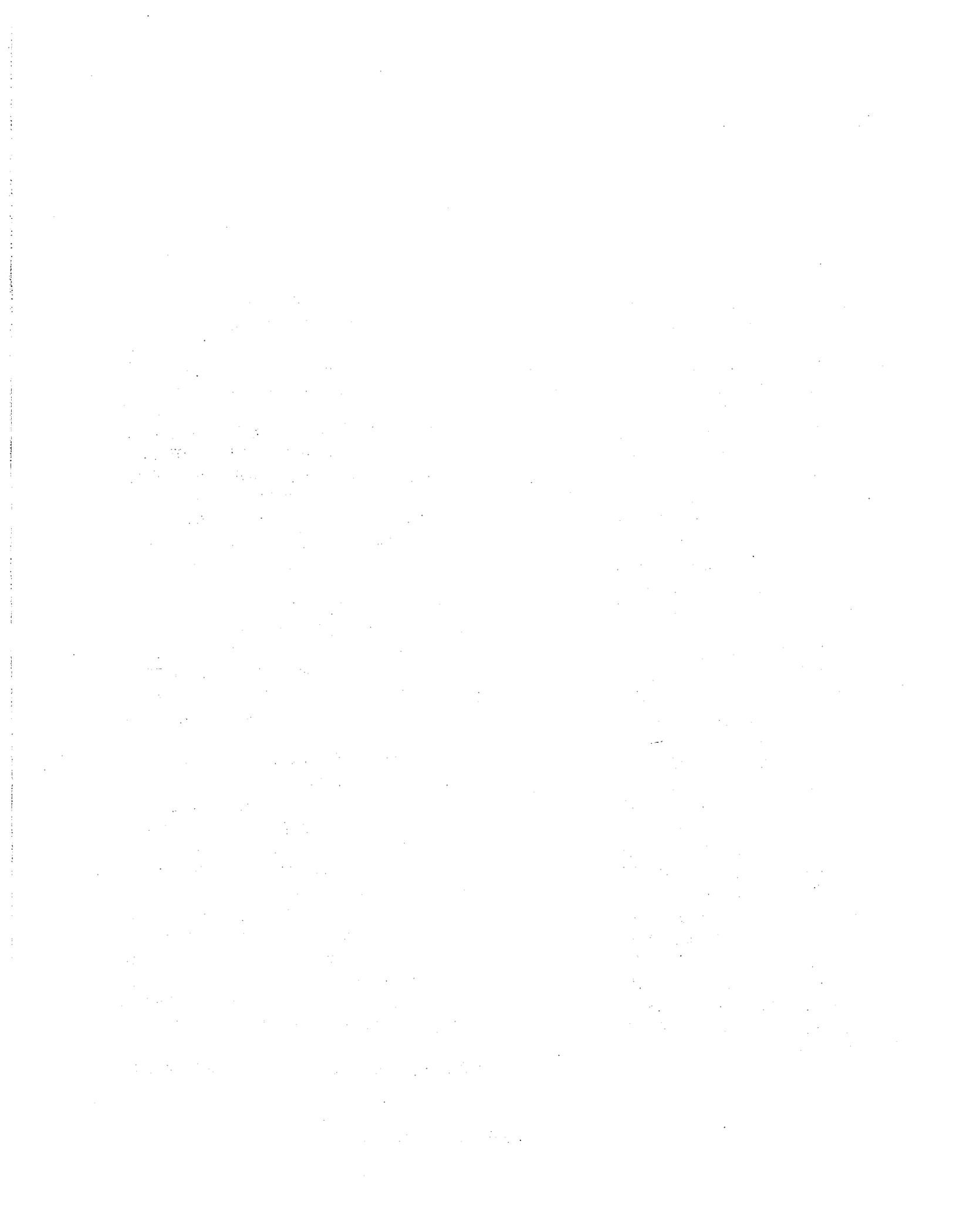


## JANUARY AND FEBRUARY 2009

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## **JANUARY AND FEBRUARY 2009**

Review was granted in the following cases during the months of January and February 2009:

Secretary of Labor, MSHA v. Dusek Sand & Gravel, Inc., Docket No. CENT 2008-357-M. (Judge Melick, unpublished Default order issued December 8, 2008)

Secretary of Labor, MSHA v. Aracoma Coal Company, Docket Nos. WEVA 2006-654, et al. (Judge Lesnick, December 23, 2008)

Secretary of Labor, MSHA v. Cumberland Coal Resources, LP, Docket Nos. PENN 2008-51-R, et al. (Judge Zielinski, January 2, 2009)

No case was filed in which review was denied during the months of January and February 2009:



**COMMISSION DECISIONS AND ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 8, 2009

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

v.

MARTIN MARIETTA MATERIALS, INC.

