JANUARY AND FEBRUARY 2007

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

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

Secretary of Labor, MSHA v. Highland Mining Company, Docket No. KENT 2006-189-R, et al. (Judge Hodgdon, January 17, 2007)

Secretary of Labor, MSHA v. Chestnut Coal Company, Docket No. PENN 2006-89-R, et al. (Judge Zielinski, unpublished Order of Dismissal, December 21, 2006)

Secretary of Labor, MSHA v. Chestnut Coal Company, Docket No. PENN 2006-145-R, et al. (Judge Zielinski, January 19, 2007)

Secretary of Labor, MSHA v. Spartan Mining Company, Inc., Docket No. WEVA 2006-540-R, et al. (Judge Zielinski, unpublished Order of Dismissal, January 8, 2007)

Secretary of Labor, MSHA v. Spartan Mining Company, Inc., Docket No. WEVA 2006-527-R, et al. (Judge Zielinski, unpublished Order of Dismissal, December 21, 2006)

Secretary of Labor, MSHA v. Spartan Mining Company, Inc., Docket No. WEVA 2006-556-R, et al. (Judge Zielinski, unpublished Order of Dismissal, December 21, 2006)

Secretary of Labor, MSHA v. Mammoth Coal Company, Docket No. WEVA 2006-759-R. (Judge Bulluck, unpublished Order of Dismissal issued December 29, 2006)

Vurnun Edwurd Jaxun v. Asarco, LLC., Docket No. WEST 2006-416-DM. (Judge Bulluck, November 28, 2006)

Secretary of Labor on behalf of Lawrence L. Pendley v. Highland Mining Co., LLC., Docket No. KENT 2006-506-D. (Judge Barbour, January 18, 2007)

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

Secretary of Labor, MSHA v. Musser Engineering, Inc., Black Wolf Coal Company, and PBS Coals, Inc., Docket No. PENN 2004-152, PENN 2004-157, and PENN 2004-158. (Interlocutory Review of Judge Lesnick's July 21, 2006 Order)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 5, 2007

UNITED MINE WORKERS OF AMERICA, LOCAL 1248	:	
	:	Docket No. PENN 2002-23-C
v.	:	
MAPLE CREEK MINING, 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" or "Act"). Pursuant to section 111 of the Mine Act, 30 U.S.C. § 821, the United Mine Workers of America, Local 1248 ("the UMWA") seeks compensation for miners idled by a July 31, 2001, order issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") requiring the withdrawal of miners from a mine of Maple Creek Mining, Inc. ("Maple Creek"). On May 4, 2006, Administrative Law Judge Michael Zielinski denied Maple Creek's motion for summary decision on the claim for compensation. 28 FMSHRC 407 (May 2006) (ALJ). Upon Maple Creek's motion for reconsideration, the judge invited the Secretary of Labor to appear as amicus curiae and file a brief on the reconsideration motion, which she did. 28 FMSHRC 904 (Oct. 2006) (ALJ). The judge subsequently denied the motion. *Id.*

Pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76, Maple Creek thereafter moved for certification of the judge's rulings for interlocutory review, and the UMWA filed a response in opposition. On December 14, 2006, the judge granted Maple Creek's motion, certifying for review the question of whether the MSHA withdrawal order became final for purposes of section 111 of the Act. Applying Rule 76(a)(1)(i), the judge found that his prior rulings on summary decision involved a controlling question of law and that immediate review by the Commission may materially advance the final disposition of the case.

Commission Rule 76(a) provides that interlocutory review is a matter of sound discretion of the Commission and that the Commission may grant interlocutory review upon a determination that the judge's interlocutory ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a). Upon consideration of the judge's certification, we hereby grant review of the

judge's decisions on motion for summary decision and the issue of whether the MSHA withdrawal order became final for purposes of section 111 of the Act. We also grant, sua sponte, amicus curiae status to the Secretary of Labor.

Maple Creek and the UMWA are hereby ordered to file initial briefs 20 days from the date of this order. Response briefs by both parties, as well as the Secretary's amicus brief if she chooses to file one, will be due 10 days following service of the last initial brief.

Michael F. Duffy, Chairman

Mary Lu Jordan, 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 17, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. YORK 2005-22-M
HANSON AGGREGATES NEW YORK , INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DECISION

BY: Duffy, Chairman, and Young, Commissioner

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), and involves a citation alleging that Hanson Aggregates New York, Inc. ("Hanson"), violated 30 C.F.R. § 56.14211(c).[1] Following the submission of cross motions for summary decision on stipulated facts,[2] Administrative Law Judge T. Todd Hodgdon granted the Secretary of Labor's motion and held that Hanson had violated the regulation. 27 FMSHRC 833 (Jan. 2005) (ALJ). The Commission thereafter ordered review of the judge's decision. For the reasons that follow, we vacate the judge's decision and remand this proceeding to the judge.

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[1] Section 56.14211(c) provides that "[a] raised component must be secured to prevent accidental lowering when persons are working on or around mobile equipment and are exposed to the hazard of accidental lowering of the component."

[2] The cross motions each contained an identical "Stipulated Factual Background," which the judge set forth in his decision. *See* 27 FMSHRC at 833-34. Each party also included in its respective motion a set of Stipulated Material Facts ("SMF"), which, while not identical, differed little in substance from each other. The SMF citations used herein are to the Secretary's version (S.'s Mot. for Summ. Dec. at 5-8), which was the only complete version submitted to the Commission, and appears to be the version cited by the judge in his decision.

I.

Factual and Procedural Background

The violation alleged arose out of a fatal accident that occurred on the morning of March 23, 2004, at Hanson's Jordanville Plant in Herkimer, New York. *Id.* at 833-34. Several Hanson employees were involved in setting up a 75-ton P & H mobile crane on a ramp leading to the mine's primary crusher. *Id.* at 833. The crew planned to use the crane to lift the crusher's feeder and hopper assembly off the crusher so that the assembly could be repaired. *Id.*

The crane had been inspected twice in the previous month and had been found to be in good working order both times.[3] A hoist ball with a hook was properly secured or rigged to the crane's auxiliary hoist line, which was the proper size and in good condition. 27 FMSHRC at 834; SMF Nos. 12-13. The parties agreed that the load brake on that line constituted a "load locking device" or a device that "prevents free and uncontrolled descent," and that it was working properly at the time. SMF Nos. 7, 14.

The crane was further equipped with an "anti-two-block" device. SMF No. 5. "Two blocking" occurs when an object such as a hoist ball is pulled tight against the tip of a crane's boom, snapping the hoist line. 27 FMSHRC at 834. The parties stipulated that load brakes, anti-two-block devices, and proper rigging are the only load locking devices that Hanson could have used to prevent the free and uncontrolled descent of the hook and ball. SMF No. 15.[4]

The way in which the anti-two-block device functioned depended upon the mode in which the crane was operating. When the crane approached a two-block condition while in "rigging/travel mode," the anti-two-block switch for the hoist approaching the two-block condition was supposed to trip or open, and the Microguard would display a red warning light. SMF 24. If the crane approached a two-block condition while in "work mode," one or both of the anti-two-block switches would trip or open, and the Microguard would activate hydraulic cut

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[3] An equipment services contractor that inspected the crane on February 24, 2004, had determined that the crane did not suffer from any defects, including defects that affected safety. SMF No. 10. Hanson had also conducted a monthly inspection of the crane in early March 2004. SMF No. 11.

[4] The anti-two-block device was a Microguard 424 Rated Capacity Indicator ("Microguard"), a computerized system with anti-two-block elements. SMF No. 22. Those elements included two anti-two-block switches or devices: one for the main hoist line and one for the auxiliary hoist line. *Id.* The anti-two-block device had been inspected during both of the aforementioned inspections of the crane, and had been found to have been functioning properly, but was not inspected on the morning of March 24. SMF Nos. 10, 11, & 26. The Secretary does not consider the crane operator's failure to inspect the anti-two-block device to have been a cause of the accident here. SMF No. 30.

valves depending whether one or both hoists were approaching a two-block condition. SMF 25. The system would also sound an audible alarm and display a red warning light. *Id.* Activation of the hydraulic cut valves would essentially shut the crane down, hydraulically preventing a two-block condition from occurring. *Id.*

While the other members of the crew were extending the crane's outriggers and roping off the working radius of the crane, the crane operator, Robert Kimball, was setting up the crane and conducting his pre-shift examination. 27 FMSHRC at 834; SMF No. 28. As Kimball raised the crane's boom approximately 71 degrees and extended the boom about fifty feet, he apparently failed to lower or extend the auxiliary hoist line. 27 FMSHRC at 834.

The extending boom eventually pulled the hoist ball tight against the tip of the boom, snapping the auxiliary hoist line. *Id.* The supervisor of the crew, Dean Robertson, was the designated signal or ground man, and at the time of the accident was standing to the side of the crane. *Id.* The hoist ball and hook fell and struck him, killing him instantly. *Id.*

The Department of Labor's Mine Safety and Health Administration ("MSHA") subsequently investigated the accident.[5] MSHA was unable to determine whether the Microguard system was in "rigging/travel mode" or "work mode" when the accident occurred. SMF No. 3. Moreover, while MSHA conducted tests on the crane, it could not determine whether the anti-two-block device was working properly and consistently on the day of the accident. SMF No. 6.[6]

MSHA thereafter issued Citation No. 6002658 to Hanson. 27 FMSHRC at 834. The citation eventually charged Hanson with violating 30 C.F.R. § 56.14211(c), alleging that "[t]he crane's anti-two-block device either was not activated or malfunctioned and there was no other functional means to prevent accidental lowering." *Id.*

In ruling upon the cross motions for summary decision, the judge identified the only issue in this case to be whether the hook and ball were secured to prevent lowering, as required by

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[5] The Secretary's brief to the Commission cites the MSHA Report of Investigation into the accident and, in so doing, states background information on the case not included in the stipulated narrative of facts or any SMF. *See* S. Br. at 1-6. In its reply brief, Hanson requested that the Commission disregard the new factual allegations not included in the Stipulated Factual Background or the individual SMF. H. Reply Br. at 2, 6-7. The Secretary responded with a letter to the Commission acknowledging that the report had not been submitted to the judge and stating that her citations to the report were only for background and did not constitute probative evidence. Letter from Solicitor's Office, dated May 19, 2006. We did not consider the information from the report cited in the Secretary's brief in reaching our decision here.

[6] During the tests, the anti-two-block device worked at angles of 50 degrees or below, but failed to work consistently at angles above 50 degrees. SMF No. 6.

section 56.14211(c). *Id.* at 835. Based on the description of the Microguard system, the judge posited three possible scenarios under which the accident might have occurred, depending upon the mode in which the crane was operating. *Id.* at 836. Drawing inferences from the stipulated facts, he disregarded as "unlikely" the scenario which assumed that the anti-two-block device did not malfunction. *Id.* at 836. The judge also rejected Hanson's argument that the load brake on the auxiliary hoist line and the proper rigging of the ball and hook to the line constituted compliance with section 56.14211. *Id.* at 835. Consequently, the judge granted the Secretary's motion for summary decision, denied Hanson's cross motion, affirmed the citation, and assessed the $9,100 penalty proposed by the Secretary. *Id.* at 837-38.

II.

Disposition

Hanson contends that the judge's finding of material fact that the anti-two-block device did not function properly was erroneous in that it was improperly based on inferences which the judge drew from the limited record in the case. H. Br. at 12-16; H. Reply Br. at 3-6. The operator further maintains that because the crane was equipped with the only three load-locking devices that could have prevented the free and uncontrolled descent of the hook and ball, and that at least two of those devices were functioning properly, Hanson was in compliance with section 56.14211(c). *Id.* at 9-12.

The Secretary responds that under section 56.14211 a device intended to prevent the hook and ball from suddenly descending must be functioning; and the fact of the accident establishes that the crane's anti-two-block device was not doing so in this instance. S. Br. at 8-13. According to the Secretary, the factual inferences which the judge drew in this case are undisputed, and thus the judge was well within his authority to rely on those inferences, in conjunction with the undisputed facts of the case, to reach the legal conclusion that Hanson violated section 56.14211(c). *Id.* at 13-14.

Section 56.14211 is entitled "Blocking equipment in a raised position" and provides in pertinent part:

> (b) Persons shall not work on top of, under, or work from a raised component of mobile equipment until the component has been blocked or mechanically secured to prevent accidental lowering. . . . .
>
> (c) A raised component must be secured to prevent accidental lowering when persons are working on or around mobile equipment and are exposed to the hazard of accidental lowering of the component.

(d) Under this section, a raised component of mobile equipment is considered to be blocked or mechanically secured if provided with a functional load-locking device or a device which prevents free and uncontrolled descent.

30 C.F.R. § 56.14211(b), (c)-(d).

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989). It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)).

As the judge found, the requirements of section 56.14211(c) can be broken down into four elements: (1) a raised component of mobile equipment; (2) must be secured to prevent accidental lowering; (3) when persons are working on or around the equipment; and (4) are exposed to the accidental lowering of the component. *See* 27 FMSHRC at 835. There was no dispute that the crane was a piece of mobile equipment on or around which Robertson was working, and while doing so he was exposed to the accidental lowering of the hook and ball. *Id.* Moreover, the parties stipulated that "[t]he 'raised component' of the crane that Hanson allegedly failed to secure is the hook and ball originally secured to the crane's auxiliary hoist line." *Id.*; SMF No. 16. Consequently, the judge concluded that the only issue that remained to be decided on the cross motions for summary decision was the mixed question of law and fact: "whether the hook and ball were secured to prevent accidental lowering" at the time of the accident. 27 FMSHRC at 835.

Summary decisions are governed by Commission Procedural Rule 67. Commission Procedural Rule 67(b) provides that:

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

(1) That there is no genuine issue as to any material fact; and

(2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). The Commission "has long recognized that[] '[s]ummary decision is an extraordinary procedure,'" and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which "the Supreme Court has indicated that summary judgment is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact.'" *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).[7]

In addition, appellate review of summary judgment decisions issued pursuant to Federal Rule 56 is *de novo*, in that the reviewing court applies the same Rule 56(c) standard as the trial court. 10A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2716, at 273-74 (3d ed. 1998). Moreover, the Supreme Court has stated that "we look at the record on summary judgment in the light most favorable to . . . the party opposing the motion," and that "the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion." *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Consequently, the Commission has held that when it reviews a summary decision and determines that the record before the judge contained disputed material facts, the proper course is to vacate the grant of summary decision and remand the matter for an evidentiary hearing. *See Energy West Mining Co.*, 17 FMSHRC 1313, 1316 (Aug. 1995); *Missouri Gravel*, 3 FMSHRC at 2473.

Here, the judge's summary decision rests upon a factual dispute that he purported to resolve. Drawing upon the description of how the Microguard system worked, the judge posited that one of three scenarios took place prior to the accident:

> (1) The crane was in the "rigging/travel mode," the anti-two-block switch for the hoist did not trip or open and/or the red warning light was not displayed; (2) The crane was in the "work mode," the anti-two-block switches did not trip or open and/or the hydraulic cut valves were not activated, the audible alarm was not sounded and the red warning light was not displayed; or, (3) The crane was in either the "rigging/travel mode" or the "work mode," the hydraulic cut valves were activated, the audible alarm was

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[7] Rule 56(c) provides for the filing of motions for summary judgment and states that:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c).

> sounded and/or the red warning light was displayed and the crane operator ignored them.

27 FMSHRC at 836.

Under the first two scenarios, the Microguard system would not be considered to be a device that was "functioning," but under the third it may have. The judge went on, however, to discount the possibility of the third scenario:

> It seems unlikely that condition No. 3 occurred without there being any evidence of it. As noted above, if the hydraulic cut valves had been activated, the crane would have shut down whether the operator ignored the situation or not, and the accident would presumably have been prevented. Further, bystanders would have noticed the shut down. Similarly, if an audible alarm had sounded, bystanders would have heard it. Moreover, when MSHA tested the anti-two-block device after the accident, it worked when crane's boom was at 50° and below, but it did not work consistently when tested above 50°. (SMF 6.) When the accident occurred, the crane's boom was at approximately 71° according to the stipulated narrative.

Id. The judge stated that he relied not only on the evidence, but also on "logical inferences to be drawn therefrom" in concluding that the Secretary had established that the anti-two-block device had not been working properly. *Id.*

We conclude that the judge erred in granting summary decision in this case. First, he incorrectly held at the outset that because the Secretary and Hanson had each stipulated to the facts, the requirement of Rule 67(b)(1) that there be "no genuine issue as to any material fact" had been met in this case. *See* 27 FMSHRC at 833. However, each of the cross motions was predicated on the filing party's position on what constituted the material facts necessary to dispose of the case according to *that* party. That does not necessarily mean that, when taken together, the two motions conclusively established the universe of facts that were in fact material to determining whether Hanson violated section 56.14211. That is not a question for the parties to decide, but rather for the judge. *See generally Federal Practice and Procedure* §§ 2725 at 401 ("the principal *judicial* inquiry required by Rule 56 is whether a genuine issue of material fact exists"), 2720 at 335-36 (in case of cross motions for summary judgment, "the court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard. Both motions must be denied if *the court finds* that there is a genuine issue of material fact.") (emphases added); 11 James Wm. Moore, et al., *Moore's Federal Practice* § 56.11[5][a], at 56-105 to 107 (3d ed. 1999) ("*Courts* ruling on summary judgment motions *are to review the submissions* of the parties *and*

determine whether a factual dispute of sufficient magnitude exists to warrant trial.") (emphases added).

