging from six to sixteen months.

Additionally, the Secretary asserts that proposed assessment No. 000198804 must be denied because the operator waited more than a year after the assessment became a final order to request reopening. Finally, the Secretary has provided evidence that three other proposed assessments mailed to the same address were signed for and were timely paid.²

H&B has not replied to the Secretary's opposition to its motion. We encourage parties seeking reopening to provide further information in response to pertinent questions raised in the Secretary's response. *See, e.g., Climax Molybdenum Co.*, 30 FMSHRC 439, 440 n.1 (June 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1316 n.3 (Nov. 2009). We would expect that in a case where an operator has claimed that it did not receive proposed assessments, and the Secretary submits evidence that the proposed assessments were delivered, the operator would respond to the Secretary's evidence, especially where the Secretary's evidence includes the representation that the operator received other assessments delivered to the same address.

H&B's sole ground for making this motion is that the three proposed assessments were not delivered to it. In light of the Secretary's unrebutted evidence that (1) the assessments were delivered and signed for, (2) four other proposed assessments were delivered to the same address and acknowledged by H&B, and (3) the assessments were sent to H&B's address of record, we conclude that H&B has failed to prove that the assessments were not properly delivered.

Moreover, we have also held that a Rule 60(b) motion shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect under subsections (1), (2), and (3) of the rule, not more than one year after the judgment, order, or proceeding was entered or taken. The motion to reopen in the case of proposed assessment No. 000198804 was filed more than a year after it became a final order. Therefore, with regard to proposed assessment No. 000198804, H&B's motion is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

² One of these other assessments was signed for by D. Hall and another one was signed for by S. Hart.

Having reviewed H&B's requests and the Secretary's responses, we conclude that H&B has failed to establish good cause for reopening the proposed penalty assessments and deny its motion with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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September 26, 2011

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

v.

TROY MINE, INC.

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Docket No. WEST 2011-929-M
A.C. No. 24-01467-249462-02

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 6, 2011, the Commission received from Troy Mine, Inc. (“Troy Mine”) a motion seeking to reopen a penalty assessment that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

Troy Mine asserts that it timely mailed its contest form to the MSHA Civil Penalty Compliance Office, and submits copies of Certified Mail receipts showing it was signed for by an MSHA employee. However, it was informed by MSHA that it failed to timely contest the proposed penalty assessment. The Secretary submits that upon reviewing the records in this proceeding, she has discovered that the proposed penalty is the subject of an active civil penalty proceeding (Docket No. WEST 2011-886-M). In that proceeding, the Secretary’s penalty petition was filed on May 23, 2011. Based upon these findings, the Secretary submits that the request to reopen should be dismissed as moot.

Having reviewed Troy Mine's request and the Secretary's response, we find that Troy Mine timely contested the proposed penalty assessment and, therefore, it did not become a final order of the Commission. Accordingly, the request to reopen is dismissed as moot.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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September 26, 2011

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

v.

FERRELL EXCAVATING CO., INC.

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Docket No. WEVA 2011-1900-M
A.C. No. 46-06034-247760

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On June 7, 2011, the Commission received from Ferrell Excavating Co., Inc. (“Ferrell”) 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 March 2, 2011, and became a final order of the Commission on April 1, 2011. The motion to reopen was filed within

30 days of receiving the delinquency notice. Ferrell asserts it timely contested the penalty assessment and provided the United States Postal Service (“USPS”) tracking number of the contest form.

The Secretary does not oppose the request to reopen. However, the Secretary notes that the Mine Safety and Health Administration (“MSHA”) has no record of the March 9, 2011 contest form. Moreover, the Secretary submits that the USPS online tracking site has no record of the tracking number provided by the operator.

Having reviewed Ferrell'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 F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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September 26, 2011

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

v.

TEN-MILE COAL COMPANY, INC.

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Docket No. WEVA 2011-2107
A.C. No. 46-09060-253336

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On July 21, 2011, the Commission received from Ten-Mile Coal Company, Inc. (“Ten-Mile”) 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 May 23, 2011, and became a final order of the Commission on June 22, 2011. Ten-Mile mailed a contest to MSHA

two days late, on June 24, 2011. MSHA's delinquency letter was mailed July 11, 2011, and the motion to reopen was filed within 10 days, on July 21, 2011. Ten-Mile asserts its Office Manager misplaced the assessment and only discovered it on June 23, 2011. The Office Manager further states she believes this was the first contest filed untimely since the company began operations in 2007, and that she has created a computer system for processing assessments in the future. The Secretary does not oppose the request to reopen and notes that MSHA received payment for the uncontested citations.

Having reviewed Ten-Mile'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 F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

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September 28, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2009-1002
ADMINISTRATION (MSHA)	:	A.C. No. 46-09085-158131 D679
	:	
v.	:	Docket No. WEVA 2009-1003
	:	A.C. No. 46-09085-161199 D679
J & A TRUCKING	:	

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 27, 2009, the Commission received from J & A Trucking (“JAT”) a motion by counsel 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.

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2009-1002 and WEVA 2009-1003, both captioned *J & A Trucking*, and involving similar procedural issues. 29 C.F.R. § 2700.12. We note that the penalty assessments at issue, as well as the public Data Retrieval System (“DRS”) maintained by the Department of Labor’s Mine Safety and Health Administration (“MSHA”), identify the operator as “J.A. Trucking.”

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).

JAT states that it is a small family-owned trucking company, whose office functions are handled on a part-time basis by Debra Whitlock, wife of the company manager. On July 24, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000158131 to JAT, which the company states it intended to timely contest and believed it had contested. JAT eventually discovered, however, that due to Mrs. Whitlock’s inadvertence or mistake, it had failed to file the contest form, and the assessment became a final order on September 5, 2008.

On August 25, 2008, MSHA issued a second assessment to JAT, No. 000161199. JAT asserts that it never received that assessment. It became a final order on October 18, 2008.

The Secretary of Labor opposes reopening either assessment. She states that JAT’s explanation for failing to contest the first assessment is conclusory and thus does not establish a basis for reopening. As for the second assessment, the Secretary states it was delivered to JAT’s address of record, a post office box. However, when it was not claimed by JAT, it was returned to MSHA two weeks later. The Secretary also objects to reopening on the grounds that JAT was notified of the delinquency of the assessments in October and December 2008, respectively, yet did not file its motion to reopen until late February 2009. Finally, the Secretary notes that JAT is delinquent in paying four other assessments, totaling \$12,578.

Having reviewed JAT’s request and the Secretary’s response, we conclude that JAT has failed to provide a sufficiently detailed explanation for its failures to timely contest the proposed penalty assessments. JAT’s explanation that it failed to file a timely contest to the first assessment due to “inadvertence or mistake,” without any further elaboration, does not provide the Commission with an adequate basis to justify reopening of the assessment. See, e.g., *Eastern Assoc. Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007). With regard to the second proposed assessment, JAT’s motion was silent on why the operator failed to retrieve it from its post office box.

In addition, in considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that passed between an operator’s receipt of a delinquency notice and its subsequent filing of a motion to reopen. See, e.g., *Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009). Although the Secretary’s response raised the issue that JAT failed to explain why, after it was informed of the delinquencies, it took as long as it did to request reopening, the operator did not file a reply providing an explanation. We encourage parties seeking reopening to provide further information in response to pertinent questions raised in the Secretary’s response. See, e.g., *Climax Molybdenum Co.*, 30 FMSHRC 439, 440 n.1 (June 2008).

Consequently, the operator also passed on the opportunity to provide an explanation for why it had failed to pay other delinquencies. Moreover, according to the DRS, JAT has failed to pay or contest additional penalties that were proposed after the time it filed its motion.

Accordingly, we hereby deny without prejudice JAT's request to reopen. *Eastern Assoc. Coal, LLC*, 30 FMSHRC at 394; *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). Should JAT choose to renew or amend its motion, it should rectify the deficiencies outlined here, and use the opportunity to respond to the Secretary's statement regarding other assessments which JAT may be delinquent in paying.² Any amended or renewed request by the operator to reopen these assessments must be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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

² While we are dismissing this motion without prejudice to allow the operator to remedy its defects, an inadequately supported motion – particularly one which does not address the Secretary's objections raised in response to motion – is subject to dismissal with prejudice. Operators and their counsel are well advised to fully support their motions with affidavits and other documentation and defend their requests for extraordinary relief from a final order.

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

On December 30, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000207483 to INR-WV. INR-WV asserts that, although the contest form was received and signed for by an individual in its Human Resources Department, it was mistakenly never delivered to its Safety Director for contest.

The Secretary opposes INR-WV's request to reopen because its explanation is conclusory and because an unreliable internal procedure does not provide adequate grounds for reopening. The Secretary also notes that a delinquency notice was sent to the operator on April 8, 2010, more than three and a half months before it filed its reopening request, and the case was referred to the Treasury Department for collection on July 8, 2010. She also submits that in March 2010, INR-WV sought reopening in two other cases (Docket Nos. WEVA 2010-788 and WEVA 2010-810), which underscores the breakdown in the operator's internal procedures. The Secretary further asserts that during the preparation of the March motions to reopen, the operator or its counsel should have learned that this case had also become a final order that was delinquent.

Having reviewed INR-WV's request to reopen and the Secretary's response thereto, we agree that the operator has failed to provide a sufficient basis for the Commission to reopen the penalty assessment. In particular, INR-WV has failed to adequately explain why it delayed approximately three and a half months in responding to the delinquency notice sent by MSHA.¹ Accordingly, we hereby deny without prejudice INR-WV's request to reopen. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that INR-WV may submit another request to reopen the assessment.² Any amended or renewed request by the operator to reopen this assessment must

¹ In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion).

² If INR-WV submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. INR-WV should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as
(continued...)

be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

²(...continued)

part of its request to reopen. INR-WV should also submit copies of supporting documents with its request to reopen and specify which proposed penalties it is contesting. INR-WV should further include an explanation for why the operator waited so long to file for reopening after receipt of the notice of delinquency. Finally, INR-WV should specify exactly which penalties contained on the assessment it wishes to contest.

Chairman Jordan and Commissioner Cohen, dissenting:

Because the operator's explanation for the late-filed penalty contest lacks specific information, and because there was a delay of approximately three and a half months from the operator's receipt of the delinquency notice until the motion to reopen was filed, we would deny this motion with prejudice.

/s/ Mary Lu Jordan

Mary Lu Jordan, Chairman

/s/ Robert F. Cohen, Jr.

Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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September 30, 2011

SECRETARY OF LABOR, : Docket Nos. CENT 2010-702-M
MINE SAFETY AND HEALTH : CENT 2010-1296-M
ADMINISTRATION (MSHA) : CENT 2010-1297-M
: :
v. : :
JET MATERIALS : :

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

ORDER

BY THE COMMISSION:

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”).

On August 24, 2011, Administrative Law Judge L. Zane Gill issued a Default Order entering judgment in favor of the Secretary of Labor and ordering Jet Materials to pay civil penalties of \$6,452, \$10,000, and \$1,671. On September 6, 2011, the Commission received a letter from James Thompson, the former owner of Jet Materials, requesting that the default order be set aside.¹ We construe the letter to be a petition for discretionary review. On September 26, 2011, the Secretary filed an opposition to the petition for discretionary review. For the reasons that follow, we grant the petition, vacate the judge’s order, and remand for further proceedings consistent with this order.

The judge issued a prehearing order on April 20, 2011. The order required the parties to confer regarding the possibility of settlement, to provide a status report, and, if no settlement was reached, to initiate a conference call to set a date and location for the hearing.

On July 22, 2011, the Commission received the Secretary’s motion for default judgment. The motion asserted that most of the Secretary’s attempts to reach Jet Materials had been unsuccessful and that Jet Materials had failed to comply with the judge’s prehearing order by

¹ While other matters were included in the petition for discretionary review, to the extent that the operator’s petition asked for review of additional issues beyond those discussed in this order, we do not reach those issues. In light of our decision to remand, other issues raised by Jet Materials, including the Secretary’s late filing of the petition, need to be considered, in the first instance, by the administrative law judge.

failing to participate in a conference call with the judge and the Secretary's representative to set a date and location for the hearing. Without further proceedings, the judge granted this motion on August 24, 2011.

The Commission's procedural rule concerning orders of default, Rule 66, 29 C.F.R. § 2700.66, provides that:

(a) Generally. When a party fails to comply with an order of a Judge or these rules, except as provided in paragraph (b) of this section, an order to show cause shall be directed to the party before the entry of any order of default or dismissal. The order shall be mailed by registered or certified mail, return receipt requested.

(b) Failure to attend hearing. If a party fails to attend a scheduled hearing, the Judge, where appropriate, may find the party in default or dismiss the proceeding without issuing an order to show cause.

Thus, our rule requires that prior to issuing an order of default, a judge must issue a show cause order unless the party fails to attend a hearing. See *Secretary of Labor v. Reb Enterprises, Inc.*, 18 FMSHRC 311 (March 1996); *Patsy v. Big "B" Mining Co.*, 16 FMSHRC 1937, 1938 (September 1994). Here, the judge did not issue an order to show cause before he entered the default order, as required by Rule 66(a). A party's failure to attend a scheduled conference call with the judge, although objectionable, is not the equivalent of failure to attend a "scheduled hearing" so as to obviate the need for an order to show cause pursuant to Rule 66(b).

Accordingly, for the reasons set forth above, Jet Materials' petition for discretionary review is granted. The default order is vacated, and the case is remanded to the judge for further proceedings in accordance with the Commission's procedural rules.²

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen
Robert F. Cohen, Jr., Commissioner

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

² To avoid further sanctions, Jet Materials needs to respond to all contacts by the Secretary and judge, and attend all scheduled conferences and hearings.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 2, 2011

PINNACLE MINING COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 2011-1758-R
v.	:	Order No. 4201901; 05/20/2011
	:	
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine: Pinnacle Mine
Respondent	:	Mine ID: 46-01816

DECISION AND ORDER

Appearances: R. Henry Moore, Esq., Jackson Kelly PLLC, Three Gateway Center, 401 Liberty Avenue, Suite 1340, Pittsburgh, Pennsylvania 15222, for Contestant

Samuel Charles Lord, Esq., U.S. Department of Labor, 1100 Wilson Boulevard, 22nd Floor West, Arlington, Virginia 22209, for Respondent

Judith Rivlin, Esq., United Mine Workers of America, 18354 Quantico Gateway Drive, Suite 200, Triangle, Virginia 22172, for Intervenor

Before: Judge McCarthy

I. Statement of the Case

This case is before me on a Notice of Contest filed by Pinnacle Mining Company, LLC (“Pinnacle” or “Contestant”) pursuant to sections 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 (the “Mine Act”). Order No. 4201901 was issued to Contestant on May 20, 2011,¹ pursuant to section 103(j) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 813(j). On May 25, the Order was modified to a Section 103(k) Order.

On May 25, Respondent filed a Notice of Contest, and a Motion to Expedite, pursuant to 29 C.F.R. 2700.52. On May 26, Contestant gave notice that it was withdrawing its request for an expedited hearing, but not its Notice of Contest. On May 26, the undersigned issued an Order Approving Contestant’s Motion to Withdraw Its Motion to Expedite.

On June 27, after several modifications to the 103(k) Order and after unsuccessful negotiations with MSHA, Respondent filed its Renewed Motion to Expedite. An expedited

¹ All dates are in 2011, unless otherwise indicated.

hearing was held on July 13. The parties stipulated to jurisdictional issues.² Post-hearing briefs were filed on August 1.

The issues presented by the contest are twofold: Whether the Section 103(k) order was improperly issued because no accident occurred, and whether MSHA's refusal to modify the 103(k) order to permit re-entry of the mine and re-ventilation of the longwall was unreasonable or arbitrary and capricious?

On the entire record, including my observation of the demeanor of the witnesses,³ and after considering the post-hearing briefs, I make the following:

II. Findings of Fact Pinnacle's Longwall Mining Operations

Pinnacle Mining Company, LLC, owned by Cliffs Natural Resources, operates a large underground coal mine that contains numerous mined-out longwall panels, an active longwall section, and multiple continuous miner sections to develop future longwall gate entries. G. Ex. 2. Basically, under the Pinnacle longwall mining system, two parallel gate entries, i.e., the headgate and tailgate, are developed and connected to another set of entries at the back to form a longwall panel that is typically 800 to 1,200 feet wide and several thousand feet long. Tr. 60. A mining machine or "plow" advances outby incrementally across the width of the longwall panel to cut and extract the coal, which falls onto a conveyor system for transport out of the mine. Tr. 60, 180. As cutting occurs, mechanized roof supports or "shields" advance behind the longwall face, and as the shields advance, the roof above the mined-out coal seam falls. This area where the coal has been extracted and the roof has fallen is called the "gob." Tr. 60. The Pinnacle Mine is a gassy mine that liberates in excess of one million cubic feet of methane per day. Methane is explosive in the range of 5 to 15 percent of mine atmosphere, with at least 12 percent oxygen. Tr. 61. The Pinnacle Mine is subject to methane spot inspections every five days under Section 103(i) of the Act. 30 U.S.C. § 813(i). Multiple fans are used to ventilate the mine, including the ASCO fan, which is located in back of the longwall bleeders and serves as a bleeder fan. Stip. 2; G. Ex. 6.

² See Stip. 31-35. References to the parties' stipulations are designated "Stip." References to the Secretary's Exhibits are designated "G. Ex." References to Pinnacle's Exhibits are designated "C. Ex. or R. Ex." References to Joint Exhibits are designated "Jt. Ex." References to the transcript of the hearing are designated "Tr."

³ 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, experience and credentials, and consistency or lack thereof within testimony of witnesses and between the testimony of witnesses.

The Unusual Carbon Monoxide Buildup on May 19

On May 19, Pinnacle was operating a longwall mining unit in the 9F panel. Stip. 1. The block of coal was located between the 9E entries on the tailgate side and the 9F entries on the headgate side. Stip. 1; G. Exs. 3 and 4. The 9E entries consisted of three separate entries with the No. 3 entry immediately adjacent to where the longwall panel removed coal. G. Exs. 3 and 4. The 9F longwall panel is 65 crosscuts in length, and the longwall unit was currently mining between crosscuts 56 and 55. The area of the longwall panel behind the longwall unit from crosscuts 56 through 65 was gob. G. Exs. 3 and 4. Between crosscuts 56 and 65, the No. 3 entry was inaccessible because the longwall unit had already advanced beyond those locations and the roof had collapsed behind it. Tr. 73, 355.

At various times during the day on May 19, levels of carbon monoxide (CO) in the range of 12-32 parts per million (ppm) were detected on handheld gas detectors by various Pinnacle examiners in crosscut Nos. 59-63 between the No. 2 and No. 3 entries in the 9E entries in the longwall gob area. Stip. 3; Tr. 224-26.¹ Pinnacle claims this is a low level of CO (Tr. 101), in areas of low air flow (Tr. 161-62; G. Ex.4), and that CO readings were lower in areas with more air flow inby and outby (G. Exs. 4 and 9). Mark Nelson, the mine's general manager, testified that CO readings of 12 to 26 ppm are "not typically encountered by our examiners" and the CO readings of May 19 gave mine managers a "signal that we may have an issue." Tr. 226. In fact, the event prompted management to withdraw miners from the longwall area and shut off power to the section as required by a provision in the operator's MSHA-approved ventilation plan. Mine management subsequently evacuated the entire mine. MSHA and State (WVOMHST) representatives were contacted prior to 10 p.m. on May 19. Stip. 3; Tr. 226.

The 103(j) and 103(k) Orders

MSHA issued a verbal order pursuant to Section 103(j) at 10:15 p.m. on May 19. Stip. 3. The written Order, No. 4201901, was issued on May 20, pursuant to section 103(j) of the Act, 30 U.S.C. § 813(j). The Order alleges the following "Condition or Practice:"

An event has occurred on the sites MMU (Longwall mining section) whereas approximately 22 parts per million Carbon Monoxide has been detected. This CO was measured between the No. 2 + No. 3 crosscut inby the Longwall tail. This order was initially issued verbally to the operator and is now being reduced to writing. This order is intended to protect all miners on site, including those involved in rescue + recovery of operations or investigation of this event. Also, this order is to prevent the destruction of evidence that would aid in investigation of the accident.

Stip. 5.

¹ The record reflects that carbon monoxide is a gas that may occur at different levels for several reasons in a mine, including use of diesel equipment, heat-generating friction along a belt line, oxidation of carbonaceous materials like wood, or the combustion of coal during a mine fire. Tr. 145-46, 205, 310-11.

On May 20, at 3:30 a.m., the Order was modified to a Section 103(k) Order, which alleged as follows:

The initial order is modified to reflect that MSHA is now proceeding under the authority of Section 103(k) of the Federal Mine Safety and Health Act of 1977. This Section 103(k) order is intended to protect the safety of miners on site, including those involved in the rescue and recovery operations or investigations of the event. The operator shall obtain prior approval from an Authorized Representative of the Secretary for all actions to recover and/or restore operations in the affected area.

Additionally, the mine operator is reminded of its existing obligation to prevent the destruction of evidence that would aid in investigating the cause or causes of this event.

Stip. 7.

There have been a number of subsequent modifications to the 103(k) Order, but none has allowed production to resume. Stip 9.² MSHA officials determined that the CO readings that had been reported by Pinnacle on May 19 were elevated and cause for concern since they exceeded ambient levels of 1 to 2 parts per million (“ppm”), which MSHA inspectors normally encountered. Tr. 215.

Extensive Sampling and the Retention of Experts

On the morning of May 20, MSHA consulted with John Urosek, Chief of Mine Emergency Operations, for expert guidance and opinion regarding MSHA’s response to

² These modifications include the following:

- 5/20 affected area left blank on initial order
- 5/23 allowed longwall underground area evaluation
- 5/24 allowed sampling tubes to be installed underground for surface monitoring of 9E, 61 & 62 crosscuts
- 5/25 allowed installation of CH₄ & CO monitors at ASCO fan
- 5/26 allowed installation of breaker on pump at 54 break
- 5/27 allowed sampling of 8S gob area and restoration of power to pumps
- 5/27 allowed water to be pumped through 9-F borehole
- 5/31 allowed completion of 8R deep well and maintenance at 99 break
- 6/6 established written plan for examinations
- 6/6 allowed pumping of nitrogen and carbon dioxide for gob inertion
- 6/10 allowed mine rescue members to examine temporary seals
- 6/11 allowed installation of temporary seals at 9E & 9F
- 6/15 allowed repair work to slope belt from surface location
- 6/17 allowed mine rescue members to examine temporary seals

developments at the Pinnacle Mine. Tr. 51, 83; G. Ex 1. Urosek is a mining engineer, who graduated from Pennsylvania State University in 1979. He is a registered professional engineer in Pennsylvania. Tr. 52; G. Ex 1. He has responded to most of the nation's major mine disasters during the past thirty-five years, including seventy-four mine emergencies, most of which involved mine fires or explosions. G. Ex. 1. In addition, Urosek is a former Chief of MSHA's Ventilation Division, who has conducted sixty-six investigations into mine ventilation systems in an effort to ensure that harmful dust and gas are ventilated out of working faces and mined-out gob areas. Id. Urosek has frequently testified as an expert witness for MSHA, and he has made numerous presentations on mine ventilation and emergencies. Id. He responds as needed to any fire, explosion or inundation in U.S. mines, and directs MSHA efforts in such emergency scenarios. Tr. 51-52. At the hearing, he was qualified as an expert in mine ventilation, fires and emergencies. Tr. 55.

On May 20, sampling at the ASCO fan commenced and no CO was detected. Stip. 6. No gases indicative of a fire, such as ethylene or propylene, were detected. Tr. 235-36; G. Ex. 5. At 5 a.m. on May 20, MSHA and Pinnacle representatives went underground and collected "bag samples" of the atmosphere from crosscuts 59 through 63. Stip. 8. The parties stipulated that bag sampling provides a more reliable analysis of CO levels than handheld detectors, assuming the samples were collected properly. Stip. 10.

The May 20 bag samples confirmed CO levels of 13 ppm in crosscut 62 between the No. 2 and former No. 3 entries. G. Ex. 5. The bag sample from crosscut 62 also showed over 10 percent methane, well into the explosive range given the 18 percent oxygen present. G. Ex. 5. Meanwhile, samples taken from other areas of the longwall panel, including the bleeder shaft and the longwall face, contained no detectable amounts of CO. G. Ex. 5.

Urosek reviewed the bag samples of May 20. Tr. 85. He was concerned about the 13 ppm of CO in crosscut 62, which came from somewhere in the mine. He initially thought that the single sample could have been taken in error or had been analyzed incorrectly. Tr. 85-88.

Three days later, on May 23, results of bag sampling conducted by MSHA again confirmed the presence of CO in crosscuts 59 through 62, including 13 ppm (versus 40 ppm on the handheld unit) in the presence of an explosive quantity of methane in crosscut 61. Tr. 93; G. Ex. 8; Stip 10.³ Samples from other crosscuts revealed 0-5 ppm CO levels. Stip. 10; G. Ex. 9. No detectable amounts (NDA) of CO were present in other sampled areas of the 9F panel, including six samples from the longwall face and eleven samples from the headgate entries. Tr. 91-92; G. Exs. 6 and 7.

³ The samples, other than from handheld detectors, were analyzed by use of a gas chromatograph. The parties stipulated that discrepancies between handheld detector readings and actual sample lab results were attributable to higher level hydrocarbons in areas being sampled. Stip. 10.

Based on the May 23 sampling from crosscut 61 (G. Ex. 8), Urosek concluded that the May 20 sample of 13 ppm of CO in crosscut 62 was not the result of sampling error, and given the mix of greater than 5.51 percent methane and 19.2 percent oxygen in crosscut 61 on May 23, there was an explosion hazard present in this area. Tr. 93-95. On May 23 or 24, Pinnacle retained Robert Lincoln Derick as a consultant and expert, and began including Derick in meetings with MSHA, WVOMHST, and the United Mine Workers of America (UMWA). Tr. 308. Derick has been involved in responses to twelve mine emergencies, all west of the Mississippi. Tr. 299; C. Ex. 1. Ten of those twelve emergencies involved mines prone to spontaneous combustion. The parties stipulated that the Pinnacle Mine was not a spontaneous combustion mine. Tr. 300; 302-303. All of Derick's writings on mine fires were based on his experiences at a spontaneous combustion mine (Orchard Valley) back in 1986. Tr. 300-01; C. Ex. 1, p. 2. Unlike Urosek, Derick is not a mining engineer. Tr. 297.

On May 23, MSHA, WVOMHST, and Pinnacle representatives revisited the underground longwall area and increased the sampling locations for 9F and 9E along the gob line and longwall face. Stip. 11. On the evening of May 24, MSHA and Pinnacle personnel re-entered the longwall to establish sample lines at crosscut Nos. 61 and 62, which could be monitored from the surface. Stip. 12. Other sampling sites were established at the ASCO bleeder fan at the top of the 9F entries, at the 9F-1 degasification hole above the longwall gob, and, since June 10, at crosscut 53 of the 9E entries. Stip. 20; G. Ex. 9 (complete sampling results as of July 8, five days before the hearing). Each of these locations have been sampled several times a day by MSHA and Pinnacle. G. Ex. 9; Tr. 101-102.

MSHA's samples were evaluated at MSHA's Mt. Hope facility in West Virginia and Pinnacle's samples were evaluated at Phoenix First Response lab in Glassport, Pennsylvania. Stip. 13. To verify the levels of CO sampled, MSHA retested certain samples at its Pittsburgh laboratory. Tr. 101. Urosek testified that MSHA's and Pinnacle's sampling was substantially consistent. Tr. 101. Pinnacle does not challenge the accuracy of MSHA's bag sample results, just the comparisons that were made for determination of the ambient level of CO. The sample results consistently show heightened CO levels in the tailgate side of the 9F longwall panel at crosscut 61 until temporary seals were installed on June 12. No fire gases, such as ethylene (C₂H₂) or acetylene (C₂H₄), were capable of being detected with current technology. G. Ex. 9; Tr. 119-121.

The Water Pumping Operation through the 9F-1 Degasification Borehole

On May 31, Pinnacle devised a plan to flush water down the 9F-1 degasification borehole in an effort to cool any potential "hot spot" near the mine floor. Stip. 14. Ideally, the water would spray out over the gob, saturating the material, and then flow toward the lowest point of the tailgate at about crosscut 50 (Tr. 241-42, 275, 282, 309-10; Jt. Ex.1, Attachment E). Pinnacle concluded that there was a "chance" that the water would run through the area of the gob near the 59-62 crosscuts on its way to a lower elevation outby near crosscut 50 (Tr. 275-276), but there was little expectation that the

water actually would pool in the area of any potential “hot spot,” and Pinnacle could not determine with certainty that the water ever reached the targeted area of the gob. Tr. 241, 310, 316.

On June 4, the pumping operation was completed and about 1.89 million gallons of water had been injected down the 9F-1 surface borehole into the gob area. Stip. 17. The CO levels from the array of sampling tubes in the longwall gob did not change as a result of the injection of such water. Tr. 260; G. Ex. 9.

About early June, Urosek learned during face to face questioning of operator representatives that they had encountered an odd odor around the 61 and 62 crosscuts during initial visits to the area on May 19. Tr. 191-193. MSHA inspector Jerry Cook and Pinnacle general manager Nelson confirmed the “unusual” and “unique” smell. Tr. 194-195, 228, 230. Urosek credibly testified that he specifically asked mine personnel if there had been an unusual smell based on an incident “from personal experience [at another mine] . . . where [he] actually smelled heating and was downwind of it and saw that it was a fire, [he] noticed an unusual smell.” Tr. 193. Apart from the unusual smell, however, no smoke, haze, or recognizable burning or sulfur odor was reported at the Pinnacle Mine. Tr. 195, 227-28.

Pinnacle claims that there was no event which triggered a rise in the CO levels (Tr. 238). There was no lightning strike, and no cutting and welding in the vicinity of the tailgate (Tr. 238).⁴ In addition, there was no smoke or smell of burning (Tr. 227-28, 230, 232-33). Furthermore, the coal at Pinnacle is not susceptible to spontaneous combustion (Tr. 302-03), and the sampling did not show evidence of gases associated with burning (Tr. 235-36).

Pinnacle further notes that CO can be released by normal oxidation, which is not necessarily accompanied by a detectable rise in temperature. Tr. 310. Moreover, the supplemental support in the No. 3 entry of the tailgate consists of wooden cribs, some of which is older wood in poor condition. Tr. 233-34. Pinnacle notes that the decay of wood can result in the release of CO. Tr. 311.

Inert Gas Injection Before and After Sealing

On June 7, because there was no change in the CO readings after the deluge of water, Pinnacle developed a plan to partially inert the gob area with a gas injection mixture of carbon dioxide (CO₂) and nitrogen (N₂) under reduced ventilation pull from the ASCO fan. Stip. 18; Tr. 244. Between June 7 and June 10, this injection of inert gases – 4.8 cubic feet of CO₂ and 5.1 cubic feet of N₂ – failed to achieve lasting reductions in the targeted CO levels. Stip. 18-19. During this period of inert gas

⁴ Upon questioning from the bench, however, Derick acknowledged the potential, albeit unlikely, scenario that combustion or ignition occurred during torch cutting and welding on or about April 20 on the headgate side near the longwall entry of the 9E. Tr. 260; cf. Tr. 239, 308.

injection, the gate entries of the 9F panel were not sealed off from the mine ventilation system, and oxygen levels at the sampling sites remained above 16 percent (G. Ex. 9), a level sufficient to sustain any smoldering gob fire. G. Ex. 20.

With MSHA approval, Pinnacle then moved from partial inertion of the gob to full inertion of the gob. Tr. 244. On June 11, MSHA approved Pinnacle's construction of temporary seals between the Nos. 4 and 5 crosscuts across the mouths of the 9E and 9F entries. Stip. 21. On June 12, shortly after 5:00 a.m., the ASCO fan was turned off and final temporary seals, i.e. ventilation curtains, were completed. At 11 a.m., CO₂ injection recommenced via the 9F-1 borehole. Nitrogen injection recommenced into the capped ASCO fan shaft. Stip. 22. On June 13, an inert state for methane ignition was achieved for all sampling locations. This was defined as less than 10% oxygen, a level of oxygen that is 2% below the amount necessary to ignite methane. Stip. 23; Tr. 167-68. As a result, oxygen levels and CO levels began to fall. G. Exs. 11 and 12. On June 17, oxygen levels decreased to 7% or below at all sampling locations. Stip. 24. CO₂ continued to be injected on June 18 and 19. Stip. 25- 26. The injection of inert gases such as CO₂ and N₂ reduced the percentages of other gases such as oxygen and CO, as the injection occurred. Tr. 167. On June 20, Pinnacle requested modifications of the 103(k) Order to evaluate necessary repairs for the ASCO fan. Stip. 27.

Pinnacle's June 21 Plan to Re-Ventilate the Longwall Area

On June 21, less than ten days after completion of the temporary seals, Pinnacle gave MSHA its plan (Jt. Ex. 1) to re-ventilate the longwall area. Stip. 21. Pinnacle's request stated, as follows:

Please find attached a summary review of all actions and information collected May 19, 2011 through June 20, 2011 which are being used as the basis for requesting the Pinnacle Mine be permitted to re-establish ventilation to the 9F longwall mining area, conduct a thorough examination of this area once the atmosphere is stabilized, and upon no adverse findings or sudden changes in atmospheric samples to resume normal mining operations. From the initial finding of slightly elevated carbon monoxide levels near the longwall gob area, Cliffs management has taken the initiative in our conservative approach to the situation and working with agencies in remedial efforts to eliminate the potential for a heating/combustion type event. Even with no signs of an actual event, management completed an exhaustive number of projects (intake air, flooding, inert gases, gas chromatographic gas analysis, etc) in order to ensure there were no heating activities and therefore ensuring the safety of our employees prior to their return to work. The attached supporting data reflects a steady carbon monoxide level despite the various efforts over the last 32 days. And while no prior baseline data is available, samples collected from underground locations, as well as the 9F-1 surface degas borehole demonstrate levels of hydrogen, methane, ethane, carbon monoxide, and other higher hydrocarbons to be naturally occurring in this current longwall gob/surface borehole area.

We are requesting that re-ventilation of the longwall commence on June 22, 2011, with underground sampling locations having been inert for in excess of 9 days by this time.

MSHA's Rejection of Pinnacle's Plan

On June 23, Derick and Pinnacle personnel met with Urosek and MSHA personnel and with representatives of the UMWA and the state of West Virginia concerning Pinnacle's request to re-ventilate the longwall area, perform examinations and resume operations if no abnormal conditions were found. MSHA orally denied Pinnacle's request. Stip. 29. Gas samples indicated that oxygen levels had not stabilized and were still trending downwards, and CO levels remained elevated at up to 11 ppm. G. Exs. 9, 11 and 12.

MSHA declined to approve Pinnacle's plan primarily because of disagreement over the ambient level of CO and the provision that delayed withdrawal of miners in the unsealed area until carbon monoxide levels reached 25 ppm. In addition, MSHA did not agree that the CO was a naturally occurring condition, and the 8-hour waiting period proposed after reventilation fell far short of MSHA's typical 72-hour period. Tr. 119. MSHA also rejected the specifics of Pinnacle's June 21 plan to re-ventilate, re-enter and evaluate the longwall area, and resume operations, as set forth in Jt. Ex. 2, p. 11.

By letter dated, June 30, MSHA set forth the written basis for its denial of Pinnacle's June 21 request. Jt. Ex. 2.

This is in response to your request sent by email on June 23, 2011, at 3:56 pm requesting a letter regarding the denial of your action plan to re-ventilate and examine the longwall area at the Pinnacle mine. During the 1:00 pm meeting on June 23, 2011, concerns with re-ventilating the mine so soon following the inerting process were discussed.

Those same concerns would apply to your plan to re-enter the mine dated June 21, 2011. Therefore, your request to modify the 103(k) to implement this action plan cannot be granted for the following reasons:

- Uncertainty as to the origin of the carbon monoxide (CO) concentrations.
- Samples collected from another longwall panel within the mine on 5/27/2011 indicated limited carbon monoxide concentrations (1 ppm).
- Numerous samples collected from the 9F1 degasification borehole in another longwall panel from another area of the mine (8Q5) indicated carbon monoxide concentrations of 4-5 ppm.
- Samples collected in crosscuts along the perimeter of the worked-out area of this longwall panel on the headgate side and in the tailgate side outby 59 crosscut indicated 0 ppm CO.
- Carbon monoxide was not detected in the face area when elevated methane concentrations were detected due to the inundation of floor gas. However, carbon monoxide was detected in the tailgate crosscuts in by the

face. This raises the concern that the carbon monoxide is not associated with higher concentrations of methane.

- This mine has a history showing the correlation between low concentrations of CO and subsequent explosions. Samples collected from another longwall bleeder system within the mine following re-ventilation of a sealed area after a series of events, fires and explosions, in 2003 indicated limited CO. Prior to sealing of this longwall panel, multiple explosions occurred in the mine when low concentrations of CO were being detected.
- The number and location of all ignition sources in the temporarily sealed area are unknown. Air sample analysis indicates portions of the sealed area were explosive when collected.
- The oxygen concentrations were not below 4 percent for all sampling locations for any significant length of time following the installation of the temporary seals when last sampled.
- Even though the oxygen concentrations have been decreasing, it appears the carbon monoxide concentrations have not stabilized. However, sufficient time has not expired in which a definitive determination could be made.
- The proposed procedure to restart the Asco fan and then sending miners underground to remove the temporary seals would expose miners to the hazards associated with moving explosive mixtures over an ignition source.
- The plan does not allow enough time for the mine to stabilize following a major change to the ventilation system.
- The plan does not discuss the criteria to evaluate the atmosphere during that time period before miners re-enter the mine for examination.
- As previously stated, the proposed levels of carbon monoxide are not acceptable. Ambient levels in the active mine appear to be on the order of 2 ppm or less. The carbon monoxide action level of 25 parts per million greatly exceeds the ambient level for this mine.
- The phrase “Pending no significant negative changes” is too vague to comprehend.
- There is no additional monitoring of the mine atmosphere proposed once the initial evaluation of the longwall area is completed.

The Parties’ Primary Disagreement Over the CO Level Triggering Withdrawal, and the Appropriate Length of Time Before Unsealing

It is undisputed that since late May or early June, MSHA held several meetings and engaged in good faith negotiations with Pinnacle. Tr. 40, 117, 192. The primary point of disagreement between the parties involved Pinnacle’s plan to withdraw miners after re-ventilation when CO levels reached 25 ppm. Jt. Ex. 1, p. 11; Tr. 40-41, 132-137. MSHA could not agree to Pinnacle’s plan because 25

ppm was ten times higher than what MSHA considered to be the ambient level of 1 to 2 ppm. Tr. 137.⁵

In addition, during discussions with Pinnacle, Urosek opined that it was “too early” to unseal the area because once oxygen was reintroduced, any fire that existed in the gob area could be rekindled, and as CO readings rose, the efforts to monitor and quell any potential heating or smoldering gob fire through sealing “would be wasted.” Tr. 124. Urosek credibly testified that there is an inherent uncertainty upon re-ventilating an area where a suspected gob fire cannot be seen, and if any smoldering fire is not extinguished when the oxygen reaches it, CO levels will begin to grow, and if sufficient methane reaches the hot spot before resealing can take place, an explosion may occur. Tr. 125-126. Urosek further testified about past mine fires that were unsealed too soon, including the Galatia Mine fire in Galatia, Illinois in 1996 and the VP-5 Mine fire in Vansant, Virginia in 1982, which caused rekindling of a diminished fire and led to explosions. Tr. 125-126; Tr. 154; G. Ex. 19, p. 4.

Furthermore, a gob fire at the Pinnacle Mine in 2003 generated a series of explosions, even with relatively low levels of CO at the 0 to 17 ppm range. Tr. 150; G. Ex. 19, p. 1; G. Ex. 21 (PowerPoint); R. Ex. 2, p. 30 (Powerpoint). Specifically, in early September 2003, a gob fire caused a series of explosions and nine months of lost production at the Pinnacle mine. The mine successfully resumed normal operations after remaining under seal for nearly two months from March until May 2004. Tr. 150-154; G. Ex. 21 (PowerPoint). In MSHA’s view, past experience at the Pinnacle, Galatia and VP-5 Mines established that it was prudent to wait an extended period of time – far exceeding 10 days after the mine was sealed – before reopening and re-ventilating. Tr. 154; G. Exh. 19.

The Installation of Permanent 50-PSI Seals

The 9F panel remained under temporary seal with injection of inert gases until Modification 21 to the Section 103(k) order, approved by MSHA on July 7, which allowed 50-psi seals in lieu of temporary seals to be installed at the mouths of the gate entries across the longwall panel. Tr. 147-48; G. Ex. 17.⁶ Installation of the 50-psi seals

⁵ As noted, Pinnacle’s June 21 plan contained an action level of 25 ppm of CO. Jt. Ex. 1. In its post-hearing brief, Pinnacle represents that its most recent plan submitted on July 19, included an action level of 15 ppm. That plan, however, apparently submitted a week after the expedited hearing on July 13, is not in evidence, and therefore not before me. I note that I encouraged the parties to simultaneously pursue two tracks, a litigation track and a settlement track during the luncheon recess, despite counsel’s assertion that the parties were already at impasse. Tr. 33, 41.