:  
:  
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Docket No. SE 2008-991-M  
A.C. No. 31-02009-155842  
:  
:

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

ORDER

BY THE COMMISSION:

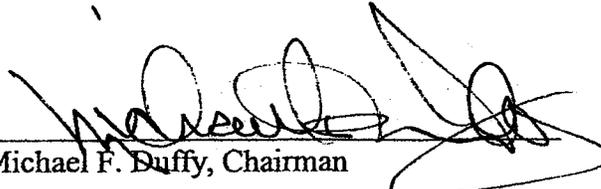
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On September 4, 2008, the Commission received from Martin Marietta Materials, Inc. ("Martin Marietta") a motion by counsel requesting reopening of a proposed penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>1</sup>

On July 3, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Penalty Assessment No. 000155842 to Martin Marietta. The operator states that it timely contested the proposed assessment. Martin Marietta further submits that, by a letter dated August 26, 2008, MSHA stated that the proposed assessment had not been timely contested.

---

<sup>1</sup> 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 Secretary has subsequently informed the Commission that Assessment No. 000155842 is being treated by MSHA as a validly contested assessment. Consequently, there is no final Commission order with respect to this assessment to reopen, and this docket is dismissed.



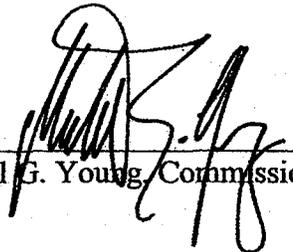
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Michael F. Duffy, Chairman



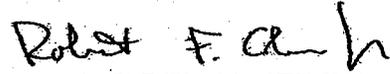
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Mary Lu Jordan, Commissioner



---

Michael G. Young, Commissioner



---

Robert F. Cohen, Jr., Commissioner

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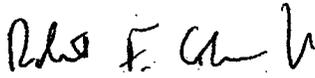


We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the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

While Delta’s request for relief addresses the mistake that led to its failure to return the assessment form to MSHA, its motion is silent regarding why the assessment sat apparently unpaid for months, despite having been routed through Delta’s payment process. Consequently, we deny Delta’s request to reopen without prejudice. Cf. *Twentymile Coal Co.*, 30 FMSHRC 177, 178 (Apr. 2008) (denying without prejudice motion to reopen by operator that explained late payment of penalties but failed to address its separate failure to return contest form).

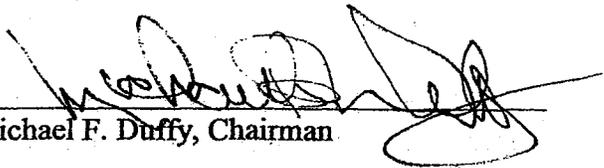
In the event Delta chooses to refile its request to reopen, we would expect it to provide, by submitting affidavits, detailed evidence regarding what happened when the assessment was routed to the payment office and why staff there failed to pay it or forward it to the appropriate personnel.

  
\_\_\_\_\_  
Mary Lu Jordan, Commissioner

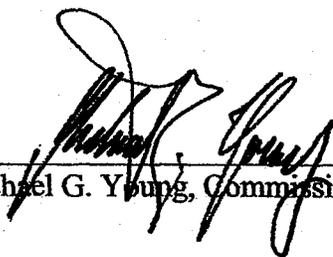
  
\_\_\_\_\_  
Robert F. Cohen, Jr., Commissioner

Chairman Duffy and Commissioner Young:

Having reviewed Delta's request and the Secretary's response, we would not deny the request on the grounds stated by our two colleagues, but would instead remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Delta's failure to timely contest the penalty proposal and whether relief from the final order should be granted.<sup>1</sup>



Michael F. Duffy, Chairman



Michael G. Young, Commissioner

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<sup>1</sup> Where two Commissioners have voted to deny without prejudice a request to reopen a case and two Commissioners have voted to remand the case for a determination of whether good cause exists to reopen the case, the effect of the split vote is that the request to reopen is not granted. However, we believe that the party seeking a reopening in such a situation may file a new request to reopen which provides additional support for its position.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 12, 2009

SECRETARY OF LABOR,	:	Docket No. KENT 2008-1111
MINE SAFETY AND HEALTH	:	A.C. No. 15-12564-125861
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2008-1181
v.	:	A.C. No. 15-12564-127886
	:	
LEFT FORK MINING COMPANY, INC.	:	Docket No. KENT 2008-1182
	:	A.C. No. 15-12564-130206

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

ORDER

BY: Jordan, Young, and Cohen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”).<sup>1</sup> On May 28, and June 20, 2008, the Commission received from Left Fork Mining Company, Inc. (“Left Fork”) a letter and motions seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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 August 28, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000125861 to Left Fork, proposing civil penalties for several citations, including 27 citations currently at issue. On October 2, 2007, MSHA issued Proposed Assessment No. 000127886 to Left Fork for six citations, including two citations

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate Docket Nos. KENT 2008-1111, KENT 2008-1181, and KENT 2008-1182, as all dockets involve similar procedural issues and similar factual backgrounds. 29 C.F.R. § 2700.12.

presently at issue. On October 30, 2007, MSHA issued Proposed Assessment No. 000130206 to Left Fork for several citations, including four citations presently at issue.

On November 29, 2007, MSHA issued a Notice of Delinquency to Left Fork pertaining to Proposed Assessment No. 000125861. On December 26, 2007, MSHA issued a Notice of Delinquency to Left Fork pertaining to Proposed Assessment No. 000127886. On January 30, 2008, MSHA issued a Notice of Delinquency to Left Fork pertaining to Proposed Assessment No. 000130206.