Second, certain factual findings the judge made by drawing inferences from the stipulated facts do not withstand scrutiny when viewed in the light most favorable to the party opposing the motion, Hanson. For instance, the judge found that bystanders would have heard the Microguard system's audible alarm if it had sounded (27 FMSHRC at 836), despite the lack of any evidence regarding how the working environment was at the time in question. For example, the limited facts reveal nothing about ambient noise, where all potential witnesses might have been positioned, what they heard or observed, or the relative volume of the audible warning. Consequently, this was not a proper inference to draw in ruling upon a motion for summary decision. Likewise, inferring that MSHA's post-accident testing established the pre-accident condition of the anti-two-block device ignores the possibility that the device was functioning properly before the accident but was damaged during the accident. The judge can rely on inferences to make such findings only after the record has been more fully developed.[8] As stated by the Commission in a previous case, "[i]n entering summary decision . . . , the judge was trying issues of fact through the summary decision procedure. This he cannot do." *Missouri Gravel*, 3 FMSHRC at 2473.

Similarly, the judge, in inferring that the accident could only be explained by a malfunction in the Microguard system, failed to take into account evidence that the accident instead could be attributed to operator error. Indeed, the parties specifically stipulated that "operator error was a root cause of the accident." SMF No. 17. The judge acknowledged the stipulation, but stated that "no information beyond that enigmatic statement is provided." 27 FMSHRC at 836 n.1. However, while the stipulation may not supply much information when viewed in isolation, according to another of the stipulations, it appears that the crane operator

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[8] We stress that inferences that could be considered reasonable in the context of a full record may not be sufficiently supported by the scant record stipulated to at this stage of the proceedings. The Commission has consistently held that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence," and that inferences drawn by the judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). However, the grant of a summary decision motion is not reviewed under the substantial evidence standard, but rather, as discussed, under the more stringent de novo review of whether the Procedural Rule 67(b) standard has been met. Furthermore, even if the lower standard of review is applied, the thin record in the case necessarily prevents a determination of whether the inferences the judge drew were reasonable. As the Commission recognized in *Mid-Continent*, drawing inferences from evidence is particularly appropriate "where . . . it is impossible or there is only a remote possibility of obtaining direct evidence to establish a violation." 6 FMSHRC at 1138. Here, where the parties made little effort to develop the record and no evidentiary hearing took place, it was premature for the judge to rely on the inferences that he did in concluding that there was a violation.

was conducting a preshift inspection at the same time he was raising and extending the boom. SMF No. 29. Further factual development is necessary on this issue, another clearly material issue.

In addition, the sparse factual record that we have been presented with is particularly problematic given the Secretary's failure to explain what she expects of operators under the terms of subsection (d) of section 56.14211. In interpreting section 56.14211(c), we cannot ignore the import of subsection (d). *See Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990) (reading regulatory provision in context to determine whether its meaning was plain or ambiguous). Subsection (d) states that "[u]nder this section, a raised component of mobile equipment is considered to be blocked or mechanically secured if provided with a functional load-locking device or a device which prevents free and uncontrolled descent." As noted, the parties stipulated that: (1) the ball and hook were properly rigged to the hoist line; (2) the load brake on the line, constituted, using the exact terms of section 56.14211(d), "a 'load locking device' or a device that 'prevents free and uncontrolled descent;'" and (3) the load brake was working properly at the time of the accident. SMF Nos. 7, 12, 14. We are unable to determine from the record developed in this case whether such conditions satisfied the requirements of section 56.14211(d). This is a question on which the judge first needs to pass, after the benefit of an evidentiary hearing which could include factual and expert testimony and the submission of documents.

III.

Conclusion

For the foregoing reasons, we vacate the judge's decision granting the Secretary's motion for summary decision and remand this case for a full evidentiary hearing.

Michael F. Duffy, Chairman

Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

The threshold question in this case — indeed, the central question — is the proper interpretation of the regulation at issue. That standard is entitled "Blocking equipment in a raised position" and provides in relevant part:

> (c) A raised component must be secured to prevent accidental lowering when persons are working on or around mobile equipment and are exposed to the hazard of accidental lowering of the component.
>
> (d) Under this section, a raised component of mobile equipment is considered to be blocked or mechanically secured if provided with a functional load-locking device or a device which prevents free and uncontrolled descent.

30 C.F.R. § 56.14211(c)-(d).

Hanson contends that the prohibition against accidental lowering contained in section (c) is qualified by the language of section (d). H. Br. at 9-12. According to this view, an operator whose equipment has a properly working load-locking device cannot be cited under the regulation, even if the device fails to prevent an accidental lowering. In the present case, Hanson's crane was equipped with three load-locking devices. 27 FMSHRC 833, 835 (Nov. 2005) (ALJ). The parties stipulated that two of the three were working properly at the time of the accident. Stipulated Material Facts ("SMF") Nos. 7 and 12. Nonetheless, the hoist ball and hook accidently fell, killing Dean Robertson, who was standing next to the crane. 27 FMSHRC at 834.

The accident resulted from an occurrence commonly known as "two blocking." *Id.* The two-blocking accident occurred despite the fact the crane was equipped with an anti-two-block load-locking device. The judge held that even though Hanson was not required to equip the crane with the anti-two-block device, once it chose to provide that mechanism, it had to make sure it functioned properly. *Id.* at 836-37. The judge inferred, on the basis of stipulated facts, that the anti-two-block device was not working properly at the time of the accident, and he upheld the violation on that basis. *Id.* My colleagues conclude that the scant stipulated record at this stage of the proceedings does not support the judge's inferences. Slip op. at 8-9. They further conclude that summary judgment is not an appropriate vehicle for deciding this case because the parties' stipulations do not establish the universe of facts that are material to a determination of whether Hanson violated section 56.14211. *Id.* at 7-8.

I agree with my colleagues that certain of the judge's inferences are not supportable; however, those faulty inferences are only relevant to the judge's determination that the anti-two-block system malfunctioned at the time of the accident. Unlike the judge, I do not consider such

a finding to be a necessary precondition for upholding the Secretary's enforcement action. Moreover, in contrast to my colleagues, I believe the stipulated facts provide a sufficient record for deciding the matter before us.

Among other things, the parties have agreed that the hook and ball constituted a "raised component" of the crane that Hanson allegedly failed to secure. SMF 16. There is no dispute that this ball and hook fell. 27 FMSHRC at 834. There is also agreement that a person was "working . . . around mobile equipment and . . . exposed to the hazard of accidental lowering." *Id.*

The Secretary maintains that these facts support a violation of 56.14211(c), because that provision states that a "raised component must be secured to prevent accidental lowering." S. Br. at 8-9. Although 56.14211(d) allows an operator to secure the raised component by using a "functional load-locking device," the Secretary does not consider a load-locking device to be "functional" as that term is used in 56.1411(d) if, despite the presence of that device, a free and uncontrolled descent nevertheless occurs. S. Br. at 8. Because none of the load-locking devices on the crane served to prevent the ball and hook from suddenly descending, the Secretary concluded the crane was not equipped with a functional load-locking device within the meaning of the regulation. *Id.* at 12.

Hanson contends that a violation occurs only when there is no properly working load-locking device, and that this is not the situation here. H. Br. 11-12. Indeed, Hanson contends it exceeded its obligation under the regulation by equipping the crane with two load-locking devices which were working properly at the time of the accident: load brakes and correct rigging. *Id.* This case therefore presents the issue of whether an operator violates section 56.14211(c) whenever there is an accidental lowering of a raised component, or whether the Secretary is precluded from issuing a citation if, despite the accidental lowering, the operator demonstrates that the equipment contains at least one load-locking device that is shown to be in working order. Because the language of the regulation does not explicitly resolve this dispute, I consider it ambiguous.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'" (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (other citations omitted). The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation and . . . serves a permissible regulatory

function." *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *See Energy West*, 40 F.3d at 463 (citing *Sec'y of Labor on behalf of Bushnell v. Cannelton Indus.*, Inc., 867 F.2d 1432, 1435, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable).

The Secretary construes the phrase "functional load-locking device" in section 56.14211(d) to apply only to devices which prevent the accidental lowering of raised components referred to in section 56.14211(c). S. Br. at 8. Under this view, a stipulation that a particular load-locking device was in working order (e.g. SMF No. 7) does not absolve Hanson from liability if a free and uncontrolled descent nevertheless occurs, even if the device might have prevented a different kind of accident. Given the purpose of the regulation, this is not an unreasonable interpretation.

The regulatory history of section 56.14211 makes clear that this provision is about more than a mere requirement to provide certain devices on mobile equipment:

> When persons work on top of, under, or from mobile equipment in a raised position, or a raised portion of that equipment, there is a hazard that the raised portion may descend without warning. Miners have been seriously injured or killed when raised equipment or raised components of equipment have fallen unexpectedly. This standard sets forth safety requirements that are intended to prevent these occurrences.

53 Fed. Reg. 32,496, 32,516 (Aug. 25, 1988). Thus, section 56.14211 was promulgated not simply to require that operators provide certain devices on cranes, but to actually protect against accidental lowering of raised components.

The Commission decision in *Fluor Daniel*, 18 FMSHRC 1143 (July 1996), also supports the Secretary's position here. In that case, the operator was charged with a violation of 30 C.F.R. § 56.14101(a)(1), which requires that self-propelled mobile equipment be provided with a service brake system capable of stopping and holding the equipment. The operator argued that since the standard provided the method and criteria for testing brakes under subsection (b), and since it was stipulated that the brakes met the requirements of that subsection, the brakes did not violate the standard. The Commission concluded:

> Under its plain language, the service brakes must be capable of stopping and holding the equipment on the maximum grade it travels. The uncontroverted evidence established that the forklift's brakes failed to meet this requirement. . . . Thus . . . we reverse [the

judge's] determination that the Secretary failed to establish a violation of section 56.14101(a)(1).

18 FMSHRC at 1146.

In upholding the citation, the Commission rejected Fluor's argument that section 56.14101(b) limited the scope of subsection (a), pointing out that "[s]ection 56.14101(b) relates only to the testing of service brakes when there is 'reasonable cause to believe that the service brake system does not function, as required'" and that "the tests contained in subsection (b) [were not] the exclusive means of determining the effectiveness of service brakes." 18 FMSHRC at 1146.

I do not find the Secretary's result-oriented approach to be unreasonable, given the language and purpose of the regulation. Subsection (c) could reasonably be read in this manner, as it requires that the raised component *must* be secured and that accidental lowering *must* be prevented. Moreover, Hanson's interpretation of the regulation — that it need only utilize a device specified in subsection (d) that is in working order to be in compliance — in effect reads subsection (c) out of the regulation. This contradicts the elementary rule of construction that effect must be given to every word, clause and sentence in a statute,[1] and that it should be construed so that effect is given to all its provisions so that no part will be superfluous. Norman J. Singer, 2A Statues and Statutory Construction, § 46.06 (6th ed. 2000); *see also Sec'y of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1438 (D.C. Cir. 1989) (rejecting a regulatory interpretation that read one subsection as circumscribed by another).

Even if one could determine that Hanson's interpretation is reasonable, it is certainly not the only logical interpretation possible. It is not the role of the Commission to decide which of the two interpretations at issue is correct; our role is merely to determine if the Secretary's view is reasonable. *See Sec'y of Labor v. Mutual Mining, Inc.*, 80 F.3d 110, 115 (4th Cir. 1996) (deferring to Secretary's interpretation of statutory provision regarding unemployment compensation). The D.C. Circuit emphasized this principle in *Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 320-321 (D.C. Cir. 1990) (adopting the Secretary's view that a training regulation that exempted "supervisory personnel" did not apply to supervisors when they were working as miners, even though the operator's facial reading of the standard was also reasonable).

I conclude that the Secretary's interpretation of section 56.14211 is a reasonable one and should be accorded deference.[2] Accordingly, I do not believe any further fact finding on the part

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[1] The principles or rules of statutory construction apply to administrative regulations. 2 Am. Jur. 2d *Administrative Law* § 245 (2004).

[2] Separate from the issue of regulatory interpretation is whether the operator has received fair notice of the Secretary's interpretation of the regulation. *Gates & Fox Co. v. OSHRC*, 790

of the judge is necessary, and therefore would not remand this case to him for a trial. Rather, I would affirm the judge's decision in result.[3]

Mary Lu Jordan, Commissioner

F.2d 154, 156 (D.C. Cir. 1986) (citations omitted). However, that issue is not before us because on review Hanson has not asserted that it did not have adequate notice.

[3] Consistent with my analysis of the regulation, I disagree with the judge's statement that the result in this case could possibly be different if Hanson had not installed an anti-two-block device. Given that an accidental lowering occurred, pursuant to my analysis, this fact would not be relevant.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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January 19, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2007-143-M
v.	:	A.C. No. 24-00499-97717
FISHER SAND & GRAVEL COMPANY	:	

BEFORE: Duffy, Chairman; Jordan 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 15, 2006, the Commission received from Fisher Sand & Gravel Company ("Fisher") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On September 6, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Fisher for three citations. Fisher, at that time acting pro se, had previously contested the underlying citations and states that it believed that the previous contests also constituted contests of the penalties. The Secretary states that she does not oppose Fisher's request to reopen the penalty assessment.

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 Fisher's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Fisher'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

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 22, 2007

SECRETARY OF LABOR,	:	Docket Nos. KENT 2006-189-R
MINE SAFETY AND HEALTH	:	KENT 2006-190-R
ADMINISTRATION (MSHA)	:	KENT 2006-194-R
	:	KENT 2006-195-R
	:	KENT 2006-196-R
	:	KENT 2006-201-R
v.	:	KENT 2006-202-R
	:	KENT 2006-227-R
	:	KENT 2006-228-R
HIGHLAND MINING COMPANY, LLC	:	KENT 2006-229-R

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DIRECTION FOR REVIEW AND DECISION

BY THE COMMISSION:

These proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), involve Notices of Contest filed by Highland Mining Company, LLC ("Highland") pursuant to section 105(d) of the Act, 30 U.S.C. § 815(d), and were on stay pending the filing of corresponding civil penalty proceedings. The Secretary of Labor issued proposed civil penalties for the citations being contested, Highland contested those penalties pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a), and the Secretary has filed petitions for assessment of the penalties in Commission Docket Nos. KENT 2006-340 and KENT 2006-406. Consequently, in a sua sponte Order issued January 17, 2007, the judge lifted the stays and dismissed the contest cases, because "with the filing of the civil penalty cases, the contest proceedings are moot."

In *Energy Fuels Corp.*, 1 FMSHRC 299 (May 1979), the Commission stated:

> Inasmuch as a citation and related withdrawal orders may be issued before the Secretary has proposed a penalty, the operator's interest in immediately contesting the allegation of violation and the special findings in a citation may be considerable.

> As we have said, affording the operators this opportunity will not adversely affect the interests of miners. The Secretary has not convinced us that the interest in avoiding piecemeal litigation necessarily outweighs the interests of the operators, for we think that the Commission both could allow operators to immediately contest all parts of citations, and largely accommodate the interest cited by the Secretary. If the citation lacked special findings, and the operator otherwise lacked a need for an immediate hearing, we would expect him to postpone his contest of the entire citation until a penalty is proposed. Even if he were to immediately contest all of a citation but lacked an urgent need for a hearing, we see no reason why the contest of the citation could not be placed on the Commission's docket but simply continued until the penalty is proposed, contested, and ripe for hearing. *The two contests could then be easily consolidated* for hearing upon motion of a party or the Commission's or the administrative law judge's own motion.

Id. at 308 (emphasis added); *see also* Commission Procedural Rule 12, 29 C.F.R. § 2700.12 ("The Commission and its judges may at any time, upon their own motion or a party's motion, order the consolidation of proceedings that involve similar issues").