⁶ In its post hearing brief, Pinnacle states that the seals were removed first by mine rescue team members, before the ASCO fan was restarted. Pinnacle replaced the curtains used as temporary seals with metal stoppings. Tr. 246-47. The metal stoppings have since been replaced by 50 psi seals. Tr. 147, 150, 268.

permitted mining and production activities to resume outside of the sealed longwall area, including maintenance throughout the mine and coal production and development on the multiple continuous miner sections.⁷ Meanwhile injection of inert gases to the longwall area was continued. Tr. 148.

In its post-hearing brief, the Secretary asserts that MSHA expected that the CO levels would continue to decline after installation of the 50-psi seals, just as had occurred after installation of the temporary seals on June 11. G. Exs.11 and 12. Once the CO levels stabilized, the longwall area would remain sealed until the trends in the sampling indicated that unsealing was safe. Sec. Br. at 9.

Pinnacle's General Manager Nelson testified that the downside to keeping the 9F panel sealed for an extended period is "the additional financial difficulty imposed upon the company." Tr. 268. He testified that resuming coal production from the continuous miner sections would not be "profitable." Id. He further testified that he did not believe an explosion was possible upon re-ventilation with the monitoring and other protections in place. Tr. 262-63.

The intervenor, UMWA, whose miners are temporarily out of work due to the partial shutdown, supports MSHA's position in this case. Tr. 15; July 28 Letter of J. Rivlin on behalf of UMWA.

Given the extensive resources that MSHA and Pinnacle have devoted to and continue to devote to this matter, it is in all parties' interest for MSHA to lift the Section 103(k) order and return the longwall to normal production as soon as it is safe to do so.

III. Legal Analysis and Conclusions of Law

A. Was the Section 103(k) Order Properly Issued Because an "Accident" Occurred?

1. Position of the Parties

a. The Contestant's Position

The term "accident" as set forth in Section 3(k) of the Act "includes a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person." 30 U.S.C. § 802(k). Contestant argues that no "accident" occurred which could properly form the basis of a Section 10(k) Order, which expressly requires an "accident." Contestant relies on *Aluminum Company of America (Alcoa)*, 15 FMSHRC 1821, 1824 (Sept. 1993), where the Commission affirmed Judge Mauer's ruling vacating a 103(k) order "because . . . the Secretary did not prove that an accident had occurred."

Contestant notes that in *Alcoa*, the Commission determined that the definition of accident in Section 3(k) was not exhaustive, because the word "includes" is a term of enlargement. Contestant argues, however, that the Commission's interpretation is not necessarily the appropriate one, and a restrictive interpretation of "includes" is more appropriate given the

⁷ Pinnacle does not have a second longwall operation, which could have resumed production at this time. Tr. 148-49.

authority that Section 103(k) confers on the Secretary, citing *Pennsylvania State Board of Pharmacy v. Cohen*, 292 A.2d 277, 280 (Pa. 1972). Contestant further highlights the Secretary's argument in *Alcoa* that "an event not specifically listed . . . falls within the definition of 'accident' if it is similar in nature or presents a similar potential for injury or death as a mine explosion, ignition, fire or inundation." 15 FMSHRC at 1825-26. Contestant argues that although the Commission agreed with this argument in general, the Commission concluded that whether a specific event is similar in nature must be determined on a case-by-case basis. *Id.* at 1826. Contestant further observes that in dicta, the Commission characterized "accidents" as "sudden events that pose an immediate hazard to miners and require emergency action," and that the regulatory definition of "accident" implementing the accident reporting provisions found at 30 C.F.R. § 50.2(h) was consistent with this understanding. *See, e.g., Homestake Mining Co.*, 4 FMSHRC 1829, 1839 (Oct. 1982) (ALJ Vail) (definition of "accident" appearing in 30 C.F.R. § 50.2(h) applied to uphold the validity of a 103(k) order); *Emerald Coal Resources, LP*, 30 FMSHRC 122, 124 (Jan. 2008) (ALJ Zielinski) (concluding that an unplanned roof fall was an accident under the Act).

Contestant emphasizes that the 103(k) order in *Alcoa* was premised on a determination that a mercury contamination had occurred. While the Commission agreed with the Secretary that an injury or death occurring as a consequence of mercury exposure would constitute an "accident," Contestant notes that the Commission found no evidence of overexposure to, contact with, or injury or illness arising from the presence of mercury. *See* 15 FMSHRC at 1825. Although not specifically referenced by Contestant, the Commission found that "[t]he Secretary presented no evidence . . . that the mercury contamination . . . was similar in nature or presented a potential for injury similar to that of a mine explosion, ignition, fire or inundation," i.e., "sudden events that pose an immediate hazard to miners and require emergency action." *Id.* at 1826. Furthermore, the Commission emphasized in *Alcoa* that "the Secretary's witnesses did not attempt to relate the hazards associated with the conditions in the area to an event similar to a mine explosion, fire or inundation . . . and while an accident need not necessarily involve a sudden occurrence that creates an immediate hazard, the evidence in this case fails to support the Secretary's argument that this particular gradual release of a toxic chemical was similar in nature or presented the same potential for injury as the events set forth in the statutory definition of accident." *Id.* at 1827.

Contestant argues that analogous reasoning applies here. MSHA suspects, but cannot demonstrate, that there is a heating or combustion in the gob or that an event identified in Section 103(k) has occurred, Contestant contends. Contestant argues that the levels of CO present do not fit within the definition of "accident." They were not a sudden event, and the Secretary can only argue that they "might" represent a fire. Based on Derick's expert opinion, following his examination of the data from the sampling and inertion period, Contestant argues that there is no definitive evidence to establish a fire or heating. Tr. 345 Contestant argues that the levels of CO are low and do not constitute an event "similar" to those listed in section 3(k) because there can be other causes for the CO. *See* Tr. 101, 333. Moreover, Contestant notes that when the initial CO levels were detected, no other fire gases such as ethylene and acetylene were detected, (*see* Tr. 235-36; G. Ex.5 and 9), and there was no heat, smoke or haze detected. *See* Tr. 227-28, 230, 232-33. In addition, the coal at Pinnacle is not prone to spontaneous combustion (*see* Tr. 302-03). Therefore, an event that would result in an ignition of coal or

methane was necessary, such as the lightning strike that led to the series of explosions at Pinnacle in 2003 (see Tr. 258; R. Ex. 2, p. 10), but such an event is absent here. See Tr. 308.

Contestant relies on Derick's testimony that CO can be produced by normal oxidation of wood or coal without a detectable rise in temperature, and faults Urosek for unfamiliarity with the relationship between oxidation and temperature. Tr. 310. In addition, Contestant notes that hydrogen was also present in the gob (G. Exs. 5 and 9), which Urosek conceded was a product of natural processes, not combustion. Tr. 187-88. Contestant argues that since the CO and hydrogen track each other in the same relationship (Tr. 324-25; G. Ex. 13), and the hydrogen is a product of normal processes in the upper gob, then the CO is also a product of natural processes. This is confirmed by the fact that the relationship between CO and hydrogen remained the same after the inertion process, Contestant argues. Tr. 324-25; G. Ex. 3; R. Ex. 4.⁸ Contestant also relies on Derick's testimony that if there was a heating, CO would have been expected to rise noticeably once ventilation stopped, and that did not occur. Tr. 318.

Contestant concludes that irrespective of what MSHA determined at the time of issuance of the 103(k) order, the Order should now be vacated because after extensive sampling, Contestant and its expert have determined that the CO was most likely the result of normal processes within the longwall gob that resulted in the presence of gases in the upper levels of the gob. See Tr. 311-12. Contestant further argues, based on Derick's testimony, that there is a direct conduit from the upper gob to crosscuts 61 and 62, which confirms that normal gases show up there from the upper gob, not from a heating in the gob. See Tr. 317-18. In sum, Contestant concludes that there was no predicate "accident" and the 103(k) Order should be vacated.

b. The Secretary's Position

The Secretary argues that "[t]he smoldering fire occurring in the 9F longwall gob at Pinnacle Mine is an 'accident' within the Mine Act's meaning of the term, and therefore MSHA could issue a Section 103(k) order to manage recovery activities until mining operations return to normal." The Secretary states that an "accident" is any event causing death or injury, or any event that is "similar in nature or presents a similar potential for injury or death as" a mine explosion, mine ignition, mine fire, or mine inundation, citing *Aluminum Company of America*, 15 FMSHRC 1821, 1825-26 (Sept. 1993). Given the central role that 103(k) control orders play in MSHA's statutory mission of advancing miner safety, *Clinchfield Coal Co.*, 8 FMSHRC 1310, 1311 n. 2 (Sept. 1986), the Secretary argues that the term "accident" must be broadly construed to effectuate the Act's "primary purpose" of protecting miners. See *Sec'y of Labor o/b/o Bushnell v. Cannelton Industries, Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989); 30 U.S.C. § 801(a); *Donovan o/b/o Anderson v. Stafford Construction Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984) (Mine Act must be broadly interpreted to further the congressional aim of making mines safe places to work.); *Sec'y of Labor v. FMSHRC (Jim Walter Resources)*,

⁸ Derick testified that G. Ex. 13 was missing a graph showing any correlation between hydrogen and methane. On request of the undersigned (Tr. 226), Contestant attached to its post-hearing brief a graph showing the relationship between hydrogen and methane. I receive this graph into evidence, and remark it as C. Ex. 3, instead of R. Ex. 3.

111 F.3d 913, 920 (D.C. Cir. 1997); *Walker Stone Co., Inc. v. Sec’y of Labor*, 156 F.3d 1076, 1082 (10th Cir. 1998).

Furthermore, to the extent that the statute is at all ambiguous, the Secretary notes that the agency’s interpretation of the term “accident” must be accepted as long as it is reasonable. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Secretary of Labor v. Excel Mining, LLC*, 334 F.3d 1, 5 (D.C. Cir. 2003). The Secretary notes that her litigating position before the Commission is as much an exercise of delegated lawmaking powers as her promulgation of a health and safety standard, and deserves deference. *Excel Mining*, 334 F.3d at 5. The Secretary concludes that the “smoldering gob” at Pinnacle meets the statutory definition of “accident” for the simple reason that it is a “mine fire.” According to Urosek, the term “mine fire” typically encompasses a gob heating of the type occurring at Pinnacle. Tr. 73. In addition, the Secretary cites the treatise “Mine Fires,” credited by both expert witnesses, which treats smoldering coal behind a seal as a “mine fire,” and makes no distinction between combusting coal that is in flames and combusting coal that is smoldering. G. Ex. 20 at 126 (no attempt should be made to unseal a mine fire until the oxygen is low enough to make explosions impossible, and the carbon monoxide has disappeared). The Secretary also cites *American Geological Institute, Dictionary of Mining, Mineral, and Related Terms* 208 (2d ed. 1997)(defining “fire” as a “fuel in a state of combustion”).

Even assuming arguendo that the smoldering gob at Pinnacle is not a “mine fire,” the Secretary argues that it still meets the statutory meaning of the term “accident” because it is “similar in nature or presents a similar potential for injury or death as” a mine explosion, mine ignition, or mine fire. *Alcoa*, 15 FMSHRC at 1825-26. The Secretary emphasizes that the Pinnacle Mine liberates a high quantity of methane every day, and methane in the explosive range of 5 to 15% was repeatedly detected in the immediate vicinity of the gob heating. G. Exs. 5 and 8; Tr. 61. Additionally, in Urosek’s opinion, the gob heating at Pinnacle was sufficient to ignite methane and create an explosion. Tr. 74-75.

The Secretary emphasizes that the history of coal mining is replete with examples of mine explosions generated by gob heatings, including the VP-5, Galatia, and Pinnacle explosions discussed in the record. Tr. 125-126; G. Ex. 21. The Secretary argues that whether a gob heating is considered to be a mine fire or some sort of an incipient fire event, it poses a similar potential for injury or death as the mine explosions and methane ignitions that it can generate. In short, the Secretary argues that smoldering coal in a gassy underground mine poses obvious and serious hazards to miners, and the Mine Act should not be interpreted so narrowly as to prevent MSHA from issuing a Section 103(k) order to address this dangerous situation.

2. Analysis - The Section 103(k) Order was Properly Issued Because the Secretary Proved by a Preponderance of Evidence that an “Accident” Occurred

In *Alcoa*, the Commission concluded that whether a specific event is similar in nature and severity to a mine explosion, ignition, fire, or inundation must be determined on a case-by-case

basis. 15 FMSHRC at 1826. The Commission rejected the Secretary's argument that an unplanned and uncontrolled release of mercury, including a gradual release that creates a long-term hazard, is an "accident" under the Mine Act, because the evidentiary record developed was insufficient to establish that the hazards associated with the conditions in the alumina hydrate production facility were similar in nature or presented the same potential for injury as a mine explosion, ignition, fire or inundation. 15 FMSHRC at 1827-28.

That is not the case here. The Secretary's expert (Urosek) specifically related the hazards associated with the elevated CO buildup -- an event similar to, but not as extensive as, an inundation of gas⁹ -- to a smoldering gob fire (an accident)¹⁰ and a potential methane ignition or explosion (another accident).

It cannot be gainsaid that successful analysis of a potential gob fire requires advanced knowledge of the causes, characteristics, and management of mine fires. In this regard, I give Urosek's expert opinion greater weight than Derick's based on his more extensive, specialized experience with mine fires, ventilation issues, explosions and related mine emergencies. Based on Urosek's superior credentials and empirical research through direct observation and experience, I find that his expert opinion that there is a smoldering gob fire has a more reliable scientific basis than Derick's expert opinion to the contrary. Thus, where Derick's expert opinion conflicts with Urosek's expert opinion, I give more weight to Urosek's opinion based on his superior qualifications and experience. *See Asarco Mining Company*, 15 FMSHRC 1303, 1307 (July 1993).

Pinnacle's June 21 plan submission, endorsed by Derick, predicted that "[a] lengthy continuation of applying inert gases into the temporary sealed area would most likely result in continued levels of carbon monoxide and hydrogen." Tr. 339; Jt. Ex. 1, p. 10, para. (e). Sample results through July 10, however, belie this prediction, since the levels of oxygen and CO consistently decreased and began to stabilize. G. Exs. 11 and 12.

On direct examination, Derick testified that based on sampling correlations between methane and hydrogen levels and methane and CO levels, and the absence of physical evidence, he concluded that there was no heating or actual fire occurring at the Pinnacle Mine. Tr. 245. On cross examination, however, Derick conceded that he could not positively rule out the possibility of a gob heating at the Pinnacle Mine. Tr. 340, 344.

By contrast, Urosek positively ruled out any source for the CO monoxide levels other than a gob heating. Tr. 91-93, 139-140, 144-45, 168-69, 170-71, 216-17, 169. Moreover, Urosek testified that Pinnacle's assertion regarding the absence of higher order fire gases such as acetylene and ethylene did not support the conclusion that there was no gob fire. He explained that these gases do not form at the beginning of a fire, and once they do begin to form they do so at concentrations in the parts per billion, an amount that is not detectable with current technology. Tr. 119-120.

⁹ As the Commission noted in *Alcoa*, "inundation" as used in section 3(k) of the Mine Act, may include the inrush of any gas. 15 FMSHRC at 1825, n. 8, citing 30 C.F.R. § 50.2(h)(4).

¹⁰ Urosek testified that the term "mine fire" typically encompasses a gob heating. Tr. 73.

More importantly, Urosek considered and rejected Pinnacle's various explanations for the elevated CO readings around crosscut 61 of the 9F longwall panel. He rejected the notion that such levels were ambient to that particular location, but nowhere else in the mine. During his extensive experiences with mine fires and ventilation issues, Urosek had never heard of elevated CO levels naturally occurring in a particular area of a mine, except when associated with a heating. Tr. 145. Nor was he aware of any situation in which differences in the composition of coal at one particular area of a mine created variations of ambient CO levels. Tr. 170-171. He also rejected Pinnacle's suggestion that oxidation of old wooden cribs could have caused the elevated CO levels because in his experience, wood oxidation from old cribbing results in a minimal rise in CO levels, up to 1 to 2 ppm, far less than the CO levels found in the 9F longwall area. Tr. 207-08; 211-12. Urosek also rejected Pinnacle's suggestion that the CO was coming from a natural source based on a supposed correlation between CO and methane levels. Contrary to Derick's assertion that methane and CO correlate to one another, G. Exh. 13 shows that the level of CO to methane fell sharply after the area was sealed on June 11. See G. Ex. 13, depicting the ratios of CO divided by methane and CO divided by hydrogen. As Urosek put it, "the methane and carbon monoxide don't have that same track. So it can't be coming from the same location or it would track the same. So we don't agree with D," i.e., Jt. Ex. 1, p. 10, para. (d) of Pinnacle's June 21 plan submission. Tr. 129.

Based on Urosek's credible testimony grounded in past experience with gob fires, I find that the Secretary proved by a preponderance of the evidence that it was more likely than not that the May 19 event, i.e., detection of 22 ppm CO measured between the No. 2 and No. 3 entries in the 9E entries of the longwall gob area, was the result of a smoldering gob fire in an inaccessible area of the collapsed gob. As Urosek explained, this type of fire in a longwall gob poses a difficult dilemma for MSHA: How do you extinguish or fight a fire that you cannot see? Tr. 73-74.¹¹

Although the record reflects that CO may rise above ambient levels for a variety of reasons besides a gob heating, including use of diesel equipment, heat-generating friction along a belt line, oxidation of carbonaceous materials like wood, or the combustion of coal during a mine fire (Tr. 145-46, 205, 310-11), Urosek persuasively rejected these alternative explanations as proffered by Contestant, as set forth above. Rather, in Urosek's expert opinion, the elevated CO,

¹¹ Pinnacle faults MSHA for failing to have used an infrared heat gun or Litton or hydrocarbon ratios to confirm whether a gob heating was occurring. I credit Urosek, however, that use of a heat gun would have been ineffective since the longwall gob occupies the former No. 3 entry and is almost entirely inaccessible. Tr. 73; 355; 362. Except for the small sections of the gob that had spilled into the twenty-foot wide crosscuts, the gob was could not be reached and no heat gun readings were attainable. *Id.* Moreover, even if MSHA could have used a heat gun in small areas of exposed gob in the crosscuts, those readings may not be reliable since the record demonstrates that temperature readings from the surface area of a smoldering fire may differ dramatically from temperature readings in the smoldering area underneath. Tr. 70-71. Similarly, Urosek testified that because inert nitrogen and carbon dioxide were artificially induced into the 9F area, the Litton or hydrocarbon ratios were not reliable. In fact, Derick agreed with Urosek on this issue when testifying that he did not place much faith in any fire equations with all the inert gas being applied. Tr. 331.

which initially caused the operator to withdraw miners from the longwall and then shut down the entire mine, could only be due to a fire or gob heating (Tr. 91-93, 139-140, 144-46; 168-69, 216-17). Urosek's expert opinion was based on extensive experience with past gob fires at other mines, including the Pinnacle Mine, and hundreds of bag samples that consistently indicated elevated carbon monoxide localized around the suspected area of gob heating, while other areas of the 9F longwall panel showed no detectable amounts of carbon monoxide. G. Ex. 9; Tr. 91-93; 139-140; 216-17. Urosek testified that the suspected gob fire could have begun as either a small flame or an area of "very, very hot" smoldering coal. Tr. 67-68.¹²

Furthermore, unlike the Secretary's witnesses and evidence in *Alcoa*, Urosek specifically related the hazards associated with 22 ppm CO, an event similar to an inundation of gas, to a smoldering gob fire and a potential methane ignition or explosion in this gassy mine. Urosek testified that a smoldering gob fire poses a risk of a methane explosion, since a heating that produces CO can ignite methane. Tr. 74. Furthermore, Urosek testified that methane in the explosive range of 5 to 15% existed somewhere in the 9F longwall gob since the gob is located between the degasification well, where samples showed 50 percent methane, and the 9E entries, which range from 0 to 2 percent methane under normal conditions. Tr. 75, 360. The following testimony is instructive on this point:

Q. Does the gob heating at Pinnacle pose any risk of injury to miners?

A. Yes, it does. Because, just as an example, I stated at a similar mine, the heating -- any heating that's producing carbon monoxide can be of a temperature such that it can ignite methane. And as we discussed earlier, for example, in the number 2 entry, located between crosscuts 56 back to 65, the oxygen levels there are greater than 20. The methane levels in that particular entry are probably less than 2 percent. However, at the degasification borehole, which is only a few feet, relatively speaking, into the gob, we have methane concentrations as high as 50 percent.

Somewhere in between where that degasification hole would locate and the gob area, and where we have the fresh air, is an explosive mixture. The concern is that's the same area where this heating could be located.

Q. What would the risk to miners be? I understand what you're saying about the potential for an explosion. What would the risk of entry to miners be?

¹² Urosek recalled a recent experience he had as part of MSHA's rescue and recovery team when they re-entered a mine two months after an explosion and encountered multiple fires that had burned out. Although Urosek's handheld detector did not pick up any signs of the fire, after encountering an unusual smell in a crosscut, his team uncovered a smoldering fire much like that seen in a charcoal grill. At the surface of the smoldering pile, Urosek obtained a temperature reading of less than one hundred degrees with less than 10 ppm CO. When the heating was disturbed, however, the area began to smoke and temperatures reached over one thousand degrees with CO levels over 30 ppm. Tr. 70-71.

A. Well, that the heating would be hot enough that the methane levels could come in contact with the heated coals or the flame from a gas, possible gas burning, that could ignite that and propagate into a much larger explosion.

Furthermore, on rebuttal, Urosek testified as follows:

Q. Final question. Mr. Nelson testified --well, he was asked the question of whether or not -- if MSHA's theory that a -- or conclusion that a heating is occurring is correct, whether or not it risked entry to miners. Let me ask you this. Where would you expect explosive mixtures of methane to be on the F9 panel?

A. On the F9 panel, again, as we discussed, the ventilation occurs across the longwall face, coming from the headgate entries to the tailgate entries. And it goes along the tailgate entries to the back bleeder entries. In those entries that are open we know we have oxygen levels of 20 percent and methane levels less than 2 percent. In the gob itself we know from the degas where we're taking samples, we have levels in excess of 40 percent, as we just discussed. So in between there's a fringe. And the only open area, the major open area or airflow path in between is very close to the number 3 entry. That's also very close to the area where we're concerned that there is a heating. So the area of the explosive mixture is in the same proximity of the area where we're concerned there's a heating.

Q. All right. And just to be clear, if the explosive mixture of methane comes into contact with the area of heating, what would the result be?

A. There would be an explosion.

Based on this testimony, I find that the explosion hazard is real and not speculative, as samples repeatedly indicated explosive levels of methane in the area of suspected heating. G. Exs. 5 and 8. In sum, I conclude that the Secretary proved by a preponderance of the evidence that it was more likely than not that the May 19 event, i.e., detection of 22 ppm CO measured between the No. 2 and No. 3 entries in the 9E entries of the longwall gob area, was the result of a smoldering gob fire in an inaccessible area of the collapsed gob. I further find, unlike the evidentiary record in *Alcoa*, that the Secretary's expert specifically related the hazards associated with the elevated CO buildup, an event similar to an inundation of gas, to a smoldering gob fire and a potential methane ignition or explosion. In these circumstances, I find that the Secretary has demonstrated by a preponderance of the evidence that an accident has occurred and that the Section 103(k) Order was appropriate.

B. Was MSHA's refusal to modify the 103(k) order to permit re-entry of the mine and re-ventilation of the longwall unreasonable or arbitrary and capricious?

1. Position of the Parties

a. The Contestant's Position

The Contestant argues that the Secretary abused her discretion by denying its plan to re-ventilate the longwall. The Contestant apparently concedes that under Commission precedent the propriety of the continuance of a 103(k) order is reviewed under an abuse of discretion standard. See, e.g., *Emerald Coal Resources*, 30 FMSHRC 122, n.1 (Jan. 2008) (ALJ Zielinski)(order denying operator’s motion for summary judgment challenging 103(k) order based on argument that unplanned roof fall was not an “accident”), citing *Eastern Associated Coal Corp.*, 2 FMSHRC 2467; see also, *Emerald Coal Resources LP*, 29 FMSHRC 956, 966 (Dec. 2007).¹³ Contestant further notes that the primary determination in adjudicating a 103(k) order is whether the inspector acted “reasonably” in issuing or modifying the order, or establishing conditions precedent to termination of the order. See *Eastern*, 2 FMSHRC at 2472; see also, *Southern Ohio Coal Co.*, 13 FMSHRC 1783, 1801 (Nov. 1991) (ALJ Koutras)(holding that the issuance of the 103(k) order was “not an unreasonable or arbitrary abuse of [the inspector’s] authority or discretion”).

The Contestant notes that the abuse of discretion 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. Put differently, the agency must cogently explain why it has exercised discretion in a given manner, and that explanation must be sufficient for a court to conclude that the agency’s action was the product of reasoned decision making. *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156 (1962) (contradictory positions and inconsistency by the agency indicate an abuse of discretion); see also *Alpharma Inc. v. Leavitt*, 460 F.3d 1 (D.C. Cir. 2006). Moreover, the decision must describe the standard under which the conclusion was reached. See, e.g., *American Lung Assoc. v. EPA*, 134 F.3d 388, 392 (D.C. Cir. 1998).

Contestant advances three primary contentions in support of its argument that the Secretary abused her discretion: 1) the Secretary acted unreasonably when denying re-ventilation and reopening; 2) the origin of the CO was not a reasonable basis for rejection of Pinnacle’s plan; and 3) the rejection is unreasonable because the plan was a conservative and cautious approach.

Initially, Pinnacle reiterates that there is no combustion occurring on the longwall gob. Moreover, even assuming there was doubt when the 103(k) Order issued, the data gathered as a result of comprehensive sampling and inertion efforts since then indicates that no combustion is occurring. Pinnacle notes that the initial levels of CO were very low and remained low, the longwall gob has been inert for over a month, and no heat, smoke, or fire gases, such as ethylene or acetylene, were detected. Tr. 227-28, 230, 232-33, 235-36; Stip. 22; G. Exs. 5 and 9. Accordingly, Pinnacle argues that it is appropriate to approve the June 21 plan, as subsequently modified, to permit re-ventilation of the longwall, evaluation of its conditions, and resumption of mining, and the Secretary’s continued insistence that the longwall remain sealed is unreasonable and an abuse of discretion.

¹³ Contestant argues, however, that the Commission’s approach to evaluating operator-submitted plans, including potential plans under Section 103(k), is incorrect and should be reviewed for reasonableness of the plan and not the reasonableness of MSHA’s rejection, citing *Ziegler Coal Co. v. Kleppe*, 536 F.2d 398, 407-07 (D.C. Cir. 1976).

Pinnacle emphasizes the limited nature of the multi-step process requested: removal of the seals and re-ventilation of the longwall; evaluation of the condition on the longwall to determine if it is safe to operate; and resumption of longwall operations with continued monitoring of conditions. Further, Pinnacle highlights several alleged fundamental flaws in MSHA's rejection of its plan.

First, although MSHA's denial is based in part on the uncertain origin of the CO (see Jt. Ex. 2), Pinnacle argues that the primary flaw in MSHA's rejection is the lack of combustion and failure to explain how a heating could have started. Contestant emphasizes that there was no event in 2011 that would have ignited coal. Tr. 191, 260. Urosek failed to explain how a heating could have started, in the absence of an event or spontaneous combustion. Contestant notes that spontaneous combustion was ruled out (Tr. 302-03), and there was no event, like lightning, cutting or welding that could have triggered a heating. Since the coal at Pinnacle was not prone to spontaneous combustion (Tr. 302-03), an event must occur that would result in ignition of coal or methane, but no such event occurred, says Contestant. Tr. 308. Contestant also faults MSHA's reliance on the 2003 incident because that event was triggered by a lightning strike, as demonstrated by pressure changes documented on fan charts. Tr. 189-90, 260; R. Ex. 2. Pinnacle argues that the lightning strike triggered an explosion in which methane continued to burn, much like a pilot light could ignite methane that is brought into an area by ventilation changes. R. Ex. 2. Pinnacle notes that such scenario was eliminated by Urosek. Tr. 168.

Second, Pinnacle reiterates its arguments rejected above, that MSHA did not utilize basic mathematical formulas and technology that would demonstrate that no fire occurred or is occurring. See Tr. 199-203, 330-31, 332, 354, 361-62. Contestant argues that Urosek did not use all tools available, including a heat sensing device available to MSHA to determine the status of the gob. Tr. 361-62. Although Urosek opined that the infrared heat gun could not be placed close enough to the gob, Contestant notes that Urosek did know the gun's range or how close to the gob a person could travel. Tr. 354, 361-62. In addition, although Urosek did not utilize standard formulas such as the Litton and hydrocarbon ratios to determine a heating because inertion was occurring, Contestant faults Urosek for failing to evaluate such formulas before the inertion process started. Tr. 199-201. Contestant claims that the results of the Litton formula that were calculated before inertion indicated that no fire was occurring. Tr. 201, 331. Similarly, Contestant faults Urosek for failing to apply the hydrocarbon ratio, which Contestant claims would show that no heat was being produced. Tr. 201, 332. Contestant argues that Urosek unreasonably ignored these calculation and detection tools, which would eliminate heating as a cause, and therefore MSHA did not act reasonably in rejecting its plan. While Contestant acknowledges that the Secretary's position has a certain superficial plausibility, i.e., there is some CO so there must be a heating, it argues that her June 30 rejection letter, when analyzed point-by-point, fails to show that she acted reasonably by gathering, evaluating and considering all the evidence in a consistent, logical fashion.

Pinnacle also argues that the Secretary relied on inappropriate comparisons from samples incorrectly collected to establish an ambient level of CO. Although MSHA found that ambient levels should be 2 ppm (Jt. Ex. 2), that conclusion is based on an alleged invalid comparison of sampling from a completed longwall panel, which was mined out for several months and located in a different portion of the mine where coal composition was different. Tr. 252-53, 272. In

addition, samples from the 9F borehole showed CO concentrations significantly higher (11 ppm) than in the mined out panel (Tr. 267-68; G. Ex. 9), which allegedly indicates that the 9F panel is different than the previously mined panel. See Tr. 253. Further, Pinnacles alleges that the samples used for comparison were not gathered properly because they were taken too far from the longwall gob to be comparable to those taken at the 9F gob. Tr. 198-99.

Pinnacle also argues that samples taken at the longwall face are suspect because they were taken in a well-ventilated area. Tr. 179-81; G. Ex. 6. Similarly, Pinnacle argues that samples taken on the headgate side of the 9F panel to establish a low ambient are inappropriate because of higher levels of ventilation in that area. Tr. 255, 322-23. Thus, MSHA compared the ambient in well-ventilated areas to an area that was not well ventilated, the edge of the longwall gob (Tr. 206), which Contestant argues is illogical and unreasonable.

Contestant also faults MSHA's comparison of CO levels at a natural gas well in unmined coal near the mine (see Jt. Ex. 2), because MSHA failed to determine the depth and extent of casing of the gas well, or to establish whether the sample was actually taken from the well itself. Tr. 172-73, 256. Contestant argues that there is no basis for comparison because the casing would prevent liberation of gas from Pinnacle's seam into the well, yet MSHA relied upon such sample.

Contestant also faults MSHA's failure to analyze what gases might be released from coal seams above the seam being mined. Tr. 178. Pinnacle notes that two other coal seams are present above the Pocahontas No. 3 seam. Tr. 312-13; Jt. Ex. 1A. Pinnacle argues that the CO, like naturally released hydrogen was part of the upper gob gases that were transferred to the area of the 61 and 62 crosscuts because of the open conduit between the 9F borehole and the tailgate entries. Tr. 329. In addition, Contestant argues that the strong association between the CO, hydrogen, and methane levels indicate that the CO is a product of natural liberation, not combustion. Tr. 257-58, 274, 312. Contestant argues that this association suggests that the CO is liberated at the same time as methane as part of the normal processes in the gob. Tr. 318-19. Similarly, Contestant notes that the CO levels correspond with the hydrogen levels, which Urosek conceded were part of normal processes in the gob. Tr. 319; R. Ex. 3. Contestant contends that if the CO was from a heating and the hydrogen was not, then the relationship between the gases should change as the heating was suppressed through introduction of inert gases, but the relationship did not change. Tr. 324-25, 327-28; R. Ex. 3. Contestant argues that the ratios are not consistent with a fire, which typically produces more CO than hydrogen, which is not the case here. Tr. 196-97. In addition, Derick testified that if a heating was expected, then CO levels would rise when the seals were installed and ventilation to the gob ceased, but CO levels did not rise. Tr. 318.

Finally, Contestant argues that MSHA's rejection is unreasonable because Pinnacle's plan was conservative and cautious. Although MSHA stated that the plan did not allow enough time for stabilization following unsealing and re-ventilation (see Jt. Ex. 2), Pinnacle notes that the plan allowed a minimum of 24 hours (see Jt. Ex. 1), which typically exceeds the time necessary for stabilization after a major ventilation change. Tr. 248, 265. Moreover, the plan specifically provided for monitoring during that period and Pinnacle could not move forward unless sampling results were acceptable. Tr. 266-67. While MSHA disagreed with plan

language that mining could resume once re-ventilation occurred “pending no significant negative changes” (see Jt. Ex. 2), Pinnacle notes that MSHA would be monitoring the re-ventilation process, and this plan language should not compel rejection, particularly since a myriad of mandatory standards contain similarly broad language. Although MSHA’s rejection also noted that oxygen concentrations were not below 4% at all sampling locations “for any significant length of time” (see Jt. Ex. 2), by the hearing date, the gob had been “inert,” below 10% oxygen for 30 days and below 4% oxygen for several weeks. G. Ex. 9. Similarly, although MSHA asserted that CO concentrations had not “stabilized” (see Jt. Ex. 2), Pinnacle argues that as long as nitrogen and carbon dioxide continued to be injected and methane continued to be liberated in the gob (see Tr. 268-69), it could be expected that the concentrations of other gases, including CO, would continue to change as the oxygen levels changed. Tr. 167, 268-69.¹⁵ Accordingly, Pinnacle claims that MSHA’s position is disingenuous since the gases that prevented stability were used to inert the heating that MSHA suspected.

In sum, Contestant argues that MSHA’s rejection was unreasonable because it was not based on reasonable conclusions and the Secretary did not utilize readily available tools to analyze the gob as she was required to do. Rather, Contestant claims that the plan, as modified, should have been approved so the multi-step re-entry process could begin. As Nelson opined after questioning from the bench, upon re-ventilation with the monitoring protections that Pinnacle had in place, he was confident that there would be no event that would cause injury or death to miners even if a heating source was present. Tr. 262-63. Pinnacle notes that approval of the plan would have permitted Pinnacle to take the first step in a process, with no guarantee that further steps could be taken. MSHA’s refusal to approve the beginning of a process, which it could halt at any time, is alleged to be unreasonable. Absent vacation of the 103(k) Order, Pinnacle requests an Order ruling that MSHA should have approved the plan submitted on June 21, as modified by subsequent submissions.

b. The Secretary’s Position

The Secretary argues that MSHA acted reasonably when it denied Pinnacle’s plan to re-ventilate the 9F panel and allow mining operations to resume when levels of CO were ten times ambient levels. The Secretary emphasizes that the Mine Act grants her “broad discretion” to control accident situations through control orders. *See* Senate Report No. 95-181, at 29 (1977) *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 617 (1978) (“The unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary or his authorized representative be permitted to exercise broad discretion in order to protect the life or to insure the safety of any person.”). By its plain terms, Section 103(k) gives the Secretary the power to accept or reject a plan submitted by the operator to resume mining, as the Secretary “deems appropriate” (see 30 U.S.C. § 813(k)), and the Ninth Circuit has described MSHA’s authority to manage accidents pursuant to Section 103(k) as one of “plenary power” and “complete control.” *See Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983).

¹⁵ Pinnacle notes that the Secretary disagreed with the order of the removal of the seals and the entry of miners (see Jt. Ex. 2), but argues that because of the installation of metal stoppings and 50 psi seals, that process would have to be changed, negating MSHA’s concern.

Given MSHA's broad discretion to control inherently unpredictable and uncertain mine accident situations, the Secretary argues that MSHA's denial of an operator's request to modify a control order must be subject to a highly deferential "arbitrary and capricious" standard of review. See *Emerald Coal*, 29 FMSHRC 956, 965-66 (Dec. 2007) (holding that the arbitrary and capricious standard applies during the less exigent circumstances of a mine plan dispute). The Secretary notes that the arbitrary and capricious standard "involves a review of the record to determine whether the Secretary properly exercised her discretion and judgment." *Id.* at 966. The Secretary cites the Third Circuit's view that MSHA action will be sustained if MSHA "considered the relevant factors brought to its attention by interested parties" and "made a reasoned choice among the various alternatives presented." *National Industrial Sand Association v. Marshall*, 601 F.2d 689, 699-700 (3rd Cir. 1979).

Under Commission precedent, the Secretary argues that absent bad faith or arbitrary action, her decision must be upheld. *Twentymile Coal Co.*, 30 FMSHRC 736, 748 (Aug. 2008). Put differently, the Secretary is not required to demonstrate that an operator's plan is unreasonable. *Id.* at 748. Rather, the appropriate inquiry is whether MSHA acted arbitrarily and capriciously when exercising its broad discretion to manage an unpredictable and uncertain accident scenario, not whether Pinnacle's action plan was "reasonable."

Applying these principles to the record evidence, the Secretary argues that MSHA acted reasonably when denying Pinnacle's plan to re-ventilate the longwall area. Initially, the Secretary claims that Pinnacle does not contest the fact that the Secretary acted in good faith throughout this event. Tr. 40. The Secretary further argues that Pinnacle cannot claim that MSHA failed to consider the relevant factors that Pinnacle brought to its attention, given the June 23 meeting in which a full discussion of the proposed plan was conducted. See Jt. Ex. 2. When Pinnacle requested a written explanation for rejection, MSHA's letter set forth sixteen reasons why it considered the plan inadequate. Jt. Ex. 2. Urosek considered the various explanations offered by Pinnacle to show how elevated carbon monoxide could occur in the absence of a fire. Tr. 145, 170-71, 208, 212. Urosek found Pinnacle's explanations unpersuasive as all evidence led him to conclude that a gob heating was occurring. Tr. 169.

The Secretary argues that MSHA "made a reasoned choice" in denying Pinnacle's plan to re-ventilate the area of the gob heating. The chief point of contention was Pinnacle's provision that delayed withdrawal of miners in the unsealed area until carbon monoxide reached 25 ppm. The Secretary claims that the ambient level of carbon monoxide was 1-2 ppm, less than one-tenth the action level proposed in Pinnacle's plan. Tr. 215. Furthermore, General Manager Nelson acknowledged that carbon monoxide readings of 12 to 26 ppm are "not typically encountered by our examiners." Tr. 226.

Even though MSHA was not required to demonstrate that Pinnacle's plan was unreasonable, the Secretary argues that Pinnacle's withdrawal provision was not a reasonable and safe proposal. Although Nelson explained that 25 ppm was selected after Pinnacle concluded that no mine fire existed because injections of water and inert gas had not reduced CO levels, the Secretary calls this determination dubious since there is no evidence that any water actually reached the suspected gob heating and the injection of inert air took place before temporary seals were installed when oxygen levels remained above sixteen percent. Tr. 241; G.

Ex. 9. The Secretary notes that even Derick conceded that a mine fire may still be occurring. Tr. 340, 344. The Secretary also notes that Nelson defended 25 ppm CO as reasonable because it was only “slightly above” the “normal” levels, which he apparently defines as the highest levels found since the mine fire started. Tr. 250. The Secretary argues there is nothing “conservative” about proposing a post-ventilation withdrawal provision that only triggers when carbon monoxide reaches 25 ppm, particularly when the operator’s own expert cannot rule out the continuing possibility of a mine fire.

In sum, the Secretary argues that MSHA acted in good faith and carefully considered Pinnacle’s request, and its denial of Pinnacle’s plan was reasonable and not arbitrary and capricious.

2. Analysis - MSHA’s refusal to modify the 103(k) order to permit re-ventilation of the longwall and re-entry of the mine was not arbitrary and capricious or an abuse of discretion

Section 103(k) provides:

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

The initial question presented is the appropriate standard of review of a 103(k) Order. In *Eastern Ass. Coal Co.*, 2 FMSHRC 2467 (Sept. 1980), the Commission concluded that it had authority to review the section 103(f) order at issue,¹⁶ but declined to determine whether such order was reviewable under an “arbitrary or capricious,” reasonableness,” or *de novo* basis. *Id.* at 2472, n. 7. While it does not appear that the Commission has resolved this issue definitively, Commission ALJs have applied an abuse of discretion standard. See *Emerald Coal Resources*, 30 FMSHRC 122, n.1 (Jan. 2008) (ALJ Zielinski) (“While the Act does not specifically provide for review of section 103(k) orders, the Commission has jurisdiction to review such orders under an abuse of discretion standard. *Eastern Ass. Coal Co.*, 2 FMSHRC 2467 (Sept. 1980).”); see also, *Southern Ohio Coal Co.*, 13 FMSHRC 1783, 1801 (Nov. 1991) (ALJ Koutras) (holding that the issuance of the 103(k) order was “not an unreasonable or arbitrary abuse of [the inspector’s] authority or discretion”).

