JANUARY AND FEBRUARY 2006

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

JANUARY AND FEBRUARY 2006

Review was granted in the following cases during the months of January and February:

Secretary of Labor, MSHA v. Hanson Aggregates New York, Inc., Docket No. YORK 2005-22-M. (Judge Hodgdon, November 21, 2005)

Secretary of Labor, MSHA v. Speed Mining, Inc., Docket Nos. WEVA 2005-20-R, etc. (Judge Weisberger, December 2, 2005)

Review was denied in the following cases during the months of January and February:

Crimson Stone v. Secretary of Labor, MSHA, Docket No. SE 2005-325-RM. (Judge Melick, December 30, 2005)

National Cement of California v. Secretary of Labor, MSHA and Tejon Ranchcorp., Docket No. WEST 2004-182-RM. (Judge Feldman, January 10, 2006)

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 17, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2006-63
v.	:	A.C. No. 46-08551-62061
MARFORK COAL COMPANY, INC.	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, 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. (2000) ("Mine Act"). On December 22, 2005, the Commission received from Marfork Coal Company, Inc. ("Marfork") a motion[1] made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On July 14, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Marfork a proposed penalty assessment that included a proposed penalty for a citation issued to the company by MSHA on June 6, 2005, Citation No. 7242070. Mot. at 1. Marfork states in its motion that although the company's safety director indicated on the assessment form the company's intention to contest the penalty proposed for Citation No.

[1] Included with Marfork's motion is a copy of the proposed penalty assessment and underlying citation at issue, and an unsworn statement by Jonah Bowles, Marfork's Safety Director.

7242070 and gave the form to the company's administrative staff for mailing, "through mistake and inadvertence, Marfork failed to mail in its contest." *Id.* and Statement of J. Bowles, Safety Director. In a response to Marfork's motion, the Secretary of Labor states that she requires additional information before she can express her position on the operator's motion. Sec'y Resp. at 1-2.

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

Having reviewed Marfork's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Marfork's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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January 23, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2006-70-M
	:	A.C. No. 46-08972-74689
v.	:	
H.B. MELLOTT ESTATE, INC.	:	

ORDER

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On January 10, 2006, the Commission received from H.B. Mellott Estate, Inc. ("Mellott") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On January 12, 2006, Mellott filed a Withdrawal of Motion to Reopen Penalty Assessment in which the company requested that it be allowed to withdraw its motion to reopen. In support of this request, Mellott states that the Department of Labor's Mine Safety and Health Administration advised Mellott that the "assessment matter" that was the subject of Mellott's January 10 motion was in fact "still open." Mot. at 1. Mellott states that it subsequently filed a contest of the penalty at issue on January 11, 2006. *Id.*

In light of the foregoing, the Commission grants Mellott's request to withdraw its motion to reopen. 29 C.F.R. § 2700.11. Accordingly, this proceeding is dismissed.

For the Commission:

Michael F. Duffy, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

February 6, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2005-116-M
v.	:	A.C. No. 19-01114-56147
R.J. CINCOTTA COMPANY, INC.	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, 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. (2000) ("Mine Act"). On August 18, 2005, Chief Administrative Law Judge Robert J. Lesnick issued a show cause order to R.J. Cincotta Company, Inc. ("Cincotta") stating that it had failed to file an answer to a petition for penalty assessment sent to it by the Secretary of Labor on July 6, 2005, and that Cincotta would be found in default if it did not file an answer or show good cause for not doing so within 30 days of the order. On November 2, 2005, Chief Judge Lesnick issued an order finding that Cincotta had failed to respond to the show cause order and entering a judgment by default for the Secretary of Labor.

On January 17, 2006, the Commission received from Cincotta a letter stating that the company never received the order of default. The letter also states "we never heard back for [sic] an order to respondent to show cause" (indicating that the company may be confused as to its status as the respondent in these proceedings). Finally, the letter states that Cincotta "would still like to contest this [penalty]." The Secretary states that she does not oppose Cincotta's motion.

The judge's jurisdiction in this matter terminated when his decision was issued on November 2, 2005. 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). The judge's order became a final decision of the Commission on December 12, 2005.

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 inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 787 (May 1993). 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 Cincotta's motion, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists to excuse Cincotta's failure to respond to the show cause order, and for further proceedings as appropriate.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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February 23, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2006-100-M
ADMINISTRATION (MSHA)	:	A.C. No. 26-02478-68079
	:	
v.	:	Docket No. WEST 2006-104-M
	:	A.C. No. 26-02000-67992
SOUTHERN NEVADA PAVING	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, 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. (2000) ("Mine Act"). On January 25, 2006, the Commission received from the Secretary of Labor a motion to reopen two consolidated penalty cases which had been dismissed by Administrative Law Judge Jacqueline Bulluck in an order dated December 23, 2005. Judge Bulluck dismissed the cases, Docket Numbers WEST 2006-100-M and WEST 2006-104-M, upon a motion made by the Secretary, filed in the form of a letter dated December 6, 2005. In this motion to dismiss, the Secretary stated that "the underlying citations have been vacated."

In her motion to reopen, the Secretary states that in the caption to her December 6, 2005, motion to dismiss, the wrong docket numbers were used, namely, the dockets that she now seeks to reopen. Mot. at 3. The record reflects that, in a letter dated January 13, 2006, counsel for the Secretary attempted to advise Judge Bulluck of this error.[1] By then, however, the judge had issued the order of dismissal.

The judge's jurisdiction in the instant penalty cases (WEST 2006-100-M and WEST 2006-104-M) terminated when her order was issued on December 23, 2005. 29 C.F.R.

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[1] Southern Nevada Paving filed a response to the Secretary's January 13 letter in which the company opposed the Secretary's request that the judge, in effect, withdraw her order of dismissal. The company did not file a response to the Secretary's motion to reopen.

§ 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). The Commission has not directed review of the judge's order, which became a final order of the Commission on February 1, 2006.

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 inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 787 (May 1993).

Having reviewed the Secretary's motion, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists to excuse the Secretary's error that led to the dismissal of the two instant cases, and for further proceedings as appropriate.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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February 27, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. PENN 2006-75-M
ADMINISTRATION (MSHA)	:	A.C. No. 36-07156-47898
	:	
v.	:	Docket No. PENN 2006-76-M
	:	A.C. No. 36-07156-67440 A
WILLIAMS & SONS	:	
SLATE & TILE, INC.	:	Docket No. PENN 2006-77-M
	:	A.C. No. 36-07156-70601
	:	
	:	Docket No. PENN 2006-78-M
	:	A.C. No. 36-07156-45867

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, 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. (2000) ("Mine Act").[1] On January 30, 2006, the Commission received a letter from Robert Williams, Sr., of Williams & Sons Slate & Tile, Inc. ("Williams & Sons") requesting that the Commission reopen four penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On February 6, 2006, the Secretary of Labor filed a Response to Request to Reopen Penalty Assessments (a clarification was subsequently filed on February 15). Williams & Sons did not reply to the Secretary's response.

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] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers PENN 2006-75-M, PENN 2006-76-M, PENN 2006-77-M, and PENN 2006-78-M, all captioned *Williams & Sons Slate & Tile, Inc.*, and all involving similar procedural issues. 29 C.F.R. § 2700.12.

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

The Secretary states that the Department of Labor's Mine Safety and Health Administration ("MSHA") issued the following proposed assessments to Williams & Sons on the dates noted: A.C. No. 36-07156-45867 (PENN 2006-78-M), issued on December 16, 2004 (received by the operator on December 28, 2004, and becoming a final Commission order on January 27, 2005);[2] A.C. No. 36-07156-47898 (PENN 2006-75-M), issued on January 13, 2005; A.C. No. 36-07156-67440 A (PENN 2006-76-M), issued on September 15, 2005; and A.C. No. 36-07156-70601 (PENN 2006-77-M), issued on October 28, 2005. In his letter, Williams states that his health has been "day to day." No further explanation is offered regarding his company's failure to timely contest the penalty proposals at issue, although the letter states that Williams & Sons wishes "to appeal the citations" underlying the penalty proposals. The Secretary states that she does not have enough information to determine whether reopening these dockets may be warranted.

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

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[2] Williams & Sons filed its request to reopen A.C. No. 36-07156-45867 (at issue in Docket No. PENN 2006-78-M) on January 26, 2006, the day the request was mailed. *See* 29 C.F.R. § 2700.5(d) (with a few exceptions noted including petitions for discretionary review and certain procedural motions, "[w]hen filing is by mail, filing is effective upon mailing"). The company's request is thus not time barred under the one-year principles set forth in *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

Having reviewed Williams & Sons's request for relief, in the interests of justice, we remand these matters to the Chief Administrative Law Judge for a determination of whether good cause exists for Williams & Sons's failure to timely contest the penalty proposals and whether relief from the final orders should be granted. If it is determined that such relief is appropriate, these cases shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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February 27, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2006-86
	:	A.C. No. 46-08798-72387
v.	:	
IO COAL COMPANY, INC.	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, 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. (2000) ("Mine Act"). On February 6, 2006, the Commission received from IO Coal Company, Inc. ("IO Coal") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On September 16, 2005, IO Coal timely contested Citation No. 7240550, issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to IO Coal's Europa Mine. Mot. at 1. The contest proceeding is currently before Commission Administrative Law Judge Avram Weisberger. *Id.* at 1-2 (citing Docket No. WEVA 2005-235-R). When MSHA subsequently proposed a penalty for Citation No. 7240550, IO Coal paid it along with 33 other penalty assessments. Mot. at 2. The company now contends that it made the payment inadvertently, and asserts that it had always intended to contest both the validity of the citation and any related penalty. *Id.*; Aff. of Timothy Beckner. The Secretary states that she does not oppose IO Coal's request for relief.

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

Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787.

Having reviewed IO Coal's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for IO Coal's failure to timely contest the penalty proposal, and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
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January 10, 2006

NATIONAL CEMENT COMPANY OF CALIFORNIA, INC., Contestant	:	CONTEST PROCEEDING Docket No. WEST 2004-182-RM Citation No. 6361036; 02/09/2004
TEJON RANCH CORP, Intervenor	:	
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Lebec Cement Plant Mine ID: 04-00213

DECISION ON REMAND

Before: Judge Feldman

This contest matter concerns Citation No. 6361036 that was issued for an alleged violation of the Secretary of Labor's ("the Secretary's") mandatory safety standard in 30 C.F.R. § 56.9300(a) that requires the construction of berms or guardrails on the banks of roadways where significant drop-offs exist. The citation involves a private paved 4.3 mile long two-lane road, beginning at State Route 138 in northern Los Angeles County, and ending at the entrance to National Cement Company of California, Inc.'s ("National Cement's") Lebec Plant. National Cement, the non-exclusive easement grantee, and Tejon Ranch Corporation ("Tejon"), as grantor and intervenor, assert that the private road is not subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").

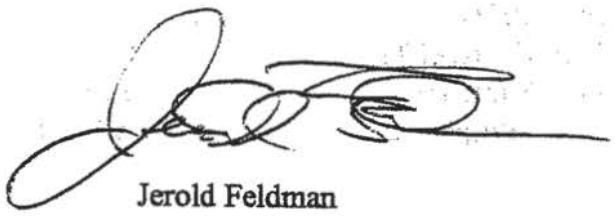
The initial decision in this matter granted the Secretary's motion for summary decision and determined the entire 4.3 mile long private access road to the Lebec Plant was subject to Mine Act jurisdiction because the road was used predominately by mine related vehicles. 27 FMSHRC 84 (Jan. 2005) (ALJ). The Commission reversed and remanded, holding that only the segment of the private roadway over which National Cement has exclusive use is a "coal or other mine" as contemplated by section 3(h)(1) of the Mine Act. 30 U.S.C. § 802(h)(1). 27 FMSHRC 721 (Nov. 2005). Consequently the Commission directed that I determine the point on the road ". . . beyond which traffic authorized by Tejon but unrelated to National Cement's facility ceases." *Id.* at 735.

On December 15, 2005, the parties filed a joint stipulation resolving all issues of fact concerning the identification of any portion of the road beyond which National Cement has exclusive use. The stipulation states:

> The Secretary, National Cement and Tejon hereby agree and stipulate that no segment of the road between State Highway 138 and the entrance to the cement plant is used exclusively by National Cement and its customers.

ORDER

Consistent with the Commission's remand, in light of the joint stipulation reflecting that National Cement lacks exclusive use over any portion of the private roadway, **IT IS ORDERED** that Citation No. 6361036 **IS VACATED** for lack of Mine Act jurisdiction.



Jerold Feldman
Administrative Law Judge

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January 20, 2006

FLOYD DOWLIN, III, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 2004-492-D
	:	DENV-CD 2004-09
v.	:	
	:	Mine I.D. 24-01747
	:	Rosebud #6 Mine
WESTERN ENERGY COMPANY, Respondent	:	

DECISION

Appearances: Amber Haff, Laurel, Montana, for Complainant;
Laura E. Beverage, Esq., Jackson Kelly, Denver, Colorado,
for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Floyd Dowlin, III, against Western Energy Company ("Western Energy"), under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). Mr. Dowlin contends that he was terminated from his employment because he complained about safety issues at the mine. An evidentiary hearing was held in Billings, Montana. I entered a bench decision at the end of the hearing dismissing the complaint of discrimination.

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

Western Energy operates the Rosebud #6 Mine, a large open pit coal mine in Rosebud County, Montana. Mr. Dowlin filed a discrimination complaint with the local office of the Department of Labor's Mine Safety and Health Administration ("MSHA"). The Secretary determined that the facts disclosed during her investigation into Dowlin's discrimination complaint do not constitute a violation of section 105(c) of the Mine Act. On September 23, 2004, Dowlin filed this proceeding on his own behalf under section 105(c)(3) of the Mine Act. He alleges that he suffered adverse actions because he complained about safety conditions at the mine. He was represented by his daughter, who is not an attorney.

Dowlin worked at the Rosebud #6 Mine for about 15 years. During that period, he operated many different types of mobile equipment but he preferred to operate bulldozers. In late August 2002, Dowlin was operating a water truck when he observed the boom of a dragline

swing over an open mine road. (Tr. 54, 111). He stated that a coal haul truck drove under the boom. He reported this condition to management over the mine radio. According to Dowlin, a representative from the company safety department investigated the condition but he did not take any action. As a consequence, Dowlin called the local MSHA office to complain about the condition he observed. An MSHA inspector investigated Dowlin's complaint and determined that no violation of a safety standard occurred. (Tr. 57). MSHA's lack of enforcement angered Dowlin, so he called MSHA again. Another MSHA inspector visited the site and wrote a non-significant and substantial citation alleging a violation of 30 C.F.R. § 77.1607(c), as follows: "verbal testimony revealed coal haul truck #148 passed under the boom of #124 dragline while the dragline was in operation." (Ex. C-2).

Between October 7, 2002 and December 6, 2002, Dowlin was on medical leave for two months because he had broken his ribs. (Tr. 59, 115). When he returned to work, he operated a water truck and he was scheduled to operate a coal haul truck. (Tr. 61, 116). Dowlin preferred not to operate coal trucks because he considered it to be "boring" and he did not believe that coal truck drivers make as much money even though the rate of pay was the same. (Tr. 61-62, 128, 143-44). Dowlin believed that haul truck drivers were not given as many opportunities to work overtime. He also believed that his assignment to operate a haul truck violated the Family Medical Leave Act. (Tr. 63). He liked operating a reclamation dozer because "you're pretty well left alone" on that job. (Tr. 142). Dowlin likes to work independently in an area with minimal supervision.

Dowlin believes that Jack Rosander, production superintendent, and Glenn Logan, a production supervisor, were instrumental in reassigning him to the coal haul crew and that this reassignment was in retaliation for his safety complaint. Dowlin testified that after he complained to them about the assignment, he was reassigned to operate a dozer. (Tr. 64, 117).