The judge's order does not explain why the initiation of the civil penalty proceedings should result in the dismissal of the contest proceedings, as opposed to the consolidation of the contest and civil penalty proceedings, a procedure set forth in *Energy Fuels*. Accordingly, the Commission directs these cases for review on a question of law and Commission policy, and summarily vacates the judge's order and remands the cases for further proceedings. *See The Anaconda Co.*, 3 FMSHRC 299, 301-02 (Feb. 1981) (remanding for failure to provide supporting reasons). If on remand the judge elects to dismiss this matter, he should provide a rationale explaining why he chose to dismiss the cases instead of consolidating them with the penalty proceedings.[1]

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

[1] Presently pending before the Commission on review is *Marfork Coal Co.*, Docket Nos. WEVA 2006-788-R, etc., which presents the issue of whether the judge properly dismissed contest proceedings prior to the issuance of proposed civil penalties. The issue presented in *Marfork* remains open notwithstanding our disposition of the instant cases.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 22, 2007

SECRETARY OF LABOR,	:	Docket Nos. PENN 2006-89-R
MINE SAFETY AND HEALTH	:	PENN 2006-90-R
ADMINISTRATION (MSHA)	:	PENN 2006-94-R
	:	PENN 2006-95-R
	:	PENN 2006-96-R
	:	PENN 2006-97-R
	:	PENN 2006-109-R
v.	:	PENN 2006-110-R
	:	PENN 2006-116-R
	:	PENN 2006-119-R
	:	PENN 2006-120-R
	:	PENN 2006-121-R
	:	PENN 2006-122-R
CHESTNUT COAL	:	PENN 2006-123-R

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DIRECTION FOR REVIEW AND DECISION

BY THE COMMISSION:

These proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), involve Notices of Contest filed by Chestnut Coal ("Chestnut") pursuant to section 105(d) of the Act, 30 U.S.C. § 815(d). The Secretary of Labor issued proposed civil penalties for the citations being contested, Chestnut contested those penalties pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a), and the Secretary has filed a petition for assessment of the penalties in Commission Docket No. PENN 2007-26-M. Consequently, in a sua sponte Order issued December 21, 2006, the judge dismissed the contest cases without prejudice, because "[a]ll issues related to the alleged violations and the amount of the proposed penalties will be resolved in the civil penalty proceeding."

In *Energy Fuels Corp.*, 1 FMSHRC 299 (May 1979), the Commission stated:

> Inasmuch as a citation and related withdrawal orders may be issued before the Secretary has proposed a penalty, the operator's interest in immediately contesting the allegation of violation and the special findings in a citation may be considerable. As we have said, affording the operators this opportunity will not adversely affect the interests of miners. The Secretary has not convinced us that the interest in avoiding piecemeal litigation necessarily outweighs the interests of the operators, for we think that the Commission both could allow operators to immediately contest all parts of citations, and largely accommodate the interest cited by the Secretary. If the citation lacked special findings, and the operator otherwise lacked a need for an immediate hearing, we would expect him to postpone his contest of the entire citation until a penalty is proposed. Even if he were to immediately contest all of a citation but lacked an urgent need for a hearing, we see no reason why the contest of the citation could not be placed on the Commission's docket but simply continued until the penalty is proposed, contested, and ripe for hearing. *The two contests could then be easily consolidated* for hearing upon motion of a party or the Commission's or the administrative law judge's own motion.

Id. at 308 (emphasis added); *see also* Commission Procedural Rule 12, 29 C.F.R. § 2700.12 ("The Commission and its judges may at any time, upon their own motion or a party's motion, order the consolidation of proceedings that involve similar issues").

The judge's order does not explain why the initiation of the civil penalty proceeding should result in the dismissal of the contest proceedings, as opposed to the consolidation of the contest and civil penalty proceedings, a procedure set forth in *Energy Fuels*. Accordingly, the Commission directs these cases for review on a question of law and Commission policy, and summarily vacates the judge's order and remands the cases for further proceedings. *See The Anaconda Co.*, 3 FMSHRC 299, 301-02 (Feb. 1981) (remanding for failure to provide supporting reasons). If on remand the judge elects to dismiss this matter, he should provide a rationale explaining why he chose to dismiss the cases instead of consolidating them with the penalty proceeding.[1]

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

[1] Presently pending before the Commission on review is *Marfork Coal Co.*, Docket Nos. WEVA 2006-788-R, etc., which presents the issue of whether the judge properly dismissed contest proceedings prior to the issuance of proposed civil penalties. The issue presented in *Marfork* remains open notwithstanding our disposition of the instant cases.

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January 22, 2007

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. PENN 2006-145-R
ADMINISTRATION (MSHA)	:	PENN 2006-146-R
	:	PENN 2006-147-R
v.	:	PENN 2006-148-R
	:	PENN 2006-149-R
CHESTNUT COAL	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DIRECTION FOR REVIEW AND DECISION

BY THE COMMISSION:

These proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), involve Notices of Contest filed by Chestnut Coal ("Chestnut") pursuant to section 105(d) of the Act, 30 U.S.C. § 815(d). The Secretary of Labor issued proposed civil penalties for the citations being contested, Chestnut contested those penalties pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a), and the Secretary has filed a petition for assessment of the penalties in Commission Docket No. PENN 2006-272. Consequently, in a sua sponte Order issued January 19, 2007, the judge dismissed the contest cases without prejudice, because "[a]ll issues related to the alleged violations and the amount of the proposed penalties will be resolved in the civil penalty proceeding."

In *Energy Fuels Corp.*, 1 FMSHRC 299 (May 1979), the Commission stated:

> Inasmuch as a citation and related withdrawal orders may be issued before the Secretary has proposed a penalty, the operator's interest in immediately contesting the allegation of violation and the special findings in a citation may be considerable. As we have said, affording the operators this opportunity will not adversely affect the interests of miners. The Secretary has not convinced us that the interest in avoiding piecemeal litigation necessarily outweighs the interests of the operators, for we think

> that the Commission both could allow operators to immediately contest all parts of citations, and largely accommodate the interest cited by the Secretary. If the citation lacked special findings, and the operator otherwise lacked a need for an immediate hearing, we would expect him to postpone his contest of the entire citation until a penalty is proposed. Even if he were to immediately contest all of a citation but lacked an urgent need for a hearing, we see no reason why the contest of the citation could not be placed on the Commission's docket but simply continued until the penalty is proposed, contested, and ripe for hearing. *The two contests could then be easily consolidated* for hearing upon motion of a party or the Commission's or the administrative law judge's own motion.

Id. at 308 (emphasis added); *see also* Commission Procedural Rule 12, 29 C.F.R. § 2700.12 ("The Commission and its judges may at any time, upon their own motion or a party's motion, order the consolidation of proceedings that involve similar issues").

The judge's order does not explain why the initiation of the civil penalty proceeding should result in the dismissal of the contest proceedings, as opposed to the consolidation of the contest and civil penalty proceedings, a procedure set forth in *Energy Fuels*. Accordingly, the Commission directs these cases for review on a question of law and Commission policy, and summarily vacates the judge's order and remands the cases for further proceedings. *See The Anaconda Co.*, 3 FMSHRC 299, 301-02 (Feb. 1981) (remanding for failure to provide supporting reasons). If on remand the judge elects to dismiss this matter, he should provide a rationale explaining why he chose to dismiss the cases instead of consolidating them with the penalty proceeding.[1]

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

[1] Presently pending before the Commission on review is *Marfork Coal Co.*, Docket Nos. WEVA 2006-788-R, etc., which presents the issue of whether the judge properly dismissed contest proceedings prior to the issuance of proposed civil penalties. The issue presented in *Marfork* remains open notwithstanding our disposition of the instant cases.

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January 22, 2007

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. WEVA 2006-540-R
ADMINISTRATION (MSHA)	:	WEVA 2006-588-R
	:	WEVA 2006-589-R
v.	:	WEVA 2006-590-R
	:	
SPARTAN MINING COMPANY, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DIRECTION FOR REVIEW AND DECISION

BY THE COMMISSION:

These proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), involve Notices of Contest filed by Spartan Mining Company, Inc. ("Spartan") pursuant to section 105(d) of the Act, 30 U.S.C. § 815(d). The Secretary of Labor issued proposed civil penalties for the citations being contested, Spartan contested those penalties pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a), and the Secretary has filed a petition for assessment of the penalties in Commission Docket No. WEVA 2007-79. Consequently, in a sua sponte Order issued January 8, 2007, the judge dismissed the contest cases without prejudice, because "[a]ll issues related to the alleged violations and the amount of the proposed penalties will be resolved in the civil penalty proceeding."

In *Energy Fuels Corp.*, 1 FMSHRC 299 (May 1979), the Commission stated:

> Inasmuch as a citation and related withdrawal orders may be issued before the Secretary has proposed a penalty, the operator's interest in immediately contesting the allegation of violation and the special findings in a citation may be considerable. As we have said, affording the operators this opportunity will not adversely affect the interests of miners. The Secretary has not convinced us that the interest in avoiding piecemeal litigation necessarily outweighs the interests of the operators, for we think that the Commission both could allow operators to immediately

> contest all parts of citations, and largely accommodate the interest cited by the Secretary. If the citation lacked special findings, and the operator otherwise lacked a need for an immediate hearing, we would expect him to postpone his contest of the entire citation until a penalty is proposed. Even if he were to immediately contest all of a citation but lacked an urgent need for a hearing, we see no reason why the contest of the citation could not be placed on the Commission's docket but simply continued until the penalty is proposed, contested, and ripe for hearing. *The two contests could then be easily consolidated* for hearing upon motion of a party or the Commission's or the administrative law judge's own motion.

Id. at 308 (emphasis added); *see also* Commission Procedural Rule 12, 29 C.F.R. § 2700.12 ("The Commission and its judges may at any time, upon their own motion or a party's motion, order the consolidation of proceedings that involve similar issues").

The judge's order does not explain why the initiation of the civil penalty proceeding should result in the dismissal of the contest proceedings, as opposed to the consolidation of the contest and civil penalty proceedings, a procedure set forth in *Energy Fuels*. Accordingly, the Commission directs these cases for review on a question of law and Commission policy, and summarily vacates the judge's order and remands the cases for further proceedings. *See The Anaconda Co.*, 3 FMSHRC 299, 301-02 (Feb. 1981) (remanding for failure to provide supporting reasons). If on remand the judge elects to dismiss this matter, he should provide a rationale explaining why he chose to dismiss the cases instead of consolidating them with the penalty proceeding.[1]

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

[1] Presently pending before the Commission on review is *Marfork Coal Co.*, Docket Nos. WEVA 2006-788-R, etc., which presents the issue of whether the judge properly dismissed contest proceedings prior to the issuance of proposed civil penalties. The issue presented in *Marfork* remains open notwithstanding our disposition of the instant cases.

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January 22, 2007

SECRETARY OF LABOR,	:	Docket Nos. WEVA 2006-527-R
MINE SAFETY AND HEALTH	:	WEVA 2006-528-R
ADMINISTRATION (MSHA)	:	WEVA 2006-529-R
	:	WEVA 2006-530-R
	:	WEVA 2006-531-R
	:	WEVA 2006-560-R
	:	WEVA 2006-561-R
	:	WEVA 2006-562-R
	:	WEVA 2006-563-R
	:	WEVA 2006-564-R
	:	WEVA 2006-565-R
v.	:	WEVA 2006-566-R
	:	WEVA 2006-567-R
	:	WEVA 2006-568-R
	:	WEVA 2006-569-R
	:	WEVA 2006-577-R
	:	WEVA 2006-578-R
	:	WEVA 2006-579-R
	:	WEVA 2006-580-R
	:	WEVA 2006-581-R
SPARTAN MINING COMPANY, INC.	:	WEVA 2006-582-R

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DIRECTION FOR REVIEW AND DECISION

BY THE COMMISSION:

These proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), involve Notices of Contest filed by Spartan Mining Company, Inc. ("Spartan") pursuant to section 105(d) of the Act, 30 U.S.C. § 815(d). The Secretary of Labor issued proposed civil penalties for the citations being contested, Spartan contested those penalties pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a), and the Secretary has filed petitions for assessment of the penalties in Commission Docket Nos. WEVA

2006-851 and WEVA 2006-852. Consequently, in a sua sponte Order issued December 21, 2006, the judge dismissed the contest cases without prejudice, because "[a]ll issues related to the alleged violations and the amount of the proposed penalties will be resolved in the civil penalty proceedings."

In *Energy Fuels Corp.*, 1 FMSHRC 299 (May 1979), the Commission stated:

> Inasmuch as a citation and related withdrawal orders may be issued before the Secretary has proposed a penalty, the operator's interest in immediately contesting the allegation of violation and the special findings in a citation may be considerable. As we have said, affording the operators this opportunity will not adversely affect the interests of miners. The Secretary has not convinced us that the interest in avoiding piecemeal litigation necessarily outweighs the interests of the operators, for we think that the Commission both could allow operators to immediately contest all parts of citations, and largely accommodate the interest cited by the Secretary. If the citation lacked special findings, and the operator otherwise lacked a need for an immediate hearing, we would expect him to postpone his contest of the entire citation until a penalty is proposed. Even if he were to immediately contest all of a citation but lacked an urgent need for a hearing, we see no reason why the contest of the citation could not be placed on the Commission's docket but simply continued until the penalty is proposed, contested, and ripe for hearing. *The two contests could then be easily consolidated* for hearing upon motion of a party or the Commission's or the administrative law judge's own motion.

Id. at 308 (emphasis added); *see also* Commission Procedural Rule 12, 29 C.F.R. § 2700.12 ("The Commission and its judges may at any time, upon their own motion or a party's motion, order the consolidation of proceedings that involve similar issues").

The judge's order does not explain why the initiation of the civil penalty proceedings should result in the dismissal of the contest proceedings, as opposed to the consolidation of the contest and civil penalty proceedings, a procedure set forth in *Energy Fuels*. Accordingly, the Commission directs these cases for review on a question of law and Commission policy, and summarily vacates the judge's order and remands the cases for further proceedings. *See The Anaconda Co.*, 3 FMSHRC 299, 301-02 (Feb. 1981) (remanding for failure to provide supporting reasons). If on remand the judge elects to dismiss this matter, he should provide a rationale explaining why he chose to dismiss the cases instead of consolidating them with the penalty proceedings.[1]

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

[1] Presently pending before the Commission on review is *Marfork Coal Co.*, Docket Nos. WEVA 2006-788-R, etc., which presents the issue of whether the judge properly dismissed contest proceedings prior to the issuance of proposed civil penalties. The issue presented in *Marfork* remains open notwithstanding our disposition of the instant cases.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 22, 2007

SECRETARY OF LABOR,	:	Docket Nos. WEVA 2006-556-R
MINE SAFETY AND HEALTH	:	WEVA 2006-557-R
ADMINISTRATION (MSHA)	:	WEVA 2006-558-R
	:	WEVA 2006-559-R
	:	WEVA 2006-573-R
	:	WEVA 2006-574-R
v.	:	WEVA 2006-575-R
	:	WEVA 2006-576-R
	:	WEVA 2006-583-R
	:	WEVA 2006-584-R
	:	WEVA 2006-585-R
SPARTAN MINING COMPANY, INC.	:	WEVA 2006-586-R

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DIRECTION FOR REVIEW AND DECISION

BY THE COMMISSION:

These proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), involve Notices of Contest filed by Spartan Mining Company, Inc. ("Spartan") pursuant to section 105(d) of the Act, 30 U.S.C. § 815(d). The Secretary of Labor issued proposed civil penalties for the citations being contested, Spartan contested those penalties pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a), and the Secretary has filed petitions for assessment of the penalties in Commission Docket Nos. WEVA 2006-867 and WEVA 2006-973. Consequently, in a sua sponte Order issued December 21, 2006, the judge dismissed the contest cases without prejudice, because "[a]ll issues related to the alleged violations and the amount of the proposed penalties will be resolved in the civil penalty proceedings."

In *Energy Fuels Corp.*, 1 FMSHRC 299 (May 1979), the Commission stated:

> Inasmuch as a citation and related withdrawal orders may be issued before the Secretary has proposed a penalty, the

> operator's interest in immediately contesting the allegation of violation and the special findings in a citation may be considerable. As we have said, affording the operators this opportunity will not adversely affect the interests of miners. The Secretary has not convinced us that the interest in avoiding piecemeal litigation necessarily outweighs the interests of the operators, for we think that the Commission both could allow operators to immediately contest all parts of citations, and largely accommodate the interest cited by the Secretary. If the citation lacked special findings, and the operator otherwise lacked a need for an immediate hearing, we would expect him to postpone his contest of the entire citation until a penalty is proposed. Even if he were to immediately contest all of a citation but lacked an urgent need for a hearing, we see no reason why the contest of the citation could not be placed on the Commission's docket but simply continued until the penalty is proposed, contested, and ripe for hearing. *The two contests could then be easily consolidated* for hearing upon motion of a party or the Commission's or the administrative law judge's own motion.

Id. at 308 (emphasis added); *see also* Commission Procedural Rule 12, 29 C.F.R. § 2700.12 ("The Commission and its judges may at any time, upon their own motion or a party's motion, order the consolidation of proceedings that involve similar issues").