In the context of plan submissions requiring MSHA approval, i.e., Emergency Response Plans (ERPs), ventilation control plans, and roof control plans, the Commission has applied an

¹⁶ Section 103(f) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 *et seq.* (1976) (amended 1977) [“the 1969 Act”], is the statutory predecessor of section 103(k) of the Federal Mine Health and Safety Act of 1977, 30 U.S.C. § 813(k). For all intents and purposes, the statutory language has remained the same under section 103(k), except for the addition of language extending coverage to all mines, not just coal mines.

arbitrary and capricious standard of review. *Emerald Coal Resources LP*, 29 FMSHRC 956, 965-66 (Dec. 2007). Although Pinnacle challenges this precedent and argues that operator-submitted plans, including potential plans under Section 103(k), should be reviewed for reasonableness of the plan and not the reasonableness of MSHA's rejection, citing *Ziegler Coal Co. v. Kleppe*, 536 F.2d 398, 407-07 (D.C. Cir. 1976), I reject this argument. After an accident, which I have found above, Section 103(k) authorizes MSHA to issue such orders deemed appropriate to insure the safety of miners, and the operator shall obtain the approval of MSHA regarding any plan to return affected areas of such mine to normal. MSHA's approval or disapproval of the plan is discretionary. Or, as the D.C. Circuit has stated, "the Secretary must independently exercise [her] judgment with respect to the content of . . . plans in connection with [her] final approval of the plan." *UMWA v. Dole*, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989), quoting S. Rep. No. 181, 95th Cong., 25 (1977), reprinted in Senate Subcom. on Labor, Com. on Human Res., 95th Cong., Legislative History of the Federal Mine Safety and Health Act of 1977, at 613 (1978). Moreover, as the Commission has noted in the ERP context, "[u]ltimately, the plan approval process involves an element of judgment on the Secretary's part." *Emerald Coal Resources LP*, 29 FMSHRC at 965, citing *Peabody Coal Co.*, 18 FMSHRC 686, 692 (May 1996) ("*Peabody II*"). "[A]bsent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval." *Id.*, citing *C.W. Mining*, 18 FMSHRC at 1746; see also *Monterey Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983) (withdrawal of approval of water impoundment plan was not arbitrary or capricious where MSHA's conduct throughout the process was reasonable).

Thus, when MSHA denies approval of a plan submission to modify a 103(k) Order, as here, the appropriate inquiry is whether that denial was arbitrary and capricious or an abuse of discretion, not whether the plan submitted was reasonable. This standard appropriately respects the Secretary's judgment while allowing review for abuse of discretion, errors of law, and review of the record under the substantial evidence test. Cf. *Emerald Coal Resources LP*, 29 FMSHRC at 966. Moreover, under the Administrative Procedure Act, agency action is set aside when "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Accordingly, I apply an arbitrary and capricious or abuse of discretion standard of review here.

This standard involves a review of the record to determine whether the Secretary properly exercised her discretion and judgment in rejecting Pinnacle's plan to re-ventilate and open the mine. *Emerald Coal Resources LP*, 29 FMSHRC at 966. While the scope of review under the "arbitrary and capricious" standard is narrow, the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choices made. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(citations omitted). Normally, agency action is considered arbitrary and capricious if the agency has relied on factors which Congress did not intend that it consider; entirely failed to consider an important aspect of the problem; offered an explanation for its decision that runs counter to the evidence before it; or has taken a position so implausible that it cannot be ascribed to a difference in view or the product of agency expertise. *Id.*; see also *Energy West Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996) ("abuse of discretion" has been found when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law") (citations omitted).

This standard has not been met here. As explained below, MSHA did not rely on extraneous factors or fail to consider important aspects of Contestant's plan. It offered reasons for rejection that were supported by the evidence before it, and staked out a position that was plausible and supported by agency expertise. When Pinnacle requested a written explanation for rejection, MSHA's letter set forth extensive reasons why it considered the plan inadequate so soon after the inertion process. Jt. Ex. 2. MSHA rationally relied on uncertainty as to the origin of the CO concentrations;¹⁷ that oxygen concentrations were not below 4 percent for all sampling locations for any significant length of time following the installation of the temporary seals; that CO concentrations had not stabilized for a sufficient time to permit definitive determination; that the proposed procedure to restart the Asco fan and remove the temporary seals would expose miners to the hazards associated with moving explosive mixtures over an ignition source; that Pinnacle's plan allows insufficient time for the mine to stabilize following a major change to the ventilation system; that Pinnacle's plan does not discuss the criteria to evaluate the atmosphere during the stabilization period before miners re-enter the mine for examination; that the proposed levels of CO are not acceptable since ambient levels appear to be 2 ppm or less, and the action level of 25 ppm greatly exceeds the ambient level; that the phrase "[p]ending no significant negative changes" is too vague to comprehend; and that no additional monitoring of the mine atmosphere is proposed once the initial evaluation of the longwall area is completed.

According to Contestant, the primary disagreement between Pinnacle and MSHA was whether combustion was occurring on the longwall gob given MSHA's alleged inability to explain how a heating could have started, but this disagreement really mirrors the issue of whether an accident occurred in the first place, an issue that I have resolved above. Urosek considered and rejected the various explanations offered by Pinnacle to show how elevated CO could occur in the absence of a fire. Tr. 145, 170-71, 208, 212.¹⁸ Urosek, a mine fire expert with

¹⁷ MSHA noted that samples collected from another longwall panel May 27 indicated limited CO concentrations (1 ppm); that numerous samples collected from the 9F1 degasification borehole in another longwall panel from another area of the mine (8Q5) indicated CO concentrations of 4-5 ppm; that samples collected in crosscuts along the perimeter of the worked-out area of this longwall panel on the headgate side and in the tailgate side outby 59 crosscut indicated 0 ppm CO; that CO was not detected in the face area when elevated methane concentrations were detected due to the inundation of floor gas, however, CO was detected in the tailgate crosscuts inby the face, raising the the concern that the CO was not associated with higher concentrations of methane; that the mine has a history showing the correlation between low concentrations of CO and subsequent explosions; that samples collected from another longwall bleeder system within the mine following re-ventilation of a sealed area after a series of events, fires and explosions in 2003 indicated limited CO; that prior to sealing of this longwall panel in 2003, multiple explosions occurred in the mine when low concentrations of CO were being detected; and that the number and location of all ignition sources in the temporarily sealed area are unknown, and air sample analysis indicated that portions of the sealed area were explosive when collected.

¹⁸ Pinnacle challenges Urosek's testimony discounting the fact that oxidation of wooden cribs in the area could produce CO because he did not know until the hearing that there were wooden cribs used as supplemental support (Tr. 166), but I give little weight to this challenge as Urosek's testimony was grounded in extensive past experience, as outlined herein.

more extensive and relevant experience than Derick, found Pinnacle's explanations unpersuasive as all evidence led him to conclude that a gob heating was occurring. Tr. 169. In addition, I note that upon questioning from the bench, Pinnacle's own expert acknowledged the potential, albeit unlikely, scenario that combustion or ignition occurred during torch cutting and welding on or about April 20 on the headgate side near the longwall entry of the 9E. Tr. 260; cf. Tr. 239, 308. As explained in Section III, A, 2 above, I conclude that the Secretary proved by a preponderance of the evidence that it was more likely than not that the May 19 event, i.e., detection of 22 ppm CO measured between the No. 2 and No. 3 entries in the 9E entries of the longwall gob area, was the result of a smoldering gob fire, and therefore, an accident occurred within the meaning of Section 103(k).

The record clearly establishes that MSHA and its expert considered relevant factors that Pinnacle brought to its attention during several meetings or telephone conferences in May and June, including a full discussion on June 23 of the details of Pinnacle's June 21 reventilation plan and whether it met MSHA's specifications. Tr. 116-18. MSHA declined to approve Pinnacle's plan at that time primarily because of disagreement over the ambient level of CO and the provision that delayed withdrawal of miners in the unsealed area until carbon monoxide levels reached 25 ppm. In addition, MSHA did not agree that the CO was a naturally occurring condition, and the 8-hour waiting period proposed after re-ventilation fell far short of MSHA's typical 72-hour period. Tr. 119. "[I] discern in these events adequate notice and discussion by MSHA officials. Nothing in the record suggests bad faith by MSHA, and [I] perceive no course of arbitrary conduct." See *C.W. Mining* 18 FMSHRC 1740, 1747 (Oct. 1996)(roof control plan).

Furthermore, at the hearing, Urosek gave reasoned explanations why MSHA disagreed with the Pinnacle's conclusion at page 10 of its plan (Jt. Ex. 1, p. 10) that the CO levels were naturally occurring from upper seams around the borehole location. Tr. 119-136. Based on all of his extensive years of experience with MSHA, Urosek credibly testified that the only time he ever saw elevated, localized levels of CO such as existed at the tailgate side of the 9F longwall panel in this case, was when it was associated with some type of heating. Tr. 145-46. He explained MSHA's view that given the CO levels present and the recent inerting and sealing process, it was too early on June 23 to safely re-ventilate the mine. Tr. 124-26; see also Jt. Ex. 2. He explained why MSHA disagreed with Pinnacle's plan assertion that gob gas was homogeneous and stable based on strong correlations between hydrogen, methane and CO. Thus, although hydrogen and CO mirrored each other, the methane and CO did not track each other, as shown by G. Ex. 13. Tr. 126-29, 131. Therefore, MSHA concluded that the CO was coming from a different location than the methane. Tr. 131. Urosek also refuted Pinnacle's prediction that a lengthy continuation of the inertion process into the temporary sealed area would most likely result in continued levels of carbon monoxide and hydrogen (Tr. 339; Jt. Ex. 1, p. 10, para. (e)), since sample results through July 10, showed that CO consistently declined and began to stabilize. Tr. 129-31; G. Ex. 12.

MSHA also rationally rejected the specifics of Pinnacle's June 21 plan to re-ventilate, re-enter and evaluate the longwall area, and resume operations, as set forth in Jt. Ex. 2, p. 11. With regard to re-ventilation, Urosek and MSHA were of the view that eventually they could have worked with Pinnacle to achieve a safe way to take the seals down and restart the fan. But MSHA was concerned in late June about sampling results and the prospect of an explosive

mixture of methane during re-ventilation while miners were underground with battery-powered equipment in the sealed area. Tr. 132-33. With regard to re-entry and evaluation after the ASCO fan had been restarted for 24 hours, Pinnacle proposed an eight-hour waiting period for atmospheric stability. In the absence of missing or trapped miners, however, MSHA adhered to longstanding “standard mine rescue practice” to wait 72 hours after the ventilation change for atmospheric stability before re-entry. Tr. 133-34. Urosek opined that MSHA and Pinnacle could have likely worked out these re-entry and evaluation time frames. Tr. 136.

Turning to the chief point of contention concerning Pinnacle’s re-ventilation plan, the resumption of operations, the parties were at loggerheads over the ambient level of CO and Pinnacle’s provision that delayed withdrawal of miners in the unsealed area until CO reached 25 ppm, a level the Secretary considered unreasonable and unsafe. Urosek credibly testified that CO at 25 ppm indicated that some type of heating was going on of sufficient level and temperature to ignite methane. Tr. 141. Based on CO samples taken from a natural gas pipeline at the mine (G. Ex. 14), degasification boreholes in adjacent longwall panels (G. Ex. 15), and another bleeder system in the mine (G. Ex. 16), MSHA rationally concluded that the ambient level of CO in the mine was 1 or 2 ppm. Tr. 138-143. This conclusion is also supported by Urosek’s testimony that ambient levels of 1 to 2 parts per million (“ppm”) was what MSHA inspectors normally encountered. Tr. 215. Although Pinnacle challenges the use of particular samples for comparison purposes, MSHA asked Pinnacle to sample anywhere it was safe to travel and get as close to the gob as possible, in order to validate Pinnacle’s claim that the CO was naturally occurring at levels above the ambient level as determined by MSHA, but such sampling failed to support Pinnacle’s contention. Tr. 140, 142; G. Exs. 14-16. In these circumstances, I find that the sampling was sufficiently widespread and representative enough to establish an ambient level of CO of 1 or 2 ppm as determined by MSHA. Pinnacle failed to establish an alternative ambient level that could be considered more accurate.

It is important to note that in determining whether MSHA’s rejection was arbitrary and capricious, I examine the circumstances before the MSHA District Manager when he considered Pinnacle’s plan in late June. *Cf. Emerald Coal Resources LP*, 29 FMSHRC at 968. As noted, any Pinnacle plan after this date is not in evidence and not ripe for adjudication before me. See note 5 *supra*. A contrary result would allow an operator to continually manipulate the time frame for adjudication by revising its plan without giving MSHA an opportunity to fully address the updated revisions. Pinnacle took this risk here by renewing its motion for expedited hearing while negotiations were still ongoing and any arguable impasse was broken by its subsequent revisions.

Based on my review of the record, it is apparent that MSHA’s refusal to approve Pinnacle’s June 21 plan was not arbitrary, capricious or an abuse of discretion. In Section 103(k), Congress gave the Secretary the power to accept or reject a plan submitted by the operator to resume mining as the Secretary “deems appropriate.” See e 30 U.S.C. § 813(k). As the Ninth Circuit has observed, MSHA’s authority to manage accidents pursuant to Section 103(k) is one of “plenary power” and “complete control.” See *Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983).

I find that MSHA examined the relevant data and articulated a reasoned and satisfactory explanation for its rejection including a rational connection between the facts found and the choice made. *National Industrial Sand Association v. Marshall*, 601 F.2d 689, 699-700 (3rd Cir. 1979). Put differently, MSHA cogently explained why it exercised its discretion to reject Pinnacle's June 21 plan and why that rejection was the product of reasoned decision making. The record amply demonstrates adequate consideration and discussion by MSHA regarding the disputed plan provisions, that the negotiations were conducted in good faith, and that MSHA's decision to reject the plan on June 23 was supported by facts presented to the MSHA District Manager. I find nothing arbitrary or capricious in MSHA's refusal to approve a post-ventilation withdrawal provision that was triggered only when CO levels reached 25 ppm, particularly when such levels prompted management to withdraw miners from the longwall area, shut off power to the section, as required by the MSHA-approved ventilation plan, and subsequently evacuate the entire mine. Stip. 3; Tr. 226. In fact, Pinnacle's own general manager acknowledged that CO readings of 12 to 26 ppm were atypical and raised concern. Tr. 226. In these circumstances, contrary to Pinnacle's contention, I find that Pinnacle's plan was not a conservative and cautious approach.

On the other hand, I am cognizant of the financial inconvenience caused by the ongoing loss of longwall production at the Pinnacle Mine. The longwall shutdown has imposed prodigious costs on the operator and MSHA, and resulted in considerable loss of income to the miners. But financial inconvenience caused by the "accident" is an insufficient reason to unseal the longwall panel before MSHA has greater confidence that the atmosphere has stabilized. Even Derick conceded that he could not rule out the continued existence of a mine fire at Pinnacle. Tr. 340; 344. I agree with the Secretary that the experience of the Galatia and VP mine fires and the extended idling of Pinnacle in 2003-2004 go a long way toward demonstrating that it may be safer and more conducive for long-term production, to return the mine to normal operations through extended sealing rather than premature re-ventilation under the June 23 plan provisions.

Moreover, in my view, the Secretary has proposed the better rule-of-thumb based on the learned treatise *Mine Fires*. G. Ex. 20. As noted therein, premature unsealing "might be the slowest, most difficult, most dangerous, and most expensive way" to return a mine to normal operations. G. Ex. at 128. Past experience at this mine in 2003-2004 appears to substantiate this proposition. No one can state with certainty the right time to unseal. A variety of factors must be considered, but the general "rule-of-thumb" is that unsealing should take place at the earliest one month after the mine atmosphere in the sealed area has stabilized. G. Ex. 20 at 127. Pinnacle's June 21 plan to re-ventilate was submitted just ten days after completion of temporary seals, at a time when samples showed that the mine atmosphere had not yet stabilized. G. Exs. 11 and 12. As the author of *Mine Fires* points out, "[a] better rule-of-thumb is to ask, 'Why unseal?' Too often that question was asked too late; and more often the answer was, 'There was no good reason.'" G. Ex. 20 at 128.

In sum, I cannot conclude that the Secretary's rejection of plan provisions that she deemed would jeopardize miner safety is indicative of bad faith, arbitrary or capricious conduct, particularly in light of the overarching purpose of the Mine Act to ensure miner safety and health and the history of this mine concerning gob fires and methane explosions. See my record

reservations at Tr. 258. The parties were unable to bridge their differences within the strictures of the Secretary's plenary authority under Section 103(k) as she has reasonably interpreted it. The Secretary's rejection of the Contestant's plan was neither arbitrary and capricious nor unreasonable and is hereby **AFFIRMED**.

ORDER

Based on the foregoing findings of fact and conclusions, the contested Section 103(k) Order issued on May 25, 2011 is **AFFIRMED**. The Notice of Contest filed by the Contestant is **DENIED** and **DISMISSED**.

/s/ Thomas P. McCarthy_____

Thomas P. McCarthy
Administrative Law Judge

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September 8, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. LAKE 2008-436
	:	A.C. No. 11-03054-148746
	:	
	:	Docket No. LAKE 2009-057
	:	A.C. No.11-03054-163984-01
v.	:	
	:	Docket No. LAKE 2009-058
	:	A.C. No.11-03054-163984-02
	:	
BIG RIDGE, INC., Respondent	:	Docket No. LAKE 2009-059
	:	A.C. No.11-03054-163984-03
	:	
	:	Docket No. LAKE 2009-378
	:	A.C. No.11-03054-177990-02
	:	
	:	Mine ID: 11-03054
	:	
	:	Mine: Willow Lake Portal

DECISION

Appearances: Tyler Mcleod, Esq., and Beau Ellis, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, on behalf of the Secretary of Labor;
Arthur M. Wolfson, Esq. and Jason P. Webb, Esq., Jackson Kelly PLLC,
Pittsburgh, Pennsylvania, on behalf of Big Ridge, Inc.

Before: Judge Melick

These cases are before me upon petitions for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (“the Act”), charging Big Ridge, Inc., (“Big Ridge”) with multiple violations of mandatory standards and seeking civil penalties for the alleged violations. The general issue before me is whether Big Ridge violated the cited standards as alleged and, if so, what is the appropriate civil penalty for these violations. Additional specific issues are addressed as noted. During hearings, the parties reached a settlement regarding a number of charging documents and submitted supportive documentation post hearing. I have reviewed the representations and documentation submitted with respect to those charging documents and find that the settlement is acceptable within the framework of section 110(i) of the Act. An order approving that settlement accompanies this decision.

As amended, this order, issued pursuant to section 104(d)(2) of the Act, alleges, alternatively, a violation of the standard at 30 C.F.R. § 75.362(a)(2), 30 C.F. R. § 75.363 (a) and 30 C.F.R. § 75.363(b), and charges as follows:¹

An inadequate on-shift examination was conducted on the MMU 002-0 coal production unit during the 6:30 a.m. - 3:30 p.m. shift of January 24, 2008. The conditions detailed in Mine Citation/Order No. 6673438 were neither posted nor recorded in a book maintained for that purpose.

The conditions were extensive, obvious and readily identifiable to the certified person (foreman) conducting the on-shift examination

For the reasons that follow, I find that the Secretary has sustained her burden of proving a violation of the standards at 30 C.F.R. § 363(a) and 363(b). Accordingly, there is no need to consider herein whether there was also a violation of the standard at 30 C.F.R. 75.362(a).

¹ Section 104(d) of the Act provides as follows:

- (1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those person referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
- (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

The cited standard at 30 C.F.R. § 363(a) provides as follows:

a) Any hazardous condition found by the mine foreman or equivalent mine official, assistant mine foreman or equivalent mine official, or other certified persons designated by the operator for the purposes of conducting examinations under this subpart D, shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected. If the condition creates an imminent danger, everyone except those persons referred to in section 104(c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected. Only persons designated by the operator to correct or evaluate the condition may enter the posted area.

The standard at 30 C.F.R. § 363(b) provides as follows:

(b) A record shall be made of any hazardous condition found. This record shall be kept in a book maintained for this purpose on the surface at the mine. The record shall be made by the completion of the shift on which the hazardous condition is found and shall include the nature and location of the hazardous condition and the corrective action taken. This record shall not be required for shifts when no hazardous conditions are found or for hazardous conditions found during the preshift or weekly examinations inasmuch as these examinations have separate record keeping requirements.

Inspector William Keith Roberts of the Department of Labor's Mine Safety and Health Administration ("MSHA") who has more than eleven years experience as an MSHA Inspector and significant industry experience, issued the subject order on January 25, 2008. Roberts testified that, at the beginning of the day shift on that date, he observed approximately 19 tons of loose coal and coal dust in mechanized mining unit number two. According to Roberts, the unit was idle at that time and the foreman from the prior working shift had left the piles of loose coal behind. Indeed, Respondent's Safety Manager, Bart Schiff, admitted at hearings that there were coal accumulations in the cited area including coal piles next to the continuous miner. He also acknowledged that although there was a layer of rock dust on top of the coal it was not mixed within the piles and that an explosion could lift that rock dust and expose the coal and coal dust underneath. Roberts issued the order at bar for an inadequate on-shift examination by the foreman and for failing to identify, immediately correct and post and record this material.

Roberts opined that loose coal and coal dust in a gassy mine is a hazardous condition. The subject mine is classified as a "gassy" mine liberating more than two million cubic feet of methane every 24 hours. Roberts testified that amounts far less than what he observed have been shown in test conditions to further propagate a mine fire or explosion, and that the presence of such coal dust could turn an ignition into an explosion. He also noted that this material in a working section is of particular concern since there are trailing cables, cable reel equipment and electrical equipment that may become damaged and are known fire sources. Miners were also working immediately outby on a construction project.

Roberts also noted that despite having failed to first remove the 18.99-ton piles of coal from the floors and ribs, Respondent placed only a “very light layer of rock dust” in the area from a slinger-type rock dusting machine. According to Roberts, this machine does not rock dust the floor, but rather the rock dust that ended up on the floor and the accumulation piles was simply residue that had not attached to the ribs or roof. According to Roberts, the rock dust layer was thinner than a sheet of paper thus rendering it insignificant.

Roberts further opined that underneath the thin layer of rock dust were deep piles of pure coal and coal dust. He noted that the concussive forces from an explosion would suspend approximately one inch of the material into the air thereby exposing the pure combustible material in the accumulations. The cited loose coal and coal dust therefore constituted a condition that would create or increase the possibility of loss in the event of an ignition or fire.

Roberts noted that foreman Les Hawkins was obligated to perform the subject on-shift examination on the January 24 day shift and that Hawkins was also required under section 363(a) to post the hazardous conditions with a conspicuous danger sign and immediately correct the conditions or keep the area posted until the conditions were corrected. He was also required under section 363(b) to record the conditions and the corrective action in the on-shift examination reports. The Secretary maintains that Hawkins failed to comply with both of these requirements.

The subject unit was considered a “spare” unit since a scheduled crew was not assigned, but rather miners elected to work this area on their days off. It is undisputed that this unit last produced coal during the day shift (i.e., 6:30 a.m. to 3:30 p.m.) on January 24 when Hawkins was the foreman. In Respondent’s pre-shift and on-shift reports, the mine examiners had repeatedly noted, “unit needs more cleaning”. The examiners placed these comments under “remarks” on January 24- 3 a.m. to 7 a.m, and 7 p.m to 11 p.m, . Hawkins therefore was on notice that cleanup efforts were needed before he worked the unit on the January 24 day shift, but failed to clean the unit, report the condition, or post the area as a hazard pending corrective action.

The on-shift report for the subject shift shows that the section was in fact in production on the day shift January 24, and that Hawkins was present, Hawkins failed to record information concerning the purported loose coal piled around the unit, or why he failed to clean the unit as noted by the pre-shift examiners. Hawkins also failed to post the area. Considering the credible testimony of Inspector Roberts, significantly corroborated by Mr. Schiff, I find that a reportable hazard in fact existed and that Hawkins therefore violated the requirements of sections 75.363(a) and 75.363(b). Even applying a “reasonably prudent” person test it is clear that the significant size and amount of combustible accumulations herein constituted a “hazardous condition” within the meaning of the cited standard. See *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). I note, however that the violation was not deemed to have been “significant and substantial” and it is therefore of lesser gravity.

The Secretary also maintains that the violation was the result of Respondent’s unwarrantable failure. Unwarrantable failure is “aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act.” *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (Feb. 1991); see also *Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 157 (2d Cir. 1999); *Buck Creek Coal, Inc. v. MSHA*, 52

F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure and recognized that a heightened standard of care is required of such individuals. See *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (Dec. 1987) (section foreman held to demanding standard of care in safety matters); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995) (heightened standard of care required of section foreman and mine superintendent).

When determining whether conduct is "aggravated" all the facts and circumstances must be considered to see if any aggravating factors are present. These factors include, "the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation." *Consolidation Coal Co.*, 22 FMSHRC 340, (Mar. 2000).

The pre-shift examiners reported that the unit needed cleaning since at least the midnight shift before Hawkins worked on the unit. Roberts testified that the mine produced the 18.99 tons of loose coal and coal dust during more than one mining cycle. He explained that accumulations in a normal mining cycle would be produced in a single location to be cleaned. This situation, however, involved extremely large accumulations in multiple areas. Thus, it is clear that Respondent permitted the conditions to exist for an extended period of time. Roberts further emphasized that this was not a remote location, but rather at the last open crosscut across all the headings. The conditions were therefore extensive and obvious and Hawkins was working in the area the entire shift in question, yet failed to address the serious problem in any manner.

In addition, Safety Manager Schiff acknowledged that Hawkins was required to do an on-shift examination. After Roberts told Schiff there would be an enforcement action for the accumulations and potentially for the examination, mine manager Terry Ward arrived on the unit. Ward told Roberts that the unit had in fact produced coal on the previous day shift and that he and Hawkins specifically discussed at that time the need to clean the unit. When Roberts asked Ward why nothing had been done, Ward stated that it was not entirely Hawkins' fault since Hawkins' requested a coal scoop but Ward had removed it from that area to be used on a nearby construction project.

I do not find Ward's excuse that he was using the coal scoop for other purposes was a mitigating factor. Indeed, Roberts' discussion with Ward established that both the foreman and the mine manager knew that there were significant loose coal and coal dust accumulations throughout the unit on January 24, if not before and that the foreman had requested a scoop to clean the unit, but the mine manager would not provide the scoop and that the foreman did not implement any other means to remove the coal from the unit. These factors are indicative of an unwarrantable failure to comply.

I also find that Respondent had been placed on ample notice that it had an ongoing problem with accumulations. At the time of his inspection, Roberts viewed the violation history for the previous 24-month period and noted that the mine had previously been cited for 164 violations of the cited standard during that time. He testified credibly that these violations were discussed with the Respondent in pre- and post-inspection conferences, in addition to informal meetings during the

course of the inspection period. Respondent was thereby placed on notice that additional compliance efforts were necessary. See *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (Jan 1997).

Within the above framework of evidence, is clear that the violation cited in Order No. 6673443 is proven as charged, and that it was the result of Respondent's unwarrantable failure.

Order Number 6673462

This order, also issued pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the mine operator's roof control plan under the standard at 30 C.F.R. § 75.220(a)(1) and charges as follows:

The mining of perimeter cut #25 in the previously mined room developed off Entry 8@ 42+50', MMU 014-0, was not compliant with the approved roof control plan. The perimeter cut was mined in a manner that not only holed the cut through into the preceding perimeter cut but also eliminated the required 5' wide coal fender between the perimeter cuts.

This pillar recovery effort resulted in only a small "stump" of coal between the perimeter cuts and the rib line of the room. This small fender has subsequently crushed out due to its reduced width and the weight of the roof strata. The mining method at the cited location presented a distinct roof fall hazard to the continuous mining machine operator.

The relevant pages of the mine operator's approved roof control plan are set forth in Appendix A, attached hereto and exhibit G-8.

The roof control plan ("Plan") stated in relevant part as follows with respect to engaging in perimeter mining:

1. This plan can be seen on sketches on pages 20-24 [Appendix A pp. 5-9].

* * * *

5. If a perimeter cut inadvertently holes into the preceding cut, the miner machine will immediately stop and pull out of this cut and proceed to the next cut (Ex. G-8 p.24 and Appendix A p.4).

The Plan included a sketch that illustrates the manner in which the continuous mining machine is to make the perimeter cut, as well as the requirement that the remaining coal fender must be equal to or greater than five feet in width (Ex. G-8 pps. 22 and 27 and Appendix A pps.2 and 7). The coal fender is the remnant of coal left between two perimeter cuts to help support the roof, which is illustrated as the triangle shape on the Plan (Appendix A p. 7).

Inspector Roberts testified that this sketch depicted a cut similar to the one at issue. He further testified that a five-foot coal fender is the minimum amount of coal necessary to adequately support the immediate and main roof. The Plan also included a sketch illustrating a perimeter cut where the remaining coal fender is configured differently in light of the angled headings. In this illustration, the fender was required to be equal to or greater than five feet at the back end of the fender or six feet at the front end. (Ex. G-8 p. 29 and Appendix A p. 9).

Roberts explained that while he was performing a five-day spot inspection in unit four, he noticed a large number of timbers and cribs at the mouth where there typically should only be three timbers. This area was immediately adjacent to a frequently traveled shuttle car road. Roberts observed the missing coal fender and walked around the area to view the condition. Roberts testified that based on his observation, it was “obvious” that the miner operator had not only holed through the fender but continued to mine out the remaining portion of the fender toward the rib, leaving only a small triangular coal stump behind the miner at the front end of the fender. He concluded that this small stump then crushed out from the weight of the roof leaving no roof support. Roberts explained that, under the Plan, in the event the miner holes through the fender, the miner operator is required to immediately cease mining and withdraw the machine from that cut and start a new perimeter cut if there is one to be made. Roberts opined, however, that since there were no other cuts to be made in this instance, the operator would have had to back the equipment into the panel entry headings. Roberts opined that the miner operator apparently did not wish to do this. Based upon his experience as an equipment operator and a face boss in pillar recovery methods, Roberts opined that the miner operator had approached the fender at an incorrect angle and cut through the entire fender after holing through.

I find that the testimony of this highly qualified and experienced mine inspector to be entitled to prevailing weight and that, therefore, I find the violation to have been proven as charged. In reaching this conclusion I have not disregarded the arguments presented by Big Ridge attempting to discredit the expert testimony of Roberts. However, I find those arguments unconvincing. I also find significant the unexplained absence of first hand testimony from the participants in this incident, namely the miner operator and the foreman Hawkins.

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

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

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

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

In this regard, I find that a roof fall under the circumstances herein was reasonably likely for several reasons. First, the removal of the coal fender created an excessively wide roof. Based upon his background and experience (including as an MSHA Roof Control Specialist), Roberts credibly testified that excessive widths are the primary cause of roof falls. He explained that the 90-degree perimeter cut created a four-way intersection, with one leg of the intersection unsupported without roof bolts. Because the fender had been largely removed, the width of the unsupported area was significantly increased, exposing miners to a roof fall. I further find that Respondent was aware of the excessive width and the danger posed because it had installed a substantial number of timber cribs at this location. When perimeter mining is properly performed pursuant to the Plan the mine need only to place three timbers (without any cribs) at the mouth of the rooms for roof support and to alert miners to stay out of the unbolted rooms.

A second factor is that the subject mine has a history of unplanned roof falls in four-way intersections. Roberts testified that there were 75 unplanned falls from 2005 to the time he wrote the subject order and approximately 120 falls between 2005 and 2010. Roberts noted that all of the falls occurred at intersections and primarily four-way intersections. In this case, the removal of the fender increased the cross-sectional area by a minimum of 20 feet beyond the minimum 68 feet limitation in the Plan.

According to Roberts, the miner operator was exposed to the hazard at the time the fender was holed through and while the fender was being removed. He also found that the shuttle car operators were in this location and also exposed to the hazard. The perimeter cuts were also adjacent to the active working section near the power center and dump point which were frequented by foremen. Roberts anticipated that a miner exposed to a roof fall at this location would sustain fatal crushing injuries since the fall material would typically be six to eight feet thick, the width of the crosscut and anywhere from 15 feet to 100 feet long. Within the above framework of evidence, I find that the violation was “significant and substantial” and of high gravity

I further find that the violation was the result of the operator’s unwarrantable failure. Big Ridge had been, for one thing, recently placed on notice of the specific perimeter mining requirements of the Plan. Inspector Roberts had issued Citation Number 666740 on October 11, 2007, which involved facts similar to the situation herein. In that case Roberts observed a fender holed through in two locations in violation of section 75.220(a)(1). Like the present order, this action violated item 5 of the Plan, since the continuous miner failed to stop and withdraw from the cut. To terminate that citation Roberts required that production personnel be re-instructed in the requirements of the same Plan provision at bar.

Based on his background and experience as a section foreman, and his knowledge of the subject mine, Roberts opined that it was absolutely key that Hawkins ensure proper maintenance of the fender in this location to protect the miner operator and shuttle car operators during the mining process. I further find that section foreman Hawkins was grossly negligent. Roby Podoriski, a mine

manager for Big Ridge, explained that a hole through typically occurs due to an inexperienced miner operator, an incorrect angle of the cut, or a misdirected sight line. Podoriski acknowledged that the foreman is ultimately in charge of directing the miner cuts. He testified however that Hawkins was moving cables on a continuous miner while the fender was being obliterated in this instance. While there is some evidence that Hawkins may have been suspended or fired specifically for allowing this incident to occur, I do not consider that evidence herein in determining negligence as it is contrary to social policy to discourage the taking of steps in furtherance of added safety. See Rule 407, Federal Rules of Evidence. In any event, it is the well established law that foremen are held to a high degree of care and that their actions are imputable to the mine operator.

Citation Number 6667476

This citation alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 75.400 and charges as follows:

Combustible material in the form of hydraulic oil, automatic transmission fluid and oil/fluid-saturated coal dust has been permitted to accumulate immediately beneath the exhaust pipe of the non-permissible Alpha diesel-powered mantrip, Co. No. MT-08. The accumulations are approximately 1/8" to 1/4" in depth along the entirety of the enclosed 9" x 6' tunnel that houses the drive shaft and exhaust pipe. The exhaust pipe is neither wrapped with heat resistant material nor otherwise shielded from contact with these accumulations of combustible material.

The cited standard, 30 C.F.R. §75.400, provides that “[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel- powered and electric equipment therein.”

Inspector Roberts issued this citation on November 23, 2007, when he observed what he found to be accumulations of combustible fluids and coal on a mantrip. Roberts explained that he observed a combination of hydraulic oil, automatic transmission fluid and motor oil, with oil saturated coal dust, immediately beneath the exhaust pipe of the non-permissible diesel powered mantrip. According to Roberts, the fluids and coal were in the chamber or tunnel that runs down the center of the machine from the rear of the engine along the drive shaft and exhaust pipe toward the rear of the vehicle. Using a tape measure in the tunnel area Roberts estimated the accumulations to be approximately 1/8 to 1/4 inches deep along the entire area. I find the expert testimony of Inspector Roberts to be credible and sufficient to prove the violation as charged.

The Secretary also maintains that the violation was “significant and substantial”. The mantrip was located on the surface and available for transport underground. It carried 14 miners in and out of the mine and, they would, according to Roberts, be affected from smoke in the event of a fire. He designated the violation as “significant and substantial” on the basis that the combustible materials were in close proximity to the exhaust. He opined that the surface temperature of the subject exhaust pipe while the vehicle was in use would be sufficient to ignite the material, or could intensify a fire that started at another location on the machine. Roberts was particularly concerned in this instance since the exhaust pipe on this vehicle was not wrapped with heat shielding, thus exposing the fluid to the exhaust heat.

While there appears to be no dispute that the various substances cited were combustible at some temperature I find that the Secretary has failed to sustain her burden of proving the temperatures at which these materials would ignite and the temperatures to which they were exposed. The opinion testimony of Inspector Roberts that these materials would ignite from the heat of the exhaust is simply *ipse dixit* i.e. based on a bare assertion resting solely on the authority of the individual expert, and is insufficient without some underlying factual basis. Without that essential foundation, there is no basis to determine the likelihood of an event or the likelihood of injuries. Accordingly, I do not find that the Secretary has met her burden of proving that the violation was “significant and substantial.” Rather, the violation was of lesser gravity.

I find however that the violation was the result of operator negligence. The credible evidence is that the mixture of combustible fluids and coal had existed for several shifts, was extensive and was obvious. According to Roberts, the vehicle had an access door that allowed an examiner or vehicle operator to simply look through to identify the condition. Roberts discovered the condition in this way. Roberts also explained that there had been an ongoing issue with cleaning accumulations on equipment. In the previous 18-months there had been more than 150 citations of the standard at issue. Moreover, Roberts testified that he had had discussions with the mine’s safety personnel, including Bob Clarida, Bart Schiff, Tom Patterson, (safety director), Mark Cavinder (business unit manager), and Ricky Phillips, (mine superintendent) and that a significant topic of these discussions was the accumulations on equipment and equipment clean up programs. This evidence clearly demonstrates at least a moderate degree of negligence.

Citation Number: 6674611

As amended, this citation alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 75.512 and charges as follows:

“Except when testing the machinery, guards shall be securely in place while machinery is being operated.” The face plate (guard) on the #5 (995 volt) breaker had been damaged. The face plate had been distorted, opening a 2 inch by 6 inch gap down the side of the breaker. Exposing bare conductor lead 3 inches inside the panel.

The cited standard provides as follows:

All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.

Inspector Bobby Jones had been an MSHA inspector for four years, specializing in coal mine safety and health, but also has 32 years of underground coal mine experience in many capacities. Jones testified that he issued the citation at bar on August 8, 2008, after observing a two inch by six inch opening on a breaker cover panel that exposed the inner conductors of a 995 volt breaker. According to Jones, the breaker controlled a circuit used to power the continuous miner and, although a cable was not plugged into the outlet supplied by the circuit, the upstream, or back side, of the breaker was still energized. The 995 volt circuit controlled by the breaker was but one circuit

and outlet that were part of a larger assembly i.e. the number five transformer used to supply electrical power throughout the production unit. Other circuits and outlets of varying voltages were supplied by and located on the transformer and were in close proximity to the damaged breaker face plate. These other circuits supplied electrical power to equipment such as roof bolters, feeder breakers, chop saws, and microwave ovens. According to Jones, there were numerous pieces of equipment deriving power from the transformer so there were numerous electrical cords leading from the transformer, ranging in size from one-and-a-half inches in diameter for a roof bolter cable to three inches in diameter for a continuous miner cable.

According to Jones, in addition to plugging and unplugging the cables that supplied the various pieces of equipment, miners entered the transformer area to perform a number of other tasks throughout the day, including pre-shift and on-shift examinations, gas checks, breaker resets, and heating up their meals, either with the help of a microwave oven or, because the transformer is warm, the transformer itself. Jones testified that miners also used chop saws plugged into the transformer to cut drill steels generally eight to ten feet in length. There is no dispute that steel readily conducts electricity when in contact with energized electrical components, such as those exposed by the damaged breaker panel. Based on the credible testimony of expert witness Bobby Jones, I find the violation has been proven as charged.

The Secretary also argues that the violation was “significant and substantial.” In this regard, Inspector Jones testified that numerous electrical cables, some as large as three inches in diameter, were present on the ground around the damaged breaker panel, along with rocks and chunks of coal. There is no dispute these objects presented tripping and stumbling hazards. Jones testified that the floor of underground coal mines is uneven and littered with rocks and chunks of coal. Jones also testified that there was no ambient lighting in the area and that the miners’ cap lights served as the sole source of light. Thus, the presence of numerous cables, rocks, and chunks of coal in an unlit area with an inherently uneven surface made it reasonably likely that, given continued normal mining operations, a miner would trip and come into contact with the energized conductors exposed by the damaged breaker panel. Jones further testified, without contradiction, that contact with 995 volt electrical current would most likely result in electrocution. Clearly, the violation was “significant and substantial” and of high gravity.

In reaching this conclusion, I have not disregarded Respondent’s assertion that its policy requiring miners to wear gloves and boots when working with the electrical cables diminished the likelihood of an accident. However, according to the credible testimony of inspector Jones, the gloves required by Respondent’s glove policy were plain leather gloves, not voltage-rated electrical protective gloves. Such gloves are not designed to protect the wearer against electrical current but, if clean and dry, may have afforded a small, but indeterminate amount of electrical protection.

Respondent also asserts that miners’ use of rubber boots reduced the likelihood of electrocution. However, both Jones and Barras testified that rubber boots do not provide protection from electrocution if a miner falls while in contact with the electrical current, as uninsulated parts of the miner’s body, such as knees, backs, or shoulders would come into contact with the ground and thereby allow the electrical current to flow through and exit his body.

Respondent further argues that the presence of rubber mats around the transformer also provided miners protection against electrocution. However, the mats used by Respondent were not true electrical protective equipment, rather they were pieces of an old conveyor belt that was no

longer suitable for its intended purpose. These mats were not subject to periodic testing and, as Jones testified and Barras admitted, were not designed to serve as electrical protective equipment nor were they tested or evaluated to determine quantitatively the electrical protection, if any, they afforded. The small size of the mats also reduced or negated any electrical protection they would provide in the event of a fall. The mats, which were approximately two feet square, would not fully prevent a fallen miner from contacting the earth, thus providing a path for the electrical current to travel to ground. I also note that since Barras was not present during the inspection and did not observe the conditions giving rise to the violation, I give his testimony that an accident was unlikely but little weight.