On May 13, 2008, counsel for MSHA sent Left Fork a letter pertaining to the delinquencies of all three proposed assessments. In this letter, MSHA stated that the total unpaid delinquencies amounted to \$76,897.79, including statutory interest and administrative fees. MSHA further stated that unless payment was made by May 27, 2008, it would issue a citation under section 104(a) of the Mine Act charging Left Fork with a failure to comply with the Commission's final orders and for failing to comply with sections 105 and 110(j) of the Mine Act. MSHA also stated that if Left Fork should fail to abate the section 104(a) citation, it would necessitate the issuance of a mine closure order.

On May 28, 2008, the Commission received a letter from Left Fork's safety director, stating with respect to Proposed Assessment No. 000125861 that Left Fork did not receive a conference regarding the citations on the proposed assessment form that it had "checked for contest." Left Fork alleged that MSHA was seeking payment of penalties associated with the citations that Left Fork indicated it was contesting, and that there had been an error. The Secretary responded that Left Fork failed to make a showing of exceptional circumstances required to obtain reopening under Fed. R. Civ. P. 60(b). She further stated that MSHA had no record of having received a contest of the proposed assessment. The Secretary requested that the Commission provide the operator with an opportunity to satisfy the requirements for reopening.

On June 20, 2008, the Commission received from Left Fork's counsel a memorandum responding to the Secretary's statement that the operator be given an opportunity to satisfy the requirements for reopening with respect to Proposed Assessment No. 000125861. On that same date, the Commission received motions to reopen from Left Fork's counsel with respect to Proposed Assessments Nos. 000127886 and 000130206.

In all three pleadings, Left Fork's counsel states that, upon receipt of the proposed assessments, the assessment forms were marked to indicate Left Fork's intent to contest the penalties associated with several citations, and then forwarded to Left Fork's Brookside office, consistent with company policy. Counsel maintains that "[t]hrough inadvertence or mistake," the completed assessment forms were not timely returned to MSHA. Counsel attached to the pleadings affidavits by Tony Nelson, Jr., Left Fork's safety director, in which the safety director states in part that "[b]ecause of a misunderstanding, personnel formerly employed in the Brookside office paid the uncontested penalties but apparently did not return the assessment cards to MSHA as contested."

On July 2, the Commission received responses to the three pleadings from the Secretary, in which the Secretary opposed the operator's requests to reopen the penalty assessments. The Secretary states that the operator does not explain how or why a mistake occurred in the Brookside office, but merely asserts that a mistake occurred. She submits that such a conclusory assertion is insufficient to establish exceptional circumstances that warrant reopening. In addition, the Secretary states that the operator failed to identify facts that, if proven on reopening, would establish a meritorious defense. She further states that the operator failed to explain why, after it was sent the Notices of Delinquency in each of the three cases many months earlier, it took as long as it did to request the reopenings. In this regard, the Secretary noted the letter sent by her counsel on May 13, 2008. The Secretary submits that the operator's filing of requests to reopen only when facing enforcement action does not demonstrate good faith.

On July 22, the Commission received from Left Fork a reply to the Secretary's responses. Left Fork asserts that, contrary to the Secretary's assertions, it did explain how or why a mistake occurred at the Brookside office. It states that the explanation was set forth in the safety director's affidavit when he stated that he intended to contest the penalties but that "[f]or reasons unknown" the proposed assessment was not returned to MSHA.

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 noted that Rule 60(b) "is a tool which . . . courts are to use sparingly . . ." *Atlanta Sand & Supply Co.*, 30 FMSHRC 605, 608 (July 2008) (citing *JWR*, 15 FMSHRC at 789). We have also observed, however, 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).

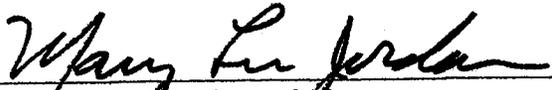
Having reviewed Left Fork's filings and the Secretary's responses, we agree with the Secretary that Left Fork has failed to make a showing of circumstances that warrant reopening. The operator's conclusory statements that its failure to timely file was due to "inadvertence or mistake" do not provide the Commission with an adequate basis to justify reopening. Even after the Secretary opposed Left Fork's motion on the grounds that it had set forth only a conclusory assertion in its attempt to justify relief, the operator merely responded that "[f]or reasons unknown, the proposed assessments were not returned as contested." L.F. Reply at 2.

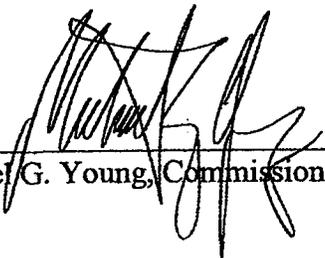
In addition, Left Fork fails to explain its failure to act after receiving Notices of Delinquency in November, December, and January. Rather, the record reveals that the operator did not seek relief until it faced the enforcement action described in MSHA's May 13, 2008 letter

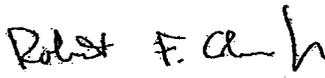
to the operator, including potential mine closure. Despite the receipt of a Notice of Delinquency in each of the three penalty assessments, Left Fork did not seek reopenings until approximately eight months after each of them became final, and approximately six months after MSHA notified the operator of its delinquencies in the three cases.