Between December 2002 and March 2004 Dowlin was primarily scheduled to operate a dozer on the reclamation crew. (Tr. 118-19). He operated other equipment during that period as assigned by management. *Id.* On the graveyard shift of March 2, 2004, Dowlin was scheduled to work with Harry Stevenson to help load a train. (Tr. 64). Both men operated dozers to push coal into the feeders. A feeder is an opening in the ground that consists of a square concrete box that is lined with quarter inch flat metal plate. (Tr. 232). There are about 15 feeders in the area. (Ex. R-7). Coal falls through these feeders onto a belt that transports the coal to the top of the tipple. Dowlin was operating a D-10 Caterpillar and Stevenson was operating a larger D-11. Dowlin testified that visibility was very poor that night and that steam was rising from the coal. The feeders were covered with coal and it was impossible to see where they were. (Tr. 65, 122). The metal lining and lips of several feeders were extensively damaged that night. Dowlin and Stevenson were shown the damaged feeders at 8:00 a.m. at the end of their shift. (Tr. 122). Dowlin believes that any number of people could have damaged the feeders before his shift but that he was singled out for punishment. (Tr. 65-66, 123). He also testified that other people have damaged the feeders, but he is the only employee who has been disciplined for damaging the feeders. He stated that management based its conclusion that he was responsible for the damage

solely on measurements taken of track marks made by the dozer he was operating. (Tr. 66-67). Dowlin believes that it is more likely that Stevenson damaged the feeders that night. (Tr. 67). Dowlin attended a fact-finding meeting with management on the morning of March 3, 2004. (Tr. 123). He admitted at the meeting that he had run over the lip of one or more feeders that night. Dozer operators are required to keep some coal over the feeder area and are not supposed to scrape down to bare dirt. Dowlin received a verbal warning for the incident. (Tr. 67-68, 124). He admitted telling Terry Sprenger, the human resources manager, after the meeting that he did not disagree with the verbal warning. (Tr. 124-25).

Dowlin was told that he would be assigned to work on the coal haul crew as a result of the feeder incident. (Tr. 69). He discussed the matter with Jack Rosander. According to Dowlin, Rosander told him that he was taken off the dozer because of past incidents including the feeder damage. Rosander also cited the fact that Dowlin had run over a dragline cable a few years earlier. Dowlin responded that another employee had run over a dragline cable three times in less than a year. Dowlin told Rosander that this inconsistent discipline demonstrates that he was discriminated against in violation of the Mine Act. He testified that other employees damaged equipment without receiving any discipline. (Tr. 144-45). Dowlin maintains that he was reassigned to drive coal haul trucks in retaliation for his 2002 safety complaint.

After this meeting with Rosander, Dowlin talked to Terry Sprenger. (Tr. 70). Sprenger apparently told Dowlin that Rosander and Joe Micheletti, a facilities manager, arranged for the change in his work assignment, but Sprenger told Dowlin that he was not discriminated against as a result of his safety complaint. (Tr. 71).

Late in the day on March 3, 2004, Dowlin went to the mine to work the graveyard shift that started at midnight. Dowlin was "severely upset, severely depressed" because of the way the feeder incident had been handled by the company. (Tr. 72). Dowlin testified that because he has a history of "depression and mental problems," he "just wasn't quite [in a] right mind." *Id.* He decided that if the posted schedule showed him working on the coal haul crew the following week, he would turn in a request for medical leave because he "was on the verge of a mental breakdown." (Tr. 72, 129). When Dowlin saw that he was scheduled to drive a haul truck starting the following Monday, he turned in a medical leave request and left the mine. He testified that he would not have turned in the medical leave request if the posted schedule indicated that he would be operating the dozer. (Tr. 129). His regular shift boss was not there, so he wrote a supervisor's name on the envelope and placed the medical leave form where the time cards are kept in the crew shack. (Tr. 131).

Jim Holenbeck, the relief shift boss on the graveyard shift, was an hourly employee and a member of the local Operating Engineers union with Dowlin. Holenbeck told Dowlin what dozer he would be operating that night. (Tr. 74). Dowlin testified that he refused to "acknowledge" Holenbeck because he has "no use for that man." *Id.* Dowlin went to his locker, removed his personal belongings, and put them in his truck. He then told Holenbeck that he would have to find someone to replace him because he was going home. (Tr. 76, 136). Dowlin

did not tell Holenbeck that he had requested medical leave. (Tr. 135-36). When Holenbeck asked why he was leaving, Dowlin testified that he replied "because of brown nosing rotten spanky wanky snitches like you." (Tr. 76-77). Dowlin also remembers that he told Holenbeck that he "might have to tear his head off for snitching"and "whip his ass." (Tr. 77, 132, 138). Dowlin admitted that he threatened Holenbeck. (Tr. 131-32).[1]

Dowlin then went home to rest. When he woke up he was feeling "depressed and suicidal" so he called to make an appointment with his doctor. (Tr. 77). After meeting with the doctor, he received a referral to a psychiatrist and the doctor wrote a letter recommending that Dowlin be excused from work because of his mental condition. (Tr. 78; Ex. C-3). Dowlin checked into the psychiatric ward of the Deaconess Hospital in Billings. He was in the hospital about four or five days. (Tr. 84). His diagnosis was "major depression, recurrent with mild psychotic features" and "occupation related problems." (Ex. C-5, p. 2). He agreed to see a counselor as a condition of his release. Dowlin had therapy sessions with several counselors. (Tr. 84-5, 88-89, Exs. C-6, C-7).

When Dowlin left the mine just before the start of his shift, Western Energy assumed that he had quit. Mr. Sprenger wrote a letter to Dowlin which stated that the company had been "notified that you tendered your verbal resignation on March 3, 2004, at approximately 11:30 p.m. to Mr. Jim Holenbeck, acting supervisor." (Ex. C-8). Dowlin testified that he did not tell Holenbeck that he was quitting and he left the request for medical leave in the crew shack. (Tr. 94). Dowlin testified that, because he was a faithful 15 year employee at Western Energy, Mr. Sprenger should have called to find out why he left the mine. The fact that he was never called demonstrates that Western Energy was trying to "get rid" of him "due to safety factors." (Tr. 92). He never received a response to the request for medical leave. Dowlin maintains that the company terminated him for raising safety issues.

After he was released from the hospital, Dowlin contacted his union representative to set up a meeting with management. He did not want his job back at that time, but he wanted the company to honor his request for medical leave. (Tr. 97, 126-27). Dowlin testified that the union negotiated a settlement in which he would receive $3,600 and have his medical leave request honored, but he turned the settlement down. (Tr. 97, 127, 143).

On cross-examination, Dowlin admitted that under the collective bargaining agreement a miner does not have the right to operate a particular type of equipment and that management may assign and reassign an employee to operate any other type of equipment for which he has received training. (Tr. 112). He also admitted that Western Energy is not required to make job assignments based on seniority. (Tr. 151). Mr Dowlin was task trained to operate a wide range of equipment at the mine including coal haul trucks, dozers, and scrapers. (Tr. 113; Ex. R-3).

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[1] In January 2004, Dowlin damaged a metal culvert as he removed it with his dozer. He called Holenbeck a snitch on March 3 because Dowlin believes that Holenbeck told management about the damage. Dowlin was not disciplined for the damage. (Tr. 132-35).

Dowlin admitted that he could have volunteered for overtime while he was a coal haul truck operator, but he was guaranteed work on three weekends as a reclamation dozer operator. (Tr. 149, 152-53).[2]

Jim Holenbeck worked for Western Energy for 25 years before he retired. (Tr. 203). He was a scraper blade operator in March 2004. Because he was a certified mine foreman he filled in as a supervisor on an as-needed basis. He was the acting supervisor on the graveyard shift that started at midnight. He recalls that Mr. Dowlin asked him to meet him outside before the shift started. (Tr. 204). Holenbeck recalls that Dowlin told him that he was quitting. (Tr. 205). As Dowlin walked to his pickup truck, Holenbeck asked Dowlin what was the matter. Dowlin told him that he would not work for anyone who ratted on him. *Id.* Holenbeck testified that when he tried to tell Dowlin that he did not rat on him, Dowlin replied that he should whip his butt and he drove off. At the suggestion of another supervisor, Holenbeck wrote a memo describing what happened and left it on Rosander's desk. (Tr. 205-06). In the memo, he wrote that Dowlin told him he was quitting. (Ex. R-4).

Jack Rosander was the production superintendent in March 2004. (Tr. 214). He testified that under the collective bargaining agreement, employees are assigned to equipment on a weekly basis without regard to employee seniority. (Tr. 216; Ex. R-5, p. 13). He testified that the coal crew made as much if not more money than dozer operators in 2004. He further testified that he prints out the weekly crew schedule on Wednesday of the preceding week. (Tr. 220).

Rosander testified that he investigated the damage to the feeders and took photographs. (Tr. 228; Ex. R-8). The photographs were taken the morning after Mr. Dowlin's graveyard shift. (Tr.230). Some of the feeders were severely damaged in that the metal lining had been bent back. (Tr. 232). The damage was more extensive than he could ever remember. (Tr. 236, 251-52; Ex. R-8 p. 9). In addition, quite a bit of dirt had been pushed into the feeders which affects coal quality. (Tr. 233). By looking at the dozer tracks and measuring their width, Rosander determined that the damage had been caused by Dowlin's smaller dozer. In addition, Rosander testified that Mr. Stevenson told him that Dowlin had been working around the feeders that were damaged. (Tr. 235). Stevenson told Rosander that he was working up on coal piles at the east end and Dowlin was working on the west end near the damaged feeders. (Tr. 263). Rosander also determined that the previous crew had not damaged the feeders. Rosander testified that

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[2] Five miners also testified on behalf of Dowlin. Most of the testimony concerned the events of late August 2002 when the boom of a dragline swung over a mine road. Several miners, including a union steward, testified that they were not aware of anyone else being disciplined for damaging feeders. (Tr. 50, 156, 176). There was also testimony that miners had been disciplined for damaging other equipment. (Tr. 50, 188). One miner testified that if an employee does something that management does not agree with, he will likely be assigned to a job that he does not like. (Tr. 174). Another miner testified that an employee is permitted to slow down or shut down his equipment if visibility is too poor to work safely. (Tr. 168). Another miner testified that he preferred to operate coal haul trucks rather than work on a dragline.

when he talked to Dowlin about the damage, Dowlin acknowledged that he damaged the feeders. (Tr. 237).

Following his investigation, Rosander determined that Dowlin should be transferred to another position. (Tr. 238). Damaging the feeders has a negative effect on coal production. He reassigned Dowlin to a coal hauling position. (Tr. 239). He did not expect that this transfer would reduce the amount of money Dowlin would earn. (Tr. 261).

Rosander does not believe that the boom of the dragline extended over the roadway in August 2002. (Tr. 239-43). He bases this conclusion on his understanding of the configuration of the roadway and the position of the dragline on that day. MSHA Inspector Priest did not issue a citation. A few days later, MSHA Inspector Keller issued a citation for the condition. The company paid the $55.00 penalty proposed by the Secretary because it was not worth challenging. (Tr. 244). Rosander denied that Dowlin was transferred to the coal haul trucks in December 2002 and in March 2004 as a result of his complaint about the boom of the dragline in August 2002. (Tr. 245).

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978) ("*Legis. Hist.*")

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

A. Protected Activity

I find that Mr. Dowlin engaged in protected activity. He testified that he saw the boom of a dragline swing over a roadway and a truck pass under the boom. For purposes of this decision, I credit this testimony and find that it qualifies as protected activity.

B. Adverse Action

1. Verbal Discipline and Reassignment to Coal Haulage Trucks.

Dowlin genuinely believes that the company required him to operate coal haul trucks in December 2002 and March 2004 in retaliation for his August 2002 safety complaint. The company contends that these equipment assignments were made in the ordinary course of business and that they were not "adverse" because his rate of pay did not change. In addition, it maintains that his total wages were not adversely affected by these assignments because he was still eligible for overtime.

It is clear that Dowlin saw these actions as "adverse" to his interests. The company knew that he preferred to operate a reclamation dozer and Dowlin sincerely believes that he was taken off the dozer to punish him. The December 2002 assignment to operate a coal haul truck cannot be construed as adverse because Dowlin was reassigned to the dozer as soon as he requested it.

With respect to his March 2004 assignment to a coal haul truck, Dowlin believes that he was treated differently from other employees who had damaged equipment. He pointed to a number of employees who he believed had caused significant damage to equipment. He also contends that the company had insufficient cause to blame him for the damage, which shows that management had a discriminatory motive. The company maintains that damage to the feeders was quite substantial and that it had more than enough evidence to determine that Dowlin caused the damage. It relies on the fact that Dowlin admitted that he damaged one or more feeders that evening. Western Energy contends that it was within its rights under the collective bargaining agreement to give Dowlin a verbal warning and to reassign him to a haul truck following the feeder incident. Rosander did not believe that this reassignment would reduce his pay and I credit his testimony on that issue. Thus, I find that Dowlin did not suffer an adverse action when he was assigned to operate a coal haul truck the following week. Nevertheless, I give Dowlin the benefit of the doubt and, for purposes of this decision, I will assume that his verbal warning and reassignment to operate coal haul trucks in March 2004 was an adverse action.

In determining whether a mine operator's adverse action is motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the

Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant.

Western Energy had knowledge of the protected activity. Although there was some hostility to Dowlin calling MSHA twice in August 2002, there is no evidence that this hostility continued into 2004. In addition, there is no evidence that the company was hostile to employees raising safety issues. One of Dowlin's witnesses testified that a miner is not required to operate equipment when visibility is too poor to work safely. (Tr. 168). There was no coincidence in time between the protected activity and the adverse action. Although Dowlin made claims of disparate treatment, I credit the testimony of Rosander that the damage to the feeders was more extensive than he had ever seen. He determined that Dowlin should be reassigned based on the damage caused, the dozer track marks, Stevenson's statements, and Dowlin's admission that he damaged at least one feeder. Rosander did not believe that his wages would be adversely affected. Although Dowlin believes that he was the only employee who was transferred to another piece of equipment for damaging the feeders, he admitted that other employees have been transferred for causing other equipment damage. (Tr. 137). He also testified that several employees who were not transferred caused more equipment damage than he did. (Tr. 144). All of his evidence on this issue is quite anecdotal and does not establish disparate treatment.

In a discrimination case, a judge may conclude that the justification offered by the employer for taking an adverse action "is so weak, so implausible, or so out of line with normal practice that it was mere pretext seized upon to cloak the discriminatory motive." *Chacon*, at 3 FMSHRC 2516. The Commission explained the proper criteria for analyzing an operator's business justification for an adverse action:

> The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just or "wise." The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into the motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis . . . , then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather the narrow statutory question is whether the

> reason was enough to have legitimately moved that operator to have disciplined the miner.

Chacon, at 3 FMSHRC 2516-17 (citations omitted).

I find that Western Energy's alleged business justification for reassigning Dowlin to operate a haul truck is credible. The reasons set forth by Western Energy for disciplining and reassigning Dowlin were "enough to have legitimately moved the operator to have" taken those actions. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). I conclude that the evidence establishes that the verbal warning and reassignment to operate haulage trucks was not motivated by Dowlin's protected activity

2. Separation from Employment.

Dowlin argues that he was terminated from his employment in March 2004 when he refused to operate coal haul trucks and requested medical leave for his mental condition brought on by the company's discriminatory actions. He contends that he did not tell Holenbeck that he was quitting and that he left his request for medical leave in the crew shack for the supervisor on the day shift. Given his 15 years of employment with the company, Mr. Sprenger should have inquired as to his intentions rather than assuming that he quit. He believes that he was fired by the company when it chose to ignore his request for medical leave. Dowlin also points to the intake notes of the physicians and counselors who treated him following his termination from employment which state that his mental condition was the result of his discriminatory treatment by his employer.

At the close of Dowlin's case, Western Energy moved for summary decision and asked that this case be dismissed. (Tr. 188). I took the motion under advisement. (Tr. 201). After the testimony of Holenbeck and Rosander, Western Energy renewed its motion. (Tr. 266). Following oral argument, I granted Western Energy's motion to dismiss. (Tr. 267-71).

Western Energy argues that Dowlin quit his job when he left the property just before midnight on March 3, 2004. (Exs. C-8, R-4). Holenbeck, the relief shift boss, believed that Dowlin had quit and he wrote a memo to his supervisor setting forth his conversation with Dowlin. In addition, the intake notes of the physician in Billings who saw Dowlin in March 2004 indicated that Dowlin told him that he had quit his job. (Tr. 107; Ex. C-4, R-2). Dowlin stormed off the mine in anger and failed to return. At the hearing, during oral argument, Dowlin stated that he "walked off the job." (Tr. 191). As a consequence, the company argues that there was no adverse action.