Jones determined that Respondent exhibited a moderate degree of negligence with respect to the violation. I find, based on the credible evidence that the condition was obvious and that the section foreman would have been in the transformer area to perform the on-shift inspection. Based on his observation of the breaker the previous day, Jones credibly estimated that the condition existed for up to three shifts. Under the circumstances, I find the operator chargeable with moderate negligence.

Citation Number 6674618

This citation alleges a “significant and substantial” violation of Safeguard Notice No. 7583088 and charges as follows:

Two mantraps were observed transporting roof bolting materials in the mantrip with the miner. DT-18 had 12 bundles of 4 foot roof bolts (5 bolts to the bundle) standing up in the seat. DT-04 had 7 bundles of 4 foot roof bolts (5 bolts to the bundle) standing up in the seat, 28 chain in the passenger seat behind the driver.

As amended, the cited safeguard notice, No. 7583088 issued by former MSHA inspector John Winstead on July 12, 2006, provides as follows:

DT 15-160 was observed coming out of the mine with a ram car bed jack adjacent to the driver unsecured in the vehicle. This is a notice to provide safeguards requiring that supplies or tools, except small hand tools or instruments, should not be transported with men at this mine.

On August 11, 2009, Inspector Jones accompanied underground by Respondent’s representative Donnie Hughes, observed two diesel-powered mantrips designated DT-18 and DT-04, transporting materials in the passenger compartment along with miners. Mantrip DT-18, which contained a driver and a passenger, had twelve bundles of four-foot roof bolts standing up in the rear seat behind the driver. Each bundle contained five roof bolts, with each bolt weighing approximately two pounds. Mantrip DT-04 contained seven bundles of roof bolts and a bucket of chain in the seat behind the driver, along with 28 steel chain hangers on the floorboard. Jones issued the citation at bar based upon the cited safeguard notice.

Respondent argues that the citation at bar was invalid because the safeguard notice upon which it was based was invalid. More specifically Respondent argues that the nature of the hazard was not described with the requisite specificity. The Secretary bears the burden of establishing the validity of the safeguard by showing that the inspector evaluated the specific conditions at the mine and determined that the safeguard was warranted in order to address an actual transportation hazard. *Southern Ohio Coal Co.*, 14 FMSHRC 1, 14 (Jan. 1992). A safeguard must identify with specificity the nature of the hazard involving the transportation of miners or materials at which it is directed. *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (April 1985). See also *Rochester & Pittsburgh Coal.*, 14 FMSHRC 37 (Jan. 1992).

Indeed, even MSHA's Program Policy Manual ("PPM"), Vol. 5 Subpart O, requires that a valid safeguard should identify the nature of the hazard to which it is directed. The PPM states as follows:

Where an inspector determines that a safeguard notice is necessary in order to address a transportation hazard, the specific safeguard requirements are to be determined by the inspector based on the actual, specific conditions or practices that constitute a transportation hazard at that particular mine. The inspector should document either in the notice or in the inspector's notes the conditions which provide the basis for the issuance of the safeguard notice. The safeguard notice should also identify the nature of the hazard to which it is directed. For example, if a notice to provide safeguards is issued to require a specific minimum clearance distance between pieces of haulage equipment, the safeguard should also include a statement of the hazards that the clearance distance is intended to prevent, such as injury to equipment operators from pieces of rib coal which could be knocked loose or, if the area is a walkway, injury to pedestrians by the equipment due to insufficient clearance.(emphasis added).

The Secretary's argument that a description of the condition is, in effect, a description of the hazard is contrary to both the program policy manual and commission case law. Clearly, the safeguard notice at issue did not identify with specificity the nature of a hazard to which it was directed and that Notice is therefore invalid. Accordingly, the citation at issue based on that Notice is also invalid and must be vacated.

Significantly, both inspectors also admitted at hearings that the subject Notice of Safeguard identified only the condition and not the hazard, if any, to which it was directed. Former Inspector Winstead testified in this regard in the following colloquy at hearings:

Q. Sir, what you described for me was the condition you observed, right? The bed jack was unsecured, that's the condition, correct?

A. Yes (Tr. 426)

* * * *

Q. But your safeguard does not also define a hazard, does it?

A. No. (Tr. 427)

Inspector Jones reviewed the same Notice of Safeguard that he relied upon when he issued the citation at bar and also admitted that no hazard was identified in that the Notice. He testified in this regard in the following colloquy:

Q. So there is no hazard defined in this safeguard as it's written?

A. As it's written, no (Tr. 407)

Citation No. 6673743

This citation, issued pursuant to section 104(a) of the Act alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.503 and charges as follows:

The #872 Stamler coal hauler being used on the No. 3 unit was not being maintained in approved condition. An opening in excess of .005 inches was present under the lid of the operators side tram motor.

The cited standard provides that "[t]he operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used in by the last open crosscut of any such mine."

MSHA Inspector Dean Cripps has a degree in electrical engineering technology and specializes in electrical installations in coal mines. He has additional experience as a coal miner. On October 12, 2008, Cripps issued the citation at bar after he inspected the number 872 stamler coal hauler and found an excessive opening under the lid of the tram motor. He explained that the maximum opening permitted is .004 of an inch, and the opening in this instance was .022. There is no dispute that the excessive opening was a violation of § 75.503. In this regard, Cripps testified that the specific hazard posed by the violation was the ignition of methane. He explained that the coal hauler transports coal from the continuous mining machine to the feeder and stops underneath, and in contact with, the tail of the continuous miner while it empties coal onto the hauler. According to Cripps, the vehicle, therefore, regularly operates close to the coal face where methane may be liberated. He noted however, that if the vehicle is maintained in permissible condition, sparking within the various compartments on the machine will not cause a methane ignition.

Cripps explained that when the subject lid to the tram motor compartment is shut, and the opening is within permissible parameters, an explosion proof environment is created within the motor compartment. Although methane may still enter the enclosure, the flame and the heat resulting from an explosion inside the container would not ignite methane that may be present outside of the enclosure. The explosive forces and gases are sufficiently cooled by the time they exit through the small permissible opening and across the flame vent or flame arresting path (i.e., the joint between the lid and the motor). Because of this cooling process, there is insufficient heat to ignite methane outside the compartment.

According to the credible testimony of Inspector Cripps, the subject hauler is used in by the last open crosscut where coal is being extracted and methane is liberated. When the methane is liberated the ventilation air carries it over the miner and the hauler. He further noted that the presence of coal dust, makes methane more explosive in that when the dust generated by the

continuous miner and is mixed with methane it can lower the explosive range of methane. According to the inspector, the hauler is also exposed to methane as it travels in the last open crosscut or the return entry to and from the feeder and continuous miners. Cripps testified credibly that the presence of methane and its exposure levels are unpredictable. He also noted the subject mine is known to liberate in excess of two million cubic feet of methane in a 24-hour period, which is why it is on a 5-day spot ventilation inspection regimen.

Cripps further testified that sparking or arcing occurs in the tram motor compartment in its normal operation. The motor has brushes and commutators that create sparking and arcing while tramming. I find that Cripps' testimony is entirely credible and established that it was reasonably likely for an ignition and serious injury to occur in light of (1) the excessive opening, (2) the arcing in the tram motor compartment, (3) that the subject mine was known to liberate large quantities of methane, and (4) the hauler regularly operated near the face and in the last open crosscut where methane is liberated from the coal. The violation was accordingly, "significant and substantial" and of high gravity.

The Secretary also maintains that the violation was the result of moderate negligence. In this regard I find from the credible evidence that the opening was easily identified that qualified electricians were permitted to perform work on this vehicle and that the compartment lid was bolted on the machine and the electrician who installed the lid did so while gob was in the compartment preventing it from shutting flush. Despite the obvious nature of the condition, Respondent failed to timely correct it and permitted the coal hauler to operate in face areas. I find accordingly that the violation was the result of moderate negligence.

Civil Penalties

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

Big Ridge is a large size mine operator and there is no evidence that the penalties imposed herein will affect its ability to remain business. Big Ridge had a significant history of violations in the 24 months preceding each of the charging document at issue. There is no dispute that the violations were abated in good faith. The gravity and the negligence history have been previously discussed.

ORDER

Citation No. 6674618 is hereby vacated. Charging Documents Nos. 6673440, 6673462, 6674611 and 6673743 are hereby affirmed as issued and Big Ridge Inc., is directed to pay civil penalties of **\$5,600.00, \$60,000.00, \$4,000.00 and \$2,500.00** respectively for the violations charged therein within 40 days of the date of this decision. Citation No. 6667476 is affirmed but without “significant and substantial” findings and Big Ridge Inc., is directed within 40 days of the date of this decision to pay a civil penalty of **\$8,000.00** for the violation charged therein. Pursuant to the motion to approve settlement filed herein, Big Ridge is further directed within 40 days of the date of this decision to pay civil penalties of **\$272, 961.00**. The Secretary has vacated Citation Nos. 6668239 and 6683077.

/s/ Gary Melick
Gary Melick
Administrative Law Judge
202-434-9977

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/to

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

September 20, 2011

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING:
Contestant,	:	
	:	Docket No. SE 2008-962-R
v.	:	Order No. 7693789; 07/24/2008
	:	
SECRETARY OF LABOR,	:	Mine ID 01-01401
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent.	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING:
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2009-267
Petitioner,	:	A.C. No. 01-01401-173519-02
	:	
v.	:	Mine: No. 7 Mine
	:	
	:	
JIM WALTER RESOURCES, INC.,	:	
Respondent.	:	

SUMMARY DECISION

Before: Judge Bulluck

These cases are before me on Notice of Contest and Petition for Assessment of Civil Penalty filed by Jim Walter Resources, Incorporated (“JWR”), against the Secretary of Labor (“Secretary”), acting through her Mine Safety and Health Administration (“MSHA”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“The Act”), 30 U.S.C. § 815(d). JWR challenges an Order issued by MSHA under section 104(d)(2) of the Act, alleging a violation of the Secretary’s mandatory safety standard at 30 C.F.R. § 75.362(b).

The parties have filed cross Motions for Summary Decision. 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, Inc.*, 29 FMSHRC at 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 upon the uncontested facts represented by the parties, I find that there is no genuine issue as to any material fact. Having reviewed the parties’ Motions, I conclude that, for the reasons stated below, the Secretary is entitled to summary decision as a matter of law.

I. Stipulations

The parties stipulated as follows:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this civil penalty proceeding pursuant to section 105 of the Federal Mine Safety and Health Act of 1977;
2. JWR is a mine operator subject to the jurisdiction of the Federal Mine Safety and Health Administration;
3. JWR is the owner and operator of the No. 7 Mine located in Brookwood, Alabama;
4. MSHA Inspector John Terpo was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued Order No. 7693789; and
5. Order No. 7693789 was served on JWR or its agent as required by the Act.

JWR Mot. at 1-2.

II. Factual and Procedural Background

This matter concerns JWR’s alleged failure to conduct an on-shift examination of the belt conveyor haulageways in sections 9 and 10 of Mine No. 7. On July 24, 2008, MSHA Inspector John Terpo arrived at the No. 7 Mine to conduct a regular inspection. Sec’y Mot. at 3. While reviewing the pre-shift and on-shift examination books, Terpo noticed that belts 9, 10A, and 10B were described as “idle” during the July 24 owl shift. Sec’y Mot. at 3. Clint Webster, the Control and Operations monitor, gave Terpo a computer printout which indicated that the belts at issue had run from 11:00 p.m. until 12:18 a.m., and again from 5:54 a.m. to 7:00 a.m. Sec’y Mot. at 3. Belts 9, 10A, and 10B are located in the southwest end of the mine. Sec’y Mot. at 3. The “owl shift” precedes the day shift and runs from 11:00 p.m. to 7:00 a.m. Sec’y Mot. at 3. During the owl shift, coal was being produced in the north end of the mine, six to ten miles from sections 9 and 10. Sec’y Mot. at 3. Miners were present in sections 9 and 10 on the July 24 owl

shift performing maintenance, bolting, rockdusting, and other mining-related work. JWR Mot. at 2, 5.

Inspector Terpo issued 104(d)(2) Order No. 7693789, charging JWR with a violation of 30 C.F.R. § 75.362(b). The violation was deemed significant and substantial (“S&S”) and an unwarrantable failure to comply with the standard. The Secretary proposed a specially assessed penalty of \$70,000.00. JWR contested the Order and the case was scheduled for hearing. Subsequently, however, the parties elected to file cross motions for summary decision.

III. Findings of Fact and Conclusions of Law

JWR admits that an on-shift examination of the 9, 10A, and 10B belt haulageways was not performed during the owl shift of July 24, 2008. JWR Mot. at 2, 4.

The cited standard provides as follows:

During each shift that coal is produced, a certified person shall examine for hazardous conditions along each belt conveyor haulageway where a belt conveyor is operated.

30 C.F.R. § 75.362(b).

The issue for resolution in this case is whether section 75.362(b) requires an operator to conduct an on-shift examination of each belt conveyor haulageway where a belt is being run for any reason, so long as coal is being mined on some section of the mine during that shift.

Regarding section 75.362(b), the Commission has stated that “[t]he standard’s regulatory history supports a plain meaning approach.” *Rawl Sales & Processing Co.*, 23 FMSHRC 463 at 473 (May 2001), *accord Consolidation Coal Co.*, 18 FMSHRC 1541, 1547-48 (Sept. 1996). In *Rawl*, the Commission affirmed the ALJ’s summary decision in favor of the operator.¹ In that case, the ALJ found that no on-shift examination of the belt haulageway was required because no miners were underground during the particular shift in question. *See generally Rawl Sales & Processing Co.*, 21 FMSHRC 219 (ALJ) (Feb. 1999). That case is distinguishable from the case at hand because, here, the parties acknowledge that miners were working underground during the owl shift on July 24 while coal was being produced elsewhere in the active workings of the same mine.

The phraseology of section 75.362(b), “*during* each shift that coal is produced,” refers to a time and not a place. (emphasis added). There is no dispute that during the owl shift of July 24, 2008, coal was being produced in the north end of No. 7. The term “*each* belt conveyor haulageway” contemplates multiple belts and the duty to inspect all of them. (emphasis added). This is the case here.

¹ The Commission’s vote in that case was evenly split and, therefore, “the effect of the split decision is to allow the judge’s decision to stand as if affirmed.” 23 FMSHRC at 463.

In the course of mining, belts are “operated” for various reasons. The 9, 10A, and 10B belts were turned off for 6 hours of the 8-hour owl shift. Miners arrived on sections 9 and 10 around 11:50 p.m. and the belts were still running until 12:18 a.m. JWR Mot. at 5, 6-7. During this time, the belts were carrying the remainder coal from the evening shift out of the mine. JWR Mot. at 6. The belts were reactivated at the end of the owl shift “[i]n order to assure that a proper on-shift examination could be made on the day shift.” JWR Mot. at 6-7. It is unclear whether the miners were still on the sections when the belts were turned on at 5:54 a.m. at the end of the owl shift.

As mentioned previously, miners were present on sections 9 and 10 performing duties associated with producing, although not actually cutting, coal such as bolting, rockdusting, and servicing equipment. JWR Mot. at 5. Whenever belts are running, miners are exposed to potential hazards that can arise during their operation.

The legislative history of the Act points to Congress’ concern with hazards associated with belt lines, noting that “[m]any fires occur along belt conveyors as a result of defective electric wiring, overheated bearings, and friction; and therefore, an examination of belt conveyors is necessary.” S. Rep. No. 91-411, at 57 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 183 (1975).

Based on the foregoing, I find that JWR violated section 75.362(b) when it failed to conduct an on-shift examination of the belt haulageways in sections 9 and 10 of Mine No. 7, during the owl shift of July 24, 2008.

Significant & Substantial

This violation was designated as significant and substantial by the inspector. A violation is significant and substantial (“S&S”) when the violation is “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). A violation is properly designated as 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 reasonable serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish that a violation is significant and substantial, the Secretary must prove:

- (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation;
- (3) a reasonable likelihood that the hazard contributed to will result in an injury; and
- (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 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. Secretary*, 861 F.2d 99, 103-4 (5th Cir. 1988), *aff’g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). The evaluation is made in terms of “continued normal mining operations.” *U.S. Steel*

Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based “on the particular facts surrounding the violation.” *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The fact of the violation has been established. The focus of the S&S analysis here is whether the violation was reasonably likely to result in an injury producing event. In *U.S. Steel Mining Co.*, the Commission provided further guidance:

We have explained 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.” 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) (citations omitted). Lack of an on-shift examination of the belt haulageways is likely to lead to a failure to identify serious conditions that could result in injuries ranging from cuts, bruises, sprains, broken bones and contusions to fatalities. Conditions such as faulty wiring, malfunctioning equipment, and falling objects present discrete safety hazards, such as slip and fall or the possibility of fire or explosion. If any of these events were to occur, it is reasonably likely that injuries resulting to miners would be of a reasonably serious nature.

With respect to belt haulageways in sections 9 and 10, the belts were running while miners were working on the sections, and for a period of time the belts were transporting coal. Should a defective wire or belt friction have generated a spark, it is reasonably likely that it would have lead to a fire or explosion. Belt fires are a significant hazard associated with mining, as evidenced by Congress’ concern with belt line hazards, noted above. Oxygen and a fuel source – elements necessary for a fire to occur – were present. Friction from rollers could have produced an ignition source that could have lead to a fire. As is possible with belt fires, a fire could have spread throughout the mine. Furthermore, smoke from a fire could have created a serious safety hazard. It could have obstructed the miners’ sight, preventing or delaying escape

from the mine, and could have exposed them to inhalation of toxic gases. Additionally, should a belt defect, such as a stuck roller or a ripped or loose belt, have gone undetected, it is reasonably likely that a miner situated in close proximity to the belt could have tripped and fallen or otherwise become entangled in the belt’s moving parts, causing a reasonably serious injury.

I find that the failure to conduct an on-shift examination of the belt haulageways in question for any possible defects or conditions requiring attention was reasonably likely to result in injury causing events of a serious nature and, therefore, that the violation was S&S. Accordingly, I affirm the Secretary’s S&S finding.

Unwarrantable Failure

The Order was also designated as an unwarrantable failure to adhere to the requirement of the standard, as set forth in section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1). Unwarrantable failure is considered “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 2003-4; *Rochester & Pittsburgh Coal Corp.*, 13 FMSHRC 189, 193-4 (Feb. 1991).

The Commission has set forth the following factors to be considered in making an unwarrantable failure analysis: “the extensiveness of the violation, the length of time that the violative condition has existed, the operator’s efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1548 (Sept. 1996) (citing *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994)).

The violation was based on the activities of one shift. No evidence has been proffered by the Secretary that JWR has been cited for violating this standard at any time in the past. As stated previously, miners were present on sections 9 and 10 while the belts were running for approximately 1.5 hours. During that time, coal was transported on the belts for approximately 30 minutes. This short length of time is a mitigating factor.

Moreover, as JWR points out, it had a good faith belief that there was no duty to conduct an examination of the subject belt haulageways on the July 24 owl shift. In fact, JWR did conduct an on-shift examination pursuant to another subsection of the standard, section 75.362(a)(1).² Therefore, this violation does not rise to the level of aggravated conduct contemplated by the Act.

Consequently, I find that the Secretary has not met her burden of establishing aggravated conduct contemplated by the Act, and that the violation was a result of JWR’s moderate negligence, not its unwarrantable failure to comply with the standard. Accordingly, the Order shall be modified to a citation issued pursuant to section 104(a) of the Act.

Penalty

While the Secretary has proposed a specially assessed civil penalty of \$70,000.00, the judge must independently determine the appropriate assessment by proper consideration of the

² Section 75.362(a)(1) requires that “[a]t least once during each shift . . . a certified person designated by the operator . . . conduct an on-shift examination of each section where anyone is assigned to work during the shift. . . .” According to JWR, this examination was conducted because miners were assigned to work in sections 9 and 10. JWR Mot. at 9. I find that JWR’s examination under 75.362(a)(1) of the sections where crews were scheduled to work weighs against saddling the operator with indifference or reckless disregard in failing to inspect the subject belt haulageways under section 75.362(b).

six penalty criteria set forth in section 110(I) of the Act, 30 U.S.C. § 820(j). *See Sellersburg Co.* 5 FMSHRC 287, 291-92 (March 1993), *aff'd*, 763 F.2d 1147 (7th Cir. 1984).

In assessing the appropriate penalty for this violation, I have considered that JWR is a large operator. JWR has not been cited for a similar violation and, therefore, I do not find its history to be an aggravating factor in assessing the penalty. I have found the violation to be relatively serious, given that the lack of inspection of the belt haulageways in question could potentially expose miners to serious injuries. Moreover, I have ascribed moderate negligence to the operator. Therefore, having considered JWR's large size, ability to remain in business, history of violations, seriousness of violation, moderate degree of negligence, good faith abatement and other mitigating factors, I find that a \$20,000.00 penalty is appropriate.

ORDER

WHEREFORE, JWR's Motion for Summary Decision is **DENIED**, and the Secretary's Motion for Summary Decision is **GRANTED**. Order No. 7693789 is hereby **MODIFIED** to a citation issued under section 104(a) of the Act, with the degree of negligence reduced to "moderate." It is further **ORDERED** that JWR pay a civil penalty of \$20,000.00 within 30 days of the date of this decision.³ Accordingly, these cases are **DISMISSED**.

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

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³ 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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

September 21, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	
Petitioner	:	Docket No. KENT 2009-444
	:	A.C. No. 15-18911-170135-01
v.	:	
	:	Docket No. KENT 2009-445
	:	A.C. No. 15-18911-170135-02
CAM MINING, LLC	:	
Respondent	:	Docket No. KENT 2009-446
	:	A.C. No. 15-18911-170135-03

SUMMARY DECISION

On August 26, 2011 Respondent filed, *inter alia*, a motion for summary decision in these proceedings for the Secretary's failure to establish adequate cause for her late filing of the petitions for civil penalties herein. To date the Secretary has not responded to the motion and the Respondent's proffered statement of facts is therefore accepted as undisputed.

Commission Rule 67(b), 29 C.F.R. § 2700.76(b) provides that "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".

It is now undisputed that on December 3, 2008, the Department of Labor's Mine Safety Health Administration (MSHA) Office of Assessments issued Assessment No. 000170135. On December 5, 2008, the assessment was sent to CAM Mining, LLC (CAM) by Federal Express and was delivered to CAM on December 9, 2008.

After reviewing and then deciding to contest the majority of the assessment, counsel for Respondent returned the assessment form on December 12, 2008 and asked for a hearing. That assessment form was received by MSHA on December 16, 2008. MSHA's Data Retrieval System then showed the citations and orders were in contest.

As agreed to by MSHA, the Petitions for Assessment should have been filed by January 29, 2009. No petition was filed. On March 24 and April 23, 2009, counsel for Respondent contacted MSHA Solicitor, John Mulvey, about the missing petition and provided mailing information and delivery information on the assessment. Mr. Mulvey informed said counsel that the matter was being looked into. On April 27, 2009, Mr. Burke, the District 6 Conference and Litigation Representative (CLR), filed three Motions to Allow Late Filing, all listing the same reason. The original motion claimed the Petitions for Assessment were not filed because the litigation packet was mis-delivered to an S. Iverson, who does not work for MSHA.

However, all the documents that MSHA based its Motion to Allow Late Filing on were the original assessment forms – not a litigation packet. In fact, the dates relied upon all predate the time

Respondent actually asked for a hearing. All of the documents focus on a December 9, 2008 delivery, three days before Respondent even contested the assessment and asked for a hearing. The Secretary could not have generated a Hearings Package, as no hearing had been requested on December 5, 2008. The Secretary has provided no reason why she failed to generate Petitions for Assessment and why they were not filed until April 27, 2009, some four months after it was due. It appears that, but for the questions of Respondent's counsel, Petitions would not have been filed.

This Commission permits the late filing of penalty petitions beyond the 45 days provided in Commission Rule 28, 29 C.F.R. § 2700.28, where the Secretary demonstrates adequate cause for the delay and where the respondent fails to show prejudice from the delay." *Lesueur-Richmond Slate Co.*, 21 FMSHRC 98, 99 (Jan. 1999) (citing *Salt Lake County Road Dept.*, 3 FMSHRC 1714, 1716 (July 1981)). In "the event the Secretary demonstrates adequate cause, justice may require that the case nevertheless be dismissed if the operator can demonstrate that it was prejudiced in the preparation of its case by the stale penalty proposal." *Cactus Canyon Quarries of Texas, Inc.*, 25 FMSHRC 262, 265 (March 2002).

In this case, the Secretary has shown no factually supportable reason for the late filing. As noted in the undisputed statement of facts, the Secretary bases her entire argument for late filing on the representation that a litigation packet was mis-delivered. However, it is now also undisputed that the Secretary's argument relates to the original assessment, dated December 3 and overnighted to Respondent on December 5. The December 9 signature, "S. Iverson", cited by the Secretary is in fact the date Respondent received the assessment. Within three days of receiving the assessment, on Dec. 12, 2008, Respondent asked for a hearing.

Under the circumstances, I find that there has been no factually supported reason shown for why the petitions were not filed by January 29, 2009 as required by Commission Rule 28. Accordingly, without a showing of any cause, no less adequate cause, these petitions must be dismissed.

Order

Docket Nos. Kent 2009-444, Kent 2009-445 and Kent 2009-446 are hereby dismissed.

/s/ Gary Melick

Gary Melick
Administrative Law Judge
(202) 434-9977

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/to

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 23, 2011

USA CLEANING SERVICE &	:	EQUAL ACCESS TO JUSTICE
BUILDING MAINTENANCE,	:	PROCEEDING
Petitioner	:	
	:	Docket No. EAJ 2011-01
v.	:	AC No. 12-00065-241462-A2061
	:	
SECRETARY OF LABOR, MINE	:	
SAFETY AND HEALTH	:	Mine: Essroc Cement Corp.
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Appearances: Henry Chajet, Esq., R. Brian Hendrix, Esq., and Gregory M. Louer, Esq.,
Patton Boggs LLP, Washington, D.C., for Petitioner;

Linda M. Hastings, Esq., Office of the Solicitor, U.S. Department of
Labor, Cleveland, Ohio, for Respondent.

Before: Judge McCarthy

This case is before me on an Application for Award of Fees and Expenses under the Equal Access to Justice Act (EAJA) (5 U.S.C. § 504). USA Cleaning Service and Building Maintenance (USA Cleaning) filed the application against the Secretary of Labor's Mine Safety and Health Administration (MSHA) based upon the vacation of a contest proceeding (Docket No. Lake 2011-384R) that USA Cleaning brought against the Secretary pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (Mine Act) (30 U.S.C. § 815(d)).

Factual and Procedural Background

Since 1987, Essroc Cement Corporation has contracted with USA Cleaning to provide janitorial services in the offices, break rooms, locker rooms, and bathrooms located in its Logansport facility. Pet'r Application for Fees at 1. In accordance with 30 C.F.R. § 46.11(b), Essroc provides site-specific hazard training to USA Cleaning employees that work at the mine site. *Id.* at 2. On February 14, 2011, MSHA issued Order No. 6497182 pursuant to section 104(g)(1) of the Act. That Order required USA Cleaning to immediately withdraw three janitors from the Logansport facility. The MSHA inspector justified this order by claiming that the janitorial staff should be classified as miners under the Mine Act¹ and 30 C.F.R. § 46.5(a) would

¹ 30 C.F.R. § 46.2(g) provides:
(1) Miner means:

(continued...)

require them to receive twenty-four hours of comprehensive new miner training before being allowed to return to work at the plant.

On February 17, 2011, USA Cleaning filed a Notice of Contest and a Motion for Expedited Consideration concerning Order No. 6497182. The next day, I was assigned this case and a conference call was promptly scheduled to discuss USA Cleaning's Motion for Expedited Consideration. On February 24, 2011, after the Solicitor reviewed the case for a mere 48 hours, the Secretary vacated the contested order and USA Cleaning was free to resume work at the Logansport facility. Sec'y Answer at 4.

The Secretary filed a Motion to Dismiss the contest proceeding on March 15, 2011. On March 21, 2011, I issued an Order granting the Secretary's motion. My Order expressly noted that it did not address any claims or arguments about attorney fees under the EAJA.

In its EAJA application, USA Cleaning asserts that despite several attempts to convince MSHA to vacate an alleged, clearly erroneous order, the Secretary ended her "vigorous prosecution" only after she inferred from the conference call that I may be inclined to grant USA Cleaning's Motion for Expedited Consideration. Pet'r Resp. to Sec'y Answer at 3. USA Cleaning argued that it was a "prevailing party" in the underlying adversarial adjudication and that it met the EAJA's eligibility requirements with regards to size and net worth of the company. Pet'r Application for Fees at 6-7. Therefore, USA Cleaning claimed \$22,000 in legal fees and expenses connected to the underlying contest proceeding and subsequent EAJA action.

Disposition & Analysis

The EAJA provides for the award of attorney's fees and other expenses to a prevailing party against the United States or an agency thereof, unless the position of the government "was

¹ (...continued)

- (i) Any person, including any operator or supervisor, who works at a mine and who is engaged in mining operations. This definition includes independent contractors and employees of independent contractors who are engaged in mining operations; and
- (ii) Any construction worker who is exposed to hazards of mining operations.

(2) The definition of "miner" does not include scientific workers; delivery workers; customers (including commercial over-the-road truck drivers); vendors; or visitors. This definition also does not include maintenance or service workers who do not work at a mine site for frequent or extended periods."

30 C.F.R. § 46.2(h) provides:

Mining operations means mine development, drilling, blasting, extraction, milling, crushing, screening, or sizing of minerals at a mine; maintenance and repair of mining equipment; and associated haulage of materials within the mine from these activities.

substantially justified or that special circumstances make an award unjust.” 5 U.S.C. 504 (a)(1); *see also* 28 U.S.C. § 2412(d)(1)(A). USA Cleaning argues that the Secretary's allegation that it was non-compliant with 30 C.F.R. § 46.5 was “not substantially justified” and that it is eligible for an award under the EAJA as the prevailing party in the contest proceeding.²

The Secretary answers that USA Cleaning is not eligible for an award under the EAJA because the underlying proceeding was not an adversarial adjudication and that the inspector's conclusions were substantially justified in law and fact. Sec'y Answer at 3-4. I need not decide the arguments outlined by the Secretary, however, since USA Cleaning does not meet the basic threshold of being classified as a “prevailing party” under the EAJA.³

In establishing the parameters of what constitutes a “prevailing party” under the EAJA, both USA Cleaning and the Secretary appear to have looked to the Commission's decision in *MSHA v. Black Diamond Construction Inc.*, 21 FMSHRC 1188 (Nov. 1999). In that case, the Commission allowed a contractor to recover attorneys' fees and expenses under the EAJA when the Secretary vacated a civil penalty proceeding the day before the case was scheduled for hearing. *Id.* at 1191. The Commission focused its analysis on whether MSHA's pre-litigation position throughout a rather lengthy pre-trial period was “substantially justified.” As USA Cleaning points out, the Commission's decision in *Black Diamond* did not provide a firm definition of a “prevailing party” under the EAJA. Pet'r Application for Fees at 7. Rather, I infer from the Commission's decision that a judgment on the merits was not a necessary prerequisite in establishing EAJA eligibility.

Given the Commission's ambiguity on the “prevailing party” status of the applicant in *Black Diamond*, I am wary to conclude that the Commission intended to convey “prevailing party” status on a contestant when the Secretary promptly vacates an order or citation before any petition has been filed and the issues have been joined for litigation. In *Black Diamond*, unlike the present case, the Secretary pursued the litigation for a considerable amount of time. After the mine was inspected, it took five months for the Secretary to file a petition for assessment of civil penalties and another three months of pre-trial proceedings and discovery before the citations were finally vacated the day before the scheduled hearing. *Black Diamond, supra*, at 1191.

In the case at bar, the Secretary expeditiously vacated the 104(g)(1) Order without any of the prolonged pre-trial preparation and discovery that took place in *Black Diamond*. There was

² I note that under 5 U.S.C. § 504(a)(4) and 29 C.F.R. 2704.100, a *non-prevailing party* is eligible for an award of legal fees and expenses if the demand of the Secretary is substantially in excess of the decision of the Commission and unreasonable, unless the applicant party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. The underlying proceeding, however, was a contest proceeding and the Secretary had yet to assess a penalty against USA Cleaning. Furthermore, USA Cleaning did not claim recovery based on its status as a “non-prevailing party.” Given these facts, I find that this alternative standard under 5 U.S.C. § 504(a)(4) does not apply to the case at bar.

³ Even USA Cleaning found it “odd” that the Secretary did not attempt to challenge USA Cleaning's claimed “prevailing party” status. Pet'r Resp. to Sec'y Answer at 5.

little time to discuss the 104(g)(1) Order since the underlying contest proceeding was initiated by USA Cleaning only a few days after the Order was issued. Once the Notice of Contest and Motion for Expedited Consideration were served on the Secretary, she promptly assigned the case to counsel and ultimately vacated the Order within a week. Furthermore, unlike in *Black Diamond*, there was never a joinder of the issues for litigation as the Secretary never filed a petition for assessment of civil penalty or any pleading in opposition to USA Cleaning's Notice of Contest.

In the decade since the Commission issued its *Black Diamond* decision, the Supreme Court issued a landmark decision concerning the definition of a "prevailing party" in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Res.*, 532 U.S. 598 (2001). *Buckhannon* represents a major shift in the determination of how "prevailing party" status is established. Prior to that decision, most circuits applied the "catalyst theory," which designated a plaintiff the prevailing party "if it achiev[ed] the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.* at 601. However, in *Buckhannon*, the Court rejected the catalyst theory and found that "prevailing party" is a legal term of art to denote that a party has been awarded some relief by the court. *Id.* at 615-16. While *Buckhannon* concerned the question of "prevailing party" status under the Fair Housing Amendments Act of 1988 (FHAA) and the Americans with Disabilities Act of 1990 (ADA), courts have consistently applied its rationale in the context of the EAJA. *See, e.g., Perez-Arellano v. Smith*, 279 F.3d 791, 793 (9th Cir. 2002); *Thomas v. Nat'l Sci. Found.*, 330 F.3d 486, 492-93 (D.C. Cir. 2003).

The D.C. Circuit has interpreted *Buckhannon* as setting forth three criteria for establishing whether a party has "prevailed" for the purposes of a fee-shifting statute. *Turner v. Nat'l Transp. Safety Bd.*, 608 F.3d 12, 15 (D.C. Cir. 2010) (citing *District of Columbia v. Straus*, 590 F.3d 898, 901 (D.C. Cir. 2010)).⁴ Under this three-part test, a party is classified as having "prevailed" if: (1) there is a court-ordered change in the legal relationship of the parties; (2) the judgment is in favor of the party seeking the fees; and (3) the judicial pronouncement is accompanied by judicial relief. *Id.*

The D.C. Circuit most recently applied this test in an analogous case involving an application for fees and expenses under the EAJA. In *Turner v. National Transportation Safety Board*, shortly after two pilots appealed their suspensions by the Federal Aviation Administration (FAA), the FAA withdrew the complaints before an Administrative Law Judge could schedule a hearing. *Turner, supra*, at 12. The court held that where an ALJ dismisses a complaint at the request of an administrative agency, there is nothing "analogous to judicial relief." *Id.* at 16. The ALJ's dismissal was deemed to be mere "administrative housekeeping" and not judicial relief because the FAA unilaterally withdrew the complaint without the ALJ's permission. *Id.* Furthermore, the court concluded that the legal relationship between the parties was not altered by the case's dismissal. *Id.* at 15. The court found that when the ALJ is silent on

⁴ As the EAJA is a statute of general application that is not committed to administration by the Commission or the Secretary, the D.C. Circuit has declined deference to MSHA or the Commission's construction of the EAJA's provisions. *Contractor's Sand & Gravel, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 199 F.3d 1335, 1339 (D.C. Cir. 2000).

the subject, the case is understood to have been dismissed without prejudice, thereby returning the parties to the same legal position as existed prior to the proceedings. *Id.* In failing to meet prongs one and three of the court's three-part test for establishing themselves as "prevailing parties," the court ruled that the pilots were not eligible for reimbursement under the EAJA.

The facts in *Turner* closely mirror those in the case at bar. In both cases, the administrative agency requested that the ALJ dismiss the case before a hearing could be scheduled. The court's reasoning in *Turner* made clear that, while the pilots did receive a favorable outcome, the resolution of the case was not enough to warrant their designation as "prevailing parties" without securing a favorable judgment on the merits or a court-ordered consent decree. Similarly, I find that the dismissal of the underlying contest proceeding as a result of MSHA's vacation of the underlying 104(g)(1) Order in the case at bar did not convey any judicial relief upon USA Cleaning, nor did it change the legal relationship between USA Cleaning and the Secretary.

Within ten days of issuing the 104(g)(1) Order, the Secretary promptly vacated the Order and ended any adversarial relationship between the parties. No petition or pleading responding to the Notice of Contest was ever filed by the Secretary. It has long been settled that the Secretary has the unreviewable discretion to vacate a citation or order. *See, e.g., Secretary v. RBK Constr. Inc.*, 15 FMSHRC 2099 (1993). Thus, the Order I issued granting the Secretary's Motion to Dismiss was simply a procedural formality that, in itself, offered no relief to USA Cleaning. Furthermore, given that I did not dismiss the underlying case with prejudice, the Secretary's vacation of the order did not change the legal relationship between the parties. Rather, it restored both parties to the same legal status they held prior to MSHA's issuance of the order. *See Turner, supra*, at 15.

As USA Cleaning did not receive any judicial relief in the underlying proceeding, and my dismissal did not change the legal relationship between the two parties, I find that it would be inappropriate to classify USA Cleaning as a prevailing party for purposes of the EAJA. Having failed to meet the eligibility criteria under the EAJA, USA Cleaning's Application for Award of Fees and Expenses is hereby **DENIED**.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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/tjr

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 23, 2011

CONNOLLY-PACIFIC COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 2011-1064-RM
	:	Order: 8607223; 05/24/11
	:	
v.	:	Docket No. WEST 2011-1065-RM
	:	Citation: 8607224; 05/24/11
	:	
SECRETARY OF LABOR,	:	Docket No. WEST 2011-1066-RM
MINE SAFETY AND HEALTH	:	Citation: 8607225; 05/24/11
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEST 2011-1067-RM
	:	Citation: 8607226; 05/24/11
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2011-1238
Petitioner	:	A.C. No. 04-00081-260016
	:	
v.	:	
CONNOLLY-PACIFIC COMPANY	:	Mine: Pebbly Beach Quarry
Respondent	:	Mine ID: 04-00081

DECISION

Appearances: Susan Seletsky, Office of the Solicitor, U.S. Department of Labor, Los Angeles, California for the Secretary,
Adele L. Abrams, Law Office of Adele L. Abrams, Beltsville, Maryland for the Respondent.

Before: Judge Miller

This case is before me on a notice of contest based upon four enforcement documents filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Connolly-Pacific Company at its Pebbly Beach Quarry, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act"). The case includes four separate docket numbers that involve three 104(a) citations and one 107(a) imminent danger withdrawal order.

These dockets were heard on an expedited basis after Connolly-Pacific timely filed Notices of Contest for the citations and order and moved to consolidate and expedite proceedings. Connolly-Pacific stated that the highwall was not a safety hazard and argued that a mining/mine plan is not required for surface aggregate operations. Further, Connolly-Pacific argued that the section 107(a) imminent danger order would prevent them from meeting a pre-existing production contract. The Secretary opposed Connolly-Pacific's motion to expedite, stating that she did not expect the Contestant to prevail and Connolly-Pacific would ultimately have to develop a prudent mining plan. The Court granted the Contestant's Motion to Consolidate and Expedite Proceedings and the hearing of this matter commenced on July 18, 2011 in Long Beach, California.

I. STATEMENT OF FACTS

Connolly-Pacific Company ("Connolly-Pacific") operates a stone quarry, the Pebbly Beach Quarry (the "quarry" or "mine"), on Catalina Island, California. Resp. Ex. 7 p. 3.¹ Connolly-Pacific has owned and operated the quarry since as early as the 1950s. *Id.* The quarry is subject to regular inspections by the Secretary's Mine Safety and Health Administration ("MSHA") pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated that Connolly-Pacific is the operator of the mine, that its operations affect interstate commerce, and that it is subject to the jurisdiction of the Mine Act. (Tr. Vol. II: 5). The parties further agreed that, although this is a notice of contest case, the penalty case may be consolidated and decided with the contest.

The Pebbly Beach Quarry produces greywacke landscape and armor stone in varying sizes ranging up to 30 tons. Cont. Ex. E-1, p. 1; (Tr. Vol. I: 230). The rock is primarily brought down by blasting. Connolly-Pacific uses a number of blasting methods, including the "coyote" blasting method, to generate raw stone at the quarry. Cont. Ex. E-1, p. 1; (Tr. Vol. I: 36). The last major blasting event in the area cited by MSHA Inspector Hilde was a "coyote" blast that occurred in 2004. (Tr. Vol. I: 36). Since 2004 there have been additional blasts of less intensity, including "lifter blasts," "down blasts," and "secondary blasts." (Tr. Vol. I: 36, 165). Due to the height of the highwall, Connolly-Pacific does not, and cannot, scale the highwall to control loose material and, instead, relies on a few blasts, gravity, and rainfall to bring down debris and loose boulders. (Tr. Vol. I: 33, 34, 49, 72, 84). The Pebbly Beach Quarry produces three types of raw product: "A" rock, "B" rock and Quarry Run. (Tr. Vol. I: 229). "A" rock comprises of armor rock between 4 and 30 tons; "B" rock is between ¼ to 4 tons; and Quarry Run is everything smaller than "B" rock. (Tr. Vol. I: 229). The large "A" rock is greywacke, which is the most valuable and sold to ports along the coast. (Tr. Vol. I: 235; Tr. Vol. II: 106). The stone is loaded on a barge at a loading dock at the foot of the quarry for transport to its final location. Resp. Ex. 7 p. 3.