Left Fork, as the movant, carries the burden of establishing its entitlement to extraordinary relief. Delay in seeking that relief, if unexplained, has been a relevant consideration in denial of motions to reopen. *See Central Operating Co. v. Utility Workers of America*, 491 F.2d 245, 253 (4th Cir. 1974) (finding "inexcusable dereliction" and denying motions to vacate when defendants waited almost four months after receiving notice of default judgments); *see also McLawhorn v. John W. Daniel & Co.*, 924 F.2d 535, 538 (4th Cir. 1991) (finding that unexplained delay of three-and-a-half months was not reasonable).

Left Fork has provided no explanation for what cannot be objectively viewed as a prompt and diligent response, including its failure to seek relief of any type from the final orders until after MSHA threatened further enforcement action and closing the mine for non-payment. Accordingly, we deny Left Fork's requests.

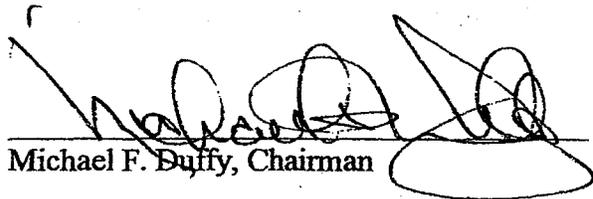
  
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Mary Lu Jordan, Commissioner

  
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Michael G. Young, Commissioner

  
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Robert F. Cohen, Jr., Commissioner

Chairman Duffy, dissenting:

While I agree with the majority that Left Fork has not been as responsive as it could and should have been regarding its failure to return the contest forms, and has thus far failed to explain why it waited so long to act after MSHA had sent it delinquency notices, I do not agree that the operator's failures justify denial of its requests to reopen with prejudice. Rather, I would deny the requests without prejudice, to allow Left Fork, should it choose to renew its requests to reopen, the opportunity to explain why it waited five to six months following its receipt of delinquency notices before filing its original requests to reopen. *See Pinnacle Mining Co.*, Docket Nos. WEVA 2008-927, etc., slip op. at 4 (Dec. 17, 2008) (denying without prejudice requests to reopen ten assessments, totaling over \$250,000 in proposed penalties, that had gone final because of operator inaction, and noting that any renewed request for reopening should address, among other matters, the operator's actions following the receipt of delinquency notices regarding nine of the assessments).



Michael F. Duffy, Chairman

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 12, 2009

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

v.

SOUTHWEST ROCK PRODUCTS, LLC

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Docket No. WEST 2009-51-M  
A.C. No. 02-03111-141339

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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 October 16, 2008, the Commission received from Southwest Rock Products, LLC ("Southwest") a request to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

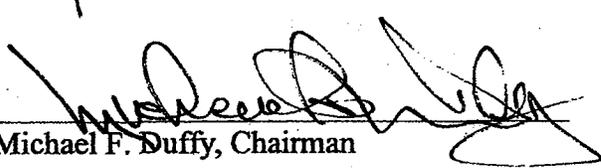
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

The Secretary supports reopening of the proposed penalty assessments in order that the parties' agreement to settle the assessments can be approved.

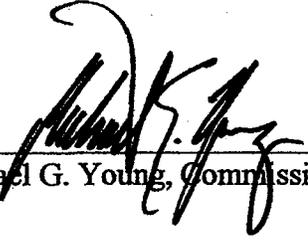
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the 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 mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed

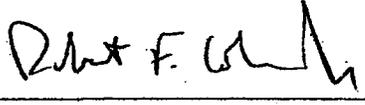
that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Southwest's request and the Secretary's response, we grant reopening and hereby remand this matter to the Chief Administrative Law Judge to rule on the motion for approval of the settlement attached to the Secretary's response.

  
Michael F. Duffy, Chairman

  
Mary Lu Jordan, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

January 13, 2009

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

v.

LOPKE QUARRIES, INC.

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Docket No. KENT 2008-1561-M  
A.C. No. 15-00101-136796

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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 September 9, 2008, the Commission received from Lopke Quarries, Inc. ("Lopke") a request 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 Secretary states that she does not oppose the reopening of the proposed 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 mistake, inadvertence, or excusable neglect. See 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the

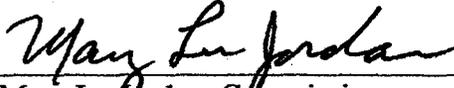
merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Lopke's request and the Secretary's response, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Lopke'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.



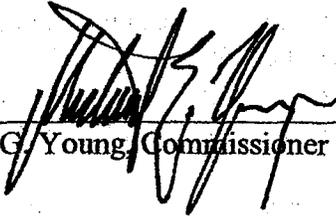
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Michael F. Duffy, Chairman



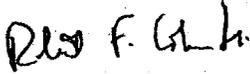
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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner

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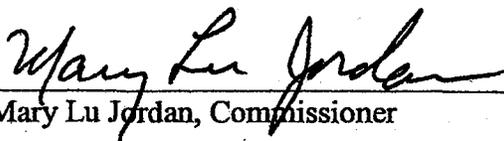
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Karat's request and the Secretary's response, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Karat'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.