Assuming that there was an adverse action, Western Energy argues that Dowlin's alleged termination is too remote in time to relate back to his complaint to MSHA in August 2002. There is no connection between Dowlin's safety complaint and the company's treatment of him in March 2004. Finally, Western Energy argues that no relief can be given in any event because

the Social Security Administration subsequently determined that Dowlin was eligible for disability benefits retroactive to March 4, 2004. Thus, the Federal government has already determined that Dowlin is not capable of working or earning a living. The Commission cannot grant Dowlin back pay or reinstate him in the face of this determination by the Social Security Administration.

I find that Dowlin did not establish that he was involuntarily terminated from his employment. I find that Western Energy, in good faith, believed that Dowlin had quit. Dowlin did not advise Holenbeck that he was requesting medical leave. Rather, he left a form for such a request in the crew shack. I credit the testimony of Holenbeck that he believed Dowlin had quit. There is no evidence that Western Energy intended to terminate Dowlin as a result of his actions.

A mine operator is not permitted to provoke a miner who has engaged in protected activity so that he quits or takes actions that subject him to discipline. In such a case a miner's "impulsive behavior" may be overlooked if he was wrongfully provoked by the mine operator. The Commission has "recognized the inequity of permitting an employer to discipline an employee for actions which the employer provoked." *Sec'y of Labor on behalf of McGill v. U.S. Steel mining Co.*, 23 FMSHRC 981, 992 (Sept. 2001). Although Dowlin did not raise this argument, a Commission judge is "obligated to determine whether the actions for which the miner was disciplined were provoked by the operator's response to the miner's protected activity. . . ." *Id.* In this case, Dowlin was not disciplined for his impulsive behavior but his behavior led the company to believe that he had quit. "Whether an employee's indiscrete reaction to being provoked is excusable is a question that depends on the particular facts and circumstances of each case." *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 22 FMSHRC 298, 306 (March 2000). I must determine whether Dowlin's conduct is within the scope of the "leeway" courts grant employees whose "behavior takes place in response to an employer's wrongful provocation." *Id.* at 307-08.

I find that Dowlin should not be granted leeway in this case. I recognize that Dowlin has a history of mental illness. Apparently he attempted suicide in the early 1990s. (Exs. C-6, C-7). Nevertheless, the incident that provoked Dowlin was simply the reassignment to drive a haul truck the following week. He did not want to drive a haul truck because he felt it was a "boring" job and he would be subject to greater supervision by management. In response, Dowlin threatened Holenbeck and stormed off the property. There was no immediate threat to Dowlin's safety or health and he was fully trained and qualified to operate a coal haul truck. He simply preferred to operate a reclamation dozer. I find that management's reassignment of Dowlin to another piece of mobile equipment did not constitute a wrongful provocation under the Mine Act.

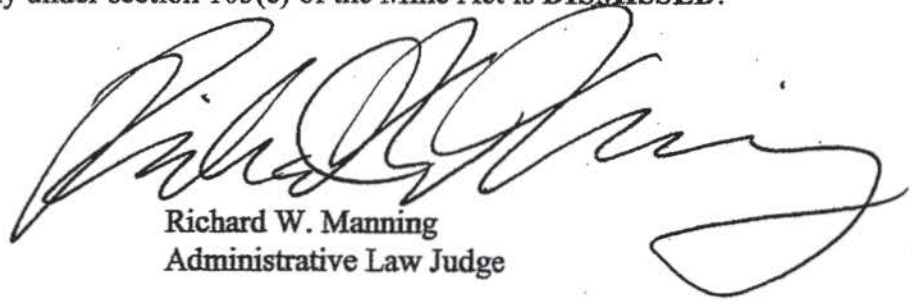
I also find that constructive discharge does not apply to this situation. A miner can claim that he was constructively discharged if the mine operator "created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign." *Sec'y of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2210 (Nov. 1994)

(citation omitted); *Sec'y of Labor on behalf of Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 265 (March 1999).[3] In this instance, there is no showing that Dowlin's safety was at risk at the time he left the mine or that, by driving coal haul trucks, he would be placed in an unsafe situation. He had driven coal haul trucks in the past and there was no evidence that these trucks were unsafe. In addition, Dowlin was assigned to operate a dozer on that shift. A reasonable miner would not have felt compelled to quit. Dowlin's decision to leave the mine was related to his idiosyncratic mental impairment rather than a reasonable fear that he would be asked to perform an unsafe task.

Dowlin contends that mine management, including Rosander, harassed him for years and that the events of early 2004 were the final straw. He feels that Western Energy treated him unfairly and that the company is partially responsible for his mental problems. Dowlin introduced evidence to show that Rosander and other managers had been treating him unfairly well before he made his safety complaint in August 2002. (Tr. 38-39, 49-50, 137-38, 145-46, 158). Although such disparate treatment may have been unfair, assuming Dowlin's allegation is correct, the Commission "does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment practices except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." *Deliso v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990). As stated above, I find that Western Energy's actions did not violate the anti-discrimination provisions of section 105(c).

III. ORDER

For the reasons set forth above, the discrimination complaint filed by Floyd Dowlin, III, against Western Energy Company under section 105(c) of the Mine Act is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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[3] Constructive discharge is typically upheld in situations were the employer's conduct is egregious. *See, e.g., Liggett Indus., Inc.* v. FMSHRC, 923 F.2d 150, 152-53 (10th Cir. 1991) (court agreed that welder with diagnosed respiratory condition was justified in quitting inadequately ventilated mine where operator demonstrated no intention of improving ventilation); *Simpson v. FMSHRC*, 842 F. 2d 453, 463 (D.C. Cir. 1988) (miner justified in quitting rather than continuing to work in mine in which operator was responsible for multiple "blatant" safety violations that had repeatedly and continually occurred).

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January 24, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 2004-212 A.C. No. 29-02170-32227
v.	:	
SAN JUAN COAL COMPANY, Respondent	:	San Juan South

DECISION

Appearances: Michael D. Schoen, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, for Petitioner;
Timothy M. Biddle, Esq., Daniel W. Wolff, Esq., Crowell & Moring, LLP, Washington, D.C., for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against San Juan Coal Company, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges three violations of the Secretary's mandatory health and safety standards and seeks a penalty of $13,524.00. A trial was held in Farmington, New Mexico. For the reasons set forth below, I modify a citation and an order, affirm the third citation, and assess a penalty of $10,224.00.

Background

San Juan Coal Company operates the San Juan South Mine, an underground coal mine in Waterflow, New Mexico. The mine operates 24 hours a day, seven days a week, in three ten hour shifts per day. The day shift, 7:00 a.m. to 5:00 p.m., and the afternoon shift, also called the "swing" shift, 4:00 p.m. to 2:00 a.m., are production shifts. The "graveyard" shift, 10:00 p.m. to 8:00 a.m., generally performs maintenance (which explains why it is also known as the "maintenance" shift).

Coal is mined by the longwall method. The longwall miner in the 102 longwall panel, the area under consideration in this case, consists of a double cutting drum shear which is conveyed back and forth across the coal face on a conveyor system, cutting the coal. The coal falls onto a

pan line below the shear and is transported to the headgate to be taken out of the mine. The roof is supported by 176 shields ranging across the longwall face, which measures 1,006 feet. After the shear cuts the coal, the shields automatically advance toward the face, providing continuous support for the newly exposed roof.

Except for the first four shields on each side of the face, which are slightly larger, the shields are five feet wide at the base. As coal is mined, the continuous cutting action of the shear causes coal dust, coal particles and chunks of coal to accumulate on the shields. These accumulations are cleaned off of the shields mainly by the use of high pressure water hoses which are located every ten shields. If the coal is too large to be cleaned off by the water, shovels are used. Of the six man longwall crew, two miners called "propmen" have the primary assignment of cleaning the longwall shields.

MSHA Inspector Donald E. Gibson, the Field Office Supervisor in MSHA's Aztec, New Mexico, field office, went to the mine on March 22, 2004, to conduct a five day spot inspection.[1] After reviewing the mine records and meeting with management officials, he went underground with Monty Owens, San Juan's safety representative, and Steve Felkins, the miners' representative, to inspect the 102 longwall. They arrived at the headgate at about 7:30 a.m., shortly after the beginning of the day shift. The longwall was not in operation because the miners were constructing an isolation stopping.[2]

Inspector Gibson proceeded across the longwall face. When he arrived in the area of longwall shield 130 he observed that shields 130 through 176 had accumulations of loose coal and coal dust on the jack legs, on the toes of the shields, as well as on the base of the shields and the leminscates. The accumulations measured between 1/8 inch and 10 inches in depth. Based on his observations, Inspector Gibson issued Citation No. 4768527.

After issuing the citation, Inspector Gibson continued his inspection to the tailgate area and the Nos. 2 and 3 return air entries. When he arrived at the No. 3 entry, he noticed that the area next to a check curtain, directing air into the No. 2 entry, was black with float coal dust. He went to the No. 2 entry and observed that both entries were black with float coal dust. The inspector examined along both entries, and noted what he believed to be impermissible float coal dust accumulations from crosscuts one through 22. As a consequence, he issued Order No. 4768528.

Citation No. 4768527 and Order No. 4768528 were contested at the trial. A third violation, set out in Citation No. 7605679, was included in this docket. San Juan stipulated that

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[1] Because the mine liberates more than one million cubic feet of methane per day it is subject to a "spot inspection . . . every five working days at irregular intervals." 30 U.S.C. § 813(i).

[2] The last time coal had been mined was on the previous day's afternoon shift.

Citation 7605679 properly alleged a violation of section 75.403 of the regulations, 30 C.F.R. § 75.403, and agreed to pay the assessed penalty of $324.00 in full. (Tr. 11-12.)

Findings of Fact and Conclusions of Law

Citation No. 4768527

This citation alleges a violation of section 75.400 of the Secretary's regulations, 30 C.F.R. § 75.400, because:

> Accumulations of loose coal and fine coal dust w[ere] permitted to accumulate on the shields on the 102 Longwall retreating working section.
>
> The accumulations were on the leminscates, both top and bottom, from shield 130 to shield 176, inclusive. The accumulations were dry.
>
> The accumulations were left from the afternoon shift which stopped mining at 0200 hours 3/22/04.
>
> Several discussions occurred with mine management concerning cleaning off of the shields.
>
> The accumulations ranged from 1/8" to 10" deep.

(Govt. Ex. 10.) Section 75.400 requires that: "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."[3]

The Respondent does not deny that the accumulations existed as observed by Inspector Gibson, but maintains that the operator was not given an opportunity to clean them up before the citation was issued. In making this argument, the company focuses on the "shall be cleaned up" language of the regulation. On the other hand, the Secretary, emphasizing "not be permitted to accumulate," asserts that if there is an accumulation, there is a violation. While the facts in some case may require that a line be drawn between the two interpretations, this is not that case. Under either reading, San Juan violated the regulation.

The company argues that the afternoon shift "just ran out of time before they were able to wash down all 176 shields" and that "it was perfectly normal for a subsequent production shift to pick up cleaning where the previous production shift left off." (Resp. Br. at 20.) This argument might have merit if the subsequent production shift began when the previous production shift left

[3] This language, with the exception of the words "diesel-powered and," was taken *verbatim* from section 304(a) of the Mine Act, 30 U.S.C. § 864(a).

off, but that is not the case here. Instead, at least five and one half hours elapsed between the time the afternoon shift left the mine and Inspector Gibson issued the citation.

The Commission has long held that the legislative history of the Mine Act "demonstrates Congress' intention to prevent, not merely to minimize, accumulations. The standard was directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated." *Old Ben Coal Co.*, 1 FMSHRC 1954, 1957 (Dec. 1979). The Commission went on to state that: "We hold that a violation of section 304(a) and 30 C.F.R. § 75.400 occurs when an accumulation of combustible material exists." *Id.* at 1958. Since there is no dispute that the accumulations on the shields existed, it follows that it was a violation of the regulation.

Furthermore, even if it is inferred that the operator has to be afforded an opportunity to clean up the accumulations, this operator made no attempt to clean the accumulations up within a reasonable time. The maintenance shift apparently made no effort to clean up the accumulations and the day shift had not started to clean them up at the time that the inspector discovered them even though the shift began at 7:00 a.m. As the Commission has stated:

> The goal of reducing the hazard of fire or explosions in a mine by eliminating fuel sources is effected by prohibiting the accumulation of materials that could be the originating sources of explosions or fires and by also prohibiting the accumulation of those materials that could feed explosions or fires originating elsewhere in a mine.

Black Diamond Coal Mining Co., 7 FMSHRC 1117, 1120 (Aug. 1985). This danger exists as long as the accumulations exist. The danger does not cease to exist when a production shift is followed by a maintenance shift or when the day shift is putting in an isolation stopping. In this case, the operator took no action to clean-up the accumulations for over five hours

Accordingly, I conclude that the company violated section 75.400 as alleged.

Significant and Substantial

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

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission enumerated four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52

F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). 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); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) a violation of a safety standard; (2) a distinct safety hazard contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4. I have already found a violation of a safety standard. I further find that the accumulations contributed to a distinct safety hazard, i.e. as the originator or feeder of a fire or an explosion. Thus, as is almost always the case, the question of whether the violation is S&S turns on whether the hazard contributed to will result in an injury.

In connection with accumulations, the Commission has held, with regard to the third *Mathies* criterion, that:

> When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990) ("*UP&L*"); *Texasgulf*, 10 FMSHRC at 500-03.

Enlow Fork Mining Co., 19 FMSHRC 5, 9 (Jan. 1997).

Inspector Gibson testified that the accumulations were "the worst that I'd seen" in his many inspections of the longwall and the mine. (Tr. 104.) They were extensive, covering up to 46 shields, an area of 230 feet, in deposits up to 10 inches in depth. They were also dry. (Tr. 104.) In addition to the extensiveness of the accumulations, the mine liberates more than one million cubic feet of methane per day. Finally, witnesses testified: (1) that the bits on the shear's drums caused sparks when striking rocks or metal, such as the sprags on the shields; (2) that there were electrical cables along the face as well as electrical equipment; and (3) that all of these could serve as ignition sources for a fire or explosion. (Tr. 84, 105, 117-18, 213.)

The Respondent argues that since no coal was produced on the maintenance shift, since coal had not been produced on the morning shift when the inspector wrote the citation and since it was the company's normal policy to clean the accumulations on the shield before resuming mining, the Secretary has not established a reasonable likelihood of an ignition. This, however, ignores the length of time the accumulations were present, the fact that maintenance was performed on the longwall during the maintenance shift, which would mean that the electrical equipment was activated in addition to the possibility that whatever tools the maintenance miners were using could be a source of ignition, the fact that with the ignition of methane anywhere in the mine the accumulations could propagate and increase the severity of a fire or explosion, and the fact that continued normal mining practices would involve operation of the shear.

Accordingly, I conclude that the Secretary has established a reasonable likelihood that a fire or explosion involving the accumulations would occur, resulting in an injury. It goes without saying that any injury sustained in a fire or explosion would be a serious one. Therefore, I conclude that the violation was "significant and substantial."

Unwarrantable Failure

This violation was also charged as resulting from the "unwarrantable failure" of the company to comply with the regulation.[4] The Commission has held that 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); *Youghiogheny*, 9 FMSHRC at 2010. "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (Aug. 1994); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission has established several factors as being determinative of whether a violation is unwarrantable, including:

> [T]he extent of a violative condition, the length of time it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705,

[4] The term "unwarrantable failure" is taken from section 104(d)(1) of the Act, which assigns more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992).

Cyprus Emerald Resources Corp., 20 FMSHRC 790, 813 (Aug. 1998).

Some of these factors are present in this case. As already noted, the accumulations were extensive and obvious. They had existed since the end of the afternoon shift, or approximately six hours.[5] Further, as the company has admitted, no attempts were made to clean-up the accumulations between the time the afternoon shift shut down and the time Inspector Gibson observed them. Nevertheless, taking everything into consideration, I do not find that this violation resulted from the operator's unwarrantable failure.

Based on the company's history of violations, discussions between mine management and Inspector Gibson, and MSHA's "Winter Alert Program," the Secretary argues that the operator had been placed on notice that greater efforts were necessary for compliance in this area. The Secretary's reliance on these factors is misplaced.

According to the operator's Assessed Violation History Report, the company was cited 47 times for violations of section 75.400 between January 2001 and March 2004. (Govt. Ex. 9.) For a mine the size of this one, that does not seem to be a significant number of citations, particularly since, as Inspector Gibson testified, section 75.400 was the most frequently cited section of the regulations, industry-wide, in 2004. (Tr. 136.) For "putting the operator on notice of the necessity for greater efforts at compliance," these citations take on even less importance inasmuch as none of them were for accumulations on the shields. (Tr. 135.) Consequently, I do not find that the company's previous violations should have put it on notice that it needed to make greater efforts to control accumulations on the shields.