The judge's order does not explain why the initiation of the civil penalty proceedings should result in the dismissal of the contest proceedings, as opposed to the consolidation of the contest and civil penalty proceedings, a procedure set forth in *Energy Fuels*. Accordingly, the Commission directs these cases for review on a question of law and Commission policy, and summarily vacates the judge's order and remands the cases for further proceedings. *See The Anaconda Co.*, 3 FMSHRC 299, 301-02 (Feb. 1981) (remanding for failure to provide supporting reasons). If on remand the judge elects to dismiss this matter, he should provide a rationale explaining why he chose to dismiss the cases instead of consolidating them with the penalty proceedings.[1]

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

[1] Presently pending before the Commission on review is *Marfork Coal Co.*, Docket Nos. WEVA 2006-788-R, etc., which presents the issue of whether the judge properly dismissed contest proceedings prior to the issuance of proposed civil penalties. The issue presented in *Marfork* remains open notwithstanding our disposition of the instant cases.

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January 22, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 2006-759-R
MAMMOTH COAL COMPANY	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DIRECTION FOR REVIEW AND DECISION

BY THE COMMISSION:

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), involves a Notice of Contest filed by Mammoth Coal Company ("Mammoth") pursuant to section 105(d) of the Act, 30 U.S.C. § 815(d). The Secretary of Labor issued a proposed civil penalty for the citation being contested, Mammoth contested that penalty pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a), and the Secretary has filed a petition for assessment of the penalty in Commission Docket No. WEVA 2006-971. Consequently, in a sua sponte Order issued December 29, 2006, the judge dismissed the contest case without prejudice, because "[a]ll issues related to the alleged violation and the amount of the proposed penalty will be resolved in the civil penalty proceeding."

In *Energy Fuels Corp.*, 1 FMSHRC 299 (May 1979), the Commission stated:

> Inasmuch as a citation and related withdrawal orders may be issued before the Secretary has proposed a penalty, the operator's interest in immediately contesting the allegation of violation and the special findings in a citation may be considerable. As we have said, affording the operators this opportunity will not adversely affect the interests of miners. The Secretary has not convinced us that the interest in avoiding piecemeal litigation necessarily outweighs the interests of the operators, for we think that the Commission both could allow operators to immediately

> contest all parts of citations, and largely accommodate the interest cited by the Secretary. If the citation lacked special findings, and the operator otherwise lacked a need for an immediate hearing, we would expect him to postpone his contest of the entire citation until a penalty is proposed. Even if he were to immediately contest all of a citation but lacked an urgent need for a hearing, we see no reason why the contest of the citation could not be placed on the Commission's docket but simply continued until the penalty is proposed, contested, and ripe for hearing. *The two contests could then be easily consolidated* for hearing upon motion of a party or the Commission's or the administrative law judge's own motion.

Id. at 308 (emphasis added); *see also* Commission Procedural Rule 12, 29 C.F.R. § 2700.12 ("The Commission and its judges may at any time, upon their own motion or a party's motion, order the consolidation of proceedings that involve similar issues").

The judge's order does not explain why the initiation of the civil penalty proceeding should result in the dismissal of the contest proceeding, as opposed to the consolidation of the contest and civil penalty proceedings, a procedure set forth in *Energy Fuels*. Accordingly, the Commission directs this case for review on a question of law and Commission policy, and summarily vacates the judge's order and remands the case for further proceedings. *See The Anaconda Co.*, 3 FMSHRC 299, 301-02 (Feb. 1981) (remanding for failure to provide supporting reasons). If on remand the judge elects to dismiss this matter, she should provide a rationale explaining why she chose to dismiss the case instead of consolidating it with the penalty proceeding.[1]

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

[1] Presently pending before the Commission on review is *Marfork Coal Co.*, Docket Nos. WEVA 2006-788-R, etc., which presents the issue of whether the judge properly dismissed contest proceedings prior to the issuance of proposed civil penalties. The issue presented in *Marfork* remains open notwithstanding our disposition of the instant case.

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January 26, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2007-32-M
v.	:	A.C. No. 21-03404-85669
UNITED TACONITE LLC	:	

BEFORE: Duffy, Chairman; Jordan 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 19, 2006, the Commission received from United Taconite LLC ("United") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On April 25, 2006, United received from the Department of Labor's Mine Safety and Health Administration ("MSHA") a proposed penalty assessment for 76 citations and orders. United states that it intended to send in the assessment sheet to contest certain of the citations and orders for which penalties had been proposed, but did not because of a misunderstanding as to which United official would do so. The Secretary notes that MSHA had alerted United to the delinquency by letter dated July 14, 2006, but she does not oppose United's request to reopen the penalty assessment.

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 United's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for United'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

Michael G. Young, Commissioner

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January 26, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. SE 2007-130
	:	A.C. No. 01-01247-095619
v.	:	
JIM WALTER RESOURCES, INC.	:	

BEFORE: Duffy, Chairman; Jordan 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 11, 2007, the Commission received from Jim Walter Resources, Inc. ("JWR") 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).

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 April 25, 2006, the Department of Labor's Mine Safety and Health Administration issued Citation No. 7689102 to JWR. JWR states that it intended to contest the citation, but misfiled it. According to JWR, this filing error led it to inadvertently pay the penalty later assessed for the citation. The Secretary states that she does not oppose JWR's request to reopen the penalty assessment.

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 JWR'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 JWR'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

Michael G. Young, Commissioner

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January 26, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2007-201
	:	A.C. No. 46-01816-95764
v.	:	
PINNACLE MINING COMPANY, LLC	:	

BEFORE: Duffy, Chairman; Jordan 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 1, 2006, the Commission received from Pinnacle Mining Company, LLC ("Pinnacle") 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).

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 April 3, 2006, the Department of Labor's Mine Safety and Health Administration issued Citation No. 3749381 to Pinnacle. Pinnacle contested that citation in Docket No. WEVA 2006-411-R, and the case was subsequently stayed pending assessment of a penalty.

Upon receipt of the penalty assessment for the citation, however, Pinnacle paid the assessment. Counsel for the Secretary in the contest proceeding notified the judge in that case and Pinnacle of the payment by letter dated October 26, 2006, but Pinnacle did not respond. Consequently, on November 20, 2006, the judge lifted the stay and dismissed the contest proceeding. In its motion to reopen the penalty proceeding, Pinnacle states that payment of the penalty was inadvertent and that it meant to contest the penalty assessment along with the

underlying citation. The motion is accompanied by an affidavit of Pinnacle's Safety Director, who states that he "inadvertently paid" the proposed penalty for the citation in question.

In her response to the motion to reopen, the Secretary states that Pinnacle's statement that the civil penalty proceeding should be reopened because payment of the penalty was inadvertent is only a conclusory statement that provides no explanation as to why its failure to contest the penalty proceeding should be excused. The Secretary requests that the Commission direct Pinnacle to provide a detailed explanation of the basis for its motion to reopen and states that, upon receipt of that explanation, the Secretary will take a position on Pinnacle's motion to reopen.

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 Pinnacle's motion and the Secretary's response thereto, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Pinnacle's failure to timely contest the penalty proposal and whether relief from the final order should be granted. The issues raised by the Secretary involve fact finding that is the province of an administrative law judge in the first instance. Consequently, the judge to whom this case is assigned should consider the Secretary's response. If the judge eventually determines that reopening is warranted, 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

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 26, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 2007-233
	:	A.C. No. 46-01456-85356
EASTERN ASSOCIATED COAL, LLC	:	

BEFORE: Duffy, Chairman; Jordan 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 11, 2007, the Commission received from Eastern Associated Coal, LLC ("Eastern") a motion from its counsel requesting to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Commission had denied, without prejudice, an earlier request from Eastern to reopen the penalty assessment, on the grounds that Eastern's motion did not explain the company's failure to contest the proposed assessment. *Eastern Assoc. Coal, LLC*, 28 FMSHRC 999, 1000 (Dec. 2006).

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 March 9, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued three citations to Eastern. Eastern contested those citations, and that proceeding was stayed by the assigned judge. MSHA subsequently sent Eastern a proposed penalty assessment relating to the citations. Eastern now explains that it paid the penalties assessed due to an error on the part of its corporate office, which was unaware that the penalty assessment was related to citations that had previously been contested. The Secretary states that she does not oppose Eastern's renewed request to reopen the penalty assessment.

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.

Having reviewed Eastern's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Eastern'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

Michael G. Young, Commissioner

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February 1, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2007-134-M A.C. No. 10-02063-77188
v.	:	Docket No. WEST 2007-135-M A.C. No. 10-02063-87813
GRANGEVILLE TRANSIT MIX, INC.	:	Docket No. WEST 2007-136-M A.C. No. 10-02063-93037
	:	Docket No. WEST 2007-137-M A.C. No. 10-02063-95511

BEFORE: Duffy, Chairman; Jordan 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 December 14, 2006, the Commission received a letter from Grangeville Transit Mix, Inc. ("Grangeville") 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).

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

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2007-134-M, WEST 2007-135-M, WEST 2007-136-M, and WEST 2007-137-M, all captioned *Grangeville Transit Mix, Inc.*, and all involving similar procedural issues. 29 C.F.R. § 2700.12.

Between January 2006 and August 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") sent four separate proposed penalty assessments to the operator. None of the proposed assessments was timely contested. Each of the assessments therefore became a final Commission order.

Grangeville's original letter of December 14, 2006, attached only one of the four assessments that had become final Commission orders, and with respect to that assessment (A.C. No. 10-02063-95511), Grangeville stated it had tried to timely contest the assessment, but had sent the contest form to the wrong address. The Secretary responded to the letter by stating that, while she did not oppose reopening of that assessment, she could not take a position on the reopening of the other three assessments until Grangeville explained why it believes reopening of those three assessments is also warranted.

Grangeville subsequently submitted a second letter, dated January 14, 2007, stating that its foreman did not receive some of the citations and proposed penalties at issue in the four assessments, and that it misunderstood the MSHA enforcement procedures in this instance. In response, the Secretary now states that she does not oppose Grangeville's request to reopen all four penalty assessments.

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

Having reviewed Grangeville's request, in the interests of justice, we remand these matters to the Chief Administrative Law Judge for a determination of whether good cause exists for Grangeville'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

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 12, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2007-238 A.C. No. 46-08791-95201
v.	:	
WOLF RUN MINING COMPANY	:	

BEFORE: Duffy, Chairman; Jordan 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 23, 2007, the Commission received from Wolf Run Mining Company ("Wolf Run") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

The Department of Labor's Mine Safety and Health Administration ("MSHA") sent Wolf Run a proposed penalty assessment, dated August 9, 2006, for eight citations and orders. Wolf Run states that it timely paid the six penalties on the assessment that it was not contesting, indicated on the assessment form that it was contesting the other two penalties, and forwarded the form along with the payment to the MSHA office designated to receive payment of penalties. However, the form indicating the intent to contest penalties should have been sent to a different MSHA office than the one to which penalty payments are sent. The Secretary states that she does not oppose Wolf Run's request to reopen the assessment for the two penalties that Wolf Run intended to contest.

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 Wolf Run's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Wolf Run's failure to timely contest the penalty proposals 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

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 12, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2007-239 A.C. No. 46-08791-100397
v.	:	
WOLF RUN MINING COMPANY	:	

BEFORE: Duffy, Chairman; Jordan 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 23, 2007, the Commission received from Wolf Run Mining Company ("Wolf Run") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

The Department of Labor's Mine Safety and Health Administration sent Wolf Run a proposed penalty assessment, dated October 11, 2006, for 25 citations. Wolf Run states that it intended to pay 20 of the penalties and timely contest the other five, but because of inadvertence and miscommunication with its accounting office, it failed to contest the five penalties. The Secretary states that she does not oppose Wolf Run's request to reopen the assessment for the five penalties that Wolf Run intended to contest.

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 Wolf Run's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Wolf Run's failure to timely contest the penalty proposals 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

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 12, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2007-240
	:	A.C. No. 46-07945-100164
v.	:	
ICG, EASTERN, LLC	:	

BEFORE: Duffy, Chairman; Jordan 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 23, 2007, the Commission received from ICG, Eastern, LLC ("ICG") 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).

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 March 15, 2006, the Department of Labor's Mine Safety and Health Administration issued Citation Nos. 724791, 7247092, and 7247093 to ICG. ICG contested all three citations in Docket Nos. WEVA 2006-316-R, WEVA 2006-317-R, and WEVA 2006-318-R, and those proceedings were subsequently stayed pending assessment of penalties. On October 10, 2006, MSHA assessed penalties for the three citations.

After receiving that penalty assessment, however, ICG failed to contest the assessment for any of the penalties proposed. In its motion to reopen the penalty proceeding, ICG states that its failure to contest the penalties was inadvertent, as the ICG official who received the assessment was apparently unsuccessful in forwarding the assessment to ICG's outside counsel in the contest

cases. The Secretary states that she does not oppose ICG's request to reopen the penalty assessment.

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 ICG's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for ICG'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

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 4, 2007

ARACOMA COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2007-2-R
	:	Citation No. 7259833; 09/26/2006
	:	
	:	Docket No. WEVA 2007-3-R
	:	Citation No. 7259836; 09/26/2006
	:	
	:	Aracoma Alma Mine #1
	:	Mine ID 46-08801
	:	
	:	Docket No. WEVA 2007-8-R
	:	Citation No. 7241546; 09/18/2006
	:	
	:	Docket No. WEVA 2006-9-R
	:	Citation No. 7244581; 09/07/2006
	:	
	:	Hernshaw Mine
	:	Mine ID 46-08802
	:	
	:	Docket No. WEVA 2007-50-R
	:	Citation No. 7259837; 09/27/2006
	:	
	:	Docket No. WEVA 2007-51-R
	:	Citation No. 7259838; 09/27/2006
v.	:	
	:	Docket No. WEVA 2007-52-R
	:	Citation No. 7259839; 09/27/2006
	:	
	:	Docket No. WEVA 2007-53-R
	:	Citation No. 7259840; 09/27/2006
	:	
	:	Docket No. WEVA 2007-54-R
	:	Citation No. 7259841; 09/27/2006
	:	
	:	Docket No. WEVA 2007-55-R
	:	Citation No. 7259842; 09/27/2006
	:	
	:	Docket No. WEVA 2007-56-R
	:	Citation No. 7259843; 09/27/2006

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

:
: Docket No. WEVA 2007-57-R
: Citation No. 7259844; 09/27/2006
:
: Docket No. WEVA 2007-58-R
: Citation No. 7259846; 09/28/2006
:
: Docket No. WEVA 2007-46-R
: Citation No. 3999565; 09/13/2006
:
: Docket No. WEVA 2007-66-R
: Citation No. 7259847; 10/10/2006
:
: Docket No. WEVA 2007-67-R
: Citation No. 7259848; 10/10/2006
:
: Docket No. WEVA 2007-68-R
: Citation No. 7259849; 10/10/2006
:
: Docket No. WEVA 2007-69-R
: Citation No. 7259850; 10/10/ 2006
:
: Docket No. WEVA 2007-70-R
: Citation No. 7259853; 10/11/2006
:
: Docket No. WEVA 2007-71-R
: Citation No. 7259854; 10/10/2006
:
: Docket No. WEVA 2007-72-R
: Citation No. 7259855; 10/10/ 2006
:
: Docket No. WEVA 2007-73-R
: Citation No. 7259856; 10/12/2006
:
: Docket No. WEVA 2007-74-R
: Citation No. 7259857; 10/12/2006
:
: Docket No. WEVA 2007-75-R
: Citation No. 7259858; 10/12/2006
:
: Docket No. WEVA 2007-76-R
: Citation No. 7259859; 10/15/2006
:

: Docket No. WEVA 2007-77-R
: Citation No. 7259860; 10/15/2006
:
: Docket No. WEVA 2007-78-R
: Citation No. 7259861; 10/15/2006
:
: Aracoma Alma Mine #1
: Mine ID 46-08801
:
: Docket No. WEVA 2007-167-R
: Citation No. 7261885; 10/23/2006
:
: Docket No. WEVA 2007-168-R
: Citation No. 7261886; 10/23/2006
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: Docket No. WEVA 2007-169-R
: Citation No. 7261887; 10/24/2006
:
: Docket No. WEVA 2007-170-R
: Citation No. 7261888; 10/24/2006
:
: Docket No. WEVA 2007-171-R
: Citation No. 7261889; 10/25/2006
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: Docket No. WEVA 2007-172-R
: Citation No. 7261890; 10/30/2006
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: Docket No. WEVA 2007-173-R
: Citation No. 7261891; 10/30/2006
:
: Docket No. WEVA 2007-174-R
: Citation No. 7261892; 10/31/2006
:
: Docket No. WEVA 2007-175-R
: Citation No. 7261893; 10/31/2006
:
: Hernshaw Mine
: Mine ID 46-08802

DISMISSAL ORDER

Before: Judge Hodgdon

These 36 cases are before me on Notices of Contest pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d). The Secretary, by counsel, has filed motions to stay the cases pending assessment of civil penalties on the contested citations so that the contest and civil penalty proceedings can be consolidated for hearing. The motions state that the Contestant does not object to them.