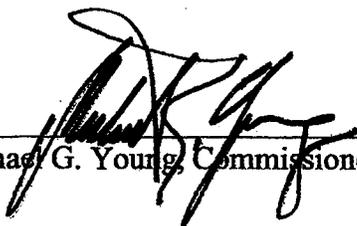
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Michael F. Duffy, Chairman



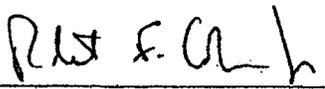
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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 13, 2009

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

v.

CRAIG & COMPANY, LLC

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Docket No. SE 2008-960-M  
A.C. No. 31-02143-134329 Q615

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On August 15, 2008, the Commission received from Craig & Company, LLC (“Craig”) a request 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).

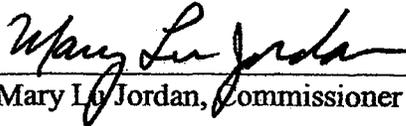
The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

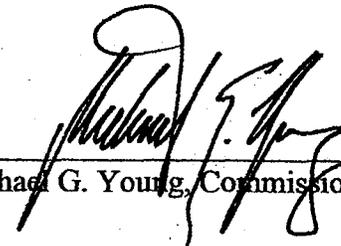
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the 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 mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a

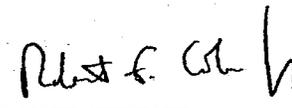
failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Craig's request and the Secretary's response, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Craig'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 L. Jordan, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

January 13, 2009

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

v.

DYNATEC MINING CORPORATION

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Docket No. SE 2008-990-M  
A.C. No. 40-00864-154105

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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 September 4, 2008, the Commission received from Dynatec Mining Corporation ("Dynatec") a request 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).

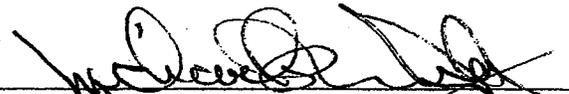
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

The Secretary states that she does not oppose the reopening of the proposed 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 mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed

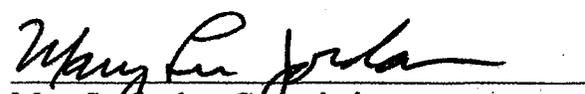
that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Dynatec's request and the Secretary's response, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Dynatec'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.



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Michael F. Duffy, Chairman



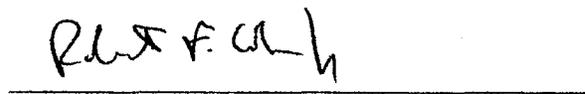
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Mary L. Jordan, Commissioner



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Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner

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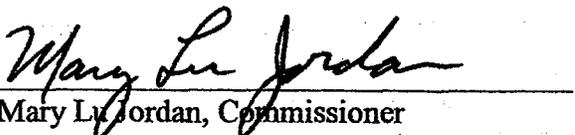


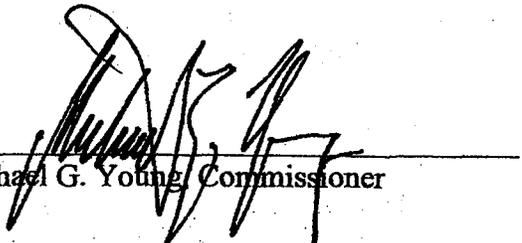
The Secretary states that she does not oppose Twentymile's request for relief.

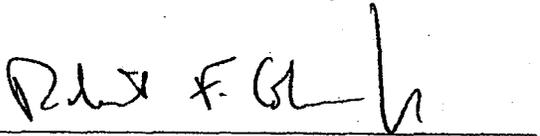
We conclude that Twentymile's contest of the proposed penalty assessment was timely filed. Twentymile's allegation that it received Proposed Assessment No. 000141404 on March 3, 2008, is supported by MSHA's delinquency notice dated April 21, 2008, which also states that Twentymile received the proposed penalty assessment on March 3. Under the Mine Act and Commission Procedural Rule 26, the deadline for filing Twentymile's contest was April 2, 2008. When filing is by mail, filing is effective upon mailing. 29 C.F.R. § 2700.5(e)(2). Here, the record reveals that Twentymile mailed its contest by overnight mail on April 2, 2008.

For the foregoing reasons, we conclude that the proposed penalty assessment has not become a final order of the Commission because Twentymile timely contested it. We deny Twentymile's motion as moot and remand this matter to the Chief Administrative Law Judge for further proceedings as appropriate pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. See *State of Alaska Dep't of Transp. and Pub. Facilities*, 29 FMSHRC 389, 390 (June 2007).

  
Michael F. Duffy, Chairman

  
Mary Lu Jordan, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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**Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
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Washington, D.C. 20001-2021**

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 15, 2009

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

v.

DUSEK SAND & GRAVEL, INC.

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: Docket No. CENT 2008-357-M  
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: A.C. No. 32-00153-139261  
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BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

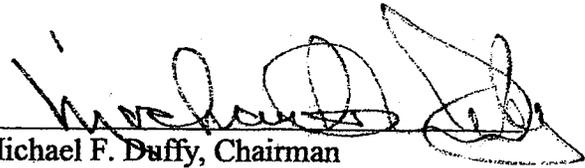
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 8, 2008, Administrative Law Judge Gary Melick entered an order of default against Dusek Sand & Gravel, Inc. ("Dusek") for its failure to file an answer to the Secretary of Labor's petition for assessment of civil penalty. On December 22, 2008, the Commission received a motion from the Secretary requesting that the Commission relieve Dusek from the order of default.