The parties stipulated that prior to this violation "San Juan management acknowledges several previous discussions with Inspector Gibson concerning the need to clean the shields of coal dust accumulations." (Tr. 58-59.) David Zabriskie, the afternoon shift longwall supervisor, testified that Inspector Gibson and the other inspectors were always pointing out areas where improvements could be made, but that he did not "consider it a warning as much as I did good advice because of their experience." (Tr. 210.) Similarly, Scott Jones, the General Mine Foreman, said that Inspector Gibson "kind of made comments to me that, you know, you need to watch your cleanup in that area, you need to make sure that you're continually cleaning those shields and keeping them up to standard." (Tr. 335.)

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[5] Inspector Gibson intimated that he believed that the accumulations might have existed for longer than a shift. (Tr. 110.) In view of the fact that almost three quarters of the shields had been cleaned, I find it highly unlikely that the accumulations on the remaining quarter of the shields had been there throughout the whole afternoon shift.

However, to raise a violation to the level of unwarrantable failure, there have to be more than just discussions. As Inspector Gibson testified, he and mine officials had had discussions ever since his first visit to the mine. (Tr. 108.) For the discussions to put the operator on notice that greater efforts at compliance are necessary, they should be admonishments of that effect. General discussions between operators and inspectors occur all the time, but they do not make every violation an unwarrantable failure. As Jones testified, neither Inspector Gibson nor the other inspectors ever told them that their method of cleaning the shields was inadequate or that they needed more miners working on the cleanup. (Tr. 335-36.) Therefore, I do not find that these discussions put the company on notice that greater efforts at compliance were needed.

The last type of notice that the Secretary relies on is MSHA's "Winter Alert Program." Inspector Gibson testified that historically most mine explosions occur between October and March. Accordingly, since the 1970's MSHA has had a "Winter Alert" campaign to remind operators of that fact. He said that in the winter 2003-2004, MSHA was emphasizing "ventilation, examination, permissibility and rock dusting." (Tr. 110.) As with the general discussions, there is no evidence that the company was ignoring the yearly alerts or had a general practice of not properly cleaning up accumulations.

As counsel for the Secretary acknowledged in his opening statement, the Secretary's foundation for claiming that the operator unwarrantably failed to comply with the regulation "is based primarily on the mine's management's notice of the requirements of the Act and a greater need for compliance with the Act." (Tr. 8.) This in turn "was based principally on many conversations that Mr. Gibson and/or other mine inspectors had had with mine management . . . ." (Tr. 8-9.) The evidence does not support this claim.

Further, the evidence shows that the company had two "propmen" assigned to each longwall, whose primary function was to clean the longwall shields. In addition, the operator had not previously been cited for accumulations on the shields. Thus, while I find that the Respondent was highly negligent with regard to this violation, I do not find that its negligence rises to the level of reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care.

Accordingly, I conclude that this violation was not the result of the operator's unwarrantable failure to comply with the regulation. The citation will be modified to a 104(a) citation, 30 U.S.C. § 814(a).

Order No. 4768528

This order alleges a violation of section 75.400 because:

> Accumulations of dry float coal dust deposited on rock-dusted surfaces was permitted to accumulate in the #2 and #3 return air entries of the 102 Longwall working section.

> The accumulations began just outby crosscut #22 and extended outby to crosscut #1 in both entries including the crosscuts for a distance of 3,000 feet. Methane in both entries ranged between 0.2-0.4 per centum through the entire distance.
>
> This area was traveled by the weekly examiner on 03/18/04 and the float coal dust was noted in the record book countersigned by the mine foreman.
>
> Other violations for this same condition have been issued to the operator. One was issued on 2/28/04 that included 3,900 feet in the #2 and #3 entries of the 102 Longwall.
>
> At crosscut #9 there w[ere] 2 wooden pallets and a cardboard box up next to the stopping.
>
> Numerous discussions have been held with mine management concerning rock dusting and clean-up on the shields.
>
> The condition noted by the weekly examiner was corrected on day shift on 03/18/04 by two miners. The area was rock dusted. Seven production shifts occurred after the area was dusted. Approximately 56 passes by the shear w[ere] mined at about 1,500 tons per pass or 84,000 tons. Due to the dryness of the coal and more float dust being generated, more attention to the condition of the return entries should have been made by management.

(Govt. Ex. 11.)

After writing the citation for the shields, Inspector Gibson proceeded to the tailgate of the longwall, to the number 2 and 3 return air entries. He testified that "the area was black with float coal dust." (Tr. 114.) He related that there was a check curtain across the number 3 entry, directing air into the number 2 entry. He said that he went through the curtain into the number 3 entry and started heading outby. He said both the number 2 and 3 entries were black with float coal dust, the "worst" that he had seen. (Tr. 115.) He said the float coal dust was dry and continued through both entries to crosscut number 1. He testified that it was thick enough that he left palm prints on the ribs and footprints on the floor. (Tr. 115.) The inspector further testified that he observed two wooden pallets and a cardboard box, also combustible materials, next to the stopping in crosscut number 9. (Tr. 154.)

Similar to its argument with regard to the previous citation, the company does not deny the existence of the accumulations, but asserts that since the area had been rock dusted on March 18, four days earlier, it should not be cited for accumulations without a showing that the rock dusted accumulations did not meet the requirements of section 75.403, 30 C.F.R. § 75.403.[6] This argument would be more persuasive if section 75.400 did not specifically require the cleaning up

[6] Section 75.403 calls for rock dusted areas in return entries to have an incombustible content of 80 percent.

of accumulations of "float coal dust deposited on rock-dusted surfaces." Plainly, float coal dust deposited on rock-dusted surfaces is dangerous whether or not the rock-dusted surface below it is incombustible.

Here float coal dust was deposited on rock-dusted surfaces to such an extent that they were black. According to Inspector Gibson this was observable right at the tailgate and got worse down the entries. The deposits were deep enough to leave hand and foot prints. Therefore, I conclude that the company violated section 75.400 as alleged.

Significant and Substantial

Inspector Gibson charged this violation as being "significant and substantial." He based this determination on the amounts of float coal dust and the fact that it was very dry so that "[a]ny forces going through there would only pick the float dust up and contribute to any forces of an explosion." (Tr. 117.) He also considered the presence of methane in the mine. (Tr. 118.) He further testified that, in addition to the propensity for the float coal dust to exacerbate an existing fire or explosion, the dust could be ignited by "[t]he shearing machine itself, the electrical cables along the face, the lights, under normal mining conditions there's going to be dust generated and again the potential of as evidenced the metal against metal cutting bits contacting the sprags or hard rock." (Tr. 117-18.)

Continuing its argument made concerning the fact of violation, the Respondent contends that the Secretary's failure to show whether or not the rock-dusted surfaces were incombustible precludes a finding that the violation was S&S. As previously noted, this contention is at odds with the specific recognition in 75.400 that float coal dust on rock-dusted surfaces is hazardous.

Considering this violation under the *Mathies* criteria, I have already found criterion 1, a violation of a mandatory safety standard, section 75.400. I further find: (2) that the accumulation contributed to the safety hazard of a fire or explosion; (3) that there was a reasonable likelihood that a fire or explosion would occur, resulting in an injury; and (4) that the resulting injury or injuries would be serious. I make these findings for the same reasons I made them concerning the previous citation. Accordingly, I find that the violation is "significant and substantial."

Unwarrantable Failure

Inspector Gibson found this violation to result from the company's unwarrantable failure to comply with the regulation. He testified that one reason he made this finding was that the operator had been cited on February 18, 2004, for accumulations of float coal dust in the numbers 2 and 3 entries, from crosscuts 20 through 33. (Tr. 122, Govt. Ex. 7.) He related further that:

> The violation was extensive, it was 3,900 feet in length. And some of the crosscuts that I was dealing with on March 22 overlapped at least two of the crosscuts that [Inspector Vetter] dealt

> with on February 18. So their awareness was already elevated, I mean it should have been, it should have been elevated, hey, we do have a problem and it should have been recognized knowing that the winter alert you're in that season, the mine's more drier, the coal's more drier. And I really felt that they should have been – had a higher degree of care displayed than what was displayed.

(Tr. 122-23.)

The Respondent maintains that since it was rock dusting in the numbers 2 and 3 entries, "at least rock dusting as much as it thought adequate," it did not act unwarrantably. (Resp. Br. at 41.) However, rock dusting is not at issue in this violation, accumulations are.

With regard to unwarrantable failure, the following factors are significant: (1) The operator was cited for float coal dust accumulations in the same entries on February 18, 2004, (Govt. Ex. 7); (2) A weekly examination report for March 15 noted the need to rock dust the returns from crosscut 24 through crosscut 8, (Govt. Ex. 1); (3) A March 18 construction report stated that the returns had been rock dusted from crosscut "19 to ?", (Govt. Ex. 4); (4) By March 22, the area at the tailgate of the longwall at the numbers 2 and 3 return air entries was black with float coal dust, (Tr. 114); (5) The mine had been going through rough conditions with the top, which was "real brittlely and falling in," and floor for the last couple of breaks, (Tr. 288-89); (6) When coal on the longwall face is dry, it is not unusual for the bottoms of the return air entries to become dark or even black over the course of several days, (Tr. 350).

By March 22, the operator had previously been cited for float coal dust accumulations in the numbers 2 and 3 return entries and it had been alerted a week earlier that the entries needed more rock dusting than they were getting. The longwall supervisors were aware that the area in which they were currently mining was producing more coal particles and float coal dust than normal. The area of the numbers 2 and 3 entries right at the tailgate was black with float coal dust. All of this should have put the operator on notice that float coal dust was accumulating in the return entries at a pace that required greater attention than waiting until the next weekly examination before taking any action to resolve the problem. Instead, the company did nothing different than it would have done when mining in "normal" conditions.

I conclude that the Respondent acted with indifference and a serious lack of reasonable care with regard to this violation. Therefore, I find that the operator unwarrantably failed to comply with the regulation.

Citation No. 4768527 was the predicate citation for this order. In view of the fact that Citation No. 4768527 is being modified to a 104(a) citation, it can no longer serve as the predicate for Order No. 4768528. Accordingly, Order No. 4768528 will be modified from a 104(d)(1) order to a 104(d)(1) citation. *Consolidation Coal Co.*, 4 FMSHRC 1791, 1794 (Oct. 1982).

Civil Penalty Assessment

The Secretary has proposed a penalty of $13,524.00 for these three violations.[7] However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (Apr. 1996).

In connection with the penalty criteria, the parties have stipulated that San Juan Coal is a large company, the San Juan South Mine is a large mine and that payment of the penalty in this case will not affect San Juan's ability to continue in business. (Tr. 11-13.) From the Assessed Violation History Report and other documents in the file, I find that the company has a slightly better than average history of violations. I further find that the Respondent demonstrated good faith in attempting to rapidly abate the violations.

I find the gravity of Citation Nos. 4768527 and 4768528 to be very serious as there is nothing more dangerous in underground coal mining than fires and explosions. The gravity of Citation No. 7605679 is serious, but not as serious as the other two because it involves levels of incombustibility. I further find that the level of negligence with regard to Citation Nos. 4768527 and 4768528 was "high" and that the level of negligence for Citation No. 7605679 was "moderate."

Taking all of these factors into consideration, I conclude that the following penalties are appropriate: (1) Citation No. 4768527-$3,000.00; (2) Citation No. 4768528-$6,900.00; and (3) Citation No. 7605679-$324.00.

Order

In view of the above, Citation No. 4768527 is **MODIFIED** from a 104(d)(1) citation to a 104(a) citation by deleting the "unwarrantable failure" designation and is **AFFIRMED** as modified; Order No. 4768528 is **MODIFIED** from a 104(d)(1) order to a 104(d)(1) citation and is **AFFIRMED** as modified; and Citation No. 7605679 is **AFFIRMED**. San Juan Coal Company is **ORDERED TO PAY** a civil penalty of **$10,224.00** within 30 days of the date of this order.

T. Todd Hodgdon
Administrative Law Judge

[7] The penalties are proposed as follows: (1) Citation No. 4768527-$6,300.00; (2) Order No. 4768528-$6,900.00; and (3) Citation No. 7605679-$324.00.

Distribution:

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/sb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601New Jersey Ave., N.W., Suite 9500
Washington, DC 20001-2021

January 26, 2006

SECRETARY OF LABOR, MSHA, and DAVID BAGLEY, GEORGE GAMBLE and WILLIAM RICHARDSON, Complainants,	:	DISCRIMINATION PROCEEDINGS
	:	Docket No. SE 2005-239-D
	:	MSHA Case No. BIRM-CD-2005-01
v.	:	
	:	Docket No. SE 2005-240-D
	:	MSHA Case No. BIRM-CD-2005-04
	:	
	:	Docket No. SE 2005-241-D
	:	MSHA Case No. BIRM-CD-2005-02
	:	
JIM WALTER RESOURCES, INC., Respondent.	:	MINE ID: 01-01401
	:	MINE NO. 7

DECISION

Appearances: U.S. Department of Labor, Office of the Solicitor, Heather A. Joys, Atlanta, Georgia, for the Complainants
Maynard, Cooper & Gale, P.C., Warren B. Lightfoot, Jr. and Janell Ahnert, Birmingham, Alabama, for the Respondent

Before: Judge Weisberger

These cases are before me based on Discrimination Complaints filed by the Secretary of Labor on behalf of miners, David Bagley, George Gamble and William Richardson. Each complaint alleges that Jim Walter Resources Inc. ("Jim Walter") discriminated against the miner in violation of Section 105 of the Federal Mine Safety & Health Act of 1977.

Pursuant to notice, a hearing was scheduled for December 13, 14, and 15, 2005, in Birmingham, Alabama. At the start of the second day of the hearing, the parties indicated that they had reached a settlement resolving all the issues in these cases.

The following is the bench decision that we rendered, with the exception of corrections of matters not of substance:

> **THE COURT:** ... A short while ago the parties advised me that they have successfully reached a settlement agreement resolving the issues raised by this litigation. I wanted to indicate on the record that I am extremely appreciative to Counsel in this regard. I can tell by the motions that were filed pretrial, by

yesterday's proceedings that the parties put a lot of thought and preparation into this case. I appreciate their efforts. But most of all I appreciate the conscientiousness and professionalism shown throughout the trial and, more importantly, their willingness to discuss settlement and finally having been able to reach a settlement in this matter. In chambers the parties advised me of the terms of the agreement. I find that the agreement is consistent with the terms of the Federal Mine Safety and Health Act. I approve it. I am thankful for the parties resolving this matter without lengthy litigation. I feel that the terms of the agreement are in the best interest of the parties and most importantly consistent with the terms of the act and constitute their resolution of all the issues herein. Is there a motion by one of the parties at this time?

MS. JOYS: Yes, Your Honor. Pursuant to the terms of the settlement agreement and the signing of a settlement agreement, the Secretary wants to withdraw her complaint in this matter.

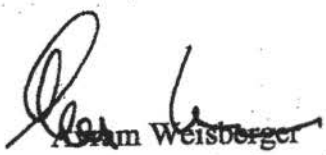
THE COURT: I assume there isn't any objection?

MR. LIGHTFOOT: No objection.

THE COURT: [The] request to withdraw the pleadings is granted based upon the settlement in this matter.

ORDER

It is **Ordered** that the case is dismissed, and it is **Ordered** that the parties agreed by all the terms of the agreement.



Adam Weisberger
Administrative Law Judge

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January 31, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2005-178-M A.C. No. 48-00152-46498
v.	:	Docket No. WEST 2005-217-M A.C. No. 48-00152-48519
FMC CORPORATION, Respondent	:	FMC @ Westvaco Mine

DECISION

Appearances: John Rainwater, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
David L. Thomas, Safety Team Leader, FMC Corporation, Green River, Wyoming, for Respondent.

Before: Judge Manning

These cases are before me on two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against FMC Corporation ("FMC"), 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"). At the hearing, FMC contested three citations issued by the Secretary under section 104(a) of the Mine Act. The Secretary seeks a total penalty of $6,110.00 for these alleged violations. An evidentiary hearing was held in Green River, Wyoming. The parties introduced testimony and documentary evidence and presented oral argument.