Because the Commission has been inundated with notices of contest in which the contestant immediately acquiesces in the proceedings being stayed, some of the Commission judges issued orders to show cause requesting the Contestant to show cause why the contests should not be dismissed. *See, e.g., Spartan Mining Co.*, 28 FMSHRC 768 (Aug. 2006) (ALJ); *Aracoma Coal Co, Inc.*, 28 FMSHRC 763 (Aug. 2006) (ALJ); *Marfork Coal Co., Inc.*, 28 FMSHRC 745 (Aug. 2006) (ALJ). The Contestants' responses were that the Act permits it. *See, e.g., Spartan Mining Co.*, 28 FMSHRC 892 (Sept. 2006) (ALJ). The Secretary, while asserting "that such 'pre-penalty' notices of contest are not an appropriate or reasonable use of the litigation process unless the contestant has an urgent or specific need for a hearing on the underlying violation," agreed. *Id.*

Certainly, section 105(d), which permits filing a notice of contest within 30 days of receipt of a citation or an order, does not state that filing a notice of contest even though the party does not desire a hearing is prohibited. Early in its existence, the Commission held that when a party had an interest in "immediately" challenging an allegation, filing a notice of contest was proper. *Energy Fuels Corp.*, 1 FMSHRC 299, 308 (May 1979). It also opined that if the party lacked an urgent need for a hearing, the contest proceeding could be continued to be tried with the penalty proceeding. (*Id.*) It went on to state, however, that if there were no need for an immediate hearing, "we would expect [the operator] to postpone his contest of the entire citation until a penalty is proposed." (*Id.*)

However, neither Congress, in drafting section 105(d), nor the Commission, in *Energy Fuels,* could have anticipated the current routine filing of literally hundreds of notices of contest when the operator has no interest in an immediate hearing. Such filings unnecessarily clog up the system. Unlike the Secretary, I am not of the opinion that the Commission is without recourse to remedy this abuse of its processes.

As the Commission noted in *Energy Fuels*, the purpose of permitting the filing of a notice of contest is to allow an operator an expeditious hearing on an order or citation without waiting for the penalty to be assessed. In these cases, however, the contestant never desired an immediate hearing since in every case it routinely and without delay agreed to having the proceedings stayed until the civil penalty was assessed.

"Abuse of process" is "generally defined as the misuse of a legal process . . . against another primarily to accomplish a purpose for which the process is not designed." 1 Am. Jur. 2d *Abuse of Process* § 1 (1994). While this is the definition of the tort of "abuse of process" and the filing of these notices of contest obviously does not rise to that level, they do involve the misuse

of a legal process for a purpose for which it was not designed. And they clearly require the Secretary to respond to them and the Commission to deal with them for no apparent purpose whatsoever.

Dismissing these contests will not deny the Contestant due process. Due process would only be denied if the dismissing them would result in the Contestant having no chance for a hearing on the order or citation. The failure to file a notice of contest does not preclude an operator from challenging, in a penalty proceeding, the fact of violation or any special findings contained in the citation or order. 29 C.F.R. § 2700.21; *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1621 (Sept. 1987). Similarly, dismissing these contests will not preclude the Contestant from challenging the orders or citations in a penalty proceeding. Indeed, the end result of the Contestant's actions in these matters is exactly that, waiting until the penalty proceeding is filed to hear the cases. It just involves extensive and ultimately unnecessary actions in the interim.

I am not issuing an order to show cause in these cases because Aracoma has already had an opportunity to offer its justifications for filing such contests in another proceeding. *Aracoma Coal Co., Inc.*, 28 FMSHRC ___ (Nov. 2006). Like Judge Feldman, I find the Contestant's reasons without merit.

Accordingly, these contest proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601New Jersey Ave., N.W., Suite 9500
Washington, DC 20001-2021
January 8, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2006-102
Petitioner	:	A.C. No. 15-02709-71962
v.	:	
	:	
HIGHLAND MINING COMPANY,	:	
Respondent	:	Highland 9 Mine

DECISION

Appearances: Neil Morholt, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("The Secretary"), alleging that Highland Mining Company, LLC ("Highland") violated 30 C.F.R. § 70.100(a). Pursuant to notice, the matter was heard in Evansville, Indiana on September 6, 2006. Subsequent to the hearing, each party filed a post-hearing brief, and Highland filed a reply brief.

Violation of Section 70.100(a), *supra*

Highland operates an underground coal mine. On July 28, 2005, MSHA Inspector, Hubert Eugene Wright, issued Highland a citation alleging a violation of 30 C.F.R. § 70.100(a).[1] The citation was based on results of a respirable dust sampling conducted by MSHA of five occupations in the 063-0 MMU unit. These indicated an average concentration of respirable dust of 2.472 milligrams per cubic meter (mg/m3). Highland does not contest these facts or its violation of Section 70.100(a), *supra*. Nor does Highland contest the designation of the violation as significant and substantial. I thus find that Highland violated Section 70.100(a), *supra*, and that accordingly the violation was significant and substantial. *Consolidation Coal Co.*, 8 FMSHRC 890 (1986)

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[1]Section 70.100(a), *supra*, provides as follows: "Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air . . . ."

Penalty

The parties stipulated that Highland is a large operator, that the cited condition was abated "within a reasonable time", and that the proposed penalty "will not affect Highland's ability to remain in business." I accept the parties' stipulations, and so find.

There is not any factual issue with regard to Highland's assessed violation history for the immediate two year period prior to July 27, 2005. The history indicates a total number of 1022 violations of which 425 were indicated to be significant and substantial. I find that there is not any basis in the record to either significantly increase or decrease the assessment of a penalty based upon Highland's history of violations.

Negligence

Stipulated Facts

On July 7, 2004, Highland received a citation for the MMU 063-0 unit for a violation of Section 70.100(a), *supra*, based on MSHA sampling taken on June 28, 2004, which indicated that an average of 2.216 mg/m3 of respirable dust. As a result of the issuance of the citation, Highland submitted a revision to its dust control portion of the ventilation plan which was approved by MSHA on July 15, 2004. On September 20, a further revision was approved by MSHA.

Between November 30, 2004 and December 2, 2004, dust concentration samples taken by Highland averaged 2.303 mg/m3 of respirable dust. On December 13, 2004, Highland received a citation for the MMU 063-0 unit alleging a violation of Section 70.100(a), *supra*. On January 14, 2005, as a result of the issuance of the citation, Highland submitted a revised ventilation and dust control plan which was subsequently approved by MSHA on January 27, 2005. A more complete plan which incorporated these revisions was approved on May 23, 2005.

Between December 13, 2004 and July 18, 2005, on three occasions, Highland sampled the continuous miner operator,[2] and MSHA sampled five occupations in the MMU 063-0 unit. The average dust concentration for these samples was below the level considered by MSHA to constitute a violation of Section 70.100(a), *supra*.

Additional Facts and Discussion

In analyzing whether Highland was negligent, a key issue is whether, prior to the issuance

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[2]30 C.F.R. § 70.207(d)(2), requires an operator to sample the designated occupation 036 (continuous miner operator) on a bi-monthly basis because that is the occupation expected to have the greatest dust exposure.

of the citation at bar,[3] Highland had notice or knowledge that it had a dust problem on the MMU 063-0 unit. In this connection, I note Highland's history of dust violations on the unit at issue. Highland was cited on July 7, 2004, based on sampling which indicated an average dust concentration of 2.216 mg/3; three occupations were exposed to more than 2.0 mg/m3. Highland was cited again on December 13, 2004, based on its sampling which indicated an average dust concentration of 2.303 mg/m3. Additionally, six out of fifteen of Highland's sampling results between January 2005 and May 2005, and more than thirty percent of the results of MSHA's sampling, were in excess of 2.0 mg/m3.[4]

Robert Smith, an MSHA Health Inspector and Health Supervisor, opined that the violation on July 28, 2005, constituted high negligence as Highland ". . . was in a state of heightened awareness from prior violations, discussions and meetings . . . ." (Tr. 113) Smith explained his opinion as follows: "We've shared the existence of [government review] programs, how they work, and the importance of maintaining all exposures below the applicable standard, which in most instances is 2 milligrams, . . .". (Tr. 114).

Highland's No. 9 Mine Safety and Training Manager, James Allen, who oversees its dust compliance efforts, agreed that three citations for respirable dust sampling violations in the same unit would be a cause for concern. However, although Highland's dust sampling between March 29, 2005 and March 31, 2005, indicated dust concentrations of 2.02 mg/3, Highland did not make any changes in its plan. Nor did Highland change its plan after its sampling indicated dust concentration levels of 1.93 mg/m3. Allen explained that "what probably happened" was that Highland "... would've got with our maintenance department, showed them these results, just wanted them to ensure us that our scrubber system was functioning as it should've, maybe look at our duct work. And also we would've gotten our section foreman, sat down and reviewed our samples, and we do this with them regularly, and showed them the concentrations of the samples that they run and instructed them to have got with their miner operators, let them know what their concentrations were and just reinforced dust parameter compliance." (Tr. 156) (emphasis added). Not much weight was accorded this testimony inasmuch as Allen did not testify based upon personal knowledge, what if anything Highland actually did in response to the May 2005, test results of 1.93 mg/m3, but rather what "probably happened" or what they "would've" done. (*Id.*)

On the other hand, in mitigation of Highland's negligence, the record indicates that after Highland was found to not be in compliance on December 13, 2004, it revised its dust plan, which was approved by MSHA. In this connection, Smith conceded on cross-examination that it

---

[3]July 28, 2005

[4]In sampling done by Highland in the March 2005 cycle the average exposure was 2.02 mg/m3. In testing by Highland in the May, 2005 cycle, three out of the five samples were above the standard, and the average dust concentration was 1.93 mg/m3.

was believed that the revision contained sufficient changes to result in compliance. In May, 2005, a subsequent plan was approved by MSHA, and Smith agreed that it was subject to the belief that the parameters of the plan would keep Highland in compliance. Also, according to Allen, after Highland became aware of the May 2005 sampling result of 1.93 mg/m3, it provided additional training and "put forth" additional maintenance efforts. (Tr. 158) It is significant that, according to Wright when he cited Highland on July 19, the latter was in compliance with all of the parameters of its plan. Wright indicated that he could not determine what caused Highland to be in violation on July 19. Further, according to Wright, all the sampling that he did on other sections of the mine on July 12, 13 resulted in average dust concentration levels that conformed with the requirements of Section 77.100(a), *supra*.

Within the above context, and considering all the mitigating factors, I conclude that the level of Highland's negligence was moderate.

Gravity

Highland asserts that the Secretary has the burden of establishing the gravity of the violation. Highland argues that the Secretary failed to establish the number of people exposed to the cited condition. Highland alleges that this is an element to be considered regarding the gravity of the violation, citing 30 C.F.R. § 100.3(d). However, Section 100.3, *supra*, sets forth the criteria to be considered by the Secretary in assessing a penalty. In contrast, assessment of penalties by the Commission is governed by Section 110(i) of the Act, and is a de novo determination. (See, *Youghiogheny & Ohio Coal Co.*, ("Y & O"), 9 FMSHRC 673, 678 (April 1987).

In Y & O, *supra*, at 678-679, the Commission elaborated as follows:

> We have consistently rejected assertions that, in serving our separate and distinct function of assessing appropriate penalties based on a record developed in adjudicatory proceedings before the Commission, we are bound by the Secretary's regulations, which are intended to assist him in proposing appropriate penalties. See, e.g., Sellersberg Stone Co., 5 FMSHRC 287 (March 1983), aff'd, 737 F.2d 1147 (7th Cir. 1984); Black Diamond Coal Mining Co., 7 FMSHRC 1117 (August 1976); U.S. Steel Mining Co., 6 FMSHRC 1148 (May 1984).

In executing its responsibility of assessing a penalty, the Commission is required to consider six specific criteria, including gravity. Section 110(i) of the Mine Act; see also, *Sellersburg Stone Co.* 5 FMSHRC 287, 291-92 (March 1983), *aff'd*, 737 F.2d 1147, 1152 (7th Cir. 1984). "The gravity penalty criterion under section 110(i) of the Mine Act, 30 USC § 820(i), is often viewed in terms of the seriousness of the violation." *Consolidation Coal Company*, 18 FMSHRC 1541, 1549 (1996). In this connection, I note that in *Consolidation Coal Company*, 8

FMSHRC 890, 898-899 (1986) the Commission, held that if a violation of Section 70.100(a), *supra*, has been established, a presumption that the violation is significant and substantial is appropriate.[5] The Commission elaborated in its holding by stating that any exposure above 2.0 mg/m3 creates a measure of danger to health, and a presumption arises that there was a reasonable likelihood that this health hazard will result in an illness. (*Id.*) The Commission set forth its rationale as follows:

> We recognize that the development and progress of respiratory disease is due to the cumulative dosage of dust a miner inhales, which in turn depends upon the concentration and duration of each exposure, and that proof of a single incident of overexposure does not, in and of itself, conclusively establish a reasonable likelihood that respirable disease will result. There is no dispute, however, that overexposure to respirable dust can result in chronic bronchitis and pneumoconiosis. The effects of the health hazards associated with overexposure to respirable dust usually do not cause immediate symptoms– as noted, simple pneumoconiosis is asymptomatic * * * *Consolidation Coal*, *supra*, at 898.

Based on the rationale set forth in *Consolidation*, *supra*, I find that the violation of Section 70.100(a), *supra*, established herein was serious, and hence of a high level of gravity.

Conclusion

Based on the factors set forth in Section 110(i) of the Act as discussed above, I find that a penalty of $5,000 is appropriate for the violation of Section 70.100(a), *supra*.

---

[5]The Commission held that this presumption " . . . may be rebutted by the operator by establishing that miners in the designated occupation in fact were not exposed to the hazard posed by the excessive concentration of respirable dust e.g., through the use of personal protection equipment." (*Consolidation*, *supra* at 899). In the case at bar, I note that the Highland not adduce any such facts, and thus did not rebut the presumption.

Order

It is **Ordered** that Highland pay a total civil penalty of $5,000 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

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January 11, 2007

R S & W COAL COMPANY, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. PENN 2007-106-R
v.	:	Order No. 7009050; 12/22/2006
	:	
SECRETARY OF LABOR,	:	
Mine Safety and Health	:	
Administration, MSHA	:	R S & W Drift
Respondent.	:	Mine ID: 36-01818

ORDER OF DISMISSAL

This matter involves a withdrawal order issued on December 22, 2006, to the Contestant, R S & W Coal Company, Inc., ("R S & W") pursuant to section 104(b) of the Federal Mine Safety and Health Act, as amended, for failure to abate a 104(a) citation alleging a violation of 30 C.F.R. 75.381(c)(5). The subject order was issued for R S & W's failure to install a directional lifeline now required under the Mine Improvement and New Emergency Response Act of 2006 ("Miner Act") after having been given a reasonable time for abatement.

Although this case does not involve an Emergency Response Plan, this proceeding is the first under new requirements pursuant to the Miner Act.

R S & W filed a Notice of Contest and requested an expedited hearing. Because of the emergency circumstance, a hearing was held on the record via telephone conference on December 27, 2006. R S & W appeared *pro se* and was represented by company president, Randy Rothermel. The Secretary of Labor ("Secretary") was represented by Adam Welsh. The parties filed post-hearing statements outlining their arguments. I held a subsequent telephone conference with the parties, on December 29, 2006.

For the following reasons, I affirm the 104(b) order as written and R S & W must comply with the standard within two weeks of December 29, 2006.

Summary of Parties' Arguments

In its Notice of Contest, R S & W requests temporary relief from the order pending a resolution of its Petition for Modification now before the Mine Safety and Health Administration ("MSHA") because "this is a new law elected by congress [sic]." Cont. Mot. The company

argues that "to comply with this law [would] be a diminution of safety for this mine." *Id.* In the petition, R S & W requests that the continuous directional lifeline not be required at this mine for safety reasons. Cont. Ex.1. In particular, the company asserts:

> [I]f we hang a lifeline – 75- to 80-degree pitch, we have to use two hands and two feet on the ladder to crawl outside. A lifeline would be in the way, and as far as going in and out of the drift, we're mining on rocks. To leave the drill holes just to fasten his lifeline and the lifeline is supposed to be hung 6- to 8-foot high, it is something that would happen, that we will have to travel the drift using the lifeline to rock. We will be standing up where the air is bad, where the lifeline we have, more or less, is our trap going in and out.
>
> Tr. 15.

R S & W does not dispute the fact of the violation. *Id.*, Tr. 49.