The judge's jurisdiction in this matter terminated when his decision was issued on December 8, 2008. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). We construe the Secretary's motion to be a timely filed petition for review, which we grant.

In her motion, the Secretary requests that Dusek's response to the Secretary's motion for summary judgment filed on November 26, 2008, be treated as an answer to the civil penalty petition and that the Commission reopen the case in order that the parties' agreement to settle the proposed penalty assessment can be approved.

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”); *Highlands Mining & Processing Co.*, 24 FMSHRC 685, 686 (Dec. 2004). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the Secretary’s motion, we hereby reopen this matter and remand it to Administrative Law Judge Melick for a determination of whether the motion for settlement should be approved, and for other appropriate relief pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. *See Tresca Brothers Sand & Gravel, Inc.*, 28 FMSHRC 494 (Aug. 2006).



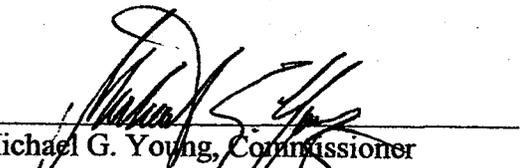
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Michael F. Duffy, Chairman



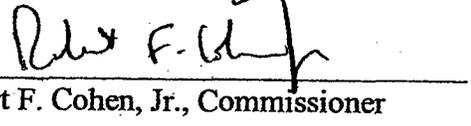
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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner

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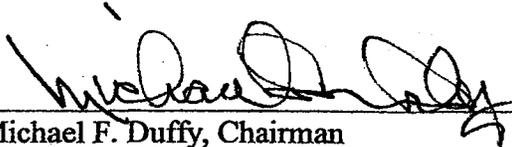
**Administrative Law Judge Gary Melick**  
**Federal Mine Safety & Health Review Commission**  
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**Chief Administrative Law Judge Robert J. Lesnick**  
**Federal Mine Safety & Health Review Commission**  
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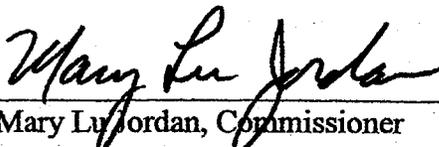
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Dyno's request and the Secretary's response, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Dyno'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.



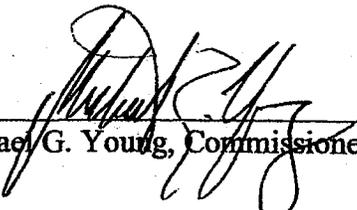
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Michael F. Duffy, Chairman



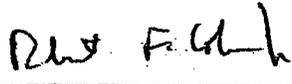
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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner

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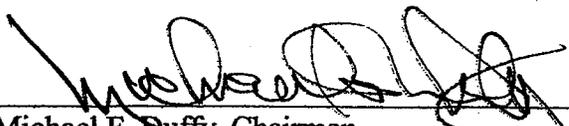
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Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001-2021



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 Ancient Sun's request and the Secretary's response, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Ancient Sun'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.



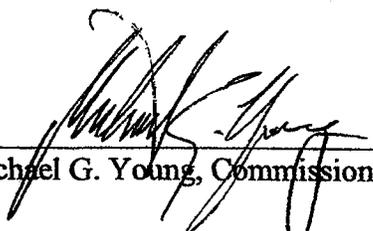
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Michael F. Duffy, Chairman



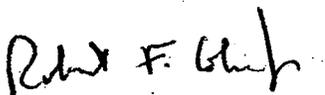
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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner

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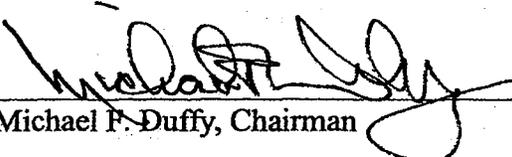
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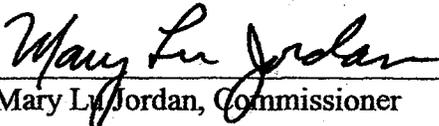
**Chief Administrative Law Judge Robert J. Lesnick**  
**Federal Mine Safety & Health Review Commission**  
**601 New Jersey Avenue, N.W., Suite 9500**  
**Washington, D.C. 20001-2021**

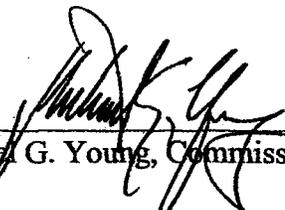


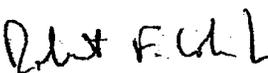
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed West Coast's request and the Secretary's response, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for West Coast'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

  
Robert F. Cohen, Jr., Commissioner

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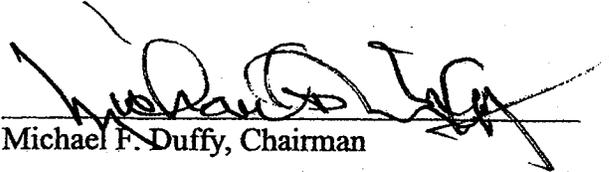
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for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Champlain's request and the Secretary's response, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Champlain'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.