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

FMC operates the Westvaco Mine, an underground trona mine in Sweetwater County, Wyoming.[1] Mark Horn was employed at the mine as a belt electrician on September 27, 2004. He had been working at the mine for about 26 years. His job was to ensure that the underground conveyor belts were operating properly. These belts transport mined rock from the working sections to the mine shafts at the other end of the mine. The mined rock travels underground

[1] "Trona" is a soft, nonmetallic mineral that is a major source of sodium compounds. Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 589 (2d ed. 1997).

about five miles on these belts. (Tr. 19). He also maintained pumps and other electrical equipment. There are about eight pumping stations around the perimeter of the mine. The mine is a single level mine.

Horn was scheduled to work the graveyard shift on September 27, 2004, which runs from midnight to 8:00 am. The mine operates three shifts per day. The belt control division of the mine's maintenance department was assigned one Jeep for use underground. The top and windshield of the Jeep had been removed. The Jeep is equipped with automatic transmission and a parking brake. The parking brake is activated by a pedal. The brakes on the Jeep often get wet and muddy as the Jeep is driven through the mine. (Tr. 27). When the brakes are wet and muddy they are not very responsive. In addition, from time to time the Jeep is "used so hard that the brake lines are crushed and brake fluid has actually leaked out of it so that either the front or back [brakes are] not functional." *Id.*

Horn testified that the parking brake is rarely very reliable and "it never seems to work properly." (Tr. 28). Horn said that he usually cannot feel the parking brake ratchet down when he pushes the pedal and that the pedal is bent from being pushed down so hard. The Jeep was converted to operate on diesel fuel rather than gasoline. When this conversion was made, the dash board was not properly reconnected, with the result that none of the gauges work, including the speedometer and brake warning light. (Tr. 29; Ex. G-1).

On September 27 Horn was driving the Jeep underground to various pumping stations to adjust the water flow. He was traveling from crossover station in 2 West toward the No. 8 Shaft when he arrived at a set of air doors. These doors must be kept closed to maintain the ventilation in the mine. Horn parked his Jeep, opened the door, drove through the doorway, and parked his Jeep again. Horn testified that when he parked his Jeep this second time, he put the vehicle in park, stepped on the parking brake, and put chocks under one of the wheels. (Tr. 33-34; Ex. G-3). He did not turn off the engine. Horn walked back, closed the air door, and removed the chocks from the wheel. Horn thought he heard the air rushing around the air door. He wondered if he had forgotten to close the vent on the door. The vent must first be opened before the air door can be opened or closed to equalize the pressure on both sides of the door. (Tr. 37-39; Ex. G-2). When he turned to face the air door he noticed that the vent was closed but he went over to the door to see if it was fully closed. He picked up the chocks, which were on the ground. As he turned back to face his Jeep, he felt something hit him and he was knocked backward against the door. (Tr. 39). When he realized that the back of the Jeep was pushing him against the air door, he took the chocks and tried to wedge them between the back bumper and the air door before the Jeep "smashed [him] and the door." (Tr. 39-40). Horn estimates that he had parked the Jeep about 20 to 30 feet from the air door. The ground was level in that location. It was about 3 a.m. when this accident occurred. (Joint Stips. ¶ 10).

The Jeep hit Horn hard despite his efforts to wedge the chocks between the vehicle and the door. He believes that he may have passed out momentarily. He was in a sitting position and he was unable to move because his chest was wedged between the bumper and the door. He

could hardly breathe. (Tr. 42). He was able to wiggle a little and when he looked under the Jeep he discovered that his right foot was under the left wheel. The Jeep was still running as he tried to extricate himself from his position but his knee was also stuck in the undercarriage of the Jeep. He tried to grab his right leg to pull his foot out from under the wheel, but he was not successful. He reached into the back of the Jeep, opened the door, and started pulling things he could reach out of the Jeep. (Tr. 44). He did not find anything he could use to help him get his foot out.

The diesel exhaust was very strong and between not being able to breathe very well and the fumes, Horn believes that he passed out again. When he awoke, he tried again to pull his right foot out from under the wheel of the Jeep. Because he was in a remote location, he realized that it was unlikely that anyone would find him any time soon. After much work and maneuvering, Horn was able to extricate his foot from under the wheel. (Tr. 45-46). With a lot of effort, he was able to get himself up into the driver's seat of the Jeep. He drove the Jeep up to the second air door and slowly pushed it open with the Jeep. He then drove to belt control, got out of the Jeep, and called the hoist man. He was barely able to breathe at that point. Horn was taken out of the mine and then to the hospital in Rock Springs, Wyoming.

Horn testified that he inspected the Jeep before he drove it that night. (Tr. 52-53). He looked underneath the Jeep to see if brake fluid was leaking. He also applied the brakes as he backed out of the parking space to make sure that they were working. The Jeep was in its usual condition and he did not find anything that would keep him from using it. (Tr. 60). The power steering was leaking fluid and the brakes were not as "good as they could have been," but he assumed that the brakes were simply wet. *Id.* If he had determined that the Jeep was not safe to operate, he would not have been required to use it, but he would have had to borrow one from another department. He also has the authority to tag out a Jeep if it is not safe to operate. (Tr. 62). Horn admitted that in the early 1980s he took annual refresher safety tests given by FMC in which he was asked to explain the procedure for blocking mobile equipment in the mine. (Tr. 64-67; Ex. R-7). Horn responded that the equipment operator should "kill engine, set brakes, use wood blocks to block both sides of wheel." (Ex. R-7). Horn testified that he uses that procedure when he parks the Jeep at the end of his shift. He testified that he does not shut off the engine on a flat surface when he is only going to be off the Jeep for a moment because of his concern that he may have difficulty starting it again. (Tr. 68). Horn said that the starter motor sometimes gets wet while driving through water in the mine.

Horn suffered extensive injuries as a result of this accident. His internal organs were pushed up through his diaphragm into his left lung cavity. (Tr. 112-13). After the extent of his injuries were identified at the Rock Springs hospital, he was air lifted to the LDS Hospital in Salt Lake City, Utah, where he underwent surgery. Complications resulted from his surgery and he had to be hospitalized again. (Tr. 117-124). Horn is still employed by FMC, but he is unable to work at the present time.

On September 30, 2004, MSHA Inspector Duane Coats traveled to the mine to investigate this accident. On October 4, 2004, he traveled underground to examine the area

where the accident occurred. (Tr. 189). At the conclusion of his investigation, Inspector Coats issued three citations related to this accident. During his investigation, Inspector Coats interviewed Gene Hutchinson and other FMC employees. (Tr. 165). Based on these interviews, Inspector Coats concluded that mounting bolts on the transmission and engine had come loose, allowing the transmission to slide to the right side so that when the Jeep "was placed in park, it would not go all the way in park." (Tr. 166). As a result, the Jeep could easily slip out of park into reverse. (Tr. 167). Inspector Coats also concluded that the parking brake on the Jeep was not working at the time of the accident and, if the parking brake had been working, "it would have held the vehicle in place on level ground if it had slipped from park to reverse as it did." *Id.*

Gene Hutchinson testified at the hearing under a subpoena from the Secretary. He is a diesel mechanic at the mine. Although Gene Hutchinson was not involved in FMC's investigation of the accident, he repaired the Jeep at the conclusion of the accident investigation. (Tr. 130). The work order that he was given said that the parking brake was not working and that the transmission may have slipped out of park. (Tr. 130, 133). In addition, he discovered that the neutral safety switch was not working. The neutral safety switch, which is a "whisker" switch, allows the Jeep to be started only when it is in park. In this instance, the Jeep could be started in any gear. (Tr. 136, 154). This switch was permanently bent over. (Tr. 154).

Upon examining the parking brakes, Gene Hutchinson determined that the parking brakes did not work on either rear wheel. (Tr. 137-40, 149-51). He had to replace the entire brake caliper system. The combination of trona and water tends to corrode the brakes. Because it was the calipers that were broken, rather than the parking brake cable, the rear disk brakes were also not engaging when the service brakes were depressed. (Tr. 141). The hydraulic lines used with the service brakes could not activate the disk brakes because the calipers were not working.

Gene Hutchinson also had to replace the transmission mount and the left front motor mount. (Tr. 141). The mount is a bolt that is used to attach a part to the vehicle. In examining the Jeep, he discovered that the transmission mount had broken away from the pan it was mounted on. (*See also* Joint Stips. ¶ 18). This was the only mounting device on the transmission. (Tr. 142). Gene Hutchinson believes that because the transmission mount was missing and one of the two motor mounts was missing, the transmission assembly could move around a little. (Tr. 142-43). He believes that this movement "may have put a stress on that shifting lever that hooked to the transmission from the shifting column." (Tr. 143). This stress could have caused the transmission to pop out of park into reverse. (Tr. 143, 146). Gene Hutchinson believes that, if the parking brake had been working, and the transmission on the Jeep had popped out of park into reverse while the engine was idling, the parking brake would have been able to hold the Jeep in place on a level surface. (Tr. 143-44). The Jeep was repaired by replacing the transmission system so that the gear-shift lever is now mounted directly to the transmission on the floor rather than through a lever on the steering column.

Following his investigation, Inspector Coats issued Citation No. 6302200 under section 104(a) of the Mine Act alleging a violation of section 57.14101(a)(2) as follows:

> A miner was seriously injured at this mine on September 27, 2004 when he was struck and pinned beneath the rear wheel of his Jeep. The miner had parked the Jeep and was closing the air door when the Jeep started rolling backward and struck him. The parking brakes on the Jeep (Company No. 25 UM) were inoperative and would not hold the parked vehicle on a grade.

(Ex. G-4). Inspector Coats determined that an injury occurred and that the injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was of a significant and substantial nature ("S&S") and that FMC's negligence was moderate. The safety standard provides, in part, that "[i]f equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." The Secretary proposes a penalty of $5,500.00 for this citation.

Although the Jeep was parked on level ground, the safety standard requires that the parking brake be capable of holding a vehicle on the maximum grade that it travels. (Tr. 169). He determined that the violation was S&S because an accident occurred that resulted in a serious injury. (Tr. 170). Inspector Coats was told by Gene Hutchinson that the rear brake calipers were not working. (Tr. 195-96). Hutchinson did not tell him whether the calipers were working on the date of the accident. *Id.* Coats was not able to determine when the parking brake ceased to operate. (Tr. 315).

Inspector Coats also issued Citation No. 6302201 under section 104(a) of the Mine Act alleging a violation of section 57.14101(a)(3) as follows:

> All braking systems were not maintained in functional condition on the Jeep (Company No. 25 UM). The brake calipers for both rear service brakes were nonfunctional.

(Ex. G-5). Inspector Coats determined that an injury was reasonably likely and that the injury could reasonably be expected to be fatal. He determined that the violation was S&S and that FMC's negligence was moderate. The safety standard provides, in part, that "[a]ll braking systems installed on [self-propelled mobile] equipment shall be maintained in functional condition." The Secretary proposes a penalty of $305.00 for this citation.

The inspector concluded that the braking systems were not being maintained in a functional condition on the Jeep. (Tr. 171). The calipers for the rear service brakes were not working. He bases this conclusion on statements made by FMC employees. (Tr. 172). He concluded that the violation was S&S because the absence of working rear brake calipers could cause a fatal accident. These rear calipers must be functioning for the rear service brakes to engage and for the parking brake to engage. Only the front service brakes were working on the Jeep. If the operator of the Jeep were driving in a congested area, he might not be able to stop in time to avoid a pedestrian. (Tr. 174). In addition, if the front brakes were to cease functioning,

the Jeep would not have any brakes. (Tr. 175). Given the wet, muddy conditions in the mine, the inspector believed that it was reasonably likely that the effectiveness of the front brakes could easily become compromised. Nevertheless, the inspector testified that if the front brakes were working, the Jeep could be stopped. (Tr. 197). The Jeep is designed with two separate hydraulic chambers so that, if the rear brakes fail, the front brakes will still function. (Tr. 318-19) Coats does not know when the rear service brakes stopped working. (Tr. 316).

Inspector Coats also issued Citation No. 6302202 under section 104(a) of the Mine Act alleging a violation of section 57.14100(b) as follows:

> The neutral safety switch was not maintained in functional condition on the Jeep (Company No. 25 UM). This safety defect enabled the Jeep engine to be started while the transmission was engaged in gear.

(Ex. G-6). Inspector Coats determined that an injury was reasonably likely and that the injury could reasonably be expected to be fatal. He determined that the violation was S&S and that FMC's negligence was moderate. The safety standard provides, in part, that "[d]efects on any equipment . . . that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The Secretary proposes a penalty of $305.00 for this citation.

Inspector Coats testified that he issued the citation because the neutral safety switch on the Jeep was not working. (Tr. 177). As a result of this defect, the Jeep could be started in any gear. When the neutral safety switch is working, the Jeep can only be started in park or neutral. The inspector testified that the cited condition is a defect that affects safety because the Jeep could lunge forward or backward as the operator was starting it. (Tr. 179). He determined that the violation was S&S because it was reasonably likely that an employee would start the Jeep in an area congested with pedestrians and pin someone against a rib or another vehicle. (Tr. 180). Because the Jeep could pop out of park, the operator of the Jeep might not know that it was actually in reverse when he started the engine and it could jerk backward. (Tr. 180-81). He admitted that many people put their foot on the brake when they start a vehicle but, since the brakes were not working properly, the Jeep could have jerked backward anyway. (Tr. 192-94). If the idle on the Jeep were set low, the Jeep would not lunge but it could move a "little bit." (Tr. 194).

MSHA Inspector Tom Barrington interviewed Mr. Horn at the LDS Hospital in Salt Lake City. (Tr. 208-11). During the interview, Inspector Barrington took notes, but they are not verbatim. In response to the question, "Did you set the brake?," Inspector Barrington wrote:

> It was in park when I got out. They told me they checked the brakes and the park brakes didn't work at all. They probably hadn't worked since I mashed them the first of the shift. I probably rode around with them on without knowing it.

(Ex. R-9, p. 3). Later in the interview, Horn was asked how he thought the Jeep rolled onto him. Horn responded by stating:

> It slipped out of park into reverse. I was told that it happened on the second shift after me. The park brakes and transmission were always broke. A wheel even fell off once. The park brake virtually never worked. There was something always wrong with it.

Id. at 5. Neither party called Inspector Barrington to testify at the hearing. On October 12, 2004, Inspector Coats, company representatives, and a union representative held a conference call with Mr. Horn while he was in the hospital in Salt Lake City. David Hutchinson testified that Horn remembered performing a pre-shift examination but he could not remember whether he set the parking brake when he got out of the Jeep at the air door. (Tr. 262-63).

Ken Lacey, who is also a belt electrician, was called by FMC to testify. He testified that he worked the swing shift immediately prior to Mr. Horn's shift. He washed the Jeep, changed a headlight, and checked underneath the Jeep. (Tr. 82). He said that everything looked good. (Exs. R-2 & R-3). He testified that he checked the brakes during his pre-shift examination, but he did not look at the braking system when he crawled underneath the Jeep. (Tr. 85). The only way to see if the brakes are "plugged up" is to take off the wheels. *Id.* Lacey did not find any other problems with the Jeep and it operated well throughout his shift. (Tr. 90). If he had found safety defects on the Jeep, he would have used another Jeep. Lacey has had problems with the transmission popping out of gear from park to reverse on that Jeep. (Tr. 95-98, 102-06). Lacey testified that he always turns off the engine when he gets off the Jeep, even when he is just opening an air door. (Tr. 103, 106).

David Hutchinson is the mine's safety coordinator. (Tr. 246). He oversaw FMC's investigation of the accident. The Jeep was first examined where Horn had left it. (Tr. 251). When the parking brakes were tested, they would not hold the vehicle. *Id.* When the service brakes were tested, they stopped the vehicle. The neutral switch was observed out of position. The Jeep was taken to the shop for further examination. The other problems discussed above, including the missing motor and transmission mounts and the defective rear brake calipers were discovered in the shop.

FMC determined that there were several "immediate" causes of the accident: failure to follow procedures and defective equipment. (Tr. 264; Ex. R-6). FMC believes that Mr. Horn should have turned off the engine and kept the chocks around the wheel until he was ready to drive off. It also concluded that it was not certain whether Horn set the parking brake. (Tr. 262-23). In addition, the transmission mount and motor mounts were missing.