The Secretary contends she has established a prima facie case that the 104(b) order is valid and that R S & W does not dispute the validity of the order. Sec'y Position Statement 2-3. Moreover, the Secretary asserts that R S & W's request that the regulation not be applied to this mine is an invalid argument in this Commission proceeding because the issue relates to the Petition for Modification, not to the validity of the order or underlying citation. *Id.* at 4. Such an argument is properly brought in Department of Labor proceedings associated with the modification petition. *Id.* In short, the Secretary avers, a Commission proceeding is not the proper forum for determining whether a mine should be exempt from a particular standard. *Id.*

Discussion

Section 75.381(c)(5) provides:

> Each escapeway shall be
> (5) Provided with a continuous, durable directional lifeline or equivalent device that shall be--
> (i) Installed and maintained throughout the entire length of each escapeway as defined in paragraph (b) of this section;
> (ii) Flame-resistant in accordance with the requirements of part 18 of this chapter upon replacement of existing lifelines; but in no case later than June 15, 2009;
> (iii) Marked with a reflective material every 25 feet;
> iv) Located in such a manner for miners to use effectively to escape;
> (v) Equipped with directional indicators, signifying the route of escape, placed at intervals not exceeding 100 feet. When cones are used as directional indicators, they shall be installed so that the tapered section points inby; and

30 C.F.R. 75.381(c)(5).

As stated by the Secretary, there is no dispute that a violation exists. Tr. 28. R S & W was issued the underlying citation on June 8, 2006. Tr. 12. R S & W purchased a lifeline, but it did not install the line by the time the 104(b) order was issued in December. Tr. 14. The company was given a reasonable amount of time to obtain the lifeline from the vendor and extensions of time to abate. Tr. 18, 26-27. Accordingly, I conclude that the 104(b) order was validly issued, and I affirm the order as written.

I also agree with the Secretary's argument that the Petition for Modification and the issue of whether R S & W should be exempt from the regulation are irrelevant to this Commission proceeding. Such matters are properly brought before the Department of Labor. In general, the diminution of safety defense is not applied in Mine Act proceedings. An operator may use the defense only when the following circumstances apply: "(1) the hazards of compliance are greater than non-compliance; (2) alternative means of protecting miners are unavailable; and (3) a modification proceeding under section 101(c) of the Mine Act would not have been appropriate." *Westmoreland Coal Co.*, 7 FMSHRC 1338, 1341 (Sept.1985). *See also Penn Allegh Coal Co. Inc.*, 3 FMSHRC 1392 (June 1981); *Sewell Coal Co.*, 5 FMSHRC 2026 (Dec. 1983).

In response to the question of whether it would be safe to install the lifeline, MSHA Field Office Supervisor Lawrence Gazdick testified that MSHA is not requiring the mine to put the ladder on the pitch. It could be fastened to the face of the rock along the side. Tr. 29-30. Gazdick testified that this is not a modification of the standard; the requirements for installation are only slightly different than the requirements as understood by R S & W. Tr. 32-33. Thus, R S & W has not met all requirements of the test.

The Commission later stated that while *Penn Allegh* and *Sewell* preclude resolution of a modification petition based upon diminution of safety *per se* in enforcement proceedings, they do not "bar[ ] the Commission from weighing the hazards to miners of compliance vs. non-compliance within the context of an extension of abatement time to contest" *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2130 (Nov. 1989). However, this exception does not apply, as Mr. Gazdick testified that R S & W was given approximately four chances to abate over a period exceeding six months. Tr. 26.

During the conference call on December 29, 2006, I issued a bench decision, ordering R S & W to install the lifeline after receiving assurance from MSHA that it could install the lifeline in the manner indicated by Mr. Gazdick. MSHA agreed to allow the mine to remain in operation during those two weeks.

Accordingly, R S & W is **ORDERED** to install the lifeline within two weeks of December 29, 2006. If it fails to do so, MSHA, once again, will close the mine.

This case is **DISMISSED**.

Robert J. Lesnick
Chief Administrative Law Judge

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Randy Rothermel, Mine Operator, R S & W Coal Company, Inc., 207 Creek Road, Klingerstown, PA 17941

/rao

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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January 12, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 2006-320 A. C. No. 15-02132-85547
v.	:	
WEBSTER COUNTY COAL, LLC, Respondent	:	Dotiki Mine

DECISION

Appearances: Christian Barber, Esq. and Thomas Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner; Thomas C. Means, Esq., Crowell & Moring LLP, Washington, DC and Mark Evans, Director of Safety and Training, Webster County Coal, LLC, Nebo, Kentucky, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," charging Webster County Coal, LLC, (Webster County) with one violation of the mandatory standard at 30 C.F.R. § 75.503 and proposing a civil penalty of $629.00 for the violation. The general issue before me is whether Webster County violated the cited standard and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Also before me is the question of whether the Commission has jurisdiction in this case regarding the validity of a "section 104(b)" order. Additional specific issues are also addressed as noted.

Citation No. 7662703 alleges a violation of the standard at 30 C.F.R. § 75.503 and charges as follows:

> The Long Airdox 488 scoop, Company No. 6239 on number 1 unit, MMU 031, was not being maintained in a permissible condition. The locking bar used to secure the top lid of the left side battery box was missing.

The cited standard, 30 C.F.R. § 75.503, provides that "[t]he operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine." There is no dispute that the cited scoop was required by the cited standard to be maintained in permissible

condition and that the scoop was not, at the time the citation in this case was issued on January 5, 2006, being maintained in the required permissible condition.[1] The Secretary's findings of low gravity and moderate negligence are also undisputed. What is disputed is the issuance on January 9, 2006, of "failure to abate" withdrawal Order No. 7662706 issued pursuant to section 104(b) of the Act on January 9, 2006, and the enhanced penalty resulting from the alleged failure to timely abate the violative condition.

For the following reasons, however, I find that this Commission does not have jurisdiction to entertain a challenge to that order. The Act provides two potential opportunities for an operator to contest before this Commission an order issued under section 104. Section 105(d) provides an operator a right to contest an order issued under section 104 within 30 days of receipt of the order. The order at bar was not contested in this manner. Alternatively, where a proposed civil penalty is assessed under section 110(a) for a cited violation, section 105(a) provides that an operator has a right to contest the alleged violation or the proposed assessment of penalty within 30 days of receipt of notice of the proposed assessment. In this case, however, no opportunity to contest the 104(b) order was provided under section 105(a) because there was no violation alleged in, and there was no proposed assessment of a penalty for, the 104(b) order. Section 104(b) orders, like the one at issue herein, typically do not allege a separate violation. Consequently, no civil penalty can be assessed for the order under the mandatory language of section 110(a) of the Act. Because no penalty was assessed for the 104(b) order, it may be inferred that the notation "104(a)/104(b)" on the assessment form refers only to the operator's lack of good faith in attempting to achieve rapid compliance after notification of the violation- -one of the factors that the Commission and its judges must consider in determining the amount of a civil penalty under section 110(i) of the Act.

Within the above framework it is clear that the validity of the 104(b) order is therefore not properly before me.[2] Nevertheless, the allegations in the order are relevant in determining an appropriate civil penalty under section 110(i) of the Act. In this regard the order alleges as follows:

> No apparent effort was made by the operator to repair the locking bar used to secure the top lid of the battery box on the Long Airdox Scoop company number 6239 on section no. 1, MMU 031. The top lids were not secured at the time of the inspection.

William Cook III, an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) testified, without contradiction, that on January 5, 2006, he issued Citation No. 7662703 after observing that the locking bar to the battery box lid on the left side of the cited

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[1] Respondent's attempt, in its post-hearing brief, to now deny what was stipulated at hearing and to assert a defense not raised at hearing, is untimely. The attempted denial is rejected and the defense will be considered as waived.

[2] For the reasons subsequently set forth in this decision, however, I would, in any event, have found that the Secretary had proven the validity of the order by a preponderance of the evidence. See *Mid-Continent Resources, Inc.*, 11 FMSHRC 505, 509 (April, 1989).

scoop had been broken off. The Secretary's representation that Respondent stipulated that the scoop was accordingly not being maintained in a permissible condition, was not disputed. Cook explained that, without a secured lid over the battery box, a foreign object could contact the battery terminals causing a fire or explosion. He considered however, that injuries were unlikely as a result of the violation because there was no evidence of an explosive atmosphere. He found the violation to be of low gravity and the operator chargeable with moderate negligence. These findings are undisputed and accepted for purposes of a civil penalty assessment.

According to the undisputed testimony of Inspector Cook, both Foreman Jimmy Ray and Section Mechanic James Chappell were present when he issued the citation. At that time, he told them that they could wrap a chain over the subject lid tightened with a "boomer" as a temporary measure to permit continued operations. He testified that he also told them, however, that such a temporary measure would not be sufficient to terminate the citation. Cook issued the citation with a termination due date of January 6, 2006, at 8:00 a.m., nearly 24 hours from the issuance of the citation. According to the credible testimony of Inspector Cook, he also told Mark Evans, Respondent's director of safety and training and Gary Lewis, the chief electrician, that the chain wrap would provide only a temporary fix for the problem.

Inspector Cook returned to the mine on January 9, 2006, and found the cited scoop without even the temporary chain and with no other means of securing the battery lid. At this time Cook issued the "section 104 (b)" withdrawal order. He terminated the order after the Respondent welded a chain onto the scoop and secured the chain on top of the battery box with a bolt and nut. Cook explained that the loose chain permitted as a temporary fix on January 5th was inadequate because the chain could fall off or be easily removed whereas the chain welded onto the scoop on January 9th would not fall off and was secured with a nut and bolt. Cook nevertheless told Mine Foreman Larry Mitchell that they still needed to replace the locking bar.

Webster County argues in its post-hearing brief that the citation should have been terminated on January 5, 2006, when it "took immediate action to 'secure' and thus abate the violative condition". As previously noted, however, Inspector Cook credibly testified that the temporary use of a loose chain wrapped around the battery lid did not provide a secure closure because it could readily fall off or be removed for other uses. Indeed, when he returned on January 9, 2006, the chain was no longer present and the lid to the battery compartment was unsecured. Moreover, at the time he issued the citation, Inspector Cook informed the Respondent's foreman, its section mechanic, its director of safety and training and its chief electrician of the necessity to provide more secure repairs and they were advised that the citation would not be terminated until such repairs were made. The inspector's assessment of the required abatement was certainly reasonable under the circumstances.

In reaching these conclusions, I note that Webster County presented no testimony at hearing and submitted as evidence only the "out-of-court" statements of Section Mechanic, James Chappell and Scoop Operator, Anthony Yates (Exh. R-1 and R-2 respectively). While such statements are admissible in Commission proceedings the witnesses could not be subjected to the scrutiny of cross examination and therefore the statements cannot be given the same weight as testimony at hearing.

In addition, without any evidence of the experience and expertise of these gentlemen, I find that neither statement is sufficient to negate the credible expert testimony of Inspector Cook, that the temporary method of utilizing a loose chain to secure the battery lids was inadequate and was indeed permitted only as a temporary fix insufficient to abate the violative condition. Cook had 19 years experience in the safety department of Peabody Coal Company and was familiar with underground mining equipment and the safety issues relating to such equipment. He also had two years experience as a coal mine inspector for MSHA and attended the 26 week training program at the MSHA academy in Beckley, West Virginia.

Under all the circumstances, I therefore find that the Secretary has proven by a preponderance of the evidence that the violation charged in Citation No. 7662703 was not abated in a timely or good faith manner.

Civil Penalties

Under section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator's ability to continue in business. The record shows that Webster County is a large size mine and has a modest history of violations (0.3 to 0.5 violations per inspection day). The gravity and negligence findings have previously been discussed in the instant decision. As previously noted, the violation was not abated in a timely and good faith manner. There is no evidence that the penalty would affect the operator's ability to continue in business. Under the circumstances, I find that the Secretary's proposed penalty of $629.00, is appropriate for the violation charged herein.

ORDER

Citation No. 7662703 is affirmed and Webster County Coal, LLC, is directed to pay a civil penalty of $629.00 for the violation charged in the citation within 40 days of the date of this decision. Order No. 7662706 is affirmed as it became final at the expiration of 30 days after its issuance.

Gary Melick
Administrative Law Judge
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January 17, 2007

HIGHLAND MINING COMPANY, LLC, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. KENT 2006-189-R
	:	Citation No. 7661095;02/01/2006
	:	
	:	Docket No. KENT 2006-190-R
	:	Citation No. 7661098;02/01/2006
	:	
	:	Docket No. KENT 2006-194-R
	:	Citation No. 7663983;02/01/2006
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 2006-194-R
ADMINISTRATION, (MSHA),	:	Citation No. 7663983;02/01/2006
Respondent	:	
	:	Docket No. KENT 2006-195-R
	:	Citation No. 7663985;02/01/2006
	:	
	:	Docket No. KENT 2006-196-R
	:	Citation No. 7638723;02/02/2006
	:	
	:	Docket No. KENT 2006-201-R
	:	Citation No. 7663855;02/14/2006
	:	
	:	Docket No. KENT 2006-202-R
	:	Citation No. 7663859;02/16/2006
	:	
	:	Docket No. KENT 2006-227-R
	:	Citation No. 7638501; 02/21/2006
	:	
	:	Docket No. KENT 2006-228-R
	:	Citation No. 7638505; 02/21/2006
	:	
	:	Docket No. KENT 2006-229-R
	:	Citation No. 7663860; 02/21/2006
	:	
	:	Highland 9 Mine
	:	Mine ID 15-02709

ORDER LIFTING STAYS
DISMISSAL ORDER

These cases are before me on Notices of Contest under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d). Docket Nos. KENT 2006-189-R through KENT 2006-202-R were stayed on April 13, 2006, and Docket Nos. KENT 2006-227-R through KENT 2006-229-R were stayed on May 4, 2006, pending the filing of the corresponding civil penalty proceedings. With the filing of Docket Nos. KENT 2006-340 and KENT 2006-406, that has occurred.

Accordingly, the stays are **LIFTED**. Further, with the filing of the civil penalty cases, the contest proceedings are moot. Therefore, the captioned contest cases are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 19, 2007

CHESTNUT COAL,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. PENN 2006-145-R
	:	Citation No. 7008707;03/02/2006
	:	
v.	:	Docket No. PENN 2006-146-R
	:	Order No. 7008708;03/02/2006
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. PENN 2006-147-R
ADMINISTRATION, (MSHA),	:	Order No. 7008709;03/02/2006
Respondent	:	
	:	Docket No. PENN 2006-148-R
	:	Citation No. 7008710;03/02/2006
	:	
	:	Docket No. PENN 2006-149-R
	:	Citation No. 7008711;03/02/2006
	:	
	:	No. 10 Slope
	:	Mine ID 36-07059

ORDER OF DISMISSAL WITHOUT PREJUDICE

These cases are before me on Notices of Contest filed pursuant to section 105(d) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary has issued proposed civil penalties for the alleged violations and the operator has contested those penalties pursuant to section 105(a) of the Act. The Secretary has filed a petition for assessment of civil penalties and the operator has filed an answer. See Commission Docket No. PENN 2006-272. All issues related to the alleged violations and the amount of the proposed penalties will be resolved in the civil penalty proceeding.

Accordingly, these contest cases are hereby **DISMISSED WITHOUT PREJUDICE.**

Michael E. Zielinski
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
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February 1, 2007

SPARTAN MINING COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2006-540-R
	:	Order No. 6601354; 05/09/2006
	:	Docket No. WEVA 2006-588-R
	:	Order No. 7460780; 05/11/2006
	:	Docket No. WEVA 2006-589-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Order No. 7460781; 5/11/2006
	:	Docket No. WEVA 2006-590-R
	:	Citation No. 7460783; 5/11/2006
	:	Ruby Energy
	:	Mine ID 46-08808

ORDER OF DISMISSAL WITHOUT PREJUDICE FOLLOWING REMAND

These cases are before me on Notices of Contest filed pursuant to section 105(d) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). By order dated January 8, 2007, the cases were dismissed without prejudice because the Secretary had issued proposed civil penalties for the alleged violations which the operator had contested pursuant to section 105(a) of the Act, and all issues related to the alleged violations and the amount of the proposed penalties would be resolved in the civil penalty proceeding. The Commission, on its own motion, directed review, summarily vacated the order, and remanded the cases for further proceedings. The Commission's expressed concern was the absence of an explanation of why the cases were dismissed, as opposed to being consolidated with the civil penalty proceeding, an option noted in *Energy Fuels Corp.*, 1 FMSHRC 299, 308 (May 1979). For the reasons set forth below, dismissal without prejudice is the preferable option for dealing with duplicative litigation in the circumstances of these cases.

Contest proceedings are initiated by the filing of a Notice of Contest pursuant to section 105(d) of the Mine Safety and Health Act of 1977 ("Act") and Commission Procedural Rule 20. 30 U.S.C. § 815(d); 29 C.F.R. § 2700.20. A Notice of Contest of a citation or order issued under section 104 of the Act must be filed within 30 days of the issuance of the citation or order, and places into issue the fact of violation and any special findings contained in the citation or order. It does not, however, place into issue any proposed penalty assessment that may subsequently be issued by the Secretary. 29 C.F.R. § 2700.21(a). An operator may also contest, pursuant to section 105(a) of the Act, a proposed penalty assessment for a citation or order. A contest of the proposed penalty assessment prompts the filing of a civil penalty proceeding and places into issue not only the proposed penalty, but the fact of violation and any special findings contained in the citation or order. *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1620-23 (Sept. 1987); 29 C.F.R. § 2700.21(b).