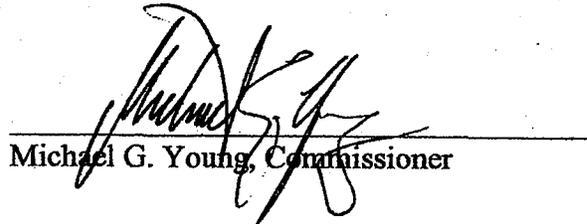
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Michael F. Duffy, Chairman



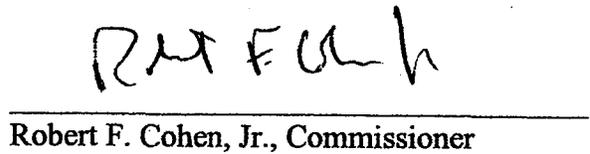
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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 22, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. CENT 2008-735-M
ADMINISTRATION (MSHA)	:	A.C. No. 41-04518-157473
	:	
v.	:	Docket No. CENT 2008-736-M
	:	A.C. No. 41-04518-140610
PETRA MATERIALS	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”).<sup>1</sup> On September 5, 2008, the Commission received from Petra Materials (“Petra”) a letter seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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 February 14 and July 17, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Penalty Assessment Nos. 000140610 and 000157473, respectively, to Petra for several citations. On September 5, 2008, the Commission received from Petra a letter requesting that the cases be reopened so that the operator could contest and discuss the amounts of the penalties. The operator states that the date to contest the penalties had passed because it “did not know the procedures.”

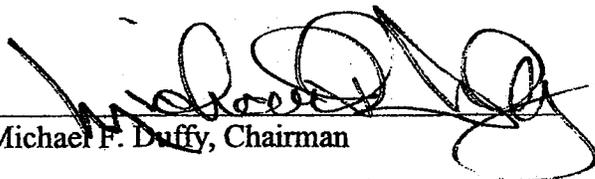
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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2008-735-M and CENT 2008-736-M, both captioned *Petra Materials* and involving similar procedural issues. 29 C.F.R. § 2700.12.

On September 30, 2008, the Commission received an opposition from the Secretary, in which the Secretary states that the operator made no showing of circumstances that warrant reopening. In addition, as to Docket No. CENT 2008-736-M, the Secretary notes that MSHA notified Petra by letter dated May 14, 2008, that it was delinquent in paying the proposed assessment. She states that Petra fails to explain why it took three months to seek relief once it received the letter advising that it was delinquent in paying the penalties.

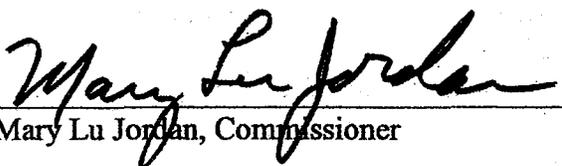
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the 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 Petra's request to reopen and the Secretary's response thereto, we agree with the Secretary that Petra has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments. Petra's conclusory statement that it failed to timely contest because it did "not know the procedures," and its failure to explain the delay in responding to the delinquency notice in Docket No. CENT 2008-736-M do not provide the Commission with an adequate basis to reopen. Accordingly, we deny without prejudice Petra's request. *See, e.g., BRS Inc.*, 30 FMSHRC 626, 628 (July 2008); *Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008). The words "without prejudice" mean Petra may submit another request to reopen the case so that it can contest the citations and penalty assessments.<sup>2</sup>



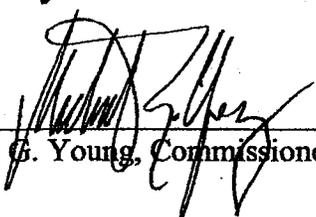
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Michael F. Duffy, Chairman



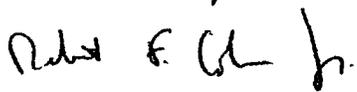
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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner

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<sup>2</sup> If Petra submits another request to reopen the cases, it must identify the specific citations and assessments it seeks to contest. Petra must also establish good cause for not contesting the citations and proposed assessments within 30 days from the date it received the proposed penalty assessments from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise or excusable fault on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation or other misconduct by the adverse party. Petra should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented Petra from responding within the time limits provided in the Mine Act, as part of its request to reopen the case. Petra should also explain its delay in responding to the delinquency notice in Docket No. CENT 2008-736-M. In addition, Petra should submit copies of supporting documents with its request to reopen the case.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

January 22, 2009

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

v.

HIGHLAND MINING COMPANY, LLC

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Docket No. KENT 2009-1  
A.C. No. 15-02709-146615

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On October 1, 2008, the Commission received from Highland Mining Company, LLC (“Highland”) a request 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).