Michael Burd was on the safety committee of the union at the time of the accident. He was also on FMC's accident investigation team. His testimony is consistent with the testimony of David Hutchinson, set forth above. (Tr. 281-89). Garth Mitchell is the maintenance

coordinator at the mine. (Tr. 290). He was on the accident investigation team. As stated above, on the morning of September 27, it was determined that the parking brake was not working and the neutral safety switch was out of position. (Tr. 291). On September 28, the Jeep was examined in the shop to find everything that was wrong with it. (Tr. 293). The cable for the parking brake was working, but the rear brakes were caked with muck and the brake calipers were not working. (Tr. 295). In addition, a motor mount and transmission mount had broken loose and the crossover bracket that holds the transmission in place was broken. (Tr. 296). The Jeep was repaired and overhauled before it was put back into service. Mitchell testified that this Jeep is the most used vehicle in the mine. (Tr. 297). Mitchell testified that it is impossible to determine when the parking brake stopped working.

Daniel Haanpaa is a mechanic in the diesel shop at the mine. He is also on the union executive committee. He testified that whenever a vehicle had problems at the mine, its operator should bring it in for repairs. (Tr. 307). The 25-UM Jeep broke down "pretty often" because of its heavy use, but there were no safety complaints. (Tr. 308). He participated in the conference call with Mark Horn when Horn was in the hospital. Horn could not remember whether he set the parking brake. (Tr. 309, 311). If Horn had shut off the engine, the accident would not have occurred.

An underlying dispute in this case is whether FMC was required to immediately advise MSHA that there had been a life-threatening accident under the provisions of 30 C.F.R. Part 50. FMC believed that it was not required to immediately report the accident because Horn's injuries were not life-threatening. (Tr. 248). The Secretary contends that the injuries caused by the accident were life threatening and that FMC was obligated to immediately advise MSHA of that fact. At about 7:00 a.m. on September 27, FMC notified MSHA's office in Green River that an accident had occurred, but FMC did not indicate that the accident resulted in a life-threatening injury. (Tr. 248-49, 321-26). MSHA did not start its investigation of the accident until September 30, 2004. Because this issue is not before me, I have not attempted to resolve it in this decision.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

The Secretary contends that she established the violation set forth in each citation as written. FMC argues that the cited safety standards are performance-based standards. It contends that there is no dispute that the company has a very good safety program which requires equipment operators to perform thorough pre-shift examinations. The examination performed on the previous shift and the examination performed by Mr. Horn did not indicate that the brakes were not working or that there were any other problems with the Jeep. The parking brake could have failed between the beginning of the shift and the accident. The company has an excellent preventive maintenance record, but it cannot be expected to guarantee that nothing will break down during the shift after the equipment operator performs his pre-shift examination. Mr. Horn was interviewed twice, once by Inspector Barrington while he was in intensive care, and once

during a conference call with MSHA, company management, and union officials. Both times, Horn could not be sure that he engaged the parking brake. It is the responsibility of mobile equipment operators to report any safety problems on their equipment.

A. Citation No. 6302200

I find that the Secretary established a violation of 57.14101(a)(2). The parking brakes on the cited Jeep were not working at the time they were inspected by FMC following the accident. The Jeep was tagged out by FMC's investigation team after the accident and was not used until after it was refurbished by the maintenance department. Substantial evidence presented at the hearing establishes this violation and FMC stipulated that, "as a result of the September 28, 2004, examination, FMC mechanics determined that the park brake on the Jeep (No. 25UM) did not work or otherwise function." (Joint Stips. ¶15).

FMC maintains that the Secretary did not establish when the parking brakes became defective. It argues that Mr. Horn and Mr. Lacey performed pre-shift examinations and determined that the braking systems on the Jeep were functioning. I find that, given the sequence of events, the preponderance of the evidence established that the parking brakes did not work at the time of Horn's accident. The defective parking brake was immediately discovered by FMC mechanics. Gene Hutchinson, a diesel mechanic at the mine, testified that the caliper that activates the parking brake and the rear service brake was corroded. (Tr. 149). He stated that wet trona gets into the braking system and corrodes the moving parts of the brakes so that these parts can no longer move or function. (Tr. 150). I find that this corrosion cannot happen during a single shift and that it is more likely than not that the parking brake did not meet the requirements of the safety standard prior to the beginning of Horn's shift. The standard requires that the parking brake be "capable of holding the equipment with its typical load on the maximum grade it travels." The evidence establishes that the parking brake was not capable of holding the vehicle on any grade.

FMC also argues that Horn told MSHA investigators that he may not have set the parking brake when he stopped the Jeep and that he may have damaged the parking brakes earlier in the shift by driving with the parking brake engaged. Even if I credit this evidence, it does not contradict my finding that the parking brakes were defective at the time of the accident. In addition, I take notice of the fact that when someone has been severely injured in an accident, he experiences a wide range of emotions following the accident, including feelings of guilt and self-doubt. Horn was in the ICU when he was interviewed by MSHA Inspector Barrington and he was still in the hospital during the subsequent conference call. At the hearing, Horn testified that it was his normal practice to set the parking brake and that he had done so that night. It is unlikely that he would remember to put chocks under the wheels, but forget to set the parking brake.

I also find that the violation was serious and S&S. A violation is classified as S&S "if based upon the facts surrounding the violation, there exists a reasonable likelihood that the

hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). 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 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, 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. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

The Secretary established all four elements of the *Mathies* test. Mr. Horn was seriously injured as a result of this violation. Although the accident would not have occurred if the transmission system were working properly or if Mr. Horn had shut off the engine, the injuries sustained by Horn were directly related to this violation. The violation is clearly S&S.

FMC argues that it was not negligent with respect to this violation. It maintains that the company reasonably relies on its maintenance program and the equipment operators' pre-shift examinations to keep mobile equipment operating safety. FMC argues that MSHA's safety standards with respect to mobile equipment are performance-oriented regulations with the result that it should not be held negligent unless safety defects reported by equipment operators are not promptly repaired.

I find that the preponderance of the evidence establishes that FMC's negligence with respect to this violation was "high." The Jeep involved in the accident was in appalling condition, as described above. It is undisputed that this Jeep is used more than any other vehicle at the mine. The transmission was not fully secured to the Jeep with the result that the vehicle popped out of park into reverse. This condition had been reported in the past. Indeed, the crossover bracket that holds the transmission in place was broken. One of the engine mounts was missing. The Jeep could be started in any gear. The rear service brakes as well as the parking brake did not function. Horn testified that the Jeep was often in poor operating condition. He stated that often when he engaged the parking brake, he could not feel it ratchet down. Given the extensive wear and tear to which this Jeep was subjected, it was incumbent on FMC to closely monitor the condition of the Jeep and keep it in safe operating condition. As stated above, I find that the parking brakes did not suddenly become defective during Horn's shift and that FMC failed to ensure that its maintenance program kept the parking brake in good operating condition. This violation was a contributing factor in Mr. Horn's accident. A penalty of $6,000.00 is appropriate for this violation.

B. Citation No. 6302201

I find that the Secretary established a violation of 57.14101(a)(3). The rear service brakes on the cited Jeep were not working at the time they were inspected by FMC following the accident. The Jeep was tagged out by FMC's investigation team. Substantial evidence presented at the hearing establishes this violation and FMC stipulated that, "as a result of the September 28, 2004, examination, FMC mechanics determined that the rear service brakes on the Jeep (No. 25UM) did not work or otherwise function." (Joint Stips. ¶16). The safety standard requires that all braking systems must be "maintained in a functional condition."

FMC maintains that the Secretary did not establish that the rear service brakes were not working at the start of Horn's shift. It also contends that this alleged violation is unrelated to the accident. The Secretary is not contending that this violation caused the accident or was related to Horn's injuries. I find that a preponderance of the evidence establishes that the rear service brakes were not working before the start of Horn's shift. The corroded calipers that caused the parking brakes to cease functioning also caused the rear service brakes to fail. The parking brake cable actuates the same brake pads as the rear service brakes. The calipers must be functioning for either braking system to work. As I stated with respect to the parking brake violation, the brake calipers did not become plugged up and corroded during a single shift.

I also find that the violation was serious and S&S. With only the front service brakes functioning, it is reasonably likely that the hazard contributed to by the violation will result in an injury of a reasonably serious nature. If the operator of the Jeep were operating in a congested area, he might not be able to stop quickly enough to avoid a pedestrian. The Jeep was subjected to wet, muddy conditions that are likely to compromise the effectiveness of the front service brakes. As stated above, wet trona tends to corrode working parts of the Jeep. The fact that this Jeep was not well maintained makes it likely that, given continued mining operations, the front service brakes would have started to fail before the condition was corrected.

For the reasons set forth with respect to Citation No. 6302200, I find that the evidence establishes that FMC's negligence was high. The braking systems on this Jeep were in poor condition. As stated above, I find that the rear service brakes did not suddenly become defective during Horn's shift and that FMC failed to ensure that its maintenance program kept the brakes in good operating condition. This violation was not a contributing factor in Mr. Horn's accident. A penalty of $350.00 is appropriate for this violation.

C. Citation No. 6302202

I find that the Secretary established a violation of 57.14100(b). The neutral safety switch on the cited Jeep was not working at the time the Jeep was inspected by FMC following the accident. The Jeep was tagged out by FMC's investigation team. Substantial evidence presented at the hearing establishes this violation and FMC stipulated that, "as a result of the September 28, 2004, incident investigation and examination by FMC's investigation team it was determined

that a mechanism that prevented the Jeep (No. 25UM) from starting when the automatic transmission was engaged in a forward or reverse gear did not work or otherwise function." (Joint Stips. ¶ 17).

The safety standard provides that safety defects on equipment shall be corrected in a timely manner to prevent the creation of a hazard. FMC contends that because this defect had never been reported by any of the operators of the Jeep, FMC did not have the opportunity to correct the defect in a timely manner. David Hutchinson testified that the defective condition of the neutral safety switch was observed upon opening the hood at the location where Horn left the Jeep. (Tr. 251). Garth Mitchell observed the condition as well. (Tr. 291). The defect was neither difficult to find nor was it hidden or latent. The Commission has held that "[w]hether the operator failed to correct [a] defect in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence." *Lopke Quarries, Inc.*, 23 FMSHRC 705, 715 (July 2001). It is not entirely clear when the defect occurred. Gene Hutchinson testified that the switch was in a "bent-over position." (Tr. 154). I find that the preponderance of the evidence establishes that this condition had existed for more than one shift. It is highly unlikely that the switch suddenly became defective on Mr. Horn's shift. Although it is clear that FMC did not know that the neutral safety switch was defective, I find that it should have known that it was defective. As stated above, the FMC investigation team easily discovered the defect during their initial examination of the Jeep.

I also find that the violation was serious and S&S. I credit the testimony of Inspector Coats that it was reasonably likely that a miner would start the Jeep in a congested area and strike a pedestrian. Because this Jeep could pop out of park, the operator of the Jeep might not know that it was actually in reverse when he started the engine. As a consequence, the Jeep could lurch backward and strike someone. The fact that only the front service brakes were working increased the danger. Because this Jeep was not well maintained, it was more likely that a serious accident would occur as a result of this violation, assuming continued mining operations.

I find that the evidence establishes that FMC's negligence was moderate, as alleged by the Secretary. FMC should have detected this violation as part of its preventive maintenance program. This violation was not a contributing factor in Mr. Horn's accident. A penalty of $300.00 is appropriate.[2]

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The record shows that the mine has a history 167 paid violations in the 24 months preceding the inspection and that all but 14 of these violations were non-S&S. In 2004, the mine worked about 1,562,568 total man-hours making it a relatively large mine. All of

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[2] FMC also contested three other citations in WEST 2005-178-M. By order dated August 26, 2005, I approved the parties' settlement of those citations.

the violations at issue in these cases were abated in good faith. The penalties assessed in this decision will not have an adverse effect on FMC's ability to continue in business. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

IV. ORDER

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

Citation No.	30 C.F.R. §	Penalty
WEST 2005-178-M		
6302201	57.14101(a)(3)	$350.00
6302202	57.14100(b)	300.00
7914705	62.130(a)	Previously Settled & Paid
7914706	62.130(a)	Previously Settled & Paid
7914707	62.130(a)	Previously Settled & Paid
WEST 2005-217-M		
6302200	57.14101(a)(2)	6,000.00
	TOTAL PENALTY	$6,650.00

For the reasons set forth above, the three citations are **AFFIRMED** as modified in this decision. FMC Corporation is **ORDERED TO PAY** the Secretary of Labor the sum of $6,650.00 within 30 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

Distribution:

John Rainwater, Esq., Office of the Solicitor, U.S. Department of Labor, P.O. Box 46550, Denver, CO 80201-6550 (Certified Mail)

David L. Thomas, Safety Team Leader, FMC Corporation, P.O. Box 872, Green River, WY 82935-0872 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 8, 2006

XAVIER F. GONZALEZ,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2005-288-DM
v.	:	RM MD 05-05
	:	
RINKER MATERIALS CORPORATION,	:	Rinker Green Valley
Respondent	:	Mine ID: 02-02643

DECISION
AND
ORDER PARTIALLY SEALING RECORD

Appearances: Steven G. Sandoval, Esq., Law Offices of Steven G. Sandoval, P.C.,177 N. Church Avenue, Suite 1008, Tucson, Arizona 85701, for Petitioner
Katherine Shand Larkin, Esq., Jackson Kelly, PLLC, 1099 18TH Street, Suite 2150, Denver, Colorado 80202, for Respondent

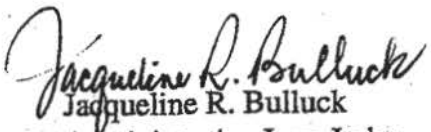
Before: Judge Bulluck

This case concerns a discrimination complaint filed pursuant to Section105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3). Xavier Gonzalez alleges that he was unlawfully terminated from employment by Rinker Materials on December 9, 2004, due to a work-related injury that he incurred on December 8, 2004. He seeks reinstatement with back pay, damages for emotional distress and attorney's fees.

A hearing on the merits was convened on November 29, 2005, in Tucson, Arizona, during the course of which the parties engaged in discussions and negotiated a settlement. Under the essential terms of the agreement, Rinker Materials is required to make a lump-sum payment to Gonzalez in consideration of Gonzalez's withdrawal of his discrimination complaint, with prejudice, and release of Rinker Materials from all other related claims and causes of action. I tentatively approved the settlement on the record pending filing of the written, executed agreement.

ORDER

The settlement is appropriate and is in the public interest. **WHEREFORE**, the approval of settlement is **GRANTED**, and it is **ORDERED** that the record is **PARTIALLY SEALED**, i.e., the hearing transcript of November 29, 2005, Settlement and Mutual Release Agreement, executed on January 6, 2006, and Withdrawal of Claim, dated January 6, 2006, and this case is **DISMISSED WITH PREJUDICE**.



Jacqueline R. Bulluck
Administrative Law Judge
(202) 434-9987

Distribution:

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/ej

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

February 24, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2005-24-M
Petitioner	:	A. C. No. 41-02363-40451
	:	
v.	:	Docket No. CENT 2005-88-M
	:	A. C. No. 41-02363-45908
WEIRICH BROTHERS INC.,	:	
Respondent	:	Davis Pit

DECISION

Appearances: Carlton C. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, on behalf of the Secretary of Labor;
Terry Weirich, Johnson City, Texas, on behalf of Weirich Borthers, Incorporated.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalties filed by the Secretary of Labor ("Secretary"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 ("Act"). The petitions allege that Weirich Brothers Incorporated ("Weirich Brothers") is liable for ten violations of the Secretary's regulations applicable to surface, metal and non-metal mines, and proposes the imposition of civil penalties totaling $12,331.00. A hearing was held in San Antonio, Texas. At the commencement of the hearing the parties announced that Respondent had agreed to withdraw its contest and request for hearing with respect to six of the alleged violations, and had further agreed to pay the civil penalties proposed for those violations.[1] The hearing proceeded on the four remaining violations. The Secretary filed a brief after receipt of the transcript. Respondent elected not to file a brief. For the reasons set forth below, I find that Respondent committed three of the alleged violations and impose civil penalties totaling $635.00 for those violations.

[1] Respondent withdrew its contest and request for hearing with respect to Citation Nos. 6233498, 6233501, 6233502, 6233503, 6233504, and 6233506. A civil penalty of $60.00 was proposed for each of those violations pursuant to 30 C.F.R. § 100.4.