An operator's contest of both the issuance of a citation or order and the subsequent proposed penalty assessment for the violation results in two separate proceedings before the Commission. The issues involved in the contest proceeding are entirely duplicative of issues involved in the penalty proceeding. There are two actions in the same forum, involving the same parties, and the same demand for relief. The contest proceeding no longer serves any useful purpose, practically or legally. As a general principle, duplicative litigation is to be avoided in the federal courts, as it undoubtedly is in other courts and adjudicative bodies.[1] *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Federal judges may, exercising their general power to administer their dockets, stay or dismiss a suit that is duplicative of another federal court suit. *Curtis v. Citibank, N.A.*, 226 F.3rd 133, 138-39 (2d Cir. 2000) ("plaintiffs have no right to maintain two actions on the same subject matter in the same court, against the same defendants at the same time."). Enjoining the parties from proceeding in one of the cases, or consolidating the cases are other options available to deal with duplicative litigation.[2]

Historically, Commission Administrative Law Judges have typically consolidated pending contest cases with subsequently filed penalty proceedings. The practice may have been an outgrowth of the Commission's suggestion in *Energy Fuels*. However, the Commission has recently experienced a substantial increase in the number of contest proceedings filed. *See Spartan Mining Co.*, 28 FMSHRC 892 (Order dated September 28, 2006) (ALJ). Penalty cases may involve as many as 20 citations or orders, all of which may be the subjects of pending contest cases.[3] Because there is no way to predict how violations will be grouped for penalty assessment purposes, contest cases related to a penalty proceeding may have been assigned to several Commission ALJ's.

Consolidating such contest cases with the penalty action would not eliminate the duplicative litigation problem, and would necessitate the reassignment of numerous cases.[4]

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[1] Duplicative *in forma pauperis* proceedings may be dismissed as malicious and abusive pursuant to 28 U.S.C. § 1915(d). *Cato v. United States*, 70 F.3d 1103, 1105 n.2 (9th Cir. 1995).

[2] On procedural matters, Commission Administrative Law Judges are guided by the Federal Rules of Civil Procedure on questions not regulated by the Act, the Commission's procedural rules or the Administrative Procedure Act. 29 C.F.R. § 2700.1(b). Commission judges have authority comparable to federal district court judges to manage their dockets and deal with duplicative litigation. 30 U.S.C. § 823(d)(1), (e); 5 U.S.C. § 556; 29 C.F.R. § 2700.55.

[3] Five penalty actions in which Spartan Mining Company is the named Respondent have been assigned to this Judge. They involve at least thirty-seven contest proceedings, several of which had been assigned to other judges.

[4] While a split of authority has developed in the federal circuit courts, the better view is that expressed by the Supreme Court prior to adoption of the federal rules, i.e., consolidated cases retain their individual legal identity, they are not merged into a single cause. *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933).

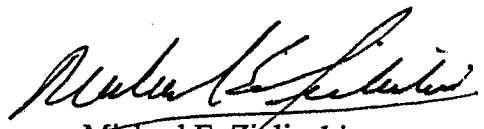
There does not appear to be any reason to place this administrative burden on Commission staff. Moreover, the captions of consolidated actions that include listings of numerous contest proceedings with penalty proceedings produce cumbersome documents, in which titles and substance are not readily apparent due to pages of case listings.

Staying contest proceedings until final disposition of a related penalty case would avoid the need to reassign cases, but would preserve the pendency of duplicative litigation and create docket management problems. A mechanism would have to be developed to notify Judges to whom the various contest cases had been assigned of the disposition of the penalty case.

Dismissal of contest cases, without prejudice, upon filing of the penalty proceeding would eliminate duplicative litigation, avoid reassignment and tracking problems, and result in more concise and efficient case and document captioning.

While these contest cases and the related penalty proceeding are now assigned to the undersigned Administrative Law Judge, the advantages of dismissing them without prejudice outweigh the options of staying them or consolidating them with the penalty proceeding.

Accordingly, these contest cases are hereby **DISMISSED WITHOUT PREJUDICE.**



Michael E. Zielinski
Administrative Law Judge

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

/mh

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 5, 2007

SPARTAN MINING COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2006-527-R
	:	Citation No. 6690068; 05/10/2006
	:	
	:	Docket No. WEVA 2006-528-R
	:	Citation No. 7427026; 05/10/2006
v.	:	
	:	Docket No. WEVA 2006-529-R
	:	Citation No. 7427031; 05/10/2006
	:	
	:	Docket No. WEVA 2006-530-R
	:	Citation No. 7583382; 05/10/2006
	:	
	:	Docket No. WEVA 2006-531-R
	:	Citation No. 7583383; 05/10/2006
	:	
	:	Docket No. WEVA 2006-560-R
	:	Citation No. 7583380; 05/09/2006
	:	
	:	Docket No. WEVA 2006-561-R
	:	Citation No. 7583381; 05/09/2006
	:	
	:	Docket No. WEVA 2006-562-R
	:	Citation No. 7427016; 05/09/2006
	:	
	:	Docket No. WEVA 2006-563-R
	:	Citation No. 7427018; 05/09/2006
	:	
	:	Docket No. WEVA 2006-564-R
	:	Citation No. 7427019; 05/09/2006
	:	
	:	Docket No. WEVA 2006-565-R
	:	Citation No. 6690054; 05/09/2006
	:	
	:	Docket No. WEVA 2006-566-R
	:	Citation No. 6690055; 05/09/2006
	:	
	:	Docket No. WEVA 2006-567-R
	:	Citation No. 6690057; 05/09/2006

	:	Docket No. WEVA 2006-568-R
	:	Citation No. 6690060; 05/09/2006
	:	
	:	Docket No. WEVA 2006-569-R
	:	Citation No. 7427015; 05/09/2006
	:	
	:	Docket No. WEVA 2006-577-R
	:	Citation No. 7583384; 05/10/2006
	:	
	:	Docket No. WEVA 2006-578-R
	:	Citation No. 7583394; 05/10/2006
	:	
	:	Docket No. WEVA 2006-579-R
	:	Citation No. 7583395; 05/10/2006
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2006-580-R
ADMINISTRATION, (MSHA),	:	Citation No. 7583396; 05/10/2006
Respondent	:	
	:	Docket No. WEVA 2006-581-R
	:	Citation No. 7583398; 05/10/2006
	:	
	:	Docket No. WEVA 2006-582-R
	:	Citation No. 7583399; 05/10/2006
	:	
	:	Diamond Energy
	:	Mine ID 46-08738

ORDER OF DISMISSAL WITHOUT PREJUDICE FOLLOWING REMAND

These cases are before me on Notices of Contest filed pursuant to section 105(d) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). By order dated December 21, 2006, the cases were dismissed without prejudice because the Secretary had issued proposed civil penalties for the alleged violations which the operator had contested pursuant to section 105(a) of the Act, and all issues related to the alleged violations and the amount of the proposed penalties would be resolved in the civil penalty proceeding. The Commission, on its own motion, directed review, summarily vacated the order, and remanded the cases for further proceedings. The Commission's expressed concern was the absence of an explanation of why the cases were dismissed, as opposed to being consolidated with the civil penalty proceeding, an option noted in *Energy Fuels Corp.*, 1 FMSHRC 299, 308 (May 1979). For the reasons set forth below, dismissal without prejudice is the preferable option for dealing with duplicative litigation in the circumstances of these cases.

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[1] Duplicative *in forma pauperis* proceedings may be dismissed as malicious and abusive pursuant to 28 U.S.C. § 1915(d). *Cato v. United States*, 70 F.3d 1103, 1105 n.2 (9th Cir. 1995).

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contest cases.[3] Because there is no way to predict how violations will be grouped for penalty assessment purposes, contest cases related to a penalty proceeding may have been assigned to several Commission ALJ's.

Consolidating such contest cases with the penalty action would not eliminate the duplicative litigation problem, and would necessitate the reassignment of numerous cases.[4] There does not appear to be any reason to place this administrative burden on Commission staff. Moreover, the captions of consolidated actions that include listings of numerous contest proceedings with penalty proceedings produce cumbersome documents, in which titles and substance are not readily apparent due to pages of case listings.

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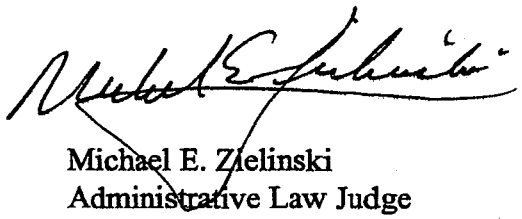
Accordingly, these contest cases are hereby **DISMISSED WITHOUT PREJUDICE.**



Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 6, 2007

CHESTNUT COAL,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. PENN 2006-145-R
	:	Citation No. 7008707;03/02/2006
	:	
v.	:	Docket No. PENN 2006-146-R
	:	Order No. 7008708;03/02/2006
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. PENN 2006-147-R
ADMINISTRATION, (MSHA),	:	Order No. 7008709;03/02/2006
Respondent	:	
	:	Docket No. PENN 2006-148-R
	:	Citation No. 7008710;03/02/2006
	:	
	:	Docket No. PENN 2006-149-R
	:	Citation No. 7008711;03/02/2006
	:	
	:	No. 10 Slope
	:	Mine ID 36-07059

ORDER OF DISMISSAL WITHOUT PREJUDICE FOLLOWING REMAND

These cases are before me on Notices of Contest filed pursuant to section 105(d) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). By order dated January 19, 2007, the cases were dismissed without prejudice because the Secretary had issued proposed civil penalties for the alleged violations which the operator had contested pursuant to section 105(a) of the Act, and all issues related to the alleged violations and the amount of the proposed penalties would be resolved in the civil penalty proceeding. The Commission, on its own motion, directed review, summarily vacated the order, and remanded the cases for further proceedings. The Commission's expressed concern was the absence of an explanation of why the cases were dismissed, as opposed to being consolidated with the civil penalty proceeding, an option noted in *Energy Fuels Corp.*, 1 FMSHRC 299, 308 (May 1979). For the reasons set forth below, dismissal without prejudice is the preferable option for dealing with duplicative litigation in the circumstances of these cases.

Contest proceedings are initiated by the filing of a Notice of Contest pursuant to section 105(d) of the Mine Safety and Health Act of 1977 ("Act") and Commission Procedural Rule 20. 30 U.S.C. § 815(d); 29 C.F.R. § 2700.20. A Notice of Contest of a citation or order issued under

section 104 of the Act must be filed within 30 days of the issuance of the citation or order, and places into issue the fact of violation and any special findings contained in the citation or order. It does not, however, place into issue any proposed penalty assessment that may subsequently be issued by the Secretary. 29 C.F.R. § 2700.21(a). An operator may also contest, pursuant to section 105(a) of the Act, a proposed penalty assessment for a citation or order. A contest of the proposed penalty assessment prompts the filing of a civil penalty proceeding and places into issue not only the proposed penalty, but the fact of violation and any special findings contained in the citation or order. *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1620-23 (Sept. 1987); 29 C.F.R. § 2700.21(b).

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Historically, Commission Administrative Law Judges have typically consolidated pending contest cases with subsequently filed penalty proceedings. The practice may have been an outgrowth of the Commission's suggestion in *Energy Fuels*. However, the Commission has recently experienced a substantial increase in the number of contest proceedings filed. *See Spartan Mining Co.*, 28 FMSHRC 892 (Order dated September 28, 2006) (ALJ). Penalty cases may involve as many as 20 citations or orders, all of which may be the subjects of pending

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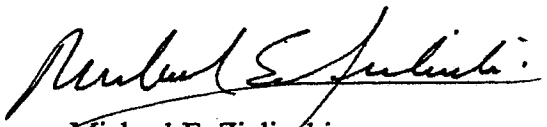
Accordingly, these contest cases are hereby **DISMISSED WITHOUT PREJUDICE.**



Michael E. Zielinski
Administrative Law Judge
202 434-9981

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[3] These contest proceedings were originally among a group of 48 such cases. Civil penalties were assessed for virtually all of the alleged violations. The operator did not timely contest many of the proposed assessments, which became final orders of the Commission, prompting dismissal of the related contest proceedings.

[4] While a split of authority has developed in the federal circuit courts, the better view is that expressed by the Supreme Court prior to adoption of the federal rules, i.e., consolidated cases retain their individual legal identity, they are not merged into a single cause. *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 6, 2007

SPARTAN MINING COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2006-556-R
	:	Citation No. 7460761; 05/09/2006
	:	Docket No. WEVA 2006-557-R
	:	Citation No. 7460764; 05/09/2006
	:	Docket No. WEVA 2006-558-R
	:	Citation No. 7460766; 05/09/2006
	:	Docket No. WEVA 2006-559-R
	:	Citation No. 7460771; 05/09/2006
	:	Docket No. WEVA 2006-573-R
	:	Citation No. 6601360; 05/10/2006
	:	Docket No. WEVA 2006-574-R
	:	Citation No. 7460775; 05/10/2006
	:	Docket No. WEVA 2006-575-R
	:	Citation No. 7460777; 05/10/2006
v.	:	
	:	Docket No. WEVA 2006-576-R
	:	Citation No. 7460778; 05/10/2006
	:	Docket No. WEVA 2006-583-R
	:	Citation No. 6601358; 05/09/2006
	:	Docket No. WEVA 2006-584-R
	:	Citation No. 6601359; 05/09/2006

	:	Docket No. WEVA 2006-585-R
SECRETARY OF LABOR,	:	Citation No. 7062290; 05/11/2006
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2006-586-R
Respondent	:	Citation No. 7062293; 05/11/2006
	:	
	:	Ruby Energy
	:	Mine ID 46-08808

ORDER OF DISMISSAL WITHOUT PREJUDICE FOLLOWING REMAND

These cases are before me on Notices of Contest filed pursuant to section 105(d) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). By order dated December 21, 2006, the cases were dismissed without prejudice because the Secretary had issued proposed civil penalties for the alleged violations which the operator had contested pursuant to section 105(a) of the Act, and all issues related to the alleged violations and the amount of the proposed penalties would be resolved in the civil penalty proceeding. The Commission, on its own motion, directed review, summarily vacated the order, and remanded the cases for further proceedings. The Commission's expressed concern was the absence of an explanation of why the cases were dismissed, as opposed to being consolidated with the civil penalty proceeding, an option noted in *Energy Fuels Corp.*, 1 FMSHRC 299, 308 (May 1979). For the reasons set forth below, dismissal without prejudice is the preferable option for dealing with duplicative litigation in the circumstances of these cases.

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Consolidating such contest cases with the penalty action would not eliminate the duplicative litigation problem, and would necessitate the reassignment of numerous cases.[4] There does not appear to be any reason to place this administrative burden on Commission staff. Moreover, the captions of consolidated actions that include listings of numerous contest proceedings with penalty proceedings produce cumbersome documents, in which titles and substance are not readily apparent due to pages of case listings.

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[1] Duplicative *in forma pauperis* proceedings may be dismissed as malicious and abusive pursuant to 28 U.S.C. § 1915(d). *Cato v. United States*, 70 F.3d 1103, 1105 n.2 (9th Cir. 1995).

[2] On procedural matters, Commission Administrative Law Judges are guided by the Federal Rules of Civil Procedure on questions not regulated by the Act, the Commission's procedural rules or the Administrative Procedure Act. 29 C.F.R. § 2700.1(b). Commission judges have authority comparable to federal district court judges to manage their dockets and deal with duplicative litigation. 30 U.S.C. § 823(d)(1), (e); 5 U.S.C. § 556; 29 C.F.R. § 2700.55.

[3] Five penalty actions in which Spartan Mining Company is the named Respondent have been assigned to this Judge. They involve at least thirty-seven contest proceedings, several of which had been assigned to other judges.

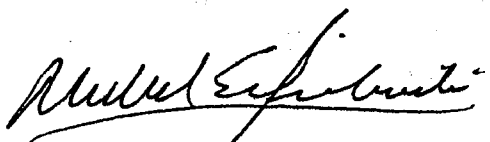
[4] While a split of authority has developed in the federal circuit courts, the better view is that expressed by the Supreme Court prior to adoption of the federal rules, i.e., consolidated cases retain their individual legal identity, they are not merged into a single cause. *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933).

Staying contest proceedings until final disposition of a related penalty case would avoid the need to reassign cases, but would preserve the pendency of duplicative litigation and create docket management problems. A mechanism would have to be developed to notify Judges to whom the various contest cases had been assigned of the disposition of the penalty case.