¹ The Secretary's exhibits will be noted as "Resp. Ex." while Connolly-Pacific's exhibits will be noted as "Cont. Ex."

On May 24, 2011, MSHA Inspector Chad Hilde visited the Pebbly Beach Quarry and issued section 104(a) Citation Nos. 8607224, 8607225, and 8607226. (Tr. Vol. I: 16). On the same day, Hilde issued section 107(a) imminent danger Order No. 8607223 based upon the conditions noted in the three 104(a) citations. He instructed Connolly-Pacific to cease quarrying operations in the described area. MSHA Engineer Steven Vamossy accompanied Inspector Hilde on May 24, 2011. Vamossy photographed and recorded observations of the highwall conditions and was present during conversations with Connolly-Pacific employees. (Tr. Vol. I: 17-18, 158, 160). Representatives of the operator also accompanied the inspection team. The citations, as amended, allege that two 300 foot tall sections of the highwall were not properly maintained, a hazard existed which had not been corrected, and the areas were not barricaded as required by 30 C.F.R. §§ 56.3130, 56.3131, and 56.3200 respectively. At the 480 south section of the quarry, the bottom seventy feet, known as the talus pile, was at an angle of repose of about 45 degrees. (Tr. Vol. I: 21-22, 30-31, 65, 221; Tr. Vol. II: 18). At the 480 north section of the quarry, there was no talus pile, however, tire tracks at the face demonstrated that travel under that highwall continued to occur in that area. (Tr. Vol. I: 23). The highwall rises up to 300 feet in the 480 north, and more than 200 feet above the talus pile in the 480 south. While the two cited areas were not bermed, a portion of the mine between the north and south areas was not being mined at the time and had been bermed to prevent access to persons and equipment. (Tr. Vol. I: 20, 29, 31).

Hilde and Vamossy agree that they observed loose material and cracked rock on the highwall above both the working sections, the 480 north and the 480 south. (Tr. Vol. I: 21, 25, 66, 166, 170). Hilde observed a loader mucking the talus pile in the 480 south area. (Tr. Vol. I: 19, 21, 30). The photo, Resp. Ex. 15, DOL 070, shows the 480 south area with a cone shaped pile of material approximately 70 feet high, described as talus pile, which consisted of material that has rolled from the highwall as a result of a blast or a fall. (Tr. Vol. I: 22). The photo further illustrates the condition of the talus pile and highwall in the 480 south area, and the position of the loader beneath, as observed by Hilde and Vamossy. (Tr. Vol. I: 21, 22, 24). A second photo, Resp. Ex. 15, DOL 072, clearly shows cracks in the highwall above the 480 south and pieces of rock that overhang the area in which the loader was working. (Tr. Vol. I: 170). After observing the 480 south, Hilde and Vamossy walked northward, along the 480, to the north area, passing by the bermed area en route. (Tr. Vol. I: 23). One photo, Resp. Ex. 14, DOL 067, is a photo of tire tracks that lead up to the toe of the highwall at the 480 north, and indicate that the loader had cleaned up to the face. (Tr. Vol. I: 23). Photo, Resp. Ex. 14, DOL 68, shows the same area, but taken from a further distance. Hilde testified, with the use of the photograph, that he could see rock overhanging at the top and loose pieces of rock in several locations on the wall, and he knew that the wall had not been scaled. (Tr. Vol. I: 24). The photographs in Resp. Exs. 14 and 15 clearly show cracks and loose rock and material on the highwall above the working area, as observed and testified to by Hilde and Vamossy.

During the course of the inspection, Hilde and Vamossy questioned the mine employees and mine management about maintaining the highwall. (Tr. Vol. I: 22, 36, 59). Neither Hilde nor Vamossy had observed a highwall of this height and it was clear that, given the height, the highwall could not be scaled. (Tr. Vol. I: 34, 49, 72, 84, 166). Further, the two cited areas were not benched or bermed. (Tr. Vol. I: 33).

Connolly-Pacific explained the method of mining used at the quarry to include the mucking out of material from the talus pile until the mine feels it is no longer safe to work in that area, at which time they move to a different location. (Tr. Vol. I: 36). The areas are mucked as material falls and joins the talus pile. (Tr. Vol. I: 36). The area is not benched and, instead, the mine uses weekly examinations, daily examinations, spotters and, to a limited extent, blasting to control the highwall. (Tr. Vol. I: 33, 37). Hilde was told that the last coyote blast was done in 2004. (Tr. Vol. I: 36). That blast brought down tons of material that continues to be mucked. (Tr. Vol. I: 233). The mine conducts one other type of blasting that relates to highwall control, lifter blasting. (Tr. Vol. I: 225). A lifter blast can help with ground control but its primary purpose is production. (Tr. Vol. I: 234). No lifter blasts were conducted at the 480 south in 2011, but two or three blasts were conducted in that area prior to August 1, 2010. (Tr. Vol. I: 250-251). One or two lifter blasts were conducted at the 480 north in 2011 and the talus was mucked back to the toe of the highwall. The mine had completed the work at the 480 north and had planned to berm the area to keep out men and machines, but had not had time to do so prior to the visit by Hilde and Vamosy. (Tr. Vol. II: 21-22). When asked, the mine could not locate any engineering or geologic studies for either area, nor could it produce any tools to measure the conditions. (Tr. Vol. I: 37-38; Tr. Vol. II: 40-41). The mine does have aerial photos taken, currently once a year, to view the quarry and to, in part, help determine the condition of the highwall. (Tr. Vol. I: 39, 57, 87, 238-238). The mine had no plan for control of the highwall other than that which was already in place. (Tr. Vol. I: 44, 47). It did not intend to begin scaling or benching in any area cited.

Connolly-Pacific has operated the Pebbly Beach Quarry for decades. (Tr. Vol. I: 227). The company has mined tons of stone and rock and has had a steady, reliable work force. (Tr. Vol. I: 138). The mine employs 22 miners, many of whom have, or have had, a father or other family who works, or worked, at the mine. (Tr. Vol. I: 123, 138, 245; Tr. Vol. II: 44, 65). The employees are loyal to the company and have never raised a complaint about the safety of the highwall. (Tr. Vol. I: 246-247; Tr. Vol. II: 25). Of the witnesses who testified on behalf of the mine, two were not everyday workers at the mine, but were present at the mine once a week or less, while the remaining witnesses work daily at the mine. The three who work daily at the mine have not worked at any other quarry or mining operation in their career. The mine, located on Catalina Island, is subject to earthquakes and small tremors. (Tr. Vol. II: 95, 113-114). The mine has had only one accident related to a fall of rock in its history. Resp. Ex. 17.

The Pebbly Beach Quarry utilizes supervisor observation and spotters to watch the highwall for any problems. (Tr. Vol. I: 128, 131, 147). On a weekly basis, one of the managers travels to the top of the highwall to look for anything unusual. (Tr. Vol. I: 111-112, 124). Each day, management looks at the highwall from the lower levels to determine if any changes have occurred. (Tr. Vol. I: 124). Machado, one of the managers at the mine, is assigned to look at the highwall each day before he assigns the day's work. (Tr. Vol. I: 90). Machado keeps notes of his weekly and daily examinations. (Tr. Vol. I: 92). Machado's notes for 1/7/11, Resp. Ex. 19, indicate that it was too muddy to travel to the top of the highwall, that the mine had received rain for two weeks, that some rocks had rolled or fallen off the highwall, and that he was continuing to watch due to the rain. (Tr. Vol. I: 113-114). His notes further reflect that, on 1/15/11, he was watching a crack that had developed and he noted that dirt had moved due to recent rain. Resp. Ex. 19 ; (Tr. Vol. I: 115). Machado explained that he had been watching a problem spot high up

above the 480 south, and his notes indicate that he observed cracks in the rock that were growing larger. Resp. Ex. 19; (Tr. Vol. I: 103). After a series of rains, the rock came down during the night on May 5, 2011, and Machado noted its movement. Resp. Ex. 19; (Tr. Vol. I: 96, 104). Machado stated that he watches the movement on the highwall and, normally, he waits a few days after a fall to see if anything else comes down before assigning work in the area. (Tr. Vol. I: 114-115, 144). However, on May 5, after the fall, he assigned miners to work in the 480 south area because, according to his testimony, it appeared safe to go in. (Tr. Vol. I: 97, 115). The notes of Machado indicate that slight rain does not get in the way of production. Resp. Exs. 19 and 20; (Tr. Vol. I: 144). However, when there is heavy rain, the roads become too muddy for equipment to pass and, consequently, the mine is closed. (Tr. Vol. II: 33).

According to mine witnesses, if a work area appears safe, they will work it, but pull back if any miner raises a safety issue. (Tr. Vol. I: 126; Tr. Vol. II: 19). The miner witnesses agree that they have not seen any rock “free fall” from the top of the highwall while working. (Tr. Vol. I: 122, 125; Tr. Vol. II: 46, 68). Instead, rocks and material slide or roll down, often landing in the talus pile or rolling off that pile. (Tr. Vol. I: 125). The notes of Machado show that mucking was ongoing at both the 480 north and south up to the time of Hilde’s inspection. Ex. 19.

Aside from blasting, work is assigned primarily at the talus pile, which is composed of material that is blasted or has slid off of the wall due to weather or other conditions. The loader can load most rock that is contained in the pile, but if the rock is too large, it is pushed aside and later broken up by a secondary blast. (Tr. Vol. I: 100, 148, 231; Tr. Vol. II: 52-53). If an area is not safe to mine, such as the area between the 480 south and 480 north, the mine constructs a berm, often with large rock, to prevent access. (Tr. Vol. I: 126, 140, 141-142, 147, 237; Tr. Vol. II: 20).

Once the manager has observed the highwall shortly after his arrival, he assigns a crew to work the talus piles to load the rock onto waiting trucks. (Tr. Vol. II: 66). A trained spotter is assigned to the crew and each crew member is issued a radio for communication during the day. (Tr. Vol. I: 129-130, Tr. Vol. II: 15, 45, 66). The spotter is assigned for 8 hours, but is relieved for bathroom breaks if he so requests. (Tr. Vol. I: 134-135). The spotter watches the talus pile and the highwall and avoids the heavy equipment working in the area while he is on foot. If the spotter observes any rock or dirt come off the wall, he notifies the other crew members who pull back and look at the area noted and together decide if they should continue with the load and haul process. (Tr. Vol. I: 126; Tr. Vol. II: 15). If the miners believe it is not safe to work in any area, they may tell the others and together determine if work should continue. (Tr. Vol. I: 126, 129; Tr. Vol. II: 26, 32). Few complaints, if any, have been made about the safety of the highwall. (Tr. Vol. I: 126, 246-247; Tr. Vol. II: 26).

The worker exposed daily to the fall of rock is the operator of the loader, who mucks the talus pile back to the toe of the highwall. (Tr. Vol. II: 46, 62). The loader cab is approximately 17.5 feet off the ground and has rollover protection and a wire screen protecting the cab. (Tr. Vol. II: 34, 40, 48, 50, 132). In the event a spotter notices a suspicious area or sees rock rolling, he warns the loader operator, who then, in the mine’s view, has time to move out of harms way. (Tr. Vol. I: 145). The distance the loader is operating from the toe of the highwall and the

amount of material in the bucket, determine how quickly the loader can escape. As a result, the level of danger or exposure to falling and rolling rock increases as the loader works ever closer to the toe of the wall where it necessarily takes longer to move out of harms way.

The other activity that occurs at the highwall and exposes miners to fall, is blasting. (Tr. Vol. I: 130). There are several kinds of blasts, mostly for production purposes. (Tr. Vol. I: 229). The blaster must approach the highwall on foot with helpers in order to set charges for a blast. (Tr. Vol. I: 116; Tr. Vol. II: 38). A spotter is present during this process. The blaster drills the wall, sets the charges and controls the blast. Once the area is blasted, it is left for 24 hours to determine if any other material will fall. (Tr. Vol. II: 69, 94). Resp. Ex. 21, DOL 181, 182, 183 are a good depiction of the location of the blasters and helpers during the process. (Tr. Vol. I: 116). The crew is next to the highwall during the setting of the charges and, because radio frequencies interfere with explosives, the spotter is armed with an air horn to warn of any dangerous conditions above. (Tr. Vol. I: 146, 151; Tr. Vol. II: 80-81). The company's blaster explained that coyote blasting has not been done for more than seven years, but he has performed "lifter" blasts, "down" and "secondary" blasts since then. (Tr. Vol. II: 72-73). The lifter blasts aid in ground control as well as production, while the other blasts are generally for production purposes. (Tr. Vol. I: 149, 234; Tr. Vol. II: 72-73). A record is kept of all blasts. (Tr. Vol. I: 250; Tr. Vol. II: 75); Resp. Ex. 18.

In general, the mine has operated with the use of spotters for many years with little problem. The methods of controlling the highwall include some limited blasting, and allowing the material to fall under natural conditions. The photographs and checks by management are used by Connolly-Pacific to observe changes in the highwall and predict the fall of material. Benches and scaling are not now, and have not or rarely been, used in this area of the mine. The highwall has been developed to such a height that it is difficult, if not impossible to scale.

II. DISCUSSION AND CONCLUSIONS OF LAW

In essence, Connolly-Pacific is charged with not maintaining the highwall in a stable condition. The stability of a highwall depends on a number of variables, including its height, the geology, and the angle of the wall. In addition to the blasting and occasional photographs utilized by Connolly, mines normally use benching and scaling to control a highwall. Generally, benches are placed above the working area to "catch" and help control rock or material that is rolling or falling from the highwall. Scaling is used to remove loose or hanging rock and material before it falls. This quarry uses neither scaling nor benching to control the fall of material from the highwall. Blasting is another method often used to control a highwall by bringing down loose material before it falls. All mines, no matter which method or methods are used to control the highwall, must always be vigilant in watching the movement and the changes in the highwall.

The Connolly-Pacific highwall is roughly 300 feet high with no bench below. While in one cited area there was a talus pile, approximately 70 feet high, there was no talus pile in the other cited working area. The talus pile, to some extent, serves to impede the travel of rock and debris as the material falls or rolls off of the wall. As the talus pile is mucked, the loader is

forced to move closer and closer to the highwall. As a result, the buffer provided by the talus pile shrinks, thereby increasing the danger. All parties agree that the talus pile consists of loose material which can move and roll, however, such movements and rolling are generally predictable. The highwall, on the other hand, is not predictable, in the sense that one will not know when material may fall. The loose and cracked rocks are most likely to roll or fall from the wall after a “secondary” event occurs. The operator’s expert, Johnson, explained that a secondary event may include an earthquake or tremor, rain, water run-off, or other weather event. While one may predict that, after a number of days of rain, material will slough off of the highwall, it is uncertain when that will occur and to what degree. Johnson testified that rain could “cause[] failures to occur days or even weeks after the rainfall.” (Tr. Vol. II: 116). In other words, rain on a certain day does not necessarily indicate that material will slide or fall within a set time period. The same is true of sloughing caused by other secondary events.

It is the position of the Connolly-Pacific that, prior to the issuance of the citations contested herein, it had not been provided with any notice that the manner in which the mine controlled the highwall was not in compliance with the requirements of section 56.3130 and the related highwall standards. Connolly-Pacific argues that the conditions had never before been cited during any inspection. Hilde inspected the mine, including the highwall, in 2008. At that time he had concerns about the highwall and its safety. According to the mine, following the inspection in 2008, management had a telephone conversation with Hilde and his supervisor and, subsequently, agreed to provide berms in certain areas of the mine to alleviate Hilde’s concerns. No other inspector had mentioned any problem with the highwall and the mine has received no citations for failing to control the highwall.

The Contestant’s assertion that they have been deprived of fair notice because they have never been cited for the highwall, or specifically notified of the application of the standards to the highwall, is not persuasive. An operator is deprived of fair notice of the applicability of a standard when it is “so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.” *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990) (*quoting Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982)) (alteration in original). Explicit notice to the operator is not required. Put another way, “[w]here 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,” *Lode Star Energy Inc.*, 24 FMSHRC 689, 692 (July 2002) (*citing Dyer v. United States*, 832 F. 2d 1062 (9th Cir. 1987)). The standard for maintaining the stability and safety of the highwall is sufficiently clear. The standard is not vague or incomplete. Section 56.3130 is a performance-oriented standard “broad enough to apply to the wide variety of conditions encountered.” *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 375 (Mar. 1993) (*quoting* 51 Fed. Reg. 36193 (Oct. 8, 1986)).

Next, there is no evidence to demonstrate that the conditions cited by Hilde during the 2011 inspection were identical to the conditions observed in 2008 or on any other inspection. In fact, the photos provided by the mine demonstrate that the mine has changed. Specifically, the talus piles that were in place in 2008 are not the same as those in 2011. Finally, I find that a reasonably prudent person familiar with the mining industry would recognize the requirements

of the standard. As the Commission explained in *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694 (July 2002):

The appropriate test for notice is “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).

In *Phelps Dodge Tyrone, Inc.*, 30 FMSHRC 646, 656, (Aug. 2008), the Commission, citing earlier precedent, reiterated the “reasonably prudent person” standard:

[T]he alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.

Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (Dec. 1982); *see also Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992).

As the Commission stated in *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990), “in interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement,” but whether a reasonably prudent person would have ascertained the specific prohibition of the standard and concluded that a hazard existed. The reasonably prudent person is based on an “objective standard.” *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983).

In the instant case, the text of the regulation, along with the guidance in the MSHA Program Policy Manual (“PPM”), further lead to the conclusion that a reasonably prudent person would have been aware of the requirements of the cited standards. I take official notice of the MSHA PPM that specifically suggests benches as a way to effectively control the highwall along with scaling. In addition, I find that, given the obviousness of the conditions at the mine, including the extreme height of the highwall, the loose and cracked rock, and the lack of benches, a person familiar with mining would recognize the hazard and recognize that corrective action must be taken.

Having found that the mine’s argument regarding fair notice is not persuasive, I move to the individual citations. Each citation is based upon the condition of the highwall as observed by Hilde and Vamossy. The Mine Act requires the highwall to be maintained in a stable condition. Many experts, including the expert presented by Connolly-Pacific, recommend that benches and scaling, as well as limited blasting, be used to maintain the stability of the highwall. Photographs, watching the highwall, and tracking the weather are helpful in anticipating the fall

of rock and material, but they do not prevent or actively control such falls. Further, having spotters on the ground observing the highwall while miners work below does not maintain the highwall's stability and, instead, only mitigates against the damage a fall may create. For the reasons set forth herein, I find that Connolly-Pacific failed to adequately maintain the highwall and slope stability as required by the Mine Act and the Secretary's regulations

a. *Docket No. WEST 2011-1065-RM - Citation No. 8607224*

On May 24, 2011 Inspector Hilde issued Citation No. 8607224 at the Pebbly Beach Quarry for an alleged violation of 30 C.F.R. § 56.3130. The citation, as amended, alleges, in pertinent part, the following:

At the south end of the 480 level, a Cat 992 D Loader, Co # 5, was loading under an approximate three hundred foot highwall. The lower approximate seventy feet containing material that had slid or raveled off the highwall, was at angle of repose of approximately 45 degrees. The slope of the remaining approximate two hundred thirty feet of wall ranged from seventy two to ninety degrees. The top of the wall had loose and unconsolidated materials and boulders. The loader was cleaning material that had raveled and slid off the wall. There was also recent activity at the north end of the 480 level where material had been cleaned up under overhanging material. The mining method involved assigning employees to pick up material that had slid off the highwall. The operator took no action to determine or maintain the stability of the highwall after material had slid before assigning employees to work under it.

Inspector Hilde found that a fatal injury was reasonably likely to occur, that one person was affected, that the violation was significant and substantial, and that the violation was the result of moderate negligence.

1. The Violation

Chad Hilde has worked as an MSHA mine inspector for nearly ten years and worked in the mining industry prior to that. He has taken college courses, including courses in engineering and geology. Hilde cited a violation of 30 C.F.R. § 56.3130, which requires the following:

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

The Commission has stated that section 56.3130 is a "performance-oriented" standard "broad enough to apply to the wide variety of conditions encountered." *Cyprus Tonopah Mining Corp.*,

15 FMSHRC 367, 375 (Mar. 1993) (*quoting* 51 Fed. Reg. 36193 (Oct. 8, 1986)). MSHA details the requirements of section 56.3130 in its Program Policy Manual, which states the following:

Consistent with . . . [Section 56.3130], MSHA requires that a bench located immediately above the area where miners work or travel be maintained in a condition adequate to retain material that may slide, ravel, or slough onto the bench from the wall, bank, or slope.

IV MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 56, at 10 (2010) ("PPM").

Neither 30 C.F.R. § 56.3130, nor the PPM, should be interpreted as mandating a benching system in all areas of all highwalls. *Malvern Minerals Co.*, 11 FMSHRC 2382, 2386-87 (Nov. 1989) (ALJ) (stating that section 56.3130 "requires benching . . . only when 'necessary'"). However, it is clear that operators must employ excavation/mining methods that not only protect workers from falling or sliding rock, but also "maintain wall, bank, and slope stability." 30 C.F.R. § 56.3130. Commission judges have previously relied upon the cited section of the PPM in upholding section 56.3130 citations when operators failed to provide an adequate protective bench at the toe of a highwall. *See e.g., Summit Inc.*, 19 FMSHRC 1326, 1339 (July 1997) (ALJ). While Pebbly Beach Quarry argues that photographs, limited blasting, and the watchful eyes of its supervisors and spotters maintain the highwall, the mine, nevertheless, does not employ scaling or benches as a method of control. I agree that there is no requirement to engage in the use of benches to protect the miners below the highwall from falling material, but if benches are not used, the mine must employ some alternative effective methods to maintain stability of the wall.

Many of the photos taken by Hilde and Vamossy on the day of citation demonstrate the condition of the highwall. For example, the photo, Resp. Ex. 15, DOL 070, clearly depicts the Cat 992 Loader referenced in the citation positioned at the base of the highwall. The highwall is approximately three hundred feet high directly above the loader and increases in height to the right side of the picture frame. The height alone is unusual in the mining industry and the wall is nearly vertical. A large pile of loose boulders is visible on the pit floor adjacent to the 992 loader. Resp. Ex. 15, DOL 070. Rocks that are overhanging and cracked on the wall, as well as loose material on the highwall, are evident in the photos. Resp. Ex. 15, DOL 067, 068, 070, 072. No benches or other evidence of highwall maintenance are apparent in the photos.

In addition to the photographs contained in Resp. Exs. 14 and 15, I have relied upon the expert testimony of both parties in considering this citation. Both parties agree that there is little likelihood of a massive highwall failure. Moreover, both experts agree that material sloughs off of the talus pile as it is being mucked. Such sloughing of the talus pile is generally predictable and mucking of the pile is an accepted method of moving the material to a load out position. The citation, however, is directed at the highwall as it soars hundreds of feet above the talus pile in one instance, and above the working area in another

Steven Vamossy presented expert testimony on behalf of the Secretary regarding the stability and alleged potential hazards present at the Pebbly Beach Quarry. Vamossy is a

registered professional civil engineer and has worked in MSHA's Technical Support division for ten years. Vamossoy accompanied Inspector Hilde on the day the May 24th citations were issued. It appears that, at least in part, Hilde relied upon Vamossoy's observations and evaluation of the highwall conditions in his decision to issue all three 104(a) citations and the subsequent 107(a) withdrawal order. In his final report, Vamossoy described two general types of hazards associated with highwalls: (1) mass instability, and (2) individual rock fall hazards. Resp. Ex. 7. Vamossoy stated that, due to the orientation of the rock layers present at this area of the Pebbly Beach Quarry, the possibility of massive rock movement was unlikely. However, Vamossoy also stated that there were some joints at the north end of the quarry wall which indicated a potential for sliding or toppling of smaller slabs of rocks.

Vamossoy testified that a falling rock hazard was present at the pit floor. He noted that Connolly-Pacific had not established horizontal catch benches consistent with MSHA's Program Policy Manual section addressing section 56.3130, and had allowed the front end loader to operate near the toe of the highwall, which contained loose and overhanging rock. Vamossoy concluded that Connolly-Pacific should: (1) incorporate benching as part of their mining plan; (2) extend the rock catchment berm to protect haul road traffic; and (3) periodically monitor the tension crack located at the inactive south end of the quarry. *Id.* Vamossoy was able to point out, through the use of photographs, a large section of rock on the north 480 highwall that had fallen and rolled down the wall after a series of rainfalls. This same area had been identified and was being watched by Machado, and clearly came down during the night of May 5, 2011.

Jeffrey Johnson presented expert testimony for Connolly-Pacific. Johnson has a PhD in engineering from the University of California and is certified by the State of California as an engineering geologist. Johnson's experience has been primarily in construction and earthquake preparedness. Johnson's report on the Pebbly Beach Quarry conditions was based upon a number of visits to the quarry by him and his assistants during June 2011, collections of rock samples, the contested MSHA citations, aerial photographs, and discussions with Connolly-Pacific management.

Johnson testified that quarry observations and aerial photographs indicated that the rock formations present at the operative area of the quarry were not subject to massive slope failure. He testified to the manageable nature of the blast talus slope present at the quarry. Johnson stated that, as mucking operations proceed at the toe of the talus pile, the slope will fail, predictably, in thin slabs as material is removed from the toe. According to Johnson, removal of the blast talus pile does not affect the stability of the steep areas above the talus pile. Johnson also stated that talus slopes form a buffer that will slow rock fall fragments from above. Moreover, by slowing any rock fall fragments, the talus pile provides time for equipment operators to adjust their position in the event of a rock fall. However, Johnson noted that working at the base of a highwall that is susceptible to falls and topples is problematic if a significant accumulation of talus does not exist to serve as a buffer. In that instance, Johnson recommended benching and scaling to control the highwall. Cont. Ex. E-1, p. 9. The existence of the talus pile is crucial to Johnson's testimony, yet there was no talus pile at the 480 north area. (Tr. Vol. II: 143, 146).

As Johnson explained, the primary difference between his report and conclusions reached by Vamossy is a disagreement as to when the highwall becomes a hazard. Vamossy asserted that the highwall, without benching or scaling to prevent or control any fall of material, is a hazard in its present condition. Johnson, on the other hand, opined that there was no hazard, and a hazard only comes into play when a secondary force, such as an earthquake or rain, is added into the equation. There is no question that a secondary force such as an earthquake, weather, or other force, will affect the slope and cause it to fall. Without the secondary force, in Johnson's view, there is no hazard. The Secretary's position is that the highwall must be controlled both in anticipation of the secondary event and after the secondary event. Johnson believes that the secondary force is predictable and the spotters and the talus pile serve to control any potential damage from those forces. Johnson explained that, once there is the presence of the secondary force, like an earthquake or rain, the mine has time to respond to that secondary force. According to the mine, the supervisor and spotters would be aware of the secondary event and, when rock or dirt begins to come down, they will remove the miners from the affected area. Hilde and Vamossy disagree with the mine's position, and the Secretary argues that the highwall must be controlled prior to any fall that the spotters may observe.

I credit the testimony of inspector Hilde and Vamossy in evaluating the citations. I find the Secretary's witnesses to be more convincing, reliable and objective. I find Vamossy's conclusions regarding the condition of the highwall to be consistent with the photographs and the general tenor of the testimony of all witnesses. Vamossy examined the area in order to gather enough evidence to reach his conclusion. While Johnson and his team also viewed the area, Vamossy did it with an eye to mine safety, unlike the engineers for the operator who have no experience in the mining industry.

After considering all witness testimony, photos and exhibits of quarry conditions, and expert reports detailing the Pebbly Beach Quarry, I conclude that the Secretary has demonstrated that a violation of 30 C.F.R. § 56.3130 existed at the quarry on May 24, 2011. I credit Inspector Hilde's testimony that loader tracks were present at the base of the north end of the 480 level, indicating operations beneath overhanging material where there was neither a protective catch bench or buffer talus slope to stop or slow any falling material. There is no dispute that the loader was working on the talus pile in the 480 south area. Therefore, the areas cited by Hilde are areas where miners work or travel. I do note that the design of the Cat 992 loader operating at the time of the citation may offer some protection from smaller falling rock. However, a sizeable rock or boulder falling from a height of greater than one hundred feet could certainly cause a fatal injury to an equipment operator, even if located within a protective cab. Further, the absence of a berm or warning signs at this area allowed quarry employees to enter the north end of the quarry on foot where overhanging material was present.

Connolly-Pacific has presented testimony that operating at the toe of the talus slope is consistent with prudent mining methods. While I accept Connolly-Pacific's position that the talus slope itself is a manageable area, I do not accept the proposition that continued mucking operations, without the creation of protective catch benches, scaling, or other recognized controls or maintenance of the highwall, is acceptable. If mucking operations continue without alteration, the toe of the talus slope will move closer and closer to the highwall, and loading operations will, by necessity, eventually occur at the base of the highwall without any protection.

Based on the lack of a talus pile at the 480 north, the mine apparently mucked all the way to the base of the highwall in that section prior to the inspection and was working on the other section, doing the same.

It is clear that the mine keeps an eye on the highwall through occasional or yearly photographs, examinations by management, and observation by spotters. While the mine watches the wall, they do not prevent anything from coming down unexpectedly and, hence, do not control or maintain the wall. Control at highwalls is historically done through benching and scaling, neither of which presently occurs in this area of this mine. Further, the mine has worked the area so that the high wall has reached an incredible height. I take notice of a number of MSHA and NIOSH publications that describe highwall stability and generally refer to a wall that is up to 100 feet high as the outer limit of acceptable height. “Good basic design is essential to highwall safety. The height should be limited for stability and to allow scaling.” Christopher Mark Ph.D. & Anthony T. Iannacchione Ph.D., *Ground Control Issues for Safety Professionals*, in *MINE HEALTH AND SAFETY MANAGEMENT* 365 (Michael Karmis ed., 2001). The highwall at Pebbly Beach is approximately 300 feet tall, has no benches and, due to its unusual height, the mine has eliminated the possibility of scaling. Mining publications agree that “[r]ock faces should be monitored frequently to check for loose rocks,” such as is done at Pebbly Quarry, but all industry material goes on to recommend that “scaling should be conducted as needed.” *Id.*

Connolly-Pacific has not presented evidence that contradicts the specific conditions noted at the quarry and described by Hilde and Vamossy in their testimony. Hilde and Vamossy credibly testified as to the conditions observed and the complete lack of mining methods that were being used to maintain the stability of the wall, bank, and slope. While limited blasting is a recognized method of controlling stability, given the conditions found by the Secretary, blasting is not enough in this instance. While photographs, management observation, and spotters are useful tools, again, they do not maintain the stability of the highwall. For these reasons, I find that the Pebbly Beach Quarry violated the requirements of 30 C.F.R. § 56.3130 at the 480 section of the quarry and uphold the citation.

2. Significant and Substantial

A significant and substantial (“S&S”) violation is described in 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).

I have already found that there is a violation of the mandatory safety standard; 30 C.F.R. § 56.3130, as alleged by the Secretary. Second, I find that a discrete safety hazard existed as a result of the violations, that is, the danger of rock of various sizes falling or rolling from a height of several hundred feet and striking a loader operator and or his equipment, or striking a blaster or other person standing under the highwall. Third, the hazard described, that of a rock or boulder striking equipment or an employee from a height of several hundred feet, will result in an injury and, fourth, that injury will be serious, or even fatal.

The difficulty with finding a violation S&S normally comes with the third element of the Mathies formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

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

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation, and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

Machado testified that men were on foot below the highwall, and photos show three blasters with a spotter below the 480 north. Resp. Ex. 21, DOL 181, 182, 183. There are cracks in the wall above where they are working. The critical question is not whether the material on the highwall will fall, but when will it fall, thereby making it reasonably likely that rock and material will fall and cause an injury. In most circumstances, a fall will occur when the wall is subjected to weather, earth tremors, blasting and other secondary events. Machado agreed that the mine

stayed away from the highwall after a rain. Further, he stayed away from the wall for 24 hours after a blast. Clearly, these precautions are to avoid rolling or falling material. Unfortunately, as Johnson explained, a rainstorm alone cannot predict falling material. It may take several storms and the fall can occur at any time, i.e., days or even weeks after the rainfall. Given the conditions of the wall as observed by the inspector, and the limited precautions taken by the mine, I find that the hazard contributed to, falling material striking miner operated equipment or an actual miner, is at least reasonably likely to occur in the continued course of mining.

Hilde testified to the hazard of rock coming into the cab of the loader or being large enough to crush the cab of the loader. Further, he testified to the hazard of material falling on those working without benefit of any talus pile below the 480 north. "Most highwall injuries occur when loose pieces of rock fall on workers located below. Small pieces of rock can be dangerous when they fall from great height; even a fist-sized rock caused a recent fatality." Christopher Mark Ph.D. & Anthony T. Iannacchione Ph.D., *Ground Control Issues for Safety Professionals*, in MINE HEALTH AND SAFETY MANAGEMENT 365 (Michael Karmis ed., 2001).

As described above, I have found that a violation of 30 C.F.R. § 56.3130 existed at the Pebbly Beach Quarry where loading operations occurred at the base of a highwall well in excess of one hundred feet where loose and overhanging material were present. By the operator's own admission, it appears that loading operations have proceeded at the Pebbly Beach Quarry in this manner for many years. Connolly-Pacific's failure to provide and maintain protective catch benches or appropriate muck/talus piles at the north end of the quarry significantly increases the likelihood of falling rock striking and injuring an employee. The same is true of its inability to scale and bring down loose material before it unexpectedly falls. For these reasons, I uphold the Secretary's designation of the violation as significant and substantial.

3. Negligence

Inspector Hilde determined that the violation was the result of moderate negligence. I note that Connolly-Pacific does not employ a mining/quarry plan customary in many surface mines and failed to establish protective catch benches clearly outlined in the MSHA Program Policy Manual. However, Connolly-Pacific did establish protective berms in at least some portions of the quarry, conducted routine inspections of the quarry walls, and employed a spotter during mucking operations. Thus, I agree that the operator's negligence was moderate and assess a penalty of \$1,000.00.

b. Docket No. WEST 2011-1066-RM - Citation No. 8607225

On May 24, 2011 Inspector Hilde issued Citation No. 8607225 at the Pebbly Beach Quarry for a violation of 30 C.F.R. § 56.3131. The citation, as amended, alleges, in part, the following:

At the south end of the 480 level, a Cat 992 D Loader, Co # 5, was loading under an approximate three hundred foot highwall. The lower approximately seventy feet, containing material that had slid

or raveled off the highwall, was at angle of repose of approximately 45 degrees. The slope of the remaining approximate two hundred thirty feet of wall ranged from seventy two to ninety degrees. The top of the wall had loose and unconsolidated materials and boulders and extensive raveling at the perimeter of the quarry wall. The loader was cleaning material that had raveled and slid off the wall. There was also recent activity at the north end of the 480 level where material had been cleaned up under overhanging material. The operator failed to correct conditions at and near the perimeter of the quarry wall that created a fall of material hazard to persons working below.

Inspector Hilde found that a fatal injury was reasonably likely to occur, that one person was affected, that the violation was significant and substantial, and that the violation was the result of moderate negligence. The conditions described in this citation relate to the same highwall discussed in the previous citation.

1. The Violation

Hilde cited a violation of 30 C.F.R. § 56.3131, which requires the following:

In places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected.

The photos taken the day of the inspection show large overhanging rock formations present on the perimeter of quarry wall. The formations are near vertical and the rock has clearly not been stripped back or sloped to the angle of repose. Fracture lines are clearly evident in at least one of the photos. *See* Resp. Ex. 15, DOL 072. Vamossy noted that the face of the wall had protrusions which could cause falling rock to bounce outward from the highwall. Hilde indicated that the slope of the talus pile at 480 south was probably in good condition, that it was at an angle of repose and, therefore, is not a part of the citation. The focus of this citation is on the highwall above the talus pile in the 480 south and the entire highwall in the 480 north where the talus pile had been completely removed.

While both expert witnesses testified that the possibility of mass failure at the 480 level was unlikely, Connolly-Pacific's witnesses testified that smaller rock fall events occurred during rainy conditions and the mine's expert explained that a number of secondary events can cause rocks to fall or roll off the highwall. The evidence presented by the Secretary demonstrates that persons work or travel under the highwall, particularly the loader who was mucking the talus pile on the south end, and the area in the north end where the talus pile had been completely removed

up to the toe of the highwall. The loose and cracked rock on the highwall had not been corrected or sloped back from the face.

Dr. Johnson's testimony on behalf of Connolly-Pacific focused on the stability of the talus pile and the unlikelihood of a massive failure. However, he conceded that individual rock falls are an unpredictable process that can occur at any time. The implementation of a spotter during mucking operations appears to have been motivated at least in part by the recognition of the distinct possibility of a rock fall from the perimeter highwall. Thus, I conclude that the Secretary has met her burden of establishing that a rock fall hazard existed at the perimeter of the quarry wall and had not been corrected.

In determining whether or not these conditions affected active areas of the quarry, I first credit Inspector Hilde's observation of tire tracks at the base of the north highwall. Additionally, as Connolly-Pacific did not establish protective catch benches or post effective warning signs or berms in the subject areas of the 480 level, I find that the conditions at the perimeter of the highwall were present in "places where persons work or travel in performing their assigned tasks." Therefore, I find that the Secretary has established a violation of 30 C.F.R. § 56.3131.

The Contestant also argues that the cited loose material was in fact sloped to the angle of repose, thereby satisfying the standard. While I agree with the Contestant that the talus pile at the base of the 480 south was sloped to the angle of repose, I have already found that loose material, which presented a hazard, existed on the highwall above the talus pile at the 480 south and on the highwall at the 480 north, and was not sloped to the angle of repose. For that reason, I find no merit to the Contestant's argument.

2. Significant and Substantial

I have previously found that there is a violation of the mandatory safety standard, 30 C.F.R. §56.3131, as alleged by the Secretary. Second, I find that a discrete safety hazard existed as a result of the violation, i.e., the danger of a rock fragment falling from a height of several hundred feet and striking a loader operator and/or his equipment or other employees of the mine near the highwall. Third, the hazard described, a boulder or rock falling from a height of several hundred feet and striking equipment or an employee, will result in an injury and, fourth, that injury will be serious, or even fatal.

As described above, I have found that a violation of 30 C.F.R. § 56.3131 existed at the Pebbly Beach Quarry where loose and overhanging material was present at the top of a highwall in excess of one hundred feet in height. By the operator's own admission, it appears that similar highwall conditions have existed at the Pebbly Beach Quarry since at least the last major blasting event in 2004. Connolly-Pacific's failure to strip back, slope, or perform controlled blasting to remove loose material at the highwall, significantly increases the likelihood of falling rock striking and injuring an employee. The secondary events discussed by both expert witnesses, including earthquakes and rain, can occur at any time, resulting in a rock slides or falling rock. Even with spotters present, the workers are not adequately protected from falling or rolling rock.

For these reasons, I uphold the Secretary's designation of the violation as significant and substantial.

3. Negligence

Inspector Hilde determined that the violation was the result of moderate negligence. Connolly-Pacific conducted routine inspections of the quarry walls, employed a spotter during mucking operations, and made some attempt to control the highwall with blasting. Thus, I agree that the operator's negligence was moderate and assess a penalty of \$550.00.

c. Docket No. WEST 2011-1067-RM - Citation No. 8607226

On May 24, 2011 Inspector Hilde issued Citation No. 8607226 at the Pebbly Beach Quarry for a violation of 30 C.F.R. § 56.3200. The citation, as amended, alleges, in part, the following:

At the south end of the 480 level, a Cat 992 D Loader, Co # 5, was loading under an approximate three hundred foot highwall. The lower approximate seventy feet, containing material that had slid or raveled off the highwall, was at angle of repose of approximately 45 degrees. The slope of the remaining approximate two hundred thirty feet of wall ranged from seventy two to ninety degrees. The top of the wall had loose and unconsolidated material and there was a rock at the top that appeared fractured with loose rocks overhanging the slope. The operator failed to post or restrict access to the area under the south end at the 480 level where hazardous conditions existed before permitting work in the area. The operator also failed to restrict or post an area at the north end of the 480 level where material had been cleaned up to the base of the highwall under overhanging material. The north end of the highwall was not attended and there was vehicle traffic going past this area.

Inspector Hilde found that a fatal injury was reasonably likely to occur, that one person was affected, that the violation was significant and substantial, and that the violation was the result of moderate negligence. The conditions described in this citation relate to the same highwall discussed in the previous two citations.

1. The Violation

Hilde cited a violation of 30 C.F.R. § 56.3200, which requires the following:

Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be

posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

Since I have already determined that a hazard did exist, see discussion *supra*, the violation is established. The operator does not dispute that there was no posting or barricade in the area below both the 480 north and the 480 south. In fact, one of the witnesses, Scott, said that the mine had intended to extend the berm that was currently in place between the 480 north and south to the 480 north section, but they simply hadn't had enough time before the inspector arrived. I take this to indicate that the mine understood that there was a hazardous condition at the 480 north. Scott testified that employees were told not to enter the area, but it had not yet been barricaded.