Findings of Fact - Conclusions of Law

Weirich Brothers is located in Johnson City, Texas. One of its facilities, the Davis Pit, located in Junction, Texas, is a surface mine that extracts material from natural deposits by use of a dragline, and processes it through crushers and screens to produce finished product that is sold to customers. The Davis Pit has been in operation for many years, and has been in its present configuration since 1986. On July 7, 2004, Jerry Anguiano, an Inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection of the Davis Pit. He arrived at approximately 8:00 a.m., while the plant was being put through a start-up procedure, and remained there for most of the day. In the course of the inspection, he issued ten citations charging violations of the Secretary's regulations establishing safety and health standards for surface metal and non-metal mines, 30 C.F.R. Part 56. Civil penalties were assessed for the violations, and Weirich Brothers contested the penalties and requested a hearing before the Commission.

The citations that Weirich Brothers continues to contest are discussed below, in the order that they were presented at the hearing.

Citation No. 6233497

Citation No. 6233497 alleged a violation of 30 C.F.R. § 56.15002, which provides: "All persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard." Anguiano described the violation in the "Condition or Practice" section of the citation as follows:

> The supervisor and an employee were not wearing hard hats. The supervisor, Ronny Barclay, was washing under the roll crusher conveyor while employee Jaime Dominquez was loading the red truck at the load out station. The system had a load of material. Rocks were bouncing off the roll screen – a rock could strike an employee on the head resulting in lost work days.

Ex. P-1.

Anguiano determined that it was reasonably likely that the violation would result in an injury resulting in lost work days or restricted duty, that the violation was significant and substantial, that one employee was affected and that the operator's negligence was moderate. A civil penalty in the amount of $247.00 has been proposed for this violation.

The Violation

Anguinao observed this alleged violation as he arrived on the property. Ronny Barclay, supervisor of the pit operation, was in the vicinity of a roll screen, using a hose to wash material from the tail pulley of the conveyor leading from the screen. The plant had just been started up.

There was a small amount of material left over from the previous day moving through the system. Tr. 99. Barclay, who was not wearing a hard hat, is depicted in a photograph taken by Anguiano when he observed the alleged violation. Ex. P-1.

Small rocks, 1.25-1.5 inches maximum dimension, were bouncing off the roll screen, which was located five feet above ground level and seven to ten feet to Barclay's left. Tr. 20, 100. Although no rocks bounced far enough to strike Barclay while Anguiano observed him, he believed that it was possible that a rock could bounce far enough to strike Barclay's head, resulting in an injury that would cause lost work days. Tr. 20-21, 39. He also felt that Barclay might move closer to the screen, where it would be more likely that he could be struck. Tr. 22, 33-34. There were a number of rocks on the ground near Barclay, and Anguiano assumed that they had bounced off the screen.

Barclay testified that, while rocks do bounce off the screen, there was virtually no possibility that they would bounce far enough to strike him. Tr. 100, 103. He had had a discussion with another MSHA inspector, who explained that the standard required the use of hard hats only where falling objects may create a hazard. Tr. 103. Based upon that discussion, it was his understanding that hard hats did not need to be worn in the area where he was located, because there was no hazard presented by falling objects. He told Anguiano about the prior discussion and explained why he wasn't wearing his hard hat at the time. Tr. 17, 42. Weirich Brothers issued hard hats to employees, and Barclay's was in close proximity. Tr. 44, 104, 108. He testified that he and the other employees always wore their hard hats when they worked close to the roll screen, or in other areas of the plant where there was a chance of being struck by a falling object. Tr. 106-07. Following Anguiano's inspection, the employees began to wear hard hats whenever they were working in the plant.

In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd, Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987).

Based upon Anguiano's testimony, I find that there was a possibility, albeit small, that Barclay might have been struck on the head by one of the small rocks. Consequently, his failure to wear a hard hat, in an area where "falling objects may create a hazard," was a violation of the regulation. There is also a good chance that his duties would have taken him closer to the screen, and that he would not have interrupted his work to retrieve and don his hard hat.

Respondent has argued that, because of the previous MSHA inspector's advice, the Secretary has taken inconsistent positions with respect to the requirement of hard hats in the area in question, and that it did not have fair notice of the Secretary's interpretation of the regulation. When "a violation of a regulation subjects private parties to criminal or civil sanctions, a

regulation cannot be construed to mean what an agency intended but did not adequately express." *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982), *quoting Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). To determine whether an operator received fair notice of the agency's interpretation, the Commission applies an objective, "reasonably prudent person" test, i.e., "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); *BHP Minerals Int'l Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996). In applying this standard, a wide variety of factors are considered, including the text of the regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, whether MSHA has published notices informing the regulated community with "ascertainable certainty" of its interpretation of the standard in question, and whether the practice at issue affected safety. *See Island Creek Coal Co.*, 20 FMSHRC 14, 24-25 (Jan. 1998); *Ideal Cement Co.*, 12 FMSHRC at 2416.

I reject Respondent's fair notice defense as to this violation. A reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized that the standard required the wearing of hard hats in the area in question. Moreover, there is no evidence that the Secretary has actually taken inconsistent positions with respect to this particular application of the standard. Barclay testified that the previous inspector did not specifically identify the subject area as a place where hard hats were not required. Tr. 109. It was only his "understanding" of the discussion that led him to conclude that it was not necessary to wear a hard hat on the day in question. Tr. 42, 109.

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." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

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

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

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

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The fact of the violation has been established. The focus of the S&S analysis for this violation is the likelihood that the hazard would result in an injury, and the likelihood that any injury would be serious. I find that the Secretary has failed to carry her burden as to both issues.

The rocks in question were relatively small and were not traveling at any significant velocity. They were being shaken or bounced off a roll screen that was roughly the same height as Barclay. While some of them traveled a few feet from the screen, generally by sliding down parts of the equipment, Anguiano did not observe any rocks travel to where Barclay was located. Tr. 33. While it is possible that Barclay would have moved to a position where there was an greater possibility that a rock might have struck his head, I accept his testimony that he would have donned his close-by hard hat before working in such an area. Under the circumstances, it was not reasonably likely that Barclay's failure to wear a hard hat would result in an injury, and it was not reasonably likely that any injury would be serious. The violation was not S&S.

I also find that the operator's negligence with respect to this violation was low. In light of the conditions that existed, Barclay's interpretation of the discussion he had had with the previous MSHA inspector, while erroneous, was not unreasonable.

Citation No. 6233500

Citation No. 6233500 alleged a violation of 30 C.F.R. § 56.14107(a), which provides:

> Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

The violation was described in the "Condition or Practice" section of the citation as follows:

> The provided guard that protects the tire coupling and shaft was not in place. The length of the coupling, motor and gearbox shaft combined measured 12 inches long. The guard was removed by an employee when he performed welding on the roll crusher. The tire coupling was rolled by hand to rotate the roll crusher. The roll crusher is operated by a 15 HP electric motor. Three employees work in the area maintaining the operation of the plant. An employee could become entangled by the rotating shaft resulting in a permanent disabling injury.

Ex. P-4.

Aguiano determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that one employee was affected and that the operator's negligence was moderate. A civil penalty in the amount of $324.00 has been proposed for this violation.

The Violation

In construing an analogous standard[2] in *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984), the Commission stated:

> We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. *See, e.g., Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all

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[2] 30 C.F.R. § 77.400

(a) Gears; sprockets; chains; drive, head, tail and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

> relevant exposure and injury variables, *e.g.*, accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-[case] basis.

The guard in question had been removed the prior evening to facilitate welding on the crusher, and had not been replaced. Anguiano took a photograph of the condition, which shows that the guard had been temporarily placed on top of the motor. Ex. P-4. Respondent does not dispute that the guard should have been replaced prior to the starting of the plant on the morning of the inspection. Operation of the plant without the guard having been replaced violated the standard.

Significant and Substantial

Respondent does not dispute that the violation contributed to a hazard, i.e., a rapidly rotating shaft and coupling that could entangle a miner coming into contact with it. It is also clear that any injury suffered as a result of such entanglement would be serious. Tr. 55. Respondent contends that the violation was not S&S because it was not reasonably likely that the hazard would result in an injury. I agree.

There were three employees that worked around the plant, operating equipment, doing general cleaning and monitoring the plant's operation. None of them were in the immediate vicinity of the unguarded coupling when Anguiano observed it. Tr. 52-53. Barclay had not noticed that the guard had not been replaced. However, he testified that he was about to do his daily inspection after starting the plant, and would have noticed the missing guard and replaced it. Tr. 112. Terry Weirich, Respondent's president, also testified that the failure to replace the guard was an oversight and that Barclay would have noticed it and replaced it shortly after the plant had been started. Tr. 134. Weirich also believed that the likelihood of a miner becoming entangled as a result of the missing guard was remote, because the shaft and coupling were located at "about chest height" such that one would "have to make a deliberate effort" to come into contact with the rotating machinery. Tr. 133-35.

Weirich's testimony about the height of the hazard was not contradicted, and appears to be reasonably accurate judging from the photographs taken by Anguiano. Ex. P-4. Those photos also depict substantial framing members that inhibit access to the hazard and would reduce the risk of a person accidentally encountering it. Anguiano testified that he considered an injury reasonably likely because the condition was "within reach" and cleaning was required in the area. Tr. 55. However, the area depicted in the photographs does not appear to be one that would require cleaning on any regular basis, and Anguiano later clarified that any cleaning would have been done at ground level, i.e. not in the area of the coupling itself. Tr. 59-60. Considering the location of the hazard, the limited protection provided by the framing members, the fact that any cleaning would have been done at ground level where the risk of inadvertent contact would have been substantially reduced, and that Barclay would most likely have noticed the missing guard and replaced it within approximately two hours after the plant had been started up and before any

cleaning activity would have been performed, I find that it was not reasonably likely that the hazard contributed to would result in an injury, and that the violation was not S&S.[3] I agree with Anguiano's assessment that the operator's negligence was moderate and that one person was affected by the violation.

Citation No. 6233499

Citation No. 6233499 also alleged a violation of 30 C.F.R. § 56.14107(a), the guarding standard. The violation was described in the "Condition or Practice" section of the citation as follows:

> The head pulley of the under roll conveyor belt was not guarded. A pinch point existed between the smooth head pulley and the conveyor belt. The hazard is 69 inches away from the ground. (Supervisor) Ronny Barclay, and employees Jaime Dominguez, Santos Garcia are exposed to the hazard when they work in the area, maintaining operation of the plant. Barclay stated he knew of the condition for two months. No effort to correct the condition was attempted. Barclay engaged in aggravated conduct constituting more than ordinary negligence in that he was aware the head pulley exposed a pinch point hazard. This violation is an unwarrantable failure to comply with the mandatory standard.

Ex. P-3.

Anguiano determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was S&S, that three employees were affected and that the operator's negligence was high. As noted in the body of the citation, it is alleged that the violation was the result of the operator's unwarrantable failure to comply with a mandatory safety standard. A civil penalty in the amount of $6,300.00 has been proposed for this violation.

The Violation

Anguiano took a photograph of the cited condition after a guard had been welded in place to abate the citation.[4] Ex. P-3. With the exception of the approximately one foot high piece of expanded metal screen welded to the conveyor frame and depicted in the left center of the photo,

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[3] Anguiano also believed that it was reasonably likely that Barclay would have become entangled in the rotating shaft and coupling. Tr. 56. However, I reject that conclusion, and accept Barclay's testimony, i.e., that upon noticing the hazard, he would have shut down the motor and replaced the guard, a task that would have taken less than a minute. Tr. 51, 112.

[4] Weirich testified that there had never been a guard on the head pulley. Tr. 113. Anguiano agreed that there was no evidence that a guard had ever been fabricated or installed on the head pulley prior to issuance of the citation. Tr. 79.

all of the other guarding shown in the picture was in place before the subject inspection. Tr. 72, 79. What is not apparent from Anguiano's photograph is that the smooth head pulley is located a considerable distance off the ground. The location of the pulley is more accurately depicted in the upper-right-hand portion of Petitioner's Exhibit P-1. Anguiano attempted to measure the height of the pinch point, and obtained a figure of 69 inches. Tr. 64, 71, 116. Anguiano also testified that there were no obstructions between him and the pinch point when he took the picture. Tr. 81.

Anguiano's 69-inch height figure was more of an estimate than an actual measurement. It was taken from ground level, some four feet away from the side of the conveyor, to a "reference line," i.e., Anguiano's estimate of the height of the pinch point at that distance. Tr. 74-77. Access to the pinch point, where the conveyor belt contacts the top of the smooth head pulley, is considerably more restricted than is apparent from Anguiano's photograph. Ex. P-3. Respondent introduced a photograph showing Barclay, who is approximately six feet tall, standing close to the conveyor, fully extending his arm up and over electrical conduit and the conveyor frame, and still "not quite reaching the pinch point." Tr. 139-40; ex. R-1, R-2. Barclay testified that he couldn't reach to the pinch point, in part, because he had to stand in a small drainage ditch to approach it. Tr. 114, 118. He also testified that he did not believe that Anguiano's measurement reflected the true height of the pinch point. Tr. 117-18.

The conveyor in question had been in essentially the same position since 1986. Tr. 115, 136. It had been inspected twice yearly since that time, and the head pulley, which had never been guarded, had never been cited as a violation.[5] 113, 136-37. Anguiano, himself, had inspected the plant once prior to July 2004, and had failed to cite the condition, although he testified that he would have cited it if he had seen it. Tr. 12, 77-78, 81. On one prior occasion, an MSHA inspector had suggested adding some guarding to cover an opening on the side of the motor drive guard, which was done. Tr. 114, 136. That small, rectangular piece of woven-wire screen is shown bolted to the yellow framing on the right side of Anguiano's photograph. Ex. P-3.

Respondent contends that the condition was not a violation of the cited standard because the location of the head pulley dictated that it could not "cause injury," and that a guard was not required because the regulations state that "guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces," 30 C.F.R. § 56.14107(b). It also contends that it did not have fair notice of the Secretary's interpretation of the guarding standard as applied to the particular condition here at issue. I agree with Respondent on both points.

Anguiano agreed that the opposite side of the head pulley did not need to be guarded because it was "inaccessible." Tr. 74. It appears, however, that the side he was concerned about

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[5] The Act requires that mines, other than underground coal mines, be inspected at least two times per year. 30 U.S.C. § 813(a).

was just as effectively inaccessible under any reasonable application of the regulation. It is apparent from Respondent's photograph that the hazard, the pinch point of the belt and pulley, was at least seven feet away from where a person would have to stand in order to attempt to reach it. Ex. R-1. Moreover, that location was in a small drainage ditch, not a walking or working surface. There is no evidence that miners traveled or worked in the immediate area, and it appears that there was no possibility of inadvertent contact. Weirich and Barclay believed that the condition did not violate the regulation because the moving machine parts in question could not cause injury, and were located at least seven feet away from walking or working surfaces. Several MSHA inspectors that had inspected the condition in the past apparently reached the same conclusion.

I find that the Secretary has failed to carry her burden of proving that the moving machine parts at issue presented a hazard, or that they were located less than seven feet away from walking or working surfaces.[6] The condition did not violate the regulation and the citation will be dismissed.

In addition, enforcement of the regulation in this instance would be barred because Respondent did not receive fair notice of the Secretary's interpretation of the standard, i.e., a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not have recognized the specific prohibition or requirement of the standard as the Secretary seeks to apply it here. It is apparent that numerous MSHA inspectors have observed essentially the same condition and concluded that it did not violate the standard. One inspector actually made a suggestion to improve the guarding of the drive motor on the conveyor, but did not suggest that additional guarding was needed for the head pulley.

There is no evidence that the Secretary has published notice or otherwise provided an interpretation of the regulation that would have informed operators with reasonable certainty that the standard required guarding under the circumstances presented here. None of the other factors typically considered in analyzing the fair notice argument provide significant guidance or suggest a result other than that Respondent did not have fair notice of the Secretary's interpretation of the standard.

Order No. 6233505

Order No. 6233505 also alleges a violation of 30 C.F.R. § 56.14107(a), the guarding

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[6] Anguiano testified that Barclay agreed that the head pulley presented a hazard that could cause injury to miners. Tr. 68-70. However, if Barclay made such a statement, it is not apparent whether he was referring to head pulleys in general, or this particular installation. As Anguiano described the conversation, Barclay agreed that "the head pulley should have been covered on both sides and on the back side." Tr. 69. But, Anguiano, himself, believed that no guard was necessary on the far side of the pulley, and none was required in order to abate the citation. Tr. 74.

standard. The violation was described in the "Condition or Practice" section of the citation as follows:

> The six-bladed fan on the Detroit diesel engine was not guarded on the Northwest side. The engine is used to drive a water pump. The engine and pump were set up on July 6, 2004. The hazards were the sharp edges of the fan blades, a pinch point on the V-belt of the alternator and another pinch point on the belt that turns the engine's crank shaft. The hazards were two feet from the ground. The engine's ignition switch is on the same side that the hazards existed. An employee started the engine at 07:45 on this date. Ronny Barclay (Supervisor) stated that he knew of the missing guard, and the engine had been overheating. A gasket had been replaced on the valve cover. Barclay engaged in aggravated conduct constituting more than ordinary negligence in that he knew the guard was not in place. This violation is an unwarrantable failure to comply with the mandatory standard.