Dismissal of contest cases, without prejudice, upon filing of the penalty proceeding would eliminate duplicative litigation, avoid reassignment and tracking problems, and result in more concise and efficient case and document captioning.

While these contest cases and the related penalty proceedings are now assigned to the undersigned Administrative Law Judge, the advantages of dismissing them without prejudice outweigh the options of staying them or consolidating them with the penalty proceeding.

Accordingly, these contest cases are hereby **DISMISSED WITHOUT PREJUDICE.**



Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 7, 2007

CHESTNUT COAL, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. PENN 2006-89-R
	:	Citation No. 7008218;02/21/2006
v.	:	Docket No. PENN 2006-90-R
	:	Order No. 7008219;02/21/2006
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Docket No. PENN 2006-94-R
	:	Order No. 7008224;02/21/2006
	:	Docket No. PENN 2006-95-R
	:	Citation No. 7008225;02/23/2006
	:	Docket No. PENN 2006-96-R
	:	Citation No. 7008226;02/23/2006
	:	Docket No. PENN 2006-97-R
	:	Citation No. 7008227;02/23/2006
	:	Docket No. PENN 2006-109-R
	:	Citation No. 7008298;02/21/2006
	:	Docket No. PENN 2006-110-R
	:	Order No. 7008299;02/21/2006
	:	Docket No. PENN 2006-116-R
	:	Order No. 7008418;02/23/2006
	:	Docket No. PENN 2006-119-R
	:	Order No. 7008701;02/21/2006
	:	Docket No. PENN 2006-120-R
	:	Order No. 7008702;02/21/2006
	:	Docket No. PENN 2006-121-R
	:	Citation No. 7008703;02/23/2005

:	Docket No. PENN 2006-122-R
:	Citation No. 7008704;02/23/2006
:	
:	Docket No. PENN 2006-123-R
:	Citation No. 7008705;02/23/2006
:	
:	No. 10 Slope

ORDER OF DISMISSAL WITHOUT PREJUDICE FOLLOWING REMAND

These cases are before me on Notices of Contest filed pursuant to section 105(d) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). By order dated December 21, 2006, the cases were dismissed without prejudice because the Secretary had issued proposed civil penalties for the alleged violations which the operator had contested pursuant to section 105(a) of the Act, and all issues related to the alleged violations and the amount of the proposed penalties would be resolved in the civil penalty proceeding. The Commission, on its own motion, directed review, summarily vacated the order, and remanded the cases for further proceedings. The Commission's expressed concern was the absence of an explanation of why the cases were dismissed, as opposed to being consolidated with the civil penalty proceeding, an option noted in *Energy Fuels Corp.*, 1 FMSHRC 299, 308 (May 1979). For the reasons set forth below, dismissal without prejudice is the preferable option for dealing with duplicative litigation in the circumstances of these cases.

Contest proceedings are initiated by the filing of a Notice of Contest pursuant to section 105(d) of the Mine Safety and Health Act of 1977 ("Act") and Commission Procedural Rule 20. 30 U.S.C. § 815(d); 29 C.F.R. § 2700.20. A Notice of Contest of a citation or order issued under section 104 of the Act must be filed within 30 days of the issuance of the citation or order, and places into issue the fact of violation and any special findings contained in the citation or order. It does not, however, place into issue any proposed penalty assessment that may subsequently be issued by the Secretary. 29 C.F.R. § 2700.21(a). An operator may also contest, pursuant to section 105(a) of the Act, a proposed penalty assessment for a citation or order. A contest of the proposed penalty assessment prompts the filing of a civil penalty proceeding and places into issue not only the proposed penalty, but the fact of violation and any special findings contained in the citation or order. *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1620-23 (Sept. 1987); 29 C.F.R. § 2700.21(b).

An operator's contest of both the issuance of a citation or order and the subsequent proposed penalty assessment for the violation results in two separate proceedings before the Commission. The issues involved in the contest proceeding are entirely duplicative of issues involved in the penalty proceeding. There are two actions in the same forum, involving the same parties, and the same demand for relief. The contest proceeding no longer serves any useful purpose, practically or legally. As a general principle, duplicative litigation is to be avoided in

the federal courts, as it undoubtedly is in other courts and adjudicative bodies.[1] *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Federal judges may, exercising their general power to administer their dockets, stay or dismiss a suit that is duplicative of another federal court suit. *Curtis v. Citibank, N.A.*, 226 F.3rd 133, 138-39 (2d Cir. 2000) ("plaintiffs have no right to maintain two actions on the same subject matter in the same court, against the same defendants at the same time"). Enjoining the parties from proceeding in one of the cases, or consolidating the cases are other options available to deal with duplicative litigation.[2]

Historically, Commission Administrative Law Judges have typically consolidated pending contest cases with subsequently filed penalty proceedings. The practice may have been an outgrowth of the Commission's suggestion in *Energy Fuels*. However, the Commission has recently experienced a substantial increase in the number of contest proceedings filed. *See Spartan Mining Co.*, 28 FMSHRC 892 (Order dated September 28, 2006) (ALJ). Penalty cases may involve as many as 20 citations or orders, all of which may be the subjects of pending contest cases.[3] Because there is no way to predict how violations will be grouped for penalty assessment purposes, contest cases related to a penalty proceeding may have been assigned to several Commission ALJ's.

Consolidating such contest cases with the penalty action would not eliminate the duplicative litigation problem, and would necessitate the reassignment of numerous cases.[4] There does not appear to be any reason to place this administrative burden on Commission staff. Moreover, the captions of consolidated actions that include listings of numerous contest proceedings with penalty proceedings produce cumbersome documents, in which titles and

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[1] Duplicative *in forma pauperis* proceedings may be dismissed as malicious and abusive pursuant to 28 U.S.C. § 1915(d). *Cato v. United States*, 70 F.3d 1103, 1105 n.2 (9th Cir. 1995).

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[3] These contest proceedings were originally among a group of 48 such cases. Civil penalties were assessed for virtually all of the alleged violations. The operator did not timely contest many of the proposed assessments, which became final orders of the Commission, prompting dismissal of the related contest proceedings.

[4] While a split of authority has developed in the federal circuit courts, the better view is that expressed by the Supreme Court prior to adoption of the federal rules, i.e., consolidated cases retain their individual legal identities, they are not merged into a single cause. *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933).

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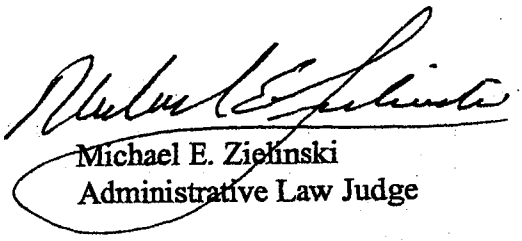
Staying contest proceedings until final disposition of a related penalty case would avoid the need to reassign cases, but would preserve the pendency of duplicative litigation and create docket management problems. A mechanism would have to be developed to notify Judges to whom the various contest cases had been assigned of the disposition of the penalty case.

Dismissal of contest cases, without prejudice, upon filing of the penalty proceeding would eliminate duplicative litigation, avoid reassignment and tracking problems, and result in more concise and efficient case and document captioning.

While these contest cases and the related penalty proceedings are assigned to the undersigned Administrative Law Judge, the advantages of dismissing them without prejudice outweigh the options of staying them or consolidating them with the penalty proceeding.

Accordingly, these contest cases are hereby **DISMISSED WITHOUT PREJUDICE.**



Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 8, 2007

LAWRENCE L. PENDLEY, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 2007-83-D
	:	MADI CD 2007-01
v.	:	
	:	
HIGHLAND MINING COMPANY, INC., Respondent	:	Highland No. 9 Mine
	:	Mine ID 15-02709

ORDER OF DISMISSAL

Before: Judge Feldman

This matter arises under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"), 30 U.S.C. § 815(c)(3), after Lawrence L. Pendley filed a discrimination complaint with this Commission on his own behalf on December 7, 2006, against Highland Mining Company, Inc. ("Highland"). Pendley's complaint followed a November 6, 2006, determination by the Mine Safety and Health Administration (MSHA) that its investigation of Pendley's complaint, filed with MSHA on October 17, 2006, did not disclose facts that constitute a violation of section 105(c) of the Mine Act.

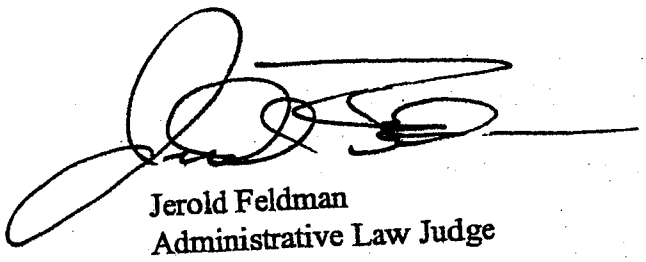
The statutory scheme pertaining to the discrimination provisions of the Mine Act were recently discussed by Chairman Duffy in his concurring opinion in *Speed Mining, Inc.*, 28 FMSHRC 773 (September 2006):

> [In section 105(c)] Congress authorizes the Commission to entertain discrimination complaints brought by miners when the Secretary has declined to do so. Under section 105(c), a miner is allowed to file a discrimination complaint if he believes an operator has retaliated against him for the exercise of his safety rights under the Act. The miner first files the complaint with the Secretary who, upon finding discriminatory conduct, files a complaint for relief with the Commission. If, however, on preliminary investigation, the Secretary determines that no discriminatory practice has occurred, the miner retains the right to bring a complaint on his own behalf before the Commission.

28 FMSHRC at 785.

Although MSHA initially, advised Pendley on November 6, 2006, that its investigation did not reveal evidence of discriminatory conduct of Highland, the November 6, 2006, determination was superceded by MSHA's December 12, 2006, determination that it was reopening its investigation into Pendley's complaint. Consequently, on January 12, 2007, Highland filed a motion to dismiss Pendley's 105(c)(3) complaint filed on his own behalf as premature because it lacks the jurisdictional predicate of an MSHA finding, upon investigation, that no discrimination occurred. Pendley has not opposed Highland's motion.

Highland is correct. The Secretary's decision to reopen her MSHA investigation renders Pendley's 105(c)(3) complaint defective because it negates the finding by MSHA that no discrimination occurred which is a prerequisite to the filing of a valid 105(c)(3) complaint. Accordingly, **IT IS ORDERED** that Pendley's discrimination complaint **IS DISMISSED**, without prejudice, as defective. In other words, Pendley may refile his complaint on his behalf under section 105(c)(3) if the Secretary ultimately concludes that her MSHA investigation failed to reveal evidence of discrimination. Alternatively, if the Secretary finds evidence of discrimination, she shall file a discrimination complaint with this Commission on Pendley's behalf pursuant to section 105(c)(2) of the Mine Act.



Jerold Feldman
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

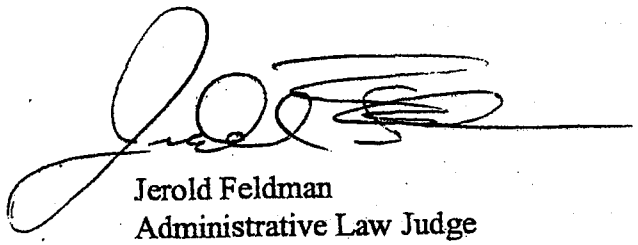
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

January 22, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2006-934
Petitioner	:	A.C. No. 46-09048-94552
	:	
v.	:	
	:	
MARFORK COAL COMPANY, INC.,	:	
Respondent	:	Slip Ridge Cedar Grove Mine

STAY ORDER

Citation No. 7257568 is a subject of the captioned civil penalty contest filed by Marfork Coal Company, Inc. (Marfork) pursuant to section 105(a) of the Federal Mine Safety and Health Act of 1977, as amended, (the Act), 30 C.F.R. § 815(a). Marfork's appeal of the dismissal of its contest of Citation No. 7257568 in Docket No. WEVA 2006-790-R filed under section 105(d) of the Act, 30 C.F.R. § 815(d), because it was defective and an abuse of process, is before the Commission. 28 FMSHRC 842 (Sept. 2006) (ALJ), *appeal docketed* (Nov. 3, 2006); *see also* 28 FMSHRC 1066 (Dec. 2006) (ALJ). Consequently, this civil penalty proceeding **IS STAYED** pending the Commission's disposition in WEVA 2006-790-R and its companion cases.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 29, 2007

MICHAEL SONNEY, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. CENT 2007-1-DM
v.	:	SC MD 2006-08
	:	
	:	
ALAMO CEMENT CO., LTD., Respondent	:	1604 Plant & Quarry Mine ID 41-03019

ORDER REQUESTING CLARIFICATION

This case is before me based on a discrimination complaint filed with this Commission pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, § 815(c)(3) (the Act). The complaint was filed by Michael Sonney against the respondent, Alamo Cement Company, LTD (Alamo). Sonney's discrimination complaint filed with the Mine Safety and Health Administration alleges:

> On 19 May 06 Company injured myself and another employee. I reported these unsafe actions to John Henderson whom took no action to correct identified safety hazards or develop procedures to prevent a reoccurrence. As a result of this, I was discharged on 21 July 06.
>
> I am seeking reinstatement.

The following statutory and case law framework is applicable in a discrimination proceeding. Section 105(c)(1) of the Mine Act provides, in pertinent part:

> No person shall discharge or in any manner discriminate against . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine . . . .

30 U.S.C. § 815(c)(1).

Sonney has the burden of proving a *prima facie* case of discrimination. In order to establish a *prima facie* case, Sonney must establish that he engaged in protected activity, and that

the aggrieved action was motivated, in some part, by that protected activity. *See Sec'y of Labor o/b/o Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor o/b/o Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981).

Alamo may rebut a *prima facie* case by demonstrating, either that no protected activity occurred, or that the adverse action complained of by Sonney was not motivated in any part by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. Alamo may also affirmatively defend against a *prima facie* case by establishing and that it would have taken the adverse actions complained of even if the protected activity had not occurred. *See also Jim Walter Resources*, 920 F.2d at 750, *citing with approval Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

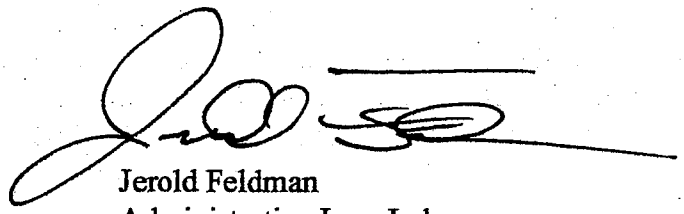
Currently before me are Alamo's motions to compel Sonney's answers to interrogatories, and to compel Sonney's responses to Alamo's request for production of documents. Commission Rule 56(b), 29 C.F.R. § 2700.56(b), permits discovery of any relevant, non-privileged matter that is admissible evidence or likely to lead to the discovery of admissible evidence. However, Sonney's discrimination complaint does not adequately identify the protected activity that serves as the basis for his complaint, the specific adverse action that he asserts was motivated by his protected activity, or how the alleged protected activity is connected to the claimed adverse action. Without additional clarification, I am unable to dispose of Alamo's Motion to Compel. Accordingly, Sonney **IS ORDERED** to provide the following information, **in writing, within fourteen (14) days of this Order**:

> (1) State, with specificity, the protected activity that serves as the basis for your complaint. If you are alleging that you communicated safety related concerns to Alamo supervisory personnel, state the names and job titles of such personnel, and provide a detailed summary of the safety related communications, including the date and time of such communications.
>
> (2) In your complaint you allege that the company injured you. State, with specificity, the date and nature and extent of your injury, and explain how the injury occurred. State whether you believe the company was at fault for your injury and why. If you assert that you suffered a job related injury, state whether you have filed a worker's compensation claim. If not, explain why.
>
> (3) State, with specificity, the adverse action you are complaining of. If the adverse action is your July 21, 2006, termination, identify the Alamo management personnel who informed you of your termination and the reasons given by the company for your separation.

(4) Section 105(c)(3) of the Act provides that if discrimination charges are sustained, the Commission shall grant appropriate relief including, but not limited to, an order requiring reinstatement of employment with back pay and interest or such remedy as may be appropriate. During a January 26, 2007, telephone conference you stated you were not seeking back pay, reinstatement or reimbursement of other expenses. At that time, Alamo represented that it would expunge all negative references in your personnel file, if any, that are in any way related to the circumstances in this case. Please state with specificity the relief you are seeking in this proceeding.

Sonney may provide any other information he deems relevant.

IT IS FURTHER ORDERED that Alamo shall have ten (10) days to reply to Sonney's submission. As a threshold matter, Alamo should state whether it believes the activities identified by Sonney constitute protected activity and why. Alamo also should state whether Sonney's termination was motivated, in any part, by the protected activity alleged by Sonney. Finally, Alamo should state, with specificity, the date and reasons given to Sonney for his termination, and Alamo should identify the management personnel who were responsible for the decision to terminate Sonney's employment. Alamo may provide any additional information it deems relevant.



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