“[B]efore finding an operator in violation of section 56.3200, it is only proper that conditions be shown to pose a danger from an objective standpoint.” *Shine Quarry Inc.*, 17 FMSHRC 1397, 1401 (Aug. 1995) (ALJ). I have already found that hazardous ground conditions, including loose overhanging material at the highwall perimeter and the absence of protective catch benches, were present at the 480 level of the Pebbly Beach Quarry and constituted violations of 30 C.F.R. §§ 56.3130 and 56.3131. Accordingly, I find that “ground conditions that created a hazard” were present at the Pebbly Beach Quarry and provide a sufficient basis for the issuance of a section 56.3200 citation in the absence of effective warnings or barriers. As discussed more fully above, I do not accept Johnson’s view that a hazard is created only after a secondary event has taken place. A secondary event is not predictable and, in the case of rain, it is not known how much rain must fall or how often the rain must occur in order for rock to slide or fall, nor is it known how long an amount of rain will continue to impact the highwall after the rain has ceased to fall.

Inspector Hilde credibly testified that the protective berm along the haul road did not adequately extend to either the north or south end of the 480 pit level. As previously noted, I credit Inspector Hilde’s testimony that tire tracks were present at the toe of the north highwall, thereby indicating recent operations in this area.

Connolly-Pacific has not presented evidence contending that warnings were posted at these areas. It also has not argued that it posted an employee to direct traffic away from these areas. Connolly-Pacific has offered portions of their Ground Control and Spotter Training Manual that it contends adequately educated employees on the dangers of entering areas with hazardous conditions. I first note that, while training materials such as these may speak to an operator’s level of negligence, if any, regarding a particular violation, they are not substitutes for the specific requirements of 30 C.F.R. § 56.3200 that mandate barricades and/or warning signs in hazardous areas. Additionally, while Scott’s testimony regarding the intention to build a berm at the 480 north seems to indicate the acknowledgment of a hazard, it appears that Connolly-Pacific employees did not consider the north end of the highwall hazardous given that there were tire tracks that indicated mucking operations had occurred at the base of the highwall. For these reasons, I find that the Secretary has established that a violation of 30 C.F.R. § 56.3200 existed at the Pebbly Beach Quarry on May 24, 2011.

The operator argues that the three citations discussed above are duplicative in nature and that, “in the event that Citation No. 8607224 is sustained, . . . at a minimum, Citations No. 8607225 and 8607226 should be vacated because they are duplicative.” Cont. Br. 23. However, although it is obvious that the hazard referenced in the language of section 56.3200 is conditioned upon a separate ground control violation, the Commission has held that 56.3200 is not a duplicative regulation and has stated the following:

[T]he requirements of sections 56.3200 and 56.3130 are different. Section 56.3130 requires that an operator use mining methods that maintain wall stability and sets forth additional requirements if benching is necessary. In contrast, section 56.3200 requires that, if a hazardous ground condition occurs, it be corrected and entry into the area be restricted until corrective work is completed. The standards are related in that an operator’s failure to mine in a way that maintains stability may also result in a hazardous condition requiring an operator to restrict access until the hazardous condition is corrected. As the Commission has recognized:

[t]he 1977 Mine Act imposes a duty upon operators to comply with all mandatory safety and health standards. It does not permit an operator to shield itself from liability for a violation of a mandatory safety standard simply because the operator violated a different, but related, mandatory standard.

El Paso Rock Quarries, Inc., 3 FMSHRC 35, 40 (January 1981). *Cyprus Tonopah Mining Corp.*, 15 FMSHRC at 378. Just as section 56.3200 is not duplicative of section 56.3130 since it requires a “separate and distinct dut[y] upon the operator,” section 56.3131 is also not duplicative, as it also requires a separate and distinct duty, i.e., the sloping of loose or unconsolidated material to the angle of repose or the stripping back of material for at least 10 feet from the top of the pit or quarry wall in areas where miners work or travel while performing assigned duties. *Id.* at 378; 30 C.F.R. § 56.3131. For these reasons, I find the Contestant’s argument to be without merit.

2. Significant and Substantial

I have found that there is a violation of the mandatory safety standard, i.e., 30 C.F.R. § 56.3200, as alleged by the Secretary. Second, I find that a discrete safety hazard existed as a result of the violation; i.e., the danger of an employee entering an unmarked or unbarricaded area with hazardous ground conditions and being struck by a falling or rolling rock. Third, the hazard described, that of rock falling from a height of several hundred feet and striking equipment or an employee in the unmarked and unbarricaded area, will result in an injury and, fourth, that injury will be serious, or even fatal.

As described above, I have found that a violation of 30 C.F.R. § 56.3200 existed at the Pebbly Beach Quarry where barriers or warnings were not adequately established at areas with hazardous ground conditions. By the operator's own admission, it appears that employees have been allowed to operate in areas with hazardous ground conditions in this manner for a number of years. Connolly-Pacific's failure to adequately berm or post warning signs at areas with hazardous ground conditions significantly increases the likelihood of an employee entering a hazardous area and being struck by falling rock. For these reasons, I uphold the Secretary's designation of the violation as significant and substantial.

3. Negligence

Inspector Hilde determined that the violation was the result of moderate negligence. I note that Connolly-Pacific did establish protective berms in at least some portions of the quarry, trained employees in recognizing hazardous ground conditions, and employed a spotter during mucking operations in an attempt to warn operators of rock fall events. However, Scott agreed that the 480 north area should have been bermed to prevent travel in that area, but the mine had simply not gotten around to constructing that berm before the inspector arrived. There is no indication that it was scheduled to be built, however, Scott's testimony shows that the mine was aware of the necessity. Thus, it is difficult to agree that the negligence was moderate and I assess a penalty of \$1,000.00.

d. Docket No. WEST 2011-1064-RM - Order No. 8607223

On May 24, 2011, Inspector Hilde issued section 107(a) withdrawal Order No. 8607223 directing Connolly-Pacific to cease mining operations in the referenced areas upon the basis of the three citations discussed above. Section 107(a) of the Mine Act provides:

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

30 U.S.C. § 817(a).

When Hilde arrived at the Pebbly Beach Quarry on May 24, 2011, he observed quarry walls ranging up to at least 300 feet in height without any benches. Further, he observed loose and overhanging rock at the top perimeter of the quarry walls and tire tracks at the toe of

highwall. Hilde inquired of mine management and was informed by Connolly-Pacific that no mining plan or geologic study of the area was in use. He learned that the protective measures implemented by Connolly-Pacific were limited to visual pre-shift quarry wall inspections from the base of the pit, weekly inspections from the top of the wall, the incomplete catch berm along the haul road that failed to extend to the north and south ends of the 480 level, the protective cab of the 992 Cat Loader, limited blasting, and the use of a spotter to warn the loader operator of falling rock after it began to slide, fall or roll. Hilde could see that the area had no benches and learned that scaling was not conducted at the mine, primarily due to the extreme height of the highwall. He inquired about protective measures, asked for studies, and sought any tools or measuring devices the mine might utilize to maintain the highwall. He received little, if any, information. Hilde was informed that the mine employs coyote blasting but that it had not been done for a number of years. He also learned that the mine used gravity, watched the areas, and allowed the rock to fall. Given his observations, his conversations with Vamossy, and the information learned from the mine, it was his understanding that the highwall was not only a hazard, but that it was an immediate hazard. The photos taken by Hilde and Vamossy bear out their initial thoughts about the highwall.

Section 3(j) of the Act defines “imminent danger” as the “existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.” 30 U.S.C. § 802(j). As previously noted, section 107(a) of the Act provides for the issuance of an order requiring the withdrawal of persons in areas of a mine who are exposed to such an imminent danger.

Imminent danger orders permit an inspector to remove miners immediately from a dangerous situation, without affording the operator the right of prior review, even where the mine operator did not create the danger and where the danger does not violate the Act or the Secretary’s regulations. This is an extraordinary power that is available only when the “seriousness of the situation demands such immediate action.”

Utah Power & Light Co., 13 FMSHRC 1617, 1622 (Oct. 1991) (quoting Sen. Rep. No. 91-411, reprinted in Senate Subcomm. On Labor, Comm. on Labor and Public Welfare, Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 215 (1975).

An imminent danger exists “when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.” *Eastern Associated Coal Corporation v. IBMA*, 491 F.2d 277, 278 (4th Cir. 1974). The Seventh Circuit adopted the same interpretation in *Old Ben Coal Corp. v. IBMA*, 523 F.2d 25, 33 (7th Cir. 1975). See also *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) (quoting *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989)). While the concept of imminent danger is not limited to hazards that pose an immediate danger, “an inspector must ‘find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time.’” *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 555 (Aug. 2006) (quoting *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991)). Inspectors must determine

whether a hazard presents an imminent danger without delay, and a finding of an imminent danger must be supported “unless there is evidence that [the inspector] had abused his discretion or authority.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC at 2164. While an inspector has considerable discretion in determining whether an imminent danger exists, that discretion is not without limits. An inspector must make a reasonable investigation of the facts, under the circumstances, and must make his determination on the basis of the facts known, or reasonably available to him. As the Commission explained in *Island Creek Coal Co.*, 15 FMSHRC 339, 346-347 (Mar. 1993):

While the crucial question in imminent danger cases is whether the inspector abused his discretion or authority, the judge is not required to accept an inspector’s subjective “perception” that an imminent danger existed. Rather, the judge must evaluate whether, given the particular circumstances, it was reasonable for the inspector to conclude that an imminent danger existed. The Secretary still bears the burden of proving [her] case by a preponderance of the evidence. Although an inspector is granted wide discretion because he must act quickly to remove miners from a situation that he believes to be hazardous, the reasonableness of an inspector’s imminent danger finding is subject to subsequent examination at the evidentiary hearing.

An inspector “abuses his discretion . . . when he orders the immediate withdrawal of miners under section 107(a) in circumstances where there is not an imminent threat to miners.” *Utah, Power & Light Co.*, 13 FMSHRC at 1622-23. In assessing an inspector’s exercise of his discretion, the focus is on “whether the inspector made a reasonable investigation of the facts, under the circumstances, and whether the facts known to him, or reasonably available to him, supported the issuance of the imminent danger order.” *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1292 (Aug. 1992).

The critical question in determining whether a highwall presents an imminent danger is whether there is a condition on the highwall such that rock or debris could reasonably be expected fall or roll within a short period of time, thereby resulting in death or serious injury. Within the above framework of law and the evidence of record, I find that the inspector did not abuse his discretion in issuing the imminent danger order. Given the conditions that both Hilde and Vamossy observed, and the information they learned as a result of their inquiries, it is reasonable to believe that a fall of rock or debris was imminent, thereby threatening the safety of the miners working below. The expert testimony offered by Dr. Johnson criticizes Hilde’s decision to issue the withdrawal order after observing the 480 level for only five minutes. However, the conditions described above were readily apparent and Connolly-Pacific site personnel confirmed that these conditions were consistent with the de facto quarrying method in operation at this level. Finally, the conditions described at the 480 level fail to conform to the most basic methods of industry accepted highwall maintenance, which would reasonably lead Hilde to believe that an imminent danger existed. For the reasons above, I uphold the issuance of Order No. 8607223.

The Contestant relies upon my decision in *Cargill Deicing Tech.*, 32 FMSHRC 1848, 1852 (Dec. 2010), and argues that the inspectors’s “visual inspection was not well-informed and [was] based on erroneous or incomplete information,” and, therefore, because “an inspector’s visual inspection of loose gravel is not *per se* sufficient evidence to prove a hazard,” no hazard has been shown and no imminent danger existed. Cont. Br. 15. I have already discussed the hazard that existed in this case, and, while a visual inspection may not *per se* prove the existence of a hazard, I find that the preponderance of the evidence does establish the presence of hazard which presented an imminent danger.

III. PENALTY

A penalty of \$555.00 has been proposed for each of the three citations contested by the mine operator and discussed above. Although this was initially an expedited notice of contest case, the parties agreed to address the issue of the penalty at hearing and the penalty docket has subsequently been assigned to me and is now been joined with the contest dockets.

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 the authority to assess all civil penalties provided in [the] Act. 30 U.S.C. § 820(I). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that, in assessing civil monetary penalties, the Commission [ALJ] shall consider the six statutory penalty criteria:

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

30 U.S.C. § 820(I). I accept the stipulation of the parties that the penalties proposed are appropriate to this operator’s size and ability to continue in business. The violations have not yet been abated, but instead the mine has moved to another area to continue its operations. The history shows the past violations at this mine, including citations for the standards discussed above. I have discussed the negligence and gravity associated with each citation above and have assessed the following penalties:

Citation/Order No.	Amount
8607224	\$ 1,000.00
8607225	\$ 550.00
8607226	\$ 1,000.00
Total:	\$ 2,550.00

IV. 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 and Connolly-Pacific is hereby **ORDERED** to pay the Secretary of Labor the sum of \$2,550.00 within 30 days of the date of this decision.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
601 NEW JERSEY AVENUE, N.W., SUITE 9500
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September 28, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. PENN 2009-617
	:	A. C. No. 36-09326-188103
	:	
v.	:	4 West Mine
	:	
DANA MINING COMPANY OF PENNSYLVANIA, LLC Respondent	:	
	:	
DANA MINING COMPANY OF PENNSYLVANIA, LLC Contestant	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. PENN 2009-461-R
	:	Order No. 8007789; 04/15/2009
	:	
v.	:	Docket No. PENN 2009-462-R
	:	Order No. 8007789; 4/15/2009
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	4 West Mine
	:	

Appearances: Najah A. Farley, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Petitioner/Respondent; Christopher D. Pence, Esq., Allen Guthrie & Thomas PLLC, Charleston, West Virginia, on behalf of the Respondent/Contestant.

Before: Judge Lesnick

DECISION

This case is before me on a Petition for the Assessment of Civil Penalty filed by the Secretary of Labor on behalf of her Mine Safety and Health Administration (“MSHA”), against Dana Mining of Pennsylvania LLC (“Dana Mining”), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Act” or “Mine Act”), 30 U.S.C. § 815. The Secretary seeks civil penalties in the amount of \$12,455.00 for three alleged violations of the Act and her mandatory safety standards. Two of the alleged violations at issue (as set forth in Order Nos. 8007789 and 8007790) were contested by Dana Mining, and were the subject of an expedited

hearing held in Washington, D.C. on April 30 and May 1, 2009. The parties' Post-hearing Briefs are of record.

While awaiting proposed penalties for the contested orders, I referred the contest proceedings to the Commission's Settlement Attorney. Settlement negotiations were unsuccessful. On May 27, 2010, just over a year after MSHA issued the orders that were the subject of the expedited hearing, the Secretary filed the Petition for the Assessment of Civil Penalty that is before me in Docket No. PENN 2009-617, and which includes proposed penalties for Order Nos. 8007789 and 8007790, and an additional Order No. 8007570. On April 21, 2011, I noticed the consolidated proceedings for a hearing. On June 10, 2011, the parties filed a Joint Motion for Decision Based on Stipulations and Evidence, and on July 7, 2011, filed a Motion for Decision and Order Approving Settlement as to Order No. 8007570.

For the reasons set forth below, I **GRANT** the Motion for Decision and Order Approving Settlement as to Order No. 8007570, and I **VACATE** Order Nos. 8007789 and 8007790.

Stipulations

Before the hearing, the parties stipulated as follows:

1. At all relevant times, Dana Mining was the "operator" of the 4 West Mine (Mine Identification No. 36-09326) within the meaning of the Act, 30 U.S.C. § 802(d).
2. At all relevant times, the 4 West Mine was a "coal or other mine" within the meaning of the Act, 30 U.S.C. § 802(h).
3. At all relevant times, the products of the 4 West Mine facility entered commerce, or the operations or products of the 4 West Mine affected commerce, within the meaning of the Act, 30 U.S.C. §§ 802(b) and 803.
4. Dana Mining is subject to the jurisdiction of the Act.
5. The orders at issue, as well as any modifications thereto, were properly served by a duly authorized representative of the Secretary upon an agent of Dana Mining on the date and place stated therein.

In their Joint Motion for Decision Based on Stipulations and Evidence, the parties further stipulated as follows as to Order Nos. 8007789 and 8007790:

6. The parties adopt their respective evidence, arguments, and positions adduced at the hearing on April 30 and May 1, 2009, and in subsequent briefs, motions, and pleadings filed with the Court.
7. Dana Mining demonstrated good faith in the abatement of the violations.
8. The Assessed Violation History Report provided by the Secretary is authentic, and

accurately reflects the history of violations at each of Dana Mining's three mines during the time period that Dana Mining operated such mines.

9. The proposed civil penalty of \$10,455.00 was based on a consideration of the factors set forth in section 110(i) of the Mine Act, 30 U.S.C. § 810(i), and imposition of the proposed penalties will not affect Dana Mining's ability to remain in business.

10. In 2009, Dana Mining produced 1,820,595 tons of coal, of which 895,034 were produced from the 4 West Mine.

Order No. 8007570

As a preliminary matter, I shall dispose of the joint motion to approve a partial settlement of Docket No. PENN 2009-617 the parties have filed. The parties request that Order No. 8007570 be modified from a section 104(d)(1) order to a section 104(a) citation, and from high to moderate negligence. As a basis for these modifications, the parties state that Dana Mining "could produce evidence tending to demonstrate reduced negligence, based on the Operator's allegation that Management was unaware that the escapeway maps [at issue] in those particular locations had not been updated in a timely fashion, and as such, the Operator's actions did not rise to the level of aggravated conduct." The parties agree that the proposed penalty of \$2,000.00 remain as proposed.

I have considered the representations and documentation submitted as to Order No. 8007570, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 810(i). The motion for approval of settlement is therefore **GRANTED**.

Summary of the Evidence

Dana Mining operates the 4 West Mine, an underground coal mine located in Greene County, Pennsylvania. On April 15, 2009, MSHA Inspector Walter Young conducted a regular inspection of the 4 West Mine. Young was accompanied by his supervisor, Russell Riley, MSHA District 2 Manager Bill Poncerof, MSHA Inspector Trainee, Mark Anderson, and the foreman of the 4 West Mine, Jim Moreau. (Tr. 31, 533.) The group traveled to the working section from the loading point inby at the number 37 crosscut. (Tr. 39-40.) Upon arriving, Young began his inspection there. (Tr. 284.)

Young walked across the tailpiece and observed what in his opinion were excessive accumulations of combustible material, particularly in the number 3 entry from the tailpiece and extending inby. (Tr. 29-30.) Young observed accumulations throughout the section, "to the point . . . where it was compacted in the ruts. It was loose on the sides[,] and [he] felt it created a hazard." (Tr. 30-31, 62.) According to Young, the accumulations "were ground up fine" and "pulverized" as a result of equipment running over them for an extended period of time. (Tr. 35-36.) Young testified that the accumulations were comprised mostly of coal. Referring to one

of many photographs of the accumulations he took (Ex. G-4),¹ Young stated: “there’s about six inches of fine coal dust and loose coal fines on the mine floor in this picture.” (Tr. 71.) He also testified:

I’m not saying that there isn’t a small amount of rock [in it] which you can see by these pictures and by other areas that I’ve dug in there, that is my opinion as a miner with 25 years experience. That . . . is crushed up fine coal. There’s a small amount of rock dust on the top of it which you can see.

(Tr. 72.) Young measured the depth of the accumulations, which ranged from one to 11 inches deep. (Tr. 82, 86.)

Young also found a damaged splice in a power cable that, in his opinion, was a potential ignition source because it posed a danger of sparking or arcing.² (Tr. 141-149.) Riley used his foot to roll the cable over and saw that where the cable had been spliced, the red phase lead was exposed. (Tr. 286-288.) Riley, a certified electrician (Tr. 268), believed this was a “very dangerous” condition because of the threat of electrical shock and ignition of combustible materials from sparks. (Tr. 287-288.)

Dana Mining’s witnesses hotly disputed the nature of the accumulations which Young found. Greg Miller, the production coordinator at the 4 West Mine, was present during much of Young’s inspection on April 15. (Tr. 315, 317.) He explained that the floor (or “bottom”) of the 4 West Mine is composed of shale rock that is black like coal and noncombustible, along with dark gray “fireclay.” (Tr. 429-430.) Asked to explain the difference between coal and shale rock, Miller testified: “Shale rock will have - - you will see a lot of triangle shapes. [Referring to Ex. G-4, photo 157, item 11:] I can see a piece right here now and I’m pretty certain that’s not coal in this snapshot with the rock dust all over it.” (Tr. 452.) He stated that the combination of shale and clay on the mine floor led to “[t]hat bottom being soft by nature[.] I could dig you a [hole in it] probably two feet [deep] if you want me to with the clay and the black rock. I could probably dig deeper than that.” (Tr. 434.) Although Miller also testified that some coal was present in the bottom along with the noncombustible materials (Tr. 435, 437), he did not see any accumulations of combustible coal as described by Young (Tr. 431, 489). Miller opined that Young could have misidentified the black shale rock and fireclay as coal. (Tr. 431.)

Miller also testified that the cited area was “well dusted, well cleaned.” (Tr. 318.) He also stated that there was “no spillage whatsoever” in the feeder area. (Tr. 328.) Miller

¹ Both the Secretary and Dana Mining introduced into evidence numerous photographs of the cited area. Exs. G-4 and C-3A-3K. As with many photographs taken underground in coal mines, it is difficult to draw any definitive conclusions based upon them. In fact, the testimony as to what the photographs portray is so contradictory that I have not relied upon them in reaching my decision.

² A citation not included in these proceedings was issued on the cable splice. (Tr. 152.)

explained further that the cited area had not been in use for the five production days before the inspection. (Tr. 320-321.) In addition, the area had been cleaned and dusted several times since the last production shift. (Tr. 322.)

Miller's testimony on the mine floor was corroborated by mine foreman James Moreau, who testified that the floor of the 4 West Mine consists of black or gray shale and gray fireclay. (Tr. 535-536.) Moreau also testified that the cited area contained no accumulations of combustible materials, and that he did not believe that the spliced cable posed any threat of arcing. (Tr. 537, 547.)

Greg Miller's son, Justin Miller, a section foreman at the 4 West Mine (Tr. 570), also testified as to the composition of the floor of the 4 West Mine:

You may have a little bit of coal and the nature of what we are seeing right now, and at that time especially, is we have real thin layers of shale rock. It's dark gray and black and it breaks up very easily during the production of coal.

...

With the bottoms breaking up how they have been, you know, that is basically the consistency you have with those real thin like shelf rock. It just breaks very easily. A shuttle car breaks up that bottom.

(Tr. 581, 593.) When asked whether shale can mimic the appearance of coal, Justin Miller responded "Oh, yes." (Tr. 593.) He further testified that he saw no accumulations of combustible material in the cited area "knowing the bottoms we have at the 4 main section [i.e., the cited area] . . . [a]fter watching him dig through those areas I know what the bottom consist[s] of with the gray shale, the black shale rock in the bottom." (Tr. 597-598.)

When called as a rebuttal witness, MSHA Inspector Young testified only that no one from Dana Mining told him that the material he found was stone, shale, or fireclay. (Tr. 622.) Young neither reiterated nor elaborated upon *any* of his earlier testimony. He did not, for instance, state any basis for his belief that the accumulations he cited were composed of combustible amounts of coal.

Based upon his observations during his inspection, Young issued a section 104(d) order for a violation of section 75.400.³ The order includes sixteen numbered items, each corresponding to a specific area in the cited section of the mine where Young observed what he believed were accumulations. Order No. 8007789. Young testified that the mine personnel

³ Section 75.400 states: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel- powered and electric equipment therein." 30 C.F.R. § 75.400.

responsible for conducting preshift examinations of the cited area for the several shifts prior to the inspection, as well as mine management, should have been aware of the presence of excessive accumulations in the section, but that there were no notations of any such accumulations in the examination book. (Tr. 186-187.) Young stated his belief that the accumulations were present for “several shifts.” (Tr. 187.) Paul Sebesky, the mining examiner who preshifted the cited area, testified that during his preshift examination, he found no hazardous conditions. (Tr. 504-516.) Sebesky specifically testified that he did not find any accumulations of combustible materials during his preshift examination. (Tr. 517.)

Based upon the combustible accumulations he believed existed, as well as the failure of any notation being made of them in any examination book, Young issued a second section 104(d) order for a violation of the preshift examination requirements of section 75.360(b)(3).⁴

Findings of Fact and Conclusions of Law

The Commission has held that under section 75.400, “an accumulation exists where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source were present.” *Old Ben Coal Co.*, 2 FMSHRC 2806, 2807-08 (Oct. 1980). The judgment of an MSHA inspector as to whether a violation existed is subject to review under “an objective test of whether a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized the hazardous condition that the regulation seeks to prevent.” *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (May 1990), *aff'd*, 951 F.2d 292 (10th Cir. 1991) (citation omitted).

In addition to these legal standards is the more general rule that the Mine Act imposes on the Secretary the burden of proving an alleged violation by a preponderance of the credible evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998) (quoting *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)). The preponderance standard means proof that something is more likely so than not so. *In re: Contests of Respirable Dust*, 17 FMSHRC at 1838.

Here, I find the evidence in equipoise. On the one hand, the Secretary offered the testimony of Inspector Young that the floor of the 4 West Mine in the area he cited consisted largely of “crushed up fine coal,” with only a small amount of rock in it. (Tr. 71-72.) In fact, there is no dispute that some coal was present in the floor on the day Young conducted his inspection. (Tr. 435, 437, 581.) Moreover, the Secretary established that a potential ignition source was present – the spliced cable. (Tr. 145-149, 287-288.) Had the hearing ended at the close of the Secretary’s case in chief, clearly, I could easily have concluded that a violation of section 75.400 existed.

⁴ Section 75.360(b) states, in relevant part: “The person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction. . . .” 30 C.F.R. § 75.360(b).

However, the Secretary's "she said" was followed by Dana Mining's equally convincing "he said" which cast considerable doubt on the Secretary's allegations. The operator introduced credible, corroborated, and largely uncontradicted evidence that most of the material Young found was shale rock and fireclay. (Tr. 429-430, 535-536, 581, 593.) I find the operator's evidence particularly compelling because of the specificity with which Greg Miller, Justin Miller, and James Moreau described the constituents of the mine floor. For example, Greg Miller described how "[s]hale rock will have - - you will see a lot of triangle shapes," then proceeded to point out an example of shale in one of the Secretary's photographs. (Tr. 452.) He also highlighted the "soft" nature of the floor. (Tr. 434.) Justin Miller explained how the floor of the cited area became so pulverized, testifying to the brittle nature of shale, and how it is broken up by equipment passing over it. (Tr. 581, 593.)

I am also persuaded by the operator's assertions that before Young's inspection, the cited area had been cleaned and dusted several times, and that at the time of the inspection, the area was "well dusted, well cleaned," and free of any spillage. (Tr. 318-328.)

On rebuttal, the Secretary had every opportunity to contradict the operator's evidence.⁵ But Young merely stated that no one told him that the floor of the cited area consisted mainly of shale and fireclay. (Tr. 622.) I find that Young's rebuttal testimony was singularly inadequate for the Secretary to carry her burden of proof in light of the case put on by the operator. I note that the Secretary did not introduce *any evidence*, testimonial or otherwise, explaining *why* Inspector Young determined that what he found were combustible accumulations of coal. On rebuttal, the Secretary needed to do more than simply stand by Young's belief that what he cited were combustible accumulations, and that no one told him otherwise – even though the record contains testimony that Dana Mining personnel expressed their incredulity when informed about the orders Young issued. (Tr. 328, 331-332, 348, 538-539.) The effect of the Secretary's choice to stand primarily on her case in chief and forego any attempt to rebut the operator's evidence is that she has not met her burden to prove her case – to prove that her allegations were more likely so than not so. *In re: Contests of Respirable Dust*, 17 FMSHRC at 1838.

I am therefore compelled to conclude that the Secretary has not provided enough evidence to support the violation of section 75.400 as alleged. Because she has not proven that the hazard alleged existed, I am also compelled to conclude that the Secretary has not met her burden of proving that the cited preshift examination was inadequate.

⁵ I note also that the Secretary had a similar opportunity to adduce additional evidence at the hearing set in my order of April 21, 2011, but chose not to do so.

Order

Consistent with this Decision, **IT IS ORDERED** that Order Nos. 8007789 and 8007790 are **VACATED**.

The motion for approval of settlement is **GRANTED**.

IT IS FURTHER ORDERED that Order No. 8007570 be **MODIFIED** from a section 104(d)(1) order to a section 104(a) citation, and from high to moderate negligence, and that Dana Mining Company of Pennsylvania, LLC pay a penalty of \$2,000.00 within 30 days of this order.⁶ Upon receipt of payment, this case is **DISMISSED**.

/s/ Robert J. Lesnick _____
Robert J. Lesnick
Chief Administrative Law Judge

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⁶ 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

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September 28, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2009-548
Petitioner	:	A.C. No. 36-09549-184206-02
	:	
	:	Docket No. PENN 2009-595
	:	A.C. No. 36-09549-186977
v.	:	
	:	Docket No. PENN 2009-667
	:	A.C. No. 36-09549-190068-02
	:	
	:	Mine ID: 36-09549
	:	Mine: Kimberly Run
ROXCOAL, INC.	:	
Respondent	:	Docket No. PENN 2010-31
	:	A.C. No. 36-09260-186974
	:	
	:	Docket No. PENN 2010-310
	:	A.C. No. 36-09260-208223
	:	
	:	Mine ID: 36-09260
	:	Mine: Roytown Deep

AMENDED DECISION

Appearances: Najah A. Farley, Esquire and John M. Strawn, Esquire, Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Vincent J. Barbera, Esquire and Melanie R. Barbera, Esquire, Barbera, Clapper, Beener, Rullo & Melvin, LLP, Somerset, Pennsylvania, for Respondent.

Before: Judge Harner

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against RoxCoal, Inc. (herein "Respondent" or "RoxCoal") at its Kimberly Run mine (3 dockets) and its Roytown Deep mine (2 dockets), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act"). The cases include five separate docket numbers that contain 47 violations assessed a total penalty of \$47,388.00. As set forth more fully below, the parties have agreed to resolve all but 8 of the violations, leaving

those for decision here. The parties presented testimony and documentary evidence at a hearing held in Pittsburgh, Pennsylvania, on June 28 and 29, 2011.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Respondent operates several bituminous coal mines in the Somerset County, Pennsylvania, area, including the Kimberly Run and Roytown Deep mines involved herein. The mines are subject to regular inspections by the Secretary's Mine Safety and Health Administration ("MSHA") pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). At the hearing, the parties stipulated, at Joint Exhibit 1, that:

1. RoxCoal is the "operator" of both mines within the meaning of the Mine Act;
2. The Kimberly Run Mine and the Roytown Deep Mine were coal mines within the meaning of the Mine Act;
3. Its products entered commerce, and its operations affected interstate commerce within the meaning of the Mine Act;
4. RoxCoal is subject to the jurisdiction of the Mine Act;
5. The citations at issue were properly served on RoxCoal by an agent of the Secretary at the date and place stated therein;
6. RoxCoal demonstrated good faith in the abatement of the violations;
7. RoxCoal's history of violations assessed as final orders during the 15-month period prior to the issuance of the respective citations at issue is set forth on Exhibit A of the respective Petitions for each docket;
8. Payment of the proposed penalties for the citations remaining at issue will not affect RoxCoal's ability to continue in business; and
9. RoxCoal produced 1,515,037 tons of coal in 2009, of which 360,345 tons were produced at the Kimberly Run Mine and 191,891 tons were produced at the Roytown Deep Mine.¹

Five of the eight citations in dispute and discussed below have been designated by the Secretary as significant and substantial. A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular

¹ The Roytown Deep Mine tonnage was not part of the parties' stipulation, but was obtained from the Secretary's Preliminary Statement filed with me prior to the hearing as an agreed upon stipulation of the parties.

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 difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

I rely on the state of the law as cited herein considering each issue addressed below and whether each citation which is alleged to be S&S meets the above noted criteria.

DOCKET NO. PENN 2009-548 - Kimberly Run:

This docket contains fourteen violations assessed a total penalty of \$16,021.00. The parties have resolved thirteen of the violations², leaving the following citation for decision.

² Twelve of the citations have been settled. The thirteenth citation (Citation No. 7054090)

(continued...)

Citation No. 7054091

On February 24, 2009, Inspector Dennis Zeanchock³ issued Citation No. 7054091⁴ to RoxCoal for a violation of 30 C.F.R. §75.351(n)(2) of the Secretary's regulations. The citation alleges that:

The mine operator failed to make a proper 7-day functional test for the alarms of the AMS installed in this mine. An observation was made of the functional test of sensor F-36, located at the #5 stopping, 300 feet in by the drift mouth, in the primary escapeway. The company escort pushed the test button to test the sensor. Gas was not applied to activate the alarm on the surface. Upon further conversation with mine management, they stated they never apply gas to the sensors only during calibration.

This mine uses belt air at the face. This is the first time this standard has been cited at this mine.

The inspector found that an injury was unlikely to occur, that the violation was not significant and substantial, that 18 persons would be affected, and that the violation was the result of moderate negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$745.00.

The citation was terminated when the operator applied calibration gas to the 5 sensors and the alarm on the surface was activated after each application.

§75.351(n)(2) requires that alarms on an atmospheric monitoring system (AMS) must be functionally tested for proper operation at least once every seven (7) days.

Zeanchock, the MSHA mine inspector, has worked for the Mine Safety and Health Administration for approximately 8 years and has worked in the mining industry for 30 years. Tr. 20.⁵ He was at the mine for a regular E01 inspection on February 24, 2009. Tr. 20, 22. Kimberly Run is a newly developed underground coal mine in Pennsylvania that opened in

²(...continued)

involves a lifeline issue, which the parties have requested, and I have agreed, to stay pending the Commission's decision in *Cumberland Coal Resources LP*, 31 FMSHRC 1147 (ALJ) (Sept. 2009). The Commission held oral argument on this matter on March 31, 2011.

³ Inspector Zeanchock is also a Field Office Supervisor for MSHA.

⁴ Exhibit 1.

⁵ Tr followed by a number indicates pages of the official hearing transcript. The Secretary's exhibits are numbered (e.g. Exhibit 1) and the Respondent's exhibits are denoted by letters (e.g. Exhibit A).

2008. Tr. 31, 69. When Inspector Zeanchock arrived at the mine, he was accompanied during the inspection by Jim Mullen, the mine foreman, and another inspector. Tr. 23.

After reaching the Number Five stopping, Zeanchock spoke with Mullen about the CO monitors on the AMS and asked him how he performed the seven-day functional test. Tr. 24. Mullen demonstrated how the mine performs its seven-day functional tests by pushing a button on the system. Tr. 24. When Mullen pushed the button, an audible alarm sounded. Tr. 35.

Zeanchock then issued a citation for a violation of 30 C.F.R. §75.351(n)(2) which requires that at least once every seven days, alarms for the AMS “ must be functionally tested for proper operation”. AMS is an atmospheric monitoring system that tests the atmosphere of the air underground throughout the mine so that miners can be warned if there is a fire, an explosion or an accumulation of hazardous gases. Tr. 25. Inspector Zeanchock issued the citation because RoxCoal did not apply testing gas to any of the sensors in order to perform the functional test. Tr. 24-25. In his direct and redirect testimony, Inspector Zeanchock stressed that the only purpose of the seven-day test is to make sure the alarms sound. Tr. 25, 42. And again, on cross-examination, Zeanchock admitted that the only purpose of the seven-day test is to test the audible alarms and not the CO sensors inside the mine. Tr. 40-41. Zeanchock stated several times during his testimony that he believed the seven day test should be performed with a known quantity of carbon monoxide gas because it was a “more adequate test” of the system than pushing the test button, but finally asserted “that’s just my opinion”. Tr. 49.

David Flick is the Safety Director at the RoxCoal Kimberly Mine and has over 37 years experience in the mining industry. Tr. 53-58. Mr. Flick testified that the Respondent’s AMS is an integrated system which connects the CO monitors and alarms to a computer system outside the mine. Tr. 58-59.⁶ The alarms are both audible and visual (flashing lights). Tr. 59. Flick testified that representatives of Logi-Tec, the distributor from whom Respondent purchased the equipment, provided initial training to employees on the system⁷ and subsequently provided a written letter explaining how to perform the seven-day functional test in accordance with the manufacturer’s instructions. Tr. 61-62, Exhibit A. Both the training the employees received and letter describe that pressing the test button on the CO monitors is a complete functional test of the alarms in the monitoring system in accordance with the manufacturer’s specifications. Tr. 61-63, Exhibit A.

In support of its contention that the Respondent violated §75.351(n)(2), the Secretary introduced into evidence a rule-making excerpt from the Federal Register concerning another standard that discusses testing of automatic fire sensor and warning device systems.⁸ Exhibit 3. The Secretary asserts that I should consider this as it provides guidance on functional testing of

⁶ The CO monitoring equipment was manufactured by Pyott-Boone and is distributed by Logi-Tec, an exclusive authorized distributor of the equipment. Tr. 61.

⁷ The CO monitoring system was installed at the mine approximately 2-3 months before the citation was issued. Tr. 65.

⁸ §75.1103-8

alarm systems in general. Tr. 26-27. Not only is this document not conclusive as to the use of gas in seven-day functional testing, but I find it inapplicable since it is applicable to a different standard than the standard alleged to be violated in the citation at issue.

§75.351(n)(2) simply requires a functional test of the AMS alarms every seven days to insure that the alarms are working and audible. This section does not specify that gas should be used to conduct the functional test. I contrast this standard with §75.351 (n)(3) which sets forth that the 31-day calibration test must be performed on every CO sensor in accordance with the manufacturer's calibration specifications and with a "**known concentration of carbon monoxide in air sufficient to activate the alarm**" (emphasis supplied). There is no such requirement in §75.351(n)(2). I find that to be significant. Moreover, the purpose of the seven-day test is patently different than the 31-day test. The seven-day test is only to ensure that the alarms are audible, while the 31-day test is necessary to calibrate all the CO sensors so as to ensure that the AMS is fully operational. Further, although Inspector Zeanchock testified that it was **his opinion** that using gas produced a better functional test result, he failed to explain the basis for his opinion or explain that there would be any difference in the result by using gas. Finally, there is no dispute that the alarms sounded when the test button was pressed and so there can be no valid contention that a functional test was not completed. Based on the foregoing, I find that the Secretary has not shown a violation as alleged, and therefore, Citation No. 7054091 is **VACATED**.

DOCKET NO. PENN 2009-595 – Kimberly Run:

This docket contains twelve violations with a total proposed penalty of \$7,945.00. The parties have resolved eleven of the citations⁹, leaving the following citation for decision.

Citation No. 7055614

On April 21, 2009, Inspector Robert M. Snyder issued Citation No. 7055614¹⁰ to RoxCoal for a violation of §75.1103-4(a) of the Secretary's regulations. The citation alleges that:

The entire 1st Right section belt, 003 MMU, was not being monitored by an automatic fire sensor and warning device system. Upon arrival on the section, the CO monitor was being moved outby the canvas check at the section loading point. The miner moving the sensor was asked if this sensor has always been inby the check and he responded yes. It is being dumped into the return through a hole in a stopping outby the check. With the sensor being inby the check, the atmosphere in the belt entry is not being monitored in its entirety. This belt was in operation prior to the inspection. Automatic fire sensor and warning device systems shall

⁹ Ten of the citations have been settled and one lifeline citation (Citation No. 7055612) will be stayed pending the Commission's decision in *Cumberland Coal Resources*, discussed infra.

¹⁰ Exhibit 4

provide identification of fire within each belt flight operated by a belt drive. This is the first time this standard has been cited at this mine I.D.

The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that six persons would be affected, and that the violation was the result of moderate negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$1,944.00.

The citation was terminated when the sensor was moved to the outby side of the check.

§75.1103-4 discusses the minimum requirements for placement of carbon monoxide sensors for the belt drive, tailpiece and transfer point, specifying the distances involved in the placement of the sensors.

Inspector Robert Snyder has been an inspector with MSHA for three years and has 17 years of mining experience. Tr. 81-82. On April 21, 2009, Snyder was performing a regular quarterly E01 inspection of the mine accompanied by his supervisor, Dennis Zeanchock. Tr. 84-85. After taking care of some preliminary matters, Snyder, Zeanchock and two company safety representatives, John Datko and Brad Russian, proceeded underground to the first right belt at the head of the mine, inspecting the length of the belt toward the working section. As Inspector Snyder and the others were traveling to the first right section belt inby, they measured the belt air velocity and checked the belt's general condition. Tr. 87-88. As the party was walking down the belt line, there were no problems encountered, such as hot rollers or other problems with the belt and no accumulations of coal. Tr. 111-112. Carbon monoxide (CO) monitors that sound alarms are required to be placed at the head of the belt line and at least every 350 feet thereafter along the belt line so as to warn employees of fire or other danger.¹¹ Tr. 95. When they arrived at the loading point, they saw the section mechanic had the CO monitor on the inby side of the line canvas,¹² rather than the outby side of the canvas. Tr. 88, 93.¹³ While underground, Inspector Snyder used chemical smoke to determine the air movement both outby and inby the

¹¹ In this section of the mine, there were CO monitors at the head and at the tail of the belt as the belt line was only about 300 feet in length. Tr. 108.