Ex. P-9.

Anguiano determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that two employees were affected and that the operator's negligence was high. As noted in the body of the order, it is alleged that the violation was the result of the operator's unwarrantable failure to comply with a mandatory safety standard. A civil penalty in the amount of $5,100.00 has been proposed for this violation.

The Violation

The cited condition is depicted in photographs taken by Anguiano. Ex. P-9. There was no guard on the left side of the pump engine, and the fan blades and small belt pulleys near the front of the engine were exposed. The engine was not running at the time. However, it had been operating that morning, most likely from shortly before Anguiano's 8:00 a.m. arrival until about 9:00 a.m., when other guarding violations were issued. Anguiano believed that employees were exposed to the hazard four times each day as they accessed the "ignition switch" to start and stop the engine for the day and during the lunch break. Tr. 89-90. The switch is depicted in one of the pictures, mounted on a small plate, along with some gauges, to the rear and left of the engine. Ex. P-9. Because of the proximity of the exposed hazards to the switch and the frequency that Aguinao believed that employees passed by the hazard, he concluded that it was reasonably likely that a serious crushing injury would occur. Tr. 92. Because Barclay was aware that the guard was not in place, and was responsible for other guarding violations, including one alleged to be an unwarrantable failure, Anguiano believed that the operator was highly negligent and that the violation was the result of an unwarrantable failure to comply with a mandatory safety standard.[7]

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[7] Anguiano also related that he had had a later phone conversation with Weirich, who stated that he had told Barclay to reinstall the guard. Tr. 93. However, both Barclay and Weirich

Barclay and Weirich testified that work had been done on the engine the day before, in an attempt to remedy an overheating problem. The thermostat had been changed and new belts had been installed. Tr. 119, 145-47. The guard on the right side of the engine was in place, but the one on the left had been left off to facilitate possible further remedial efforts, e.g., tightening the new belts, or more substantial repairs if the engine continued to overheat. The engine had been running about an hour, and would have been checked at lunch to see if the repairs had been effective. Tr. 125-27, 147. The engine normally ran all day, i.e., it was not shut off during the lunch break. Tr. 120. Barclay explained that the start-up procedure involved two employees, neither of whom would be on the left side of the engine, where the hazards were located. Tr. 121-24. Moreover, the switch was not an electrical cut-off, it only controlled the starter. The engine was shut off by pulling back on the throttle, which was located at the rear of the engine. Tr. 124, 148. Employees engaged in starting or stopping the engine would not be on the left side of the engine, near the hazard. They needed to be to the right and rear of the engine, and there was an eight-inch diameter water pipe that they would have had to crawl over to reach the area. Tr. 121-25, 143-45, 148. The positions of employees engaged in starting the pump motor are depicted in pictures introduced by Respondent. Ex. R-5, R-7. Weirch explained that there was no reason that a miner would be on the left side of the engine, where the hazard was located. Tr. 146, 148.

The guard that had been fabricated for the left side of the engine had not been replaced, leaving the hazards exposed. Miners worked in the area and, although their exposure to the hazards was substantially more limited than Anguiano believed, it was possible that a miner would inadvertently come into contact with the hazards and suffer an injury. Consequently, I find that the regulation was violated.

Respondent relies upon a provision in the Secretary's regulations stating that guards are not required "when testing or making adjustments which cannot be performed without removal of the guard." 30 C.F.R. § 56.14112(b). However, this limited exception does not encompass running of the engine for the whole morning to see if it would continue to overheat. While such a trial might be characterized as a test, it could, and should, have been performed with the guard in place. I find that Respondent violated the regulation.

Significant and Substantial

While any injury suffered as a result of the violation would have been serious, no injury was reasonably likely to occur because of the limited access to the area. Anguiano did not explain the basis for his conclusions about how often employees would be in proximity to the hazards. He apparently assumed they would be exposed four times each day because they would need to reach the "ignition switch." His assumptions were erroneous in several respects.

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testified that the instruction was to let the engine run for awhile, that the belts would probably have to be tightened, and to replace the guard after the test. Tr. 120, 145. I find the latter explanation more credible.

Respondent's unrebutted testimony establishes that the engine was started and stopped only once each day, and that the switch was used only while starting the engine. More significantly, the employees involved would not have been in close proximity to the hazard, because they would have been positioned to the right and rear sides of the engine, as depicted in Respondent's photographs. Ex. R-5, R-7. Anguiano's pictures, like those taken with respect to the previous citation, adequately depict the hazardous condition, but fail to depict the condition's accessibility. They do not show that the area on the left side of the engine is essentially barricaded off by a large water pipe approximately two feet off the ground. Respondent's testimony established that employees, who would be in the vicinity of the engine only twice per day, would have remained on the opposite side of that pipe, substantially reducing their exposure to the hazards. The condition existed that morning and would have been corrected either at the noon break, or at the end of the day. Consequently, even the limited exposure presented would have affected employees on only two limited occasions. Under the circumstances, I find that it was not reasonably likely that the violation would result in an injury, and that the violation was not S&S.

Unwarrantable Failure

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek* [*Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).
>
> Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC

705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

The Secretary failed to carry her burden of proof with respect to Citation No. 6233499, the head pulley guarding violation, negating the S&S and unwarrantable failure allegations as to that violation. The violation alleged in this order was also found to have been non-S&S. Consequently, it cannot form the basis of an unwarrantable failure charge. 30 U.S.C. § 814(d)(1). However, even if it had been S&S, it was not the result of an unwarrantable failure. As noted above, the decision to leave the guard off the left side of the engine while it was run that morning, impermissibly stretched the testing exception of the regulations. However, considering the extremely limited exposure of employees to the condition, its location with respect to their positions, and the fact that the engine would have been started once and shut down once at the lunch break to do further repairs, or re-install the guard, Respondent's negligence could not be characterized as anything more than moderate, and the violation was not the result of an unwarrantable failure.

The Appropriate Civil Penalties

Weirich Brothers is a small operator, as is its controlling entity. The Secretary introduced a printout from MSHA's computer database, an Assessed Violation History Report, showing that Respondent had 21 assessed and sustained violations in the 24 month period preceding the issuance of the subject citations. Ex. P-11. Of those violations, 12 were regularly assessed and four were S&S. The Proposed Assessment mailed to Respondent noted that there had been 29 assessed violations within the 24-month period, during which there had been 17 inspection days, i.e., 1.7 violations had been issued per inspection day. Under the penalty formula used by MSHA, this resulted in 16 penalty points being charged to Respondent, indicating a relatively poor violation history.[8] Respondent introduced a financial statement, and argued that the $12,331.00 in proposed civil penalties would affect its ability to remain in business. However, Weirich indicated that he might not make the argument if the penalties were in the $1,000.00 range. I find that the penalties imposed below would not affect Respondent's ability to remain in business. All of the violations were promptly abated in good faith. The gravity and negligence associated with the alleged violations have been discussed above.

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[8] *See* 30 C.F.R. § 100.3. Regular assessments, as opposed to single penalty and special assessments, are determined by reference to a point scale, with points being assigned for each of the penalty factors specified in the Act. The table of points for violation history ranges from zero for up to 0.3 violations per inspection day, to 20 for over 2.1 violations per inspection day.

Citation No. 6233497 was affirmed. However, it was found not to have been S&S. The violation was unlikely to result in an injury, and any injury would have been minor. The operator's negligence was found to have been low. A civil penalty of $247.00 was proposed by the Secretary. I impose a penalty in the amount of $60.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6233500 was affirmed. However, it was found not to have been S&S. The violation was unlikely to result in an injury. A civil penalty of $324.00 was proposed by the Secretary. I impose a penalty in the amount of $275.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Order No. 6233505 was found not to have been S&S, and was not the result of the operator's unwarrantable failure. The operator's negligence was moderate. Consequently, the order will be modified to a citation issued under section 104(a) of the Act. A civil penalty of $5,100.00 was proposed by the Secretary. I impose a penalty in the amount of $300.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

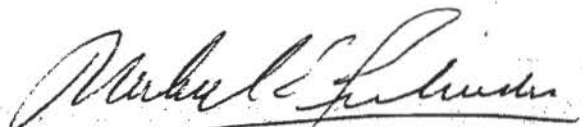
Respondent withdrew its contest and request for hearing with respect to Citation Nos. 6233498, 6233501, 6233502, 6233503, 6233504, and 6233506. It agreed to pay the proposed penalties for those violations, a total of $360.00. I have considered the representations and evidence submitted and conclude that the proffered resolution is appropriate under the criteria set forth in section 110(i) of the Act. Respondent will be ordered to pay civil penalties in the amount of $360.00 for those violations.

ORDER

Citation No. 6233499 is hereby **VACATED** and the petition as to that citation is hereby **DISMISSED**.

Citation Nos. 6233497 and 6233500 are **AFFIRMED**, as modified. Order No. 6233505 is modified to a citation issued pursuant to section 104(a) of the Act, and is **AFFIRMED**, as modified. Respondent is directed to pay civil penalties totaling $635.00 for those violations. Payment shall be made within 45 days.

With respect to the six citations as to which Respondent withdrew its contest and request for hearing, Respondent is ordered to pay civil penalties totaling $360, within 45 days.



Michael E. Zielinski
Administrative Law Judge

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/mh

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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February 28, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2006-22
Petitioner	:	A. C. No. 46-08266-66818
	:	
	:	Docket No. WEVA 2006-37
	:	A. C. No. 46-08266-69749
v.	:	
	:	
BLACK HAWK MINING,	:	Mine: Josephine No. 3
Respondent	:	
	:	
	:	

ORDER TO SUBMIT ADDITIONAL INFORMATION *

These cases concern proposals for assessment of civil penalties filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(d)), seeking the assessment of 11 alleged violations of mandatory safety standards found in Parts 75 and 50, Title 30, Code of Federal Regulations.

On January 17, 2006, the Commission received the Secretary's Motion for Settlement. In her motion, the Secretary states that the parties propose to reduce the total assessment for the 11 violations, including one violation issued as a result of a serious injury, from $62,825.00 to $16,078.00. This 74% reduction was based upon the Secretary's review of the factual circumstances and "other relevant criteria," including Section 110(i) criteria and the fact that New South Resources dba Black Hawk Mining filed for Chapter 11 Bankruptcy in August 2002 and ceased business in November 2005.

Congress stressed the importance of reviewing proposed settlements in an open and public manner and has placed a heavy burden on the Commission and its judges to provide this oversight. S. Rep. No. 181, 95th Cong., 1st Sess. 44-45 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 632-633 (1978) ("*Legis. Hist.*"); 30 U.S.C. § 820(k). It is the judge's responsibility, regardless of whether both parties have agreed on a settlement, to determine the appropriate penalty amount, in accordance with the six criteria set forth in Section 110(i) of the Act. *Sellersburg Stone Co.*, 736 F.2d 1147, 1151 (7th Cir. 1984).

Judges must consider all six of the criteria and are obliged to direct the parties to supplement the record as required for them to discharge this duty. *See, e.g., Sec'y of Labor on behalf of Hanna v. Consolidated Coal* Co., 20 FMSHC 1293, 1303 (Dec. 1998). Findings of fact on each of the statutory criteria provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, while also providing the "Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg Stone Co.*, 5 FMSHRC 287, 292-293 (Mar. 1983).

In addition to the criteria laid out in section 110(i), the Commission and its judges must "assure that the public interest is adequately protected before approval of any reduction in penalties." Conf. Rep. No. 181, 95th Cong., 1st Sess. 45 (1977), *reprinted in Legis. Hist.* at 633. Section 110(k) of the Mine Act requires judges to protect the public interest by ensuring that all settlements are consistent with the Mine Act's objectives. *Knox County Stone Co.*, 3 FMSHRC 2478, 2479 (Nov. 1981). As former Chief Administrative Law Judge Paul Merlin stated:

> Under the Mine Safety Act unlike most statutes, the administrative law judge has the affirmative duty to approve a settlement, even if the parties themselves have agreed upon its terms. Under this law *the judge does not have to approve a settlement, if he determines it is not in the public's interest.* In other words, the judge is here to guarantee the public interest . . . .

Explo-Tech Inc., 16 FMSHRC 931, 933 (Apr. 1994) (ALJ) (emphasis added).

The Secretary has failed to provide adequate evidence to support the proposed settlement under the six criteria of Section 110(i). At a minimum, the parties must provide evidence to support the assertion that the settlement penalty is justified under each of the six criteria. Thus, I must deny the subject motion unless the parties supplement the record with support showing how the penalty amount adequately considers each of the six criteria in Section 110(i).

Judges are required to verify the merits of a proposed settlement to determine if it protects the public interest. However, the judge cannot safeguard Congress' first priority - the health and safety of the miner - when the parties do not document their assertions. The parties provided no evidence to suggest that the 74% reduction in assessed penalty supports the public's interest. Additionally, the settlement motion fails to discuss any of the facts surrounding the accident or identify with specificity the reasons for the proposed reduction.

THEREFORE, it is **ORDERED** that the parties submit the required additional information and any supporting documentation within 15 days of the date of this order. I am mindful that the parties may desire to keep sensitive financial information confidential. If so, the parties may submit any documents to me for *in camera* review and may request that they be placed under seal subject to further review only by the Commission or a higher appellate body. Failure to comply with this order will result in the denial of the settlement motion.

Robert J. Lesnick
Chief Administrative Law Judge

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**this is a corrected version that was re-issued March 6, 2006.*

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February 28, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2005-116-M
Petitioner	:	A. C. No. 19-01114-56147
v.	:	
	:	
R.J. CINCOTTA CO., INC.,	:	Mine: Portable Crusher
Respondent	:	

ORDER TO RESPONDENT TO SUBMIT SUPPORTING DOCUMENTATION

This case is before me pursuant to an order of the Commission dated February 6, 2006, remanding this matter for further consideration and determination as to whether the operator, R.J. Cincotta Company, Inc., ("Cincotta") is entitled to relief under Rule 60(b) of the Federal Rules of Civil Procedure.[1] In particular, Rule 60(b)(1) provides relief from a final judgment in cases where there has been a "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1).

This matter arose because Cincotta did not file a timely answer to the Secretary of Labor's ("Secretary") penalty petition or to my August 18, 2005 show cause order. When I did not receive a response to the show cause order, I issued a default order on November 2, 2005, in which I directed Cincotta to pay the proposed penalty assessment. In support of its request, Cincotta, appearing *pro se*, claims it never received the default and that it "never heard back for [sic] an order to the respondent to show cause." Resp't Mot. The Secretary indicates that she does not oppose Cincotta's request.

The Commission has stated that default is a harsh remedy, and if the defaulting party makes a showing of adequate or good cause for failing to timely respond, the case may be reopened. *Coal Prep. Services, Inc.*, 17 FMSHRC 1529, 1530 (Sept.1995). In addition, the Commission has held pleadings drafted by *pro se* litigants to a less stringent standard than that applied to documents drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992)(*citing Haines v. Kerner*, 404 U.S. 519, 520 (1972)). However, based upon the record before me, I am unable to determine whether Cincotta has adequate cause for failing to timely file its notice of contest. The record includes certified return receipts signed by a company representative indicating Cincotta's receipt of both the show cause and default orders.

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[1]While the Commission is not obligated to adhere to the Federal Rules of Civil Procedure, the Commission has found guidance and has applied "so far as practicable" Rule 60(b). 29 C.F.R. § 2700.1(b).

Accordingly, Cincotta is **ORDERED** to address the issue of why it failed to file a timely notice of contest, particularly in light of its receipt of the show cause order, within 20 days of the date of this order. If Cincotta restates its claim of not having received the show cause order, it must explain why this Commission should not consider the enclosed certified return receipts as proof of its receipt of the show cause order. Cincotta must send sworn statements attesting to the veracity of its claim.

Robert J. Lesnick
Chief Administrative Law Judge

Enc.

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GPO U.S. GOVERNMENT PRINTING OFFICE: 2006—320-961/43951