¹² The line canvas extends from rib to rib and acts as a ventilation control, directing belt air traveling inby to the belt air dumping point and then into the return air which flows outby leaving the mine. This prevents the inby belt air from traveling to the working face. Tr. 88-92.

¹³ While the testimony of Inspector Snyder indicates that the mechanic was in the process of moving the monitor to the outby side of the canvas when they approached, it appears from all of the evidence that the monitor was likely moved as a result of the abatement process. In this regard, Snyder testified that the mechanic told him he always placed the monitor inby of the canvas. Tr. 94. Also the inspector's notes, at Exhibit 5, clearly show that the mechanic had been placing the monitor inby for at least several weeks as he thought that was correct and that it was moved as part of the abatement process which took only 10 minutes from beginning to end. Whether the mechanic was already moving the sensor when the inspection party approached or whether he moved it to abate the citation is not material to my determination herein.

canvas curtain and in both instances the air was traveling in the right direction. Tr. 90, 92. Both courses of air were vented and directed to meet at the crosscut. Tr. 91-92. Miners working in this area and along the belt line and in the travelway wear multi-gas detectors. Tr. 121-122, 142.

When the CO monitor was placed on the inby side of the canvas curtain, the air coming down the belt would not reach the CO monitor so as to warn of any fire along the belt from the head to the curtain. Tr. 96. Snyder testified that the greatest danger for a fire is along the belt line due to rubbing of parts on the belt line. Tr. 98. Snyder also testified that the CO monitor at the head of the belt would be unable to detect CO if a fire occurred along the belt since the air flow would be inby away from the monitor at the head. Tr. 99-100, 106. Snyder further testified that the CO monitor was just inby on the other side of the canvas line toward the working face and just outby the tail and the feeder and that in such position the monitor could pick up any problems from the tail or feeder area. Tr. 113.

Thomas Todd testified on behalf of the Respondent. Mr. Todd is the vice president in charge of safety for RoxCoal, where he has worked for 2-1/2 years. He has a degree in Mining Engineering, is a licensed professional engineer and has prior work experience with MSHA where he worked for over 21 years in positions of increasing responsibility. Tr. 125-127.

Todd testified that, although he was not present during the inspection on April 21, 2009, he became familiar with the facts surrounding the citation within a few days thereafter. Tr. 128-130. Todd confirmed that the CO monitor in question was inby the canvas curtain toward the tail and the feeder. In Todd's opinion, the CO monitor's location inby was appropriate because it was more likely for a fire to occur on the feeder or inby side of the curtain. Tr. 150. This is particularly so since there were no problems along the belt line from its head to the canvas curtain. He also testified that if the monitor was on the outby side of the curtain it could still monitor the air on the inby side coming from the face and area around the feeder as this air passes through the belt air dumping point on its way to the return air traveling outby. Tr. 150.

In assessing whether the Respondent violated the Secretary's mandatory standard, I give weight to Snyder's testimony that the CO monitor should have been placed on the outby side of the canvas curtain so that miners could be alerted of fire or other hazards occurring from the belt head to the curtain. I also credit Todd's testimony that the placement of the monitor outby would also warn of problems in the feeder or face areas. I find that the placement of the CO monitor inby of the curtain violated a mandatory safety standard. Accordingly, I find that the Secretary has shown a violation as alleged. The negligence associated with this violation is considered to be moderate since the placement of the monitor inby the curtain had existed for at least several weeks.

The Commission has long held that a S&S designation must be based on the particular facts surrounding the violation, and reviewed in the continuing course of mining. *Texas Gulf, Id.* In the circumstances herein and after a consideration of all the evidence, I am not convinced that the violation was S & S. While the Secretary has shown that the first two elements of the *Mathies Coal Co.*, *infra*, formula have been met, she has not shown that the third element is present herein. While there is some likelihood that an injury could occur because of the misplacement of the CO monitor, she has failed to demonstrate that there is a reasonable likelihood of injury. In this regard, Inspector Snyder testified that there were no problems noted

during his inspection of the belt line from the head to the canvas. Thus, there were no problems with the belt itself, such as rubbing or hot rollers, and significantly there were no accumulations of coal present. Also, miners working in the area around the canvas and along the belt line and in the travelway wear multi-gas detectors. While the CO monitor could have been placed in a more advantageous location, i.e. outby the curtain, this fact does not establish that the third prong of the *Mathies* formula has been met. I find, therefore, that the violation of mandatory standard 75.1103-4(a) was not S & S. *Donner Coal Co.*, 14 FMSHRC 838 (May 1992) (ALJ), cited by the Secretary in her post-hearing Memorandum is inapposite since in that case the automatic fire system was not operational so that miners would receive warning in the event of a fire. Here, there is no contention that the system was not operational.

Based on the above findings as to gravity and negligence and considering all of the factors set forth in the Mine Act at §110(i), I conclude that the penalty for this violation shall be \$436.00

DOCKET NO. PENN 2009-667 – Kimberly Run:

This docket contains ten violations with a total proposed penalty of \$6,595.00. The parties have resolved eight of the citations, leaving the following two citations for decision.

a. Citation No. 7055618

On May 5, 2009, Inspector Robert M. Snyder issued Citation No. 7055618¹⁴ to RoxCoal for a violation of §75.340(a)(1)(i) of the Secretary's regulations. The citation alleges that:

The 1st Right 003 section scoop battery charging station did not have air moving towards the vent pipe in the rear of the charging station which would course towards the return. When chemical smoke was applied over the batteries, the smoke traveled towards the mouth of the crosscut and into the alternate escape way. Underground battery charging stations shall be ventilated with intake air that is coursed into a return air course or to the surface and that is not used to ventilate working places. The charging station is located at s/s 285 in the #5 entry. The charger was taken out of service until it is vented properly. This is the first time that this standard has been cited at this mine I.D.

The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that six persons would be affected, and that the violation was the result of moderate negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$1,944.00.

The citation was terminated when additional vent pipes were installed in the charging station so that air flow over the batteries was increased to the return air course.

¹⁴ Exhibit 6.

§75.340(a)(1)(i) provides that underground battery charging stations shall be ‘[v]entilated with intake air that is coursed into a return air course or to the surface and that is not used to ventilate working places.’”

Inspector Snyder was at the Kimberly Run mine on May 5, 2009, to conduct a quarterly inspection and during this inspection he was accompanied by RoxCoal safety inspector, John Datko. Tr. 166. After going underground, Snyder traveled across the faces to check for imminent dangers, conducted a rock dust survey, and examined several pieces of equipment. Tr. 167. He determined that everything was operating correctly. Tr. 185.

As Inspector Snyder was leaving the area, he stopped to inspect the scoop battery charging station located in a crosscut off of the travelway.¹⁵ Tr. 167, 170. Snyder first inspected the scoop battery charger and concluded that it was operating correctly. Tr.171. He then inspected the set of batteries being charged by puffing chemical smoke over the top of the batteries, simulating the direction of the hydrogen sulfide gas emitted by the charging batteries. Tr. 171. The chemical smoke is supposed to travel to the vent pipes in the rear wall of the charging station which, in turn, courses towards the return air course. Tr. 172-173. This is designed to prevent the gas emitted by the batteries from flowing inby and mixing with the intake air on the travelway. Tr. 173-174. Although there are CO monitors in the beltway, there are none in the travelway, presenting a hazard if a charging battery catches on fire and the smoke flows into the travelway. Tr. 176. Snyder noted in his testimony that the vent pipes had strands of ribbons, or streamers, attached to them so that air flow to the pipes could be detected and there was some movement of the ribbons, indicating some air flow through the pipes. Tr. 178, 188-189. Snyder opined that the reason the gas coming off the batteries being charged was moving toward the travelway as indicated by the chemical smoke and not out the vent pipes was because the Respondent had increased the air flow down the beltway that morning. Tr. 181-182, 189-190.¹⁶

On cross-examination, Snyder testified that any air from the charging station that went into the travelway or the belt line would be coursed to the return and would not reach the working face. Tr. 185-187, 193. He also testified that CO monitors in the area would pick up any gas emitted by the batteries. Tr. 187-188.¹⁷

Inspector Snyder testified that he considered the situation in the charging station to be violative because the gas coming off the batteries was not going to the return air course but instead into the travelway. He further testified that he believed the violation to be S & S because

¹⁵ A scoop is a battery powered machine used in mines to clean holes, lift material, and transport materials and supplies. Tr. 168. The batteries that operate the scoop last for about 6-8 hours before they must be recharged in the battery charging station. Tr. 168-169.

¹⁶ Snyder testified that he rated the negligence involved in this citation as moderate because when the belt air was increased that morning, the Respondent should have followed up to see if anything else was affected. Tr. 182.

¹⁷ There is no contention that Respondent did not have the correct number of CO monitors. Tr. 19.

the charging station is unattended during the shift and if a fire occurs in the charging station, the CO monitors would have to be relied upon to detect the gas from the station going down the travelway. Tr. 184.

Bradley Russian, a safety specialist employed by Respondent at Kimberly Run who has about 9 years of mining experience, testified at the hearing and was able to locate the battery charging station on the two mine maps that were put into evidence. Tr. 207-213, Exhibits B and C.¹⁸ The location of the station is marked as “CS” on both exhibits. Russian testified that on the day the citation was issued if any air from the charging station flowed into the travelway, it would have been directed immediately around the crosscut and into the return course and would not have gone to the working face. Tr. 211-212. Finally, he testified that the distance from the charging station entrance to the nearest CO monitor was approximately 60-80 feet. Tr. 220, 226.

Respondent argues that there is no violation because the cited regulation does not require that the air from the charging station go directly to the return and that the air cannot go to the working face.

In consideration of all of the evidence, I find that the Secretary has established a violation of §75.340(a)(1)(i). When the Respondent increased the air flow down the belt line on the morning of the inspection, that action had the consequence of changing the air flow patterns in the battery charging station such that some (but not all) of the air migrated to the travelway. Although Respondent contends that such air went to the return and not to the working face, I note that the regulation states that the air from the battery charging station not be used to ventilate “**working places**”. In *New Warwick Mining Co.*, 16 FMSHRC 2451 (December 1994) (ALJ), Judge Amchan gave a broad meaning to “working place” and found that the standard would be seriously undercut if he were to interpret the standard in its strict sense. His rationale for doing so was based on the intent of the standard which is to protect miners if a fire originates at a battery charging station. *Id.* at 2463. In the instant case, I find that miners who happened to be in the crosscut or travelway could be exposed to gases that emanated from the battery charging station for at least the 60-80 feet that it would take such air to reach the nearest CO monitor. Such an area, although small, constitutes a “working place.” Accordingly, I find that the Secretary has shown a violation as alleged.

However, I find that the violation was not S & S as the likelihood of an event or fire occurring would be remote at best. The charging station was in close proximity to the CO monitor, the battery charging unit was operating correctly, any bad air in the travelway was coursed rather quickly to the return, and any bad air would have been in a very small area before reaching the return and would not have gone to the working face. As to negligence, I find that the negligence is “low” given that the violation existed for only a few hours before it was discovered, that the air flow in the battery charging station was apparently changed as a result of an increase in velocity of the belt line air that morning and that Respondent quickly took steps to correct the situation by installing additional vent pipes to the return.

¹⁸ Inspector Snyder’s testimony regarding the location of the battery charging station was tentative and incorrect. Hence it is not relied upon.

Given the above findings, I assess a penalty of \$196.00.

b. Citation No. 7055373

On May 19, 2009, Inspector Daniel Mansell issued Citation No.7055373¹⁹ to RoxCoal for a violation of Section 75.370(a)(1) of the Secretary's regulations. The citation alleges that:

The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine.

The operator failed to follow the approved roof control plan (80086-B-2AZ) page 27 item 8. The line canvas installed to ventilate the unbolted face of No. 7 entry in the B Mains Right Side section (mmu 002-0) was not extended to the last row of permanent supports as required by the approved plan. This is the sixth violation issued at this mine for this standard.

The inspector found that a fatal injury was unlikely to occur, that the violation was not significant and substantial, that 16 persons would be affected, and that the violation was the result of moderate negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$745.00.

The citation was terminated 10 minutes later when the line curtain was extended the required distance to the last row of permanent supports.

Inspector Mansell has been a field office supervisor for MSHA since December 2010 and prior to that was employed as an MSHA inspector for six years. Tr. 239. He has worked in the mining industry for 38 years. (TR 239-240). Mansell was at the Kimberly Run mine on May 19, 2009 to conduct a regular E01 inspection along with a special respirable dust inspection. Tr. 241-243.

Inspector Mansell proceeded to check for imminent dangers on the active working faces; no imminent dangers were found. Tr. 244-245. However, he discovered that the line canvas installed on the face of the Number Seven entry, in the B Mains right side section, did not extend to the last row of permanent roof supports. Tr. 245, 259. The canvas was approximately eight feet short of reaching the last row of supports. Tr. 253.

Mansell issued a citation for a violation of 30 C.F.R. § 75.370(a)(1), which requires that the operator develop and follow a ventilation plan approved by the district manager. Tr. 247. The Respondent's plan provides, inter alia, that "The line brattice shall be installed to the last row of roof bolts after mining operations have been completed in each working place, except when methane liberations require it to be kept closer". Ex. 10. Mansell credibly testified that the operator failed to comply with the pre-approved ventilation plan, which requires that the line

¹⁹ Exhibit 8.

curtain be extended to the last row of permanent supports so as to ensure that the mined-out area of the face is adequately ventilated and that there is not exposure to rock dust or noxious gases. Tr. 245-246, 249.

Inspector Mansell testified that since there was no history of methane in the mine, it was unlikely that an event would occur but if an event occurred the result would be fatal. Tr. 249. Although he believed 16 miners would be affected since that was the number working in by the loading point, he could not specify where this number would have been since they were moving “back and forth”. Tr. 250. Finally, he testified that he considered the negligence to have been moderate since the condition existed since late in the afternoon the previous day. Tr. 250. On cross-examination, Mansell admitted that, before energizing the equipment in the Number Seven entry, the Regulations require that an individual administer a methane test before any miners started working in the area. Tr. 255-256.

RoxCoal admits to a violation of § 75.370(a)(1). Tr. 262. However, it asserts that the violation is de minimus and the \$745 penalty sought by the Secretary is not appropriate. (Tr. 262). However, this is not a credible argument. If this were a violation of the Occupational Safety and Health Act, I could consider this argument. However, the Mine Act is a strict liability statute, and as such, the concept of a de minimus violation does not exist.

The operator failed to follow the ventilation plan approved by the district manager when it neglected to ensure the line curtain extended to the last row of permanent supports. Accordingly, I find that the Secretary has shown a violation as alleged. In considering the criteria for the penalty assessment, i.e. gravity and negligence, I find that appropriate penalty is \$300.00

DOCKET NO. PENN 2010-31 – Roytown Deep Mine:

This docket contains seven violations assessed a total penalty of \$8,895.00. The parties have resolved four of the violations²⁰, leaving the following three citations for decision.

a. Citation No. 7055172

On July 13, 2009, Inspector Richard A. Tronzo issued Citation No. 7055172²¹ to RoxCoal for a violation of Section 75.400 of the Secretary’s regulations. The citation alleges that:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not permitted to accumulate in active workings, or on diesel-powered and electric equipment. Dry coal and coal dust

²⁰ Two of the citations have settled and two of the citations (Citation Nos. 7055173 and 7055175) involve lifeline issues and will be stayed pending the Commission’s decision in *Cumberland Coal Resources*, discussed infra.

²¹ Exhibit 14.

was allowed to accumulate in the cable reel compartment of the Co.#4 Fletcher roof bolter (SN 2004137) located in the 3 Mains working section. These accumulations were in contact with the cable stored on the reel and measured up to 6” in depth. There was also an oil leak that allowed oil to accumulate on the machine in an area just behind the helpers side drill head hinge point.

The inspector found that an injury was reasonably likely to occur, that the violation was significant and substantial, that two persons would be affected, and that the violation was the result of moderate negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$807.00.

The citation was terminated when all the machine covers were removed and the bolter was cleaned of all accumulations.

Tronzo began working for MSHA in March 2007 and has been a general inspector out of the Johnstown, Pennsylvania field office for over four years. Tr. 381, 383. Prior to coming to MSHA, he was employed at the Beth Energy Mines for nineteen years, where he was a Mine Health and Safety Committeeman who conducted inspections and traveled with visiting MSHA and State inspectors during their inspections as well as a fourteen year member of the mine rescue team. Tr. 381-382. Later, he worked as the Safety Coordinator for Laurel Sand & Gravel. Tr. 382. Tronzo was at the Roytown Deep Mine on July 13, 2009, conducting an EO1 inspection and was accompanied by RoxCoal employees John Shander and Robert Depetro. Tr. 383-384.

Tronzo began by inspecting the working face area and proceeded to examine the roof bolter, which was located in a muddy, wet section. Tr. 384-385, 389. Before he even reached the roof bolter, he observed oil accumulations on the helper side of the bolter at the hinge point. Tr. 385. He determined that a loose hose fitting had allowed the oil to seep down through the machine, coming to rest on the machine’s surface. Tr. 385-386, 420. Tronzo testified that the base of the right side drill assembly was covered with oil accumulation, but he did not take any measurements of the thickness of the oil or the area covered, although he noted that the entire drift head was covered. Tr. 409-410.

While examining the rest of the bolter, Tronzo took the cover off the top of the cable reel and discovered an accumulation that was up to six inches deep of compressed, dry material at the bottom of the compartment. Tr. 386, Exhibits 14 and 15. He testified that the accumulated material was so compacted that, in his opinion, it must have been there for several shifts. Tr. 396. He believed the accumulated material was coal, coal fines and granular coal because there were visible pieces of coal in it, but he did not sample the material to confirm its contents. Tr. 386, 402, 411, 414. On cross-examination, Tronzo admitted that it is possible that the accumulation was comprised of the wet, sloppy material from the bottom of the mine that stuck to the cable, was transported into the compartment, and subsequently dried and hardened. Tr. 407-408.

Tronzo’s main concern was that the cable and reel were hot enough to dry the accumulation and both were rubbing into the accumulation, leaving visible marks. Tr. 386, 389.

Within the cable reel itself, Tronzo observed float coal dust which is flammable and explosive. Tr. 411-412. He notified Shander and Depetro of the accumulation of material and they took the necessary steps to clean up the equipment. Tr. 387.

Tronzo issued a citation for a violation of 30 C.F.R. § 75.400, which 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.” He testified that the bolter is electrical equipment and, where there is electrical equipment, there is always the potential for fire. Tr. 387. Although he testified that he issues a lot of citations for cut cables, at the time of inspection, there were no apparent cuts or bad spots on the bolter’s cable. Tr. 404.

Upon further inspection of the bolter, Tronzo discovered that a piece of conveyer belt was installed in the cable reel compartment on top of the fire suppression nozzle in such a way as it blocked the fire suppression line. Tr. 388. In the event of a fire, the spray of the fire suppression system could not effectively hit the entire compartment. Tr. 398-399. He further speculated that the piece of the conveyer belt was likely installed to prevent the oil accumulating on the machine from getting into the cable reel area, indicating that the roof bolter operator was aware of the oil accumulation. Tr. 391-392. Shander testified that the piece of belt was placed over the hole in the top of the machine to prevent material from falling through the hole, but admitted that it was not standard equipment for the machine. Tr. 430-431.

Tronzo testified that, if a fire were to break out, it would be to the back of the miners working in that area and they would not be aware of the fire until they smelled it. Tr. 390. Because the miners would be ahead of the fire, the extent of injury would depend upon how quickly the miners became aware of the fire. Tr. 391. The injuries sustained could range from injuries from smoke inhalation and burns if they noticed the fire quickly and were able to get out to fatality if they became trapped. Tr. 391.

The Inspector described this as significant and substantial because the machine is operating on a daily basis, the oil accumulation was obvious, and someone installed a piece of conveyer belt to keep the oil out of the compartment, indicating that the roof bolter operator must have been aware of the potential of fire. Tr. 391-392.

The operator failed to prevent float coal dust, loose coal, and oil from accumulating on and within a piece of equipment in an active working section. Accordingly, I find that the Secretary has shown a violation as alleged.

I also find that the violation of this standard is S & S. First, it is obvious that Respondent has violated a mandatory safety standard. The oil accumulation was visible from a distance and the compacted coal accumulation within the bolter had likely existed for several shifts. Second, this violation could contribute to the hazard of a fire if an ignition source presented itself. Third, there existed a reasonable likelihood that this could occur because the cable “would be hot enough that it would burn my hands.” Tr. 389. It is reasonable that the friction of the cable against the coal could generate enough heat to ignite the coal float that existed on the cable itself, later igniting the coal accumulation and, eventually, the oil accumulation on the machine. Because the miners on the section would be in by any fire that occurred, it is likely that they

would not notice it until there was the potential for them to, at least, suffer from smoke inhalation or minor burns and, at worst, to be fatally trapped by the fire.

This evaluation is made in consideration of the amount of time that the violative condition existed prior to the issuance of the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec 2005); U.S. *Steel Mining Co., Inc.*, 6 FMSHRC at 1574. Tronzo credibly testified that the accumulation inside the compartment of the bolter likely existed for several shifts. There was no evidence at the hearing to suggest that the accumulation would have been found if Respondent had been given a little more time, as the area was only required to be checked once a week. Tr. 437. Given the above findings and conclusions, I find that the assessment of \$807.00 is reasonable under the circumstances.

b. Citation No. 7055178

On July 21, 2009, Inspector Richard A. Tronzo issued Citation No. 7055178²² to RoxCoal for a violation of Section 75.503 of the Secretary's regulations. The citation alleges that:

The 3 Mains section continuous miner DBT-25M-0 9 (S/N 125666, MMU-003-0) was not being maintained in a fully permissible condition. The area light located at the operators side rear of the miner was loose. Also a[n] electric cable that was marked "Fire Spray Solenoid" that is located behind the main control panel had a one inch cut in it that exposed the inner conductors of the 115 volt cable, the inner black cable had a ¼ inch cut in it that exposed the inner copper conductor, an opening in excess of .004 of an inch was found on the junction box panel lid, this is the point where the trailing cable enters the miner. There has (*sic*) been nine citations issued for violations of 75.503 at this mine in the past two years.

The inspector found that an injury was reasonably likely to occur, that the violation was significant and substantial, that one person would be affected, and that the violation was the result of moderate negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$1,026.00.

The citation was terminated later that day after the bolts were tightened on the light, a new solenoid wire was installed, and the panel cover was cleaned and reinstalled.

Tronzo inspected the continuous miner, which was new to the mine, in the Three Main section. Tr. 447, 449. This miner had recently been rebuilt and had only been in operation for a few days. Tr. 449. When Tronzo arrived, the miner was locked out and tagged out as the scoop

²² Exhibit 16.

jack²³ on the miner was being repaired; however, he proceeded with his examination in spite of this fact. Tr. 447, 458.

During the inspection, Tronzo discovered that the bolts holding an area light located on the operator side rear of the miner were loose, causing the light to shake during operation. Tr. 448. He testified that if the bolts came off, the light would slide out, possibly breaking, damaging the cable, or hitting a person. Tr. 448, 462-464, 477. Shander tightened the light, abating the condition. Tr. 455.

Tronzo next examined a fire spray solenoid cable that was part of the fire suppression system on the miner. Tr. 448. The outer jack of the cable was damaged and there was a quarter-inch cut in the inner cable, exposing the copper wiring. Tr. 449. There was no contact between the damaged cable and any metal surface and, further, the wire suppression was still operational, even with the damaged cable. Tr. 465, 470. Shander took the damaged solenoid cable off and sent outside for a new one, abating this condition. Tr. 455.

Continuing with the inspection, Tronzo examined the junction box panel lid on the operator side of the miner where the main power cable is fed into the miner itself. Tr. 450. He ran a feeler gauge around the panel, looking for openings that would allow a flame path and informed Shander that one was present. Tr. 450. An opening in the panel creates a flame path and could lead to an explosion if methane or other gases are present. Tr. 451. Shander responded by removing the panel cover, cleaning it, and reinstalling it properly. Tr. 455.

Tronzo issued a citation for a violation of 30 C.F.R. § 75.503, which requires “[t]he operator of each coal mine [to] maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used in by the last open crosscut of any such mine.” Permissibility, in the context of Section 75.503, means maintaining the machine in a condition in which it can be operated in a methane environment. Tr. 452. Tronzo testified that each condition individually is a violation of Section § 75.503. Tr. 451.

John Shander credibly testified that the continuous miner in question was “locked and tagged out” when he and Tronzo came upon the miner. Tr. 482. Shander and Tronzo both testified that the three items Tronzo raised in the citation were repaired by 10:30 am and the citation was terminated, but the equipment was not immediately put back into service as the Respondent was still performing various work on the miner. Tr. 509-510. While maintaining equipment in permissible condition is of utmost importance, the Commission has ruled that equipment that is locked out and tagged out can avoid inspection. In *Allen Lee Good*, it states that as long as the equipment is not tagged out and parked for repairs, the code sections applies whether or not the equipment is to be used during the shift. 23 FMSHRC 995, 997 (Sept. 2001). Another Commission decision determined that equipment was “used” within the meaning of the standard at issue because it was located in the normal work area, was capable of being used and **was not removed from service**. *Ideal Basic Industries, Cement Div.*, 3 FMHRC 843 (Apr. 1981). Administrative Law Judge Michael Zielinski also used this

²³ A scoop jack is located on the bottom of a continuous miner. As the coal is cut, it goes onto the scoop where a conveyer chain pulls the coal back to load it up to the miner. Tr. 447.

“availability for use” test eloquently in an unpublished decision *LTM Incorporated-Knife River Materials* where he explained that this test governs the applicability of most safety standards to mobile equipment. 2011 WL 2170808, pg 2 (2011)(ALJ). “Only if the equipment had been effectively taken out of service, e.g., locked out and tagged out, can such equipment avoid inspection and the citation of conditions that violate safety standards. *Id.*

Here, the continuous miner was locked out and tagged out, even by the admission of the inspector. Tr. 458. While Tronzo testified that he believed that Respondent would have put the miner back to work immediately after the scoop repair and without fixing the other conditions, there is no evidence to suggest that this is the case. Tr. 452-453. He did testify that one miner asked how long he was going to keep the miner down, but he did not testify that it was anyone in charge of making that decision. Tr. 474. Further, Shander testified that repairing the scoop was just one of various things being done to the miner. Tr. 483. Based on the foregoing, I find that the Secretary has not shown a violation as alleged, and therefore, Citation No. 7055178 is **VACATED**.

c. Citation No. 7055179

On July 29, 2009, Inspector Richard A. Tronzo issued Citation No. 7055179²⁴ to RoxCoal for a violation of Section 75.333(c)(2) of the Secretary’s regulations. The citation alleges that:

The location of a personnel door was not marked. The personnel door located in the cross cut between the #2 entry (return) and the #3 entry (common entry with the belt #4 entry and the alternated (*sic*) escapeway #5 entry) was not marked in the #3 entry. The location of all personnel doors in stoppings along escapeways shall be clearly marked so that the doors may easily be identified by anyone traveling in the escapeway and in the entries on either side of the door. This door is located at SS 1172 in #3 entry. Ten miners were working inby this location. There has been two citations issued at this mine for violations of 75.333(c)(2) at this mine in the past two years.

The inspector found that an injury was unlikely to occur, that the violation was not significant and substantial, that ten persons would be affected, and that the violation was the result of moderate negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$807.00.

The citation was terminated later that day after the personnel door was marked.

On July 29, 2009, Tronzo traveled the number three entry, where he observed that the personnel door at survey station 1172 in the crosscut between the Number 2 and Number 3 entries was not marked. Tr. 514, 516. The door, which had a sign with reflective tape on it that measured approximately 18 x 12 inches, is twenty feet back from the entryway. Tr. 521, 545,

²⁴ Exhibit 18.

548, 558. Respondent typically hangs six-inch tubes with red and white reflective tape in entryways so that miners may quickly identify escapeways; however, there was not a reflector in this particular entryway. Tr. 521, 548-549. The location of this entryway is important for escape purposes in the event of an emergency. Tr. 515, 517-519. If a miner is crawling down that entry, the reflective material on the tubing is in his or her direct line of sight. Tr. 523.

The personnel door referenced by the citation is not the designated escapeway. Tr. 527. Miners using this escapeway would have to crawl either under or through the belt in order to enter it. Tr. 527. The area is traveled by only the miner examiner on a weekly basis, as no work is being done on this section. Tr. 519.

Tronzo issued a citation for a violation of 30 C.F.R. § 75.333(c)(2), which requires “[t]he location of all personnel doors in stoppings along escapeways shall be clearly marked so that the doors may be easily identified by anyone traveling in the escapeway and in the entries on either side of the doors.”

The Secretary has shown that a violation of a mandatory safety regulation exists. Although Respondent argues that this particular personnel door is not the designated escapeway, it is still an escapeway that may need to be utilized if specific circumstances arise. The regulation at issue does not delineate among those escapeways identified as primary and alternate and neither will I. Further, if weekly examinations were regularly occurring, this condition should have been identified and corrected. Therefore, the Secretary has proven a violation of the standard as well as moderate negligence on the part of the operator.

However, I do not agree that ten miners would have been affected by this condition. The section is not a working section and Tronzo himself testified that the only person regularly in this area is the weekly examiner. Further, I do not find the statement “if a disaster happens, you never know where people will end up” to be compelling evidence in determining the number of people that will be affected by a condition. Tr. 520. I find that it is more likely that at most four people would be affected if an event occurred. This would include the examiner who happened to be in the area as well as a team of up to three miners sent to rescue him.

Given the above findings, I assess a penalty of \$309.00.

DOCKET NO. PENN 2010-310 – Roytown Deep Mine:

This docket contains four violations with a total proposed penalty of \$7,932.00. The parties have agreed to settle all but one of the violations which is addressed below.

Citation No. 7056027

On November 10, 2009 Inspector Paul P. Pelesky issued Citation No. 7056027²⁵ to RoxCoal for a violation of Section 75.370(a)(1) of the Secretary’s regulations. The citation alleges that:

²⁵ Exhibit 11.

Line 13(f) on page 11 of the approved ventilation plan was found not being complied with. Line 13(f) requires that a full traverse air reading be taken weekly to determine the scrubber system's efficiency. If this reading is less than 95% of the rated capacity of the scrubber, appropriate action will be taken to attain the rated capacity. In review of records a test was conducted on 10/20/2009 of the DBT 25M-0 continuous miner's scrubber system serial number 125666, being operated in the south east Mains section, MMU 003-0. The test resulted in the scrubber producing 3,578 CFM. The rated capacity of the system was determined to be 3,808 CFM and 95% of the capacity would have been 3,618. Records of corrective actions could not be produced for review.

The inspector found that an injury was reasonably likely to occur, that the violation was significant and substantial, that seven persons would be affected, and that the violation was the result of moderate negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$2,678.00.

The citation was terminated when all persons involved with traverse readings were trained or re-trained in the proper procedure for conducting these tests, which training was recorded and available for review.

Prior to his employment with MSHA, Paul Pelesky worked in the coal mining industry for 35 years. Tr. 266. While working in the industry, he was certified as an Assistant Mine Foreman in Pennsylvania and worked as a safety director for three years. Tr. 266. Pelesky has worked for the MSHA for over 12 years, working as a coal mine inspector for six years and as a health specialist for the last three years. Tr. 264-265. Inspector Pelesky was at the Roytown Deep Mine collecting respirable dust samples for an EO1 inspection on November 10, 2009. Tr. 267, 269). The Roytown mine has a history of high quartz and silica being generated from the mine which presents a risk for black lung. Tr. 276. Thus, it is important to monitor and control this in the ventilation plan. The pertinent portion of RoxCoal's ventilation plan was placed into evidence as Exhibit 13.

On the date in question, Inspector Pelesky first conducted an imminent danger examination and then conducted a dust control parameter examination of the continuous miner to ensure that the dust control parameters on the miner are in compliance with the ventilation plan. Tr. 269. Although Pelesky began the process of taking traverse readings of the scrubber system of the miner, he was unable to complete the task inasmuch as the operator decided to change the motor on the scrubber.²⁶ Tr. 269-272.

Because Inspector Pelesky could not continue the dust survey underground, he returned to the surface to review the operator's records of the weekly traverse readings. Tr. 272-273. While

²⁶ A scrubber is a vacuum-like system that draws in air from the mine containing dust particles, filters the air, and disposes of it. Tr. 271.

reviewing these records, he discovered that the traverse reading²⁷ taken on October 3, 2009, was 3578 CFM, or 94 percent, less than the 95 percent of the rated capacity of the scrubber system required by the operator's ventilation plan.²⁸ Tr. 273, 292. Pelesky issued a citation for a violation of §75.370(a)(1), which requires that the operator develop and follow a ventilation plan approved by the district manager. The operator's ventilation plan, at section 13(f), requires that:

A full traverse air reading will be taken weekly to determine scrubber efficiency. If this reading is less than 95% of rated capacity of the scrubber, appropriate action will be taken to attain the rated capacity. A record of this reading shall be maintained.

Pelesky testified a rating of less than 95% results in an increase of respirable dust inhaled by the miner. Tr. 286. He further testified that a number of conditions could cause a traverse reading to be close to, but below, the 95 % percent marker, including a dirty filter on the scrubber. Tr. 296. On cross examination, Pelesky testified that section 13(f) of the ventilation plan requires RoxCoal to take a weekly traverse air reading, to record the result and to take appropriate action if the reading is less than 95 %, but that the plan does not require the operator to record what corrective action was taken. Tr. 296, 298. Further, Pelesky testified that he did not know what, if any, action RoxCoal took to correct the reading. Tr. 273, 294, 297. On November 10, 2009, when Pelesky asked RoxCoal manager John Shandor whether corrective action was taken on October 3, Shandor was unsure but indicated that whoever recorded the figure may have overlooked that it was not in compliance. Tr. 275-276.

Records submitted by RoxCoal show that on October 3, 2009, the day the traverse air reading was below 95 %, the Respondent serviced the scrubber on the miner by changing filters on the sprays. Exhibit D. Although the motor on the scrubber was changed on November 10, the date of Pelesky's inspection, the weekly traverse readings taken after October 3 were all in compliance with the 95 % capacity requirement. Tr. 274, 288-289. In fact, the operator took another traverse reading on October 6 even though it was not required to do so until October 10, which reading was 4050 CFM, or 106 percent of the rated capacity, well over the level required by the ventilation plan. Tr. 307-308; Exhibit E.

§75.370(a)(1) requires that the operator develop and follow a ventilation plan approved by the district manager. The ventilation plan at the Roytown mine requires that the operator conduct a weekly full traverse reading of the scrubber system, and record the test results. The ventilation plan does not require that the operator record the action taken to correct an inadequate capacity rating. It simply requires that the corrective action be taken. Moreover, the evidence shows that corrective action was taken subsequent to the October 3, 2009, reading. This is evidenced by the traverse reading taken on October 6, 2009, and the subsequent weekly

²⁷ Traverse readings are taken using a Pitot tube manufactured by Dwyer Instruments, which manufacturer permits a two (2) % variation in accuracy of the readings. Tr. 292-293; Exhibit F, page 3)

²⁸ The rated capacity of the scrubber in question is 3,803 CFM. (Exhibit13, section 3) 95 % of that capacity, allowed by the ventilation plan, is 3613 CFM.

Docket No. PENN 2009-548:

CITATION NO.	VIOLATION	GRAVITY	NEGLIGENCE	PENALTY ASSESSED	SETTLEMENT/ RATIONALE
7055447	104(a); 30 CFR 75.1714-3(d)	Non S&S, fatal, 1 miner.	Moderate	\$190.00	Modified from moderate negligence to low negligence with a negotiated penalty of \$150. <i>*Respondent could produce evidence tending to demonstrate a reduced level of negligence.</i>
7054082	104(a); 30 CFR 72.630(b)	S&S, permanently disabling, 2 miners	Moderate	\$460.00	Remains as issued, \$460.00.
7054086	104(a); 30 CFR 75.1501(c)	S&S; fatal; 19 miners	Moderate	\$3,689.00	Reduction in penalty to \$2,750.00. No change to the violation designation. <i>*Respondent could produce evidence tending to demonstrate that even though the negligence was moderate, it was not as high as originally thought. Based on this information and due to the risks of litigation, the parties agreed to the negotiated penalty.</i>

CITATION NO.	VIOLATION	GRAVITY	NEGLIGENCE	PENALTY ASSESSED	SETTLEMENT/ RATIONALE
7054088	104(a); 30 CFR 75.811	S&S; fatal; 1 miner	Moderate	\$946.00	Reduction in penalty to \$900.00. No change to the violation designation. <i>*Respondent could produce evidence tending to demonstrate that even though the negligence was moderate, it was not as high as originally thought. Based on this information and due to the risks of litigation, the parties agreed to the negotiated penalty.</i>
7054089	104(a); 30 CFR 75.1505(b)	Non S&S; Fatal; 16 miners	Low	\$243.00	Remains as issued, \$243.00.
7054090	104(a); 30 CFR 75.380(d)(7)(iv)	S&S; Fatal; 18 miners	Moderate	\$3,689.00	The parties have agreed to request a STAY .
7054092	104(a); 30 CFR 75.380(d)(1)	S&S; Lost Workdays/Restricted Duty; 18 miners	Moderate	\$1,111.00	Reduced to 6 persons affected with a modified penalty of \$750.00 <i>*Respondent could present evidence tending to show a reduced number of miners affected.</i>
7054094	104(a); 30 CFR 75.400	Non-S&S; Fatal; 16 miners	Moderate	\$745.00	Modified from moderate negligence to low negligence with a negotiated penalty of \$700.00 <i>*Respondent could produce evidence tending to demonstrate a reduced level of negligence.</i>

CITATION NO.	VIOLATION	GRAVITY	NEGLIGENCE	PENALTY ASSESSED	SETTLEMENT/ RATIONALE
7054098	104(a); 30 CFR 75.900-3	Non-S&S; Fatal; 8 miners	Moderate	\$540.00	<p>Modified from moderate negligence to low negligence with a negotiated penalty of \$490.00</p> <p><i>*Respondent could produce evidence tending to demonstrate a reduced level of negligence.</i></p>
7055141	104(a); 30 CFR 77.592	S&S; Fatal; 1 miner	Moderate	\$946.00	<p>Modified from moderate negligence to low negligence with a negotiated penalty of \$875.00</p> <p><i>*Respondent could produce evidence tending to demonstrate a reduced level of negligence.</i></p>
7054584	104(a); 30 CFR 75.220(a)(1)	S&S; Fatal; 2 miners	Moderate	\$1,026.00	<p>Reduction in penalty to \$950.00. No change to the violation designation.</p> <p><i>*Respondent could produce evidence tending to demonstrate that even though the negligence was moderate, it was not as high as originally thought. Based on this information and due to the risks of litigation, the parties agreed to the negotiated penalty.</i></p>

CITATION NO.	VIOLATION	GRAVITY	NEGLIGENCE	PENALTY ASSESSED	SETTLEMENT/ RATIONALE
7054725	104(a); 30 CFR 75.523-2(c)	S&S; Fatal; 1 miner	Moderate	\$946.00	Modified from moderate negligence to low negligence with a negotiated penalty of \$900.00 <i>*Respondent could produce evidence tending to demonstrate a reduced level of negligence.</i>
7055601	104(a); 30 CFR 75.221(a)(12)	Non-S&S; Fatal; 12 miners	Moderate	\$745.00	No likelihood, 0 persons, No lost workdays, \$100.00 <i>*Respondent could produce evidence tending to demonstrate a reduced level of likelihood and a lowered level of injury that would not affect any miners.</i>
Total				\$15,276.00	13 citations, \$9,268.00 as modified and stayed

Docket No. PENN 2009-595:

CITATION NO.	VIOLATION	GRAVITY	NEGLIGENCE	PENALTY ASSESSED	SETTLEMENT/ RATIONALE
7055604	104(a); 30 CFR 75.220(a)(1)	Non-S&S, Fatal, 6 miners.	Moderate	\$392	Reduced to 1 person affected with a negotiated penalty of \$100. <i>*Respondent could present evidence tending to show a reduced number of miners affected.</i>
7055606	104(a); 30 CFR 75.503	Non-S&S, Fatal, 1 miner	Moderate	\$190	Remains as issued, \$190.00.

CITATION NO.	VIOLATION	GRAVITY	NEGLIGENCE	PENALTY ASSESSED	SETTLEMENT/ RATIONALE
7055607	104(a); 30 CFR 77.516	S&S, Fatal, 1 miner	Moderate	\$946	Remains as issued, \$946.00.
7055608	104(a); 30 CFR 75.1714-7(a)	S&S, Fatal, 1 miner	Moderate	\$946	Modified from Reasonably Likely to Unlikely and to non S&S with a Negotiated Penalty of \$675. <i>*Respondent could produce evidence tending to demonstrate the reduced likelihood of an accident.</i>
7055610	104(a); 30 CFR 75.350(a)(2)	Non-S&S, Fatal, 6 miners	Moderate	\$392	Reduction in penalty to \$200.00. No change to the violation designation. <i>*Respondent could produce evidence tending to demonstrate that even though the negligence was moderate, it was not as high as originally thought. Based on this information and due to the risks of litigation, the parties agreed to the negotiated penalty.</i>

CITATION NO.	VIOLATION	GRAVITY	NEGLIGENCE	PENALTY ASSESSED	SETTLEMENT/ RATIONALE
7055615	104(a); 30 CFR 75.350(a)(2)	Non-S&S, Fatal, 6 miners	Moderate	\$392	<p>Reduction in penalty to \$300.00. No change to the violation designation.</p> <p><i>*Respondent could produce evidence tending to demonstrate that even though the negligence was moderate, it was not as high as originally thought. Based on this information and due to the risks of litigation, the parties agreed to the negotiated penalty.</i></p>
7055612	104(a); 30 CFR 75.380(d)(7)(iv)	S&S, Fatal, 6 miners	Moderate	\$1944	<p>The parties have agreed to request a STAY.</p>
7055611	104(a); 30 CFR 75.370(a)(1)	Non-S&S, Lost workdays/restricted duty, 6 miners	Moderate	\$117	<p>Reduction in penalty to \$100.00. No change to the violation designation.</p> <p><i>*Respondent could produce evidence tending to demonstrate that even though the negligence was moderate, it was not as high as originally thought. Based on this information and due to the risks of litigation, the parties agreed to the negotiated penalty.</i></p>

CITATION NO.	VIOLATION	GRAVITY	NEGLIGENCE	PENALTY ASSESSED	SETTLEMENT/ RATIONALE
7055616	104(a); 30 CFR 75.350(a)(2)	Non-S&S, Fatal, 6 miners	Moderate	\$392	Reduction in penalty to \$300.00. No change to the violation designation. <i>*Respondent could produce evidence tending to demonstrate that even though the negligence was moderate, it was not as high as originally thought. Based on this information and due to the risks of litigation, the parties agreed to the negotiated penalty.</i>
7055617	104(a); 30 CFR 75.204(c)(1)	Non-S&S, Fatal, 1 miner	Moderate	\$190	Remains as issued, \$190.00.
7021146	104(a); 30 CFR 75.220(a)(1)	Non-S&S, No lost workdays, 0 miners	Low	\$100	Remains as issued, \$100.00.
Total				\$6,001	11 citations, \$3,101.00 as modified and stayed

Docket No. PENN 2009-667:

CITATION NO.	VIOLATION	GRAVITY	NEGLIGENCE	PENALTY ASSESSED	SETTLEMENT/ RATIONALE
7054589	104(a); 30 CFR 75.370 (a)(1)	Non-S&S, permanently disabling, 8 miners	High	\$807	Modified from high negligence to low negligence with a negotiated penalty of \$700. <i>*Respondent could produce evidence tending to demonstrate a reduced level of negligence.</i>

CITATION NO.	VIOLATION	GRAVITY	NEGLIGENCE	PENALTY ASSESSED	SETTLEMENT/ RATIONALE
7055620	104(a); 30 CFR 75.1100-1(f)(2)	Non-S&S, unlikely, lost workdays/restricted duty, 6 miners	Moderate	\$117	<p>Reduction in penalty to \$100.00. No change to the violation designation.</p> <p><i>*Respondent could produce evidence tending to demonstrate that even though the negligence was moderate, it was not as high as originally thought. Based on this information and due to the risks of litigation, the parties agreed to the negotiated penalty.</i></p>
7055621	104(a); 30 CFR 75.604(b)	S&S, reasonably likely, fatal, 1 miner	Moderate	\$946	<p>Modified from moderate negligence to low negligence with a negotiated penalty of \$600.</p> <p><i>*Respondent could produce evidence tending to demonstrate a reduced level of negligence.</i></p>
6685794	104(a); 30 CFR 75..370(a)(1)	Non-S&S, unlikely, lost workdays/ restricted duty, 7 miners	Moderate	\$138	<p>Vacated based on prosecutorial discretion.</p>

CITATION NO.	VIOLATION	GRAVITY	NEGLIGENCE	PENALTY ASSESSED	SETTLEMENT/ RATIONALE
7055625	104(a); 30 CFR 75.330(b)(1)	Non-S&S, unlikely, fatal, 7 miners	Moderate	\$460	Reduction in penalty to \$350.00. No change to the violation designation. <i>*Respondent could produce evidence tending to demonstrate that even though the negligence was moderate, it was not as high as originally thought. Based on this information and due to the risks of litigation, the parties agreed to the negotiated penalty.</i>
7054591	104(a); 30 CFR 70.205	Non-S&S, unlikely, no lost workdays, 1 miner	Moderate	\$100	Remains as issued, \$100.
7055627	104(a); 30 CFR 77.502	S&S, reasonably likely, fatal, 1 miner	Moderate	\$946	Modified from moderate negligence to low negligence with a negotiated penalty of \$700. <i>*Respondent could produce evidence tending to demonstrate a reduced level of negligence.</i>
7055628	104(a); 30 CFR 75.503	Non-S&S, unlikely, fatal, 6 miners	Moderate	\$392	Remains as issued, \$392.
Total				\$3,906	8 citations, \$2942.00 as modified

Docket No. PENN 2010-31:

CITATION NO.	VIOLATION	GRAVITY	NEGLIGENCE	PENALTY ASSESSED	SETTLEMENT/ RATIONALE
7055173	104(a); 30 CFR 75.380(d)(7)(iv)	Non-S&S, unlikely, fatal, 10 miners	Moderate	\$1,203	The parties have agreed to request a STAY .
7055176	104(a); 30 CFR 75.1600-3(a)(2)	Non-S&S, unlikely, fatal, 2 miners	Moderate	\$263	Modified from fatal to no lost workdays with a negotiated penalty of \$100. <i>*Respondent could produce evidence tending to demonstrate a lower level of anticipated injury.</i>
7055175	104(a); 30 CFR 75.380(d)(7)(iv)	S&S, reasonably likely, fatal, 10 miners	Moderate	\$4,689	The parties have agreed to request a STAY .
7055177	104(a); 30 CFR 75.364(h)	Non-S&S, no likelihood, no lost workdays, 0 miners	Low	\$100	Remains as issued, \$100.
Total				\$6,255	

Docket No. PENN 2010-310:

CITATION NO.	VIOLATION	GRAVITY	NEGLIGENCE	PENALTY ASSESSED	SETTLEMENT/ RATIONALE
7056026	104(a); 30 CFR 75.220(a)(1)	S&S, reasonably likely, fatal, 7 miners	Moderate	\$3,689	Reduced to 3 persons affected with a negotiated penalty of \$2,200. <i>*Respondent could present evidence tending to show a reduced number of miners affected.</i>
7056161	104(a); 30 CFR 75.325(b)	Non-S&S, unlikely, fatal, 10 miners	Moderate	\$1,203	Remains as issued, \$1,203.

CITATION NO.	VIOLATION	GRAVITY	NEGLIGENCE	PENALTY ASSESSED	SETTLEMENT/ RATIONALE
7056162	104(a); 30 CFR 75.1600-2(e)	Non-S&S, unlikely, lost workdays/ restricted duty, 10 miners	Moderate	\$362	Reduced to 5 persons affected, with a negotiated penalty of \$200. <i>*Respondent could present evidence tending to show a reduced number of miners affected.</i>
Total				\$5,254	3 citations, \$3,603.00 as modified and stayed

In summary, the settled citations in the five dockets at issue herein are as follows:

PENN 2009-548	\$ 9,268.00
PENN 2009-595	3,101.00
PENN 2009-667	2,942.00
PENN 2010-31	200.00
PENN 2010-310	<u>3,603.00</u>
TOTAL	\$19,114.00

There are also four citations that the parties have requested be stayed. As these four citations involve lifeline issues, I find that it is appropriate to stay these citations. See *Cumberland Coal Resources LP*, 31 FMSHRC 1147 (ALJ) (Sept. 2009)

I have considered the representations and documentation submitted and find that the modifications above are reasonable and appropriate under the criteria set forth in Section 110(i) of the Act. Consequently, I approve the parties' negotiated settlement on the above citations.

III. ORDER

Based on the above and 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 \$21,162.00. RoxCoal, Inc. is hereby **ORDERED** to pay the Secretary of Labor the sum of \$21,162.00 within 30 days of the date of this decision.

It is further **ORDERED** that Citation No. 7054090 (PENN 2009-548); Citation No. 7055612 (PENN 2009-595); and Citation Nos. 7055173 and 7055175 (PENN 2010-31) be **STAYED** pending the Commission's decision in *Cumberland Coal Resources LP*, 31 FMSHRC 1147 (ALJ) (Sept. 2009).

/s/ Janet G. Harner _____

Janet G. Harner
Administrative Law Judge

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September 28, 2011

THOMAS BEWAK,	:	DISCRIMINATION PROCEEDING
Complainant,	:	Docket No. WEST 2008-161-DM
	:	
v.	:	
	:	
ALASKA MECHANICAL, INC.,	:	Nome Operations
Respondent	:	Mine ID 50-01850 LWI

DECISION

Before: Chief Judge Lesnick

This case is before me on a Complaint of Discrimination filed by Thomas Bewak (“Bewak”) against Alaska Mechanical, Incorporated (“AMI”), pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 815(c). On August 31, 2010, I issued a decision granting the Complaint of Discrimination under section 105(c) of the Act. *Bewak v. Alaska Mechanical, Inc.*, 32 FMSHRC 1044. The decision also ordered the parties “to confer to determine the appropriate back pay and interest to be awarded . . . and any other relief required to make Bewak whole.” *Id.* at 1059.

On September 16, 2010, counsel for both parties submitted a Joint Response Regarding Relief to Complainant, which stated that the parties were not able to agree to the amount of relief. By Order dated September 27, 2010, I granted the request to submit briefs on damages. AMI filed their brief regarding damages on October 12, 2010. Bewak filed his brief on October 14, 2010.

I held a conference call with the parties’ counsel on January 12, 2011, in an attempt to resolve the issue of damages. I then gave the parties additional time to confer and reach a settlement and held a follow-up conference call on January 25, 2011. Bewak then filed a Request for Hearing on Damages on February 25, 2011, and AMI filed an opposition to Request for Hearing on Damages on March 1, 2011.¹ Another conference call with parties’ counsel was held on April 13, 2011, for purposes of setting a hearing date with regards to the issue of damages. The hearing was set, with the agreement of both attorneys, for a date in August. AMI’s counsel subsequently informed me that a witness would not be available for the scheduled hearing.

¹ Because the August 31, 2010 Decision was not a final appealable order, I retained jurisdiction and the record could be supplemented.

On June 29, 2011, I issued an Order directing AMI to submit a written statement as to how they believe due process can be achieved with respect to damages, and the time frame for doing so. A Response was filed on July 14, 2011, in which AMI renewed its objection to a hearing on damages and objected to adding to the record any post-hearing “evidence” regarding damages. While AMI’s objections are noted, AMI was given several opportunities to rebut and cross-examine Complainant’s evidence, including the holding of a hearing. However, AMI failed to avail itself of any of these opportunities. Accordingly, I accept the facts regarding damages as presented by Complainant.

Bewak is requesting “back pay, compensatory damages, attorney fees, and a proper interest calculation on award.” Comp. Brief on Damages at 1. Specifically, Bewak is asking for \$46,004.00 in back pay for 15.5 weeks², \$3,878.00 in job hunting expenses, \$1,980.00 in costs incurred during the hearing, \$100,000.00 in damage to professional and personal reputation, \$100,000.00 for pain and suffering, and \$19,327.00 in attorney fees for a total award of \$271,189.00 plus interest. *See* Comp. Brief on Damages. AMI argues that Mr. Bewak is entitled to eight weeks of back pay in the amount of \$19,712.00. Resp. Brief on Damages at 1, 3. While AMI did not object to Bewak’s entitlement to attorney fees, it reserved the right to rebut the amount and reasonableness. Resp. Brief at 4. To date, I have not received anything, written or otherwise, rebutting the attorney fees claimed by Mr. Bewak.

Section 105 of the Act grants the Commission authority, upon a finding of discrimination, to grant appropriate relief “including, but not limited to, an order requiring the rehiring or reinstatement of the miner of his former position with back pay and interest or such remedy as may be appropriate.” 30 U.S.C. § 815(c). *See also Secy. on behalf of Dunmire and Estle v. Northern Coal Co.*, 4 FMSHRC 126 (February 1982).

As stated above, I accept the facts regarding damages as presented by Complainant and find that \$46,004.00 in back pay is a reasonable and fair calculation to restore the discriminatee, as nearly as possible, “to the enjoyment of the wages and benefits [he] lost as a result of [his] illegal termination[.]” and to “effectuate the purposes of the Mine Act.” *Id.* at 142, 143. The Commission has held that the “reimbursement of . . . hearing expenses is an appropriate form of remedial relief.” *Id.* at 143. Therefore, I find that \$1,980.00 for costs incurred during the hearing is fair and reasonable and should be awarded to Complainant. Additionally, I find that Complainant attempted to mitigate damages by seeking new employment and \$3,878.00 in job hunting expenses shall be awarded. I also find the requested attorney fees and expenses to be fair and reasonable, and Complainant is hereby awarded \$19,327.00 for those costs.

There is no authority or precedent for awarding compensatory damages for damage to reputation and/or pain and suffering. Accordingly, the claims for \$100,000.00 for damage to professional and personal reputation, and \$100,000.00 for pain and suffering are DENIED.

² Bewak was fired from AMI on July 25, 2007, and obtained new employment on November 10, 2007.

ORDER

AMI is hereby directed to pay to the Complainant, Mr. Thomas Bewak, within 30 days of the date of this decision back pay, expenses, and attorney fees of \$71,189.00, plus interest through the date of payment to be calculated in accordance with the Commission decision in *United Mine Workers of America v. Clinchfield Coal Co.*, 10 FMSHRC 1493 (November 1988).

/s/ Robert J. Lesnick

Robert J. Lesnick

Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

September 29, 2011

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of	:	
BURDETTE BILLINGS,	:	Docket No. LAKE 2011-855-DM
Complainant	:	NC MD 2011-08
	:	
v.	:	
	:	
	:	
PROPPANT SPECIALISTS, LLC,	:	Oakdale Wet Plant
Respondent	:	Mine ID 47-03569

ORDER GRANTING TEMPORARY ECONOMIC REINSTATEMENT

Before: Judge Bulluck

This matter is before me upon Application, filed by the Secretary on July 20, 2011, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2), for an order requiring Proppant Specialists, LLC (“Proppant”), to temporarily reinstate Burdette Billings to his former position as a front-end loader operator, at Proppant's Oakdale Wet Plant, or to a similar position at the same rate of pay. Section 105(c) prohibits operators from discharging or otherwise discriminating against miners who have engaged in safety-related protected activity, and authorizes the Secretary to apply to the Commission for temporary reinstatement of miners, pending full resolution of the merits of their complaints. The Application is supported by Declaration of MSHA Special Investigator Thomas J. Pavlat, and a copy of the Discrimination Complaint filed by Billings with MSHA on May 9, 2011. The Application alleges that Billings was terminated by Proppant because he filed a hazardous condition complaint with MSHA.

Proppant elected to waive its right to a hearing, and on September 2, 2011, both parties filed simultaneous briefs. The parties have agreed to temporary economic reinstatement should I grant the Application. Proppant’s Opposition denies that Billings had been terminated for any discriminatory reason, and is supported by Declaration of Chris E. Cummins, Senior Vice President of Frac Tech Services, LLC, Proppant’s parent company.

Procedural Framework

The scope of this proceeding is governed by the provisions of Commission Rule 45(c), 29 C.F.R. § 2700.45(c), which limits the inquiry to a “not frivolously brought” standard, by providing that “[i]f no hearing is requested, the Judge assigned the matter shall review immediately the Secretary's application and, if based on the contents thereof the Judge

determines that the miner's complaint was not frivolously brought, he shall issue immediately a written order of temporary reinstatement.”

It is well settled that the “not frivolously brought” standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In *Jim Walter Resources v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990), the Court explained the standard as follows:

The legislative history of the Act defines the ‘not frivolously brought standard’ as indicating whether a miner's ‘complaint appears to have merit’ -- an interpretation that is strikingly similar to a reasonable cause standard. [*Citation omitted*]. In a similar context involving the propriety of agency actions seeking temporary relief, the former 5th Circuit construed the ‘reasonable cause to believe’ standard as meaning whether an agency's ‘theories of law and fact are *not insubstantial or frivolous.*’ 920 F.2d at 747 (*emphasis in original*) (*citations omitted*).

. . . Congress, in enacting the ‘not frivolously brought’ standard, clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. Any material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits. Also, the erroneous deprivation of the employer's right to control the makeup of his work force under section 105(c) is only a *temporary* one that can be rectified by the Secretary's decision not to bring a formal complaint or a decision on the merits in the employer's favor. *Id.* at 748, n. 11 (*emphasis in original*).

Ruling

The Mine Act accords to miners and miners' representatives protection from discharge or other discriminatory acts, based on their exercise of any statutory right under the Act. 30 U.S.C. § 815(c). The Commission has consistently held a miner seeking to establish a *prima facie* case of discrimination to proving that he engaged in activity protected by the Act, and that he suffered adverse action as a result of the protected activity. *Secretary on behalf of Pasula v. Consolidation Coal Company*, 2 FMSHRC 2786, 2797-2800 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Coal Company*, 3 FMSHRC 803, 817-18 (April 1981).

The Secretary's allegations are based, in part, on Inspector Pavlat's investigation of Billings' discrimination claims. Based on his investigation, Pavlat found: 1) that prior to his filing a hazard complaint with MSHA, Billings spoke with Brandon Crawford, Acting Regional Manager, about the hazardous condition created by hot sand; 2) that Todd Rainey, Production Supervisor, was in charge at the Oakdale Wet Plant at the time and was well aware of the hazardous situation; 3) that Billings filed his hazard complaint with MSHA on Saturday, April

23, 2011, when nothing was done to correct the hot sand hazard; 4) that Supervisory MSHA Inspector Christopher Hensler in Hibbing, Minnesota, spoke with Billings no later than April 25, 2011, to follow up on his hazard complaint, at which time Billings told Hensler about his prior conversation with Crawford, and that Rainey was aware of the situation; 5) that on April 25, 2011, MSHA Inspector Robert Marcinel went to the Oakdale Wet Plant to commence an investigation of Billings' complaint, during which Inspector Marcinel interviewed Billings; 6) that on April 27, 2011, Inspector Marcinel finished his inspection, held his closing conference with Crawford and Regional Safety Manager Jesse McAnally, and issued four 104(d)(1) high negligence citations to Proppant, including two relating to miners who were standing in or walking through hot sand; 7) that at the April 27, 2011, closeout conference, Inspector Marcinel told Crawford and McAnally that the citations would be reviewed for possible special assessment and a possible determination that the violations were knowing and/or willful; 8) that on April 28, 2011, Proppant discharged Billings and gave him an "Employee Counseling/Disciplinary Action Form" listing four reasons for his discharge; 9) that Crawford signed the form as "Supervisor" and Chris E. Cummins signed the form as "District or Department Manager;" 10) that a day or two after the MSHA inspection, Crawford and Rainey asked an Oakdale Wet Plant employee whether he knew who made the hazard complaint to MSHA (either Crawford or Rainey said they knew the complainant was either that employee or Billings, and that it was a process of elimination); the employee denied making the hazard complaint and Crawford responded that if the employee did not make the complaint, then they knew who did; and 11) that other company employees who have reported hazardous conditions or filed hazard complaints with MSHA have suffered adverse action. Sec'y. Brief, Pavlat Aff. Based on these findings, Pavlat concluded that Billings' allegation that he was terminated because he filed a hazard complaint with MSHA was not frivolous.

Proppant's Opposition seeks to establish that the Discrimination Complaint was frivolously brought by asserting, in part: 1) that Chris E. Cummins is responsible for overseeing the operations of the mine; 2) that on April 28, 2011, Cummins traveled to the mine to follow up on reports of a disturbance caused by a mine employee at a local township council meeting; 3) that prior to his arrival at the mine, Cummins had never heard of Burdette Billings and when he arrived, Cummins learned that there were concerns about recent actions by Billings; 4) that the disciplinary form given to Billings set forth four instances of violations of company policy; 5) that Cummins did speak to other Proppant employees, both hourly and management, to discuss the factual details of the events described in the disciplinary form; 6) that Cummins decided to terminate Billings' employment based upon the actions described in the disciplinary form, and without consulting anyone else as to the appropriate level of discipline to be administered; and 7) that Cummins was not aware that the April 25, 2011, MSHA inspection resulted from an anonymous complaint, nor did he know which, if any, miners spoke to the MSHA inspector. Resp. Opp. at 1-3. Proppant concludes, therefore, that the decision to terminate Billings was based solely on the four instances of misconduct described in the disciplinary form, and Billings was not terminated because of his hazard complaint to MSHA.

While I have carefully considered Proppant's opposition, because it has waived its right to a hearing on the Secretary's Application, I must accept as true, the events, as alleged. The Secretary has set forth allegations of adverse treatment, close in proximity to protected activity so as to create a nexus, sufficient to raise an inference of discrimination. At best, Proppant has

shown an intent to defend its actions at hearing, on the basis of legitimate business-related, non-discriminatory reasons. At this juncture, it is emphasized that, at hearing, the Secretary ultimately bears the burden of proving discrimination by a preponderance of the evidence, in order to sustain a violation under section 105(c). Accordingly, since the allegations of discrimination, as set forth in the Secretary's Application, have not been shown to be clearly lacking in merit, it must be concluded that they are not frivolous and, therefore, satisfy the lesser threshold in this proceeding.

ORDER

For the reasons set forth above, it is **ORDERED** that Proppant Specialists, LLC temporarily economically reinstate Burdette Billings, by agreement of the parties, retroactive to August 8, 2011, to the position he held prior to his termination on April 28, 2011, at the same rate of pay and benefits applicable to that position.

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
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September 7, 2011

SECRETARY OF LABOR, MINE SAFETY :	CIVIL PENALTY PROCEEDING
AND HEALTH ADMINISTRATION,	:
(MSHA),	:
Petitioner	:
	:
v.	:
	:
HIDDEN SPLENDOR RESOURCES, INC., :	Mine: Horizon Mine
Respondent	:

ORDER DENYING RESPONDENT’S MOTION TO COMPEL DISCOVERY

This case is before me upon a Petition for Assessment of Civil Penalty under section 105 (d) of the Federal Mine Act of 1977 (“the Mine Act”), 30 U.S.C. §815(d). On August 25, 2011, Respondent filed its “Motion to Compel Production of SAR FORM.” The Secretary refused to provide the Special Assessment Review (“SAR”) document invoking the deliberative process privilege. A telephone conference was held by me on September 6, 2011 during which counsel argued the motion. Respondent asserts that although formal discovery had not been engaged in, the SAR would likely contain information that would likely lead to discovery of relevant facts. Specifically, when asked what facts would not otherwise be discoverable through formal discovery not yet engaged in, counsel responded that the conclusions reached by the agency would be contained in the SAR along with contemporaneous recommendations made by officials of the Mine Safety and Health Administration (“MSHA”). For the reasons set forth below, the motion is **DENIED**.

I. The Work Product Privilege

Commission Procedural Rule 1(b), incorporates the Federal Rules of Civil Procedure, so far as practicable, on any procedural question not regulated by the Mine Act, the Commission’s Procedural Rules, or the Administrative Procedure Act. Rule 26(b)(3) of the Federal Rules of Civil Procedure provides in relevant part:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another part or by or for that other party’s representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the

substantial equivalent of the materials by other means, in ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of **mental impressions, conclusions, opinions**, or legal theories of an attorney or other representative of a party concerning the litigation.

In *ASARCO, Inc.*, 12 FMSHRC 2548 (December 1990), the Commission discussed the work-product privilege under Rule 26(b)(3), (within which the deliberative process privilege is embodied), stating that the material sought in discovery must be: 1) documents or tangible things, 2) prepared in anticipation of litigation or for trial, and 3) by or for another party or by or for that party's representative. It is not required that the document be prepared by or for an attorney. The burden is on the party seeking to invoke the privilege, to demonstrate the three-part test has been met, however, once that has been satisfied, the burden is then on the party seeking discovery to demonstrate a substantial need and undue hardship to overcome the privilege. *P & B Marina, Ltd Partnership v. Logrande*, 136 F.R.D. 50, 57 (E.D.N.Y. 1991), *aff'd*, 983 F.2d 1047m (2d Cir. 992).

The SAR is a document which contains the selected facts pertaining to a cited violation of a health or safety standard along with the mental impressions, conclusions and opinions of MSHA officials used in the determination to categorize the violations as flagrant, and thus enhancing the penalties assessed. While this deliberative process is engaged in at a time when litigation is not pending, it is readily foreseeable that should the special assessment be imposed, the operator is highly likely to contest the penalty. Furthermore, once the enhanced penalty is decided upon, the operator is served with a notice of the proposed penalty and is given 30 days to pay or contest the proposed penalty. 30 C.F.R. §100.7(b). Therefore, this document is prepared in contemplation of litigation and is protected by the work product privilege.

Turning now to whether Hidden Splendor can overcome the privilege by demonstrating a substantial need for the information and an undue hardship if it must obtain the information by other means, Hidden Splendor fails in its attempt to do so. The Respondent has not yet engaged in any formal discovery provided under the Commission rules. They, therefore, cannot at this time, state that interrogatories, requests for admissions, or depositions would fail to provide them with the relevant information pertaining to these violations at issue. Furthermore, as the Respondent stated during the conference call, they seek the "conclusions" and the "contemporaneous recommendations," which are no more than mental impressions of the MSHA officials, contained in this document. As stated above, the court shall protect against the disclosure of mental impressions, conclusions and opinions. For these reasons, I find Hidden Splendor has not overcome the work product privilege.

It is clear to me that the Respondent is not interested in obtaining the facts in support of these violations, but is interested in reaching the inner workings or the deliberative process by which MSHA determines the special assessments. This leads me to the second basis for denial of the Respondent's motion to compel disclosure.

II. **The Deliberative Process Privilege**

The deliberative process privilege was first described by the Commission in *In Re: Contestants of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 990-93 (June 1992) as protecting "the 'consultative functions' of government by maintaining the

confidentiality of ‘advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated’ (citations omitted). The privilege attaches to inter- and interagency (sic) communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy.” *Id.* at 992 (quoting *Jordan v. U.S. Dep’t of Justice*, 591 F.2d 753, 772 (D.C. Cir. 1978)). The privilege protects thoughts, ideas, reasoning and analyses which lead to a decision of the agency. *Kan. State Network, Inc. v. F.C.C.*, 720 F.2d 185 (D.C. Cir. 1983).

As already discussed, the Respondent specifically argued that it was the conclusions and contemporaneous recommendations that it seeks through disclosure of the SAR, not the facts. Clearly they are seeking disclosure of the deliberative process involved in the special assessment. Not only are these mental impressions protected by the privilege, but they are also irrelevant in the *de novo* determination by the Administrative Law Judge at hearing.

Respondent further argued that the privilege was not invoked by the head of the agency and is therefore not properly raised here. The Commission, however, permits such assertions through counsel under the delegation of authority. *See Bright Coal Comp.*, 6 FMSHRC 2520 (Nov. 1984).

For the reasons set forth above, the Respondent’s Motion to Compel is hereby **DENIED**.

/s/ Priscilla M. Rae _____

Priscilla M. Rae
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
WASHINGTON, DC 20001

September 9, 2011

MAMMOTH COAL CO.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 2009-888-R
	:	Citation No. 8076518; 02/25/2009
v.	:	
	:	Docket No. WEVA 2009-889-R
	:	Order No. 8076519; 02/25/2009
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2009-894-R
ADMINISTRATION (MSHA),	:	Order No. 8076638; 03/02/2009
Respondent	:	
	:	Mine: Mammoth No. 2 Gas
	:	Mine ID 46-09108
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2009-1295
Petitioner	:	A.C. No. 46-09108-179898-01
	:	
v.	:	
	:	
MAMMOTH COAL CO.,	:	Mine: Mammoth No. 2 Gas
Respondent	:	

ORDER DENYING RESPONDENT’S MOTION
FOR INTERLOCUTORY REVIEW CERTIFICATION
AND
FOR STAY

These matters are scheduled for hearing on September 13, 2011, in Charleston, West Virginia. At issue are 104(d)(1) Citation No. 8076518 and 104(d)(1) Order No. 8076519 issued to Mammoth Coal Company (“Mammoth”). The citation and order concern the fundamental requirement in section 75.380(d)(1) that requires escapeways to be “[m]aintained in a safe condition to always assure passage of anyone, including disabled persons.” The Secretary initially filed a Petition for Assessment of Civil Penalty proposing a total civil penalty of \$133,000.00 for the subject citation and order.

I. Procedural History

Based on information obtained during discovery, the Secretary filed a motion to amend her assessment petition by increasing the total proposed penalty from \$133,000.00 to \$335,200.00. The proposed amendment was based on the allegation that the subject two violations were “flagrant” as contemplated by Section 110(b)(2) of the Mine Act as amended by the Mine Improvement and New Emergency Response Act of 2006 (“the Act”), 30 U.S.C. § 820(b)(2).¹ The Secretary’s motion to amend her petition was granted by Order on June 3, 2011. The Order noted there was no showing of prejudice as the underlying facts and the violations alleged remained unchanged. *Wyoming Fuel*, 14 FMSHRC 1282, 1289-90 (Aug. 1992), citing *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990) (pleadings may be liberally modified under Federal Rule of Civil Procedure 15(a) absent a showing of legal prejudice to the party opposing the modification).

Subsequent to the June 3, 2011, Order Modifying the Secretary’s Petition, Mammoth unsuccessfully attempted to withdraw its contests by paying the \$133,000.00 initially proposed by the Secretary. The Commission has determined that a mine operator may not unilaterally withdraw its contest in a civil penalty proceeding by offering to pay the original assessment proposed by the Secretary. *Consolidation Coal Company*, 2 FMSHRC 3 (Jan. 1980). Rather, the Commission has concluded that the Secretary’s request for a higher penalty than that initially proposed is a triable issue to be resolved by the statutory penalty criteria. *Id.* at 5.

II. Mammoth’s Request for Interlocutory Review

On September 8, 2011, Mammoth filed, pursuant to Commission procedural Rule 76, a Motion to Stay Proceedings and for Certification for Interlocutory Review of the June 3, 2011, Order granting the Secretary’s motion to amend her petition. 29 C.F.R. § 2700.76. Mammoth’s request for interlocutory review is based on its assertion that the grant of the Secretary’s amended petition constitutes a modification “of the original civil penalty assessment prior to the required *de novo* review of the relevant evidence to be applied to the statutory criteria in 30 U.S.C. § 820(i) (Mine Act § 110(i)) (“§820(i)” or “§110(i)”)." *Mammoth Mot.* at 1.

¹ Section 110(b)(2) of the Act provides that a mine operator who commits a violation deemed to be “flagrant” may be assessed a civil penalty of not more than \$220,000. Section 110(b)(2) defines “flagrant” as “a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.”

The Secretary opposed Mammoth's motion on September 9, 2011. The Secretary's opposition is based on her assertion that Mammoth "has not properly phrased the legal issue for which it seeks review." *Sec'y Opp.* at 2. The Secretary notes that the grant of her motion to amend her petition was not a modification of "the original civil penalty assessment" as contended by Mammoth. *Id.* at 3. In this regard, the Secretary summarized the relevant procedural history: "the Administrative Law Judge did not elevate the penalties. He merely permitted the Secretary to amend her Petition to seek higher *proposed* penalties." *Id.* at 4, fn.4 (emphasis in original).

Under Rule 76, interlocutory review is appropriate when the review sought involves a controlling question of law, and immediate review will materially advance the final disposition of the proceeding. Sections 105(a) and 110(a) of the Act empower the Secretary *to propose* civil penalties. 30 U.S.C. §§ 815(a) and 820(a). Section 110(i) of the Act delegates the *de novo* authority of the Commission *to assess* civil penalties. 30 U.S.C. § 820(i); *See also Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000). The authorities delegated by the Act to the Secretary and the Commission with respect to the imposition of civil penalties are separate and distinct. The Commission's statutory *de novo* authority to assess civil penalties in contested cases does not preclude, or otherwise restrict, the exercise of the Secretary's statutory authority to amend the penalties she seeks to impose.

ORDER

Thus, given the unambiguous statutory provisions and case law noted above, the issues raised by Mammoth present neither a novel nor controlling question of law. The Secretary may modify her initial civil penalty proposal at any time prior or subsequent to a Commission hearing on the merits. *Consolidation Coal*, 2 FMSHRC at 5; *See also Spartan Mining Co., Inc.*, 29 FMSHRC 465, 467 (June 2007) (ALJ) (Sec'y proposing to increase the civil penalty in her post-hearing brief). Consequently Mammoth has not presented any controlling question of law for which immediate review is required or otherwise appropriate. As such, **IT IS ORDERED** that Mammoth's Motion for Certification for Interlocutory Review **IS DENIED**.

Accordingly, **IT IS FURTHER ORDERED** that Mammoth's Motion to Stay the hearing in these matters **IS ALSO DENIED**. Absent any contrary direction by the Commission in the event Mammoth seeks its review, the trial proceedings will commence **at 9:00 a.m. on Tuesday, September 13, 2011**, at the U.S. Federal Courthouse, Room B 6200, 300 Virginia Street, Charleston, West Virginia.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

September 21, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. LAKE 2008-666
	:	A.C. No. 11-02752-161958
	:	Docket No. LAKE 2008-667
	:	A.C. No. 11-02752-161939
v.	:	Docket No. LAKE 2009-6 A
	:	A.C. No. 11-02752-162890-01
AMERICAN COAL COMPANY, Respondent	:	
	:	Mine: Galatia Mine

**ORDER GRANTING IN PART
RESPONDENT'S MOTION TO COMPEL**

These cases are before me upon Petitions for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act") 30 U.S.C. § 815(d). On August 15, 2011 Respondent filed a Motion to Compel asserting that the Secretary's refusal to produce certain documents sought in discovery is based on an improper invocation of the various asserted privileges. The Secretary filed her response on September 19, 2011 and, in a subsequent conference call, the Secretary was directed to produce the documents at issue for *in camera* review by the undersigned judge. Those documents were produced on September 20, 2011. For the reasons that follow, the Motion to Compel is granted in part. Additional information is required in order to rule further on the motion.

The Special Assessment Review Forms

The Secretary maintains that the Special Assessment Review Forms are protected from disclosure by the deliberative process privilege. In *In re: Contests Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 990-93 (June 1992), the Commission described the scope of the deliberative process privilege as follows:

This privilege protects the consultative functions of government by maintaining the confidentiality of "advisory opinions, recommendation and deliberations comprising parts of a process by which governmental decisions and policies are formulated. The privilege attaches to inter-and intragency [sic] communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy.

Id at 992 (quoting *Jordan v. U.S. Dep't of Justice*, 591 F. 2d 753, 772 (D.C. Cir. 1978)).

While the documents sought to be protected must ordinarily be pre-decisional, *Id* at 992, a document that is pre-decisional at the time of its creation can lose that status if it is adopted formally

or informally, as the agency position on an issue or is used by the agency in its dealings with the public. *Coastal States Gas Corp., v. Dep't of Energy*, 617 F.2d 854 at 866 (D.C. Cir. 1980); *Sec'y of Labor v. Webster County Coal, LLC*, 2004 WL 904753, at *1 (FMSHRC February 23, 2004) (ALJ). In *N.L.R.B. v. Sears, Roebuck & Company*, 421 U.S. 132, 151-52 (1975), the Supreme Court noted when the position is adopted by the agency, "the reasoning becomes that of the agency and becomes its responsibility to defend." 421 U.S. at 161. The Court further recognized that the purpose of the deliberative process privilege of encouraging frank communication in order to effectuate better decisions is served because, "agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency." *Id.*

Within this framework of law, I therefore find that the documents identified as Special Assessment Review Forms, submitted for my *in camera* review are all outside the ambit of the deliberative process privilege because the positions taken in the documents were adopted as the agency's position regarding the charging documents at issue.

I further note that, in particular, the documents identified as Special Assessment Review Forms contain the inspector's factual basis for his recommendations to the Secretary. The Commission has recognized that "purely factual material that does not expose an agency's decision making process does not come within the ambit of privilege." *Dust cases*, 14 FMSHRC at 993. Moreover, upon the Secretary's acceptance by issuing citations, the inspector's recommendations and those of his supervisors become the agency's position and any claim to the deliberative process privilege is thereby lost. *CDK Contracting Co., v. Sec'y of Labor*, 25 FMSHRC 88, 90 (Feb. 2003) (ALJ), *Aggregate Industries v. Sec'y*, 25 FMSHRC 88,90 (Feb. 2003) (ALJ).

Accordingly, while I am today returning to counsel for the Secretary by Federal Express overnight delivery all of the documents submitted to me for *in camera* review, I direct that copies of all of the documents identified as Special Assessment Review Forms be provided to Respondent forthwith.

The Memoranda

The Secretary has further provided for *in camera* review eight memoranda she claims are protected from disclosure under the attorney-client, work product and deliberative process privileges¹. While it appears that the former two privileges may apply to these documents, additional evidence is necessary before a definitive ruling can be made i.e. whether the documents were prepared in anticipation of litigation or trial for purposes of the work product privilege and whether the criteria for the attorney-client privilege has been met, namely: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a)

¹ A memorandum from Regional Solicitor Gestrin to District Manager Phillips purportedly dated April 18, 2008 and purportedly consisting of twelve pages is actually dated June 6, 2008 and consists of fourteen pages.

by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.” See *Hawkins v. Stables*, 148 F.3d 379, 383 (4th Cir. 1998)(citing *U.S. v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982).

Under the circumstances, I cannot now make findings on the privileges claimed by the Secretary to bar disclosure of the noted memoranda. The Secretary may provide the additional evidence by affidavit to support her claimed privileges but must do so on or before September 26, 2011.

/s/ Gary Melick
Gary Melick
Administrative Law Judge
202-434-9977

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 22, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2009-1118
Petitioner	:	A.C. No. 15-19011-184115
	:	
v.	:	
	:	
GRAND EAGLE MINING, INC.,	:	Mine: Grand Eagle Prep Plant
Respondent	:	

**ORDER DENYING PETITIONER’S MOTION
FOR SIMPLIFIED PROCEEDINGS**

This case is before me on a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (the “Act”). The Secretary has filed a Motion to Designate for Simplified Proceedings claiming that the docket fits the criteria set forth in Commission Procedural Rule 101 for simplified proceedings designation. 29 C.F.R. § 2700.101. Respondent has filed a motion in opposition. For the following reasons, I deny the Secretary’s motion.

Factual and Procedural Background

On March 10, 2009, MSHA inspector Keith Ryan inspected Grand Eagle Mining, Inc.’s Grand Eagle Prep Plant mine. Ryan completed a contested search of a electrician’s personal vehicle, a Dodge Ram 1500 truck, that was located on mine property, and then issued Citation No. 8494369 finding that the truck was not provided with a usable fire extinguisher that had a current examination.

On May 20, 2010, the Secretary filed a Petition for Assessment of Civil Penalty for \$100 pursuant to Section 104(a) of the Act. On June 10, 2010, a timely Answer was filed by the Respondent along with request for discovery.

On January 20, 2011, I issued a Pre-Hearing Order directing the parties to begin settlement negotiations and report back to me within 60 days. On July 14, 2011, I convened a conference call with the parties. The Secretary claimed that the inspection of the truck was valid and lawful because the Respondent gave the owner a “travel stipend.” Respondent claimed that the “search” was an unreasonable search and seizure under the Fourth Amendment. Any stipulated facts or Motion for Simplified Proceedings were due on August 1, 2011.

On July 28, 2011, the Secretary submitted the instant Motion to Designate for Simplified Proceedings and a Request for Subpoena Duces Tecum. On August 5, 2011, the Respondent submitted its Response in Opposition.

Disposition

The Secretary's argues that Docket No. KENT 2009-1118 meets the criteria set forth in Commission Rule 101 regarding Designation for Simplified Proceedings. 29 C.F.R. § 2700.101. Rule 101 requires that cases designated for Simplified Proceedings not involve fatalities, injuries, or illnesses, and generally include one or more of the following characteristics: the case involves 104(a) citations issued under the Mine Act; the proposed penalties are not specially assessed under 30 CFR 100.5; the case does not involve complex issues of law or fact; the case only involves a limited number of citations to be determined by the Judge; the case involves a limited penalty amount; the case involves a hearing of limited duration; the case does not involve only legal issues; and the case does not involve any expert witnesses. 29 C.F.R. § 2700.101.

Although most of these criteria are met here, the Respondent issued discovery before the Secretary requested the simplified proceedings designation. In addition, the constitutional issue raised by the Respondent is arguably a complex issue of law that militates against Docket No. KENT 2009-1118 being designated as a simplified proceeding. In addition, it is unclear whether a personal automobile on mine property or used by a miner to perform certain tasks is covered by 30 C.F.R. § 77.1110 dealing with examination and maintenance of firefighting equipment, as set forth in Subpart L entitled "Fire Protection." *Cf. Empire Iron Mining Partnership*, 19 FMSHRC 1912, 1923 (Dec. 1997) (Judge Hodgdon) (describing issue of whether standard covered miner's failure to maintain control of personal vehicle on mine property as one of first impression). In these circumstances, I find it inappropriate to designate this matter for simplified proceedings at this juncture.

In light of the foregoing, the Secretary's Motion to Designate for Simplified Proceedings is **DENIED**.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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