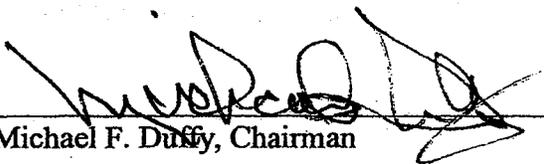
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

The Secretary states that she does not oppose the reopening of the proposed 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 mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable

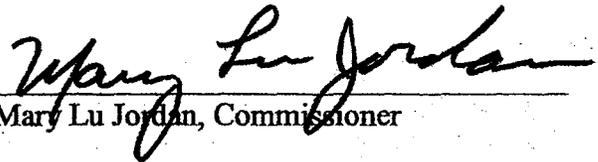
by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. See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

Having reviewed Highland’s request and the Secretary’s response, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Highland’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.



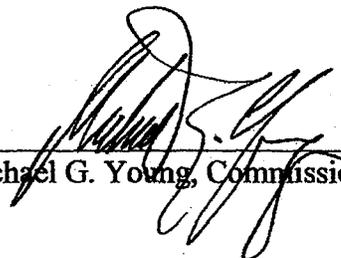
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Michael F. Duffy, Chairman



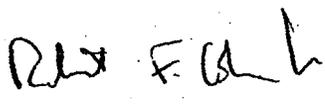
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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 22, 2009

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

v.

ALASKA MECHANICAL, INC.

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Docket No. WEST 2008-1582-M  
A.C. No. 50-01850-159018 LWI

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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 September 25, 2008, the Commission received from Alaska Mechanical, Inc. ("Alaska Mechanical") a motion by counsel seeking to reopen a penalty assessment that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

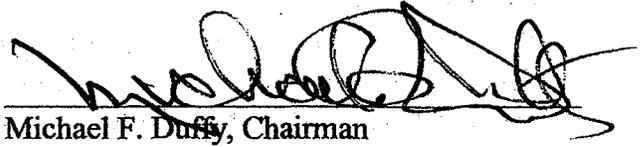
On October 4, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation Nos. 6398234 and 6398235 to Alaska Mechanical. Alaska Mechanical contested the citations, which are the subject of Docket Nos. WEST 2008-152-RM and WEST 2008-153-RM and are currently stayed. The operator states that it received Proposed Assessment No. 000159018, which proposed civil penalties for the citations, on August 11, 2008, and thus its deadline for contesting the penalties was September 10, 2008. Alaska Mechanical further states that it sent its contest by Federal Express priority delivery on September 9, and that, contrary to the assertion in MSHA's delinquency notice that MSHA received the contest on September 12, a tracking slip indicates that MSHA received the contest on September 10. Alaska asserts that it timely submitted its contest and that MSHA miscalculated applicable deadlines.

The Secretary states that she does not oppose Alaska Mechanical's request to reopen. She notes, however, that MSHA records show that the operator received the proposed penalty assessment on August 8, 2008. She asserts that the operator's contest filed on September 9 was filed one day late.

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).

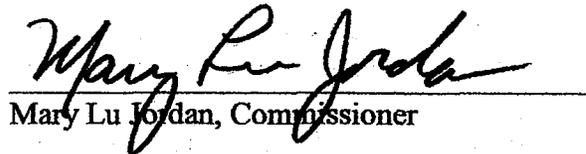
On the record presently before us, we are unable to determine whether Alaska Mechanical timely contested the proposed penalty assessment. Specifically, it is unclear on what date (August 8 or August 11, 2008) Alaska Mechanical received the proposed penalty assessment. If the company timely contested the proposed assessment, the proposed assessment has not become a final order of the Commission and the company's request for relief would be moot. *DS Mine & Dev. LLC*, 28 FMSHRC 462, 463 (July 2006).

Accordingly, we remand this matter to the Chief Administrative Law Judge for a determination of whether Alaska Mechanical timely contested the proposed penalty assessment at issue. If it is determined that the company did file a timely contest, the Chief Judge shall order further proceedings as appropriate pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. If it is determined that Palmer failed to timely contest the proposed assessment, the Chief Judge shall determine whether good cause exists for granting relief from the final order. *See Palmer Coking Coal Co.*, 30 FMSHRC \_\_\_, No. WEST 2008-934-M (Dec. 22, 2008).



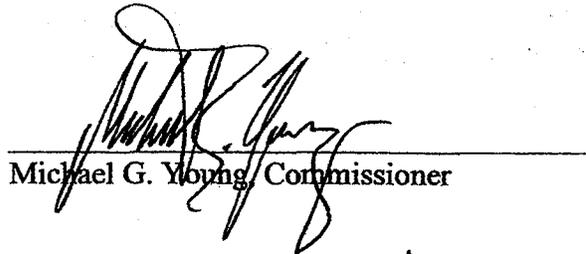
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Michael F. Duffy, Chairman



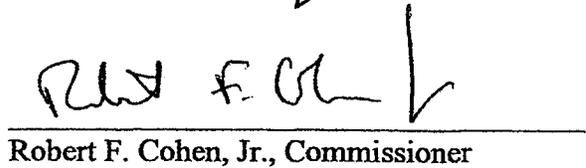
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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 27, 2009

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

v.

LUMINANT MINING COMPANY, LLC

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Docket No. CENT 2008-726  
A.C. No. 41-03660-153277

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 2, 2008, the Commission received from Luminant Mining Company, LLC ("Luminant") 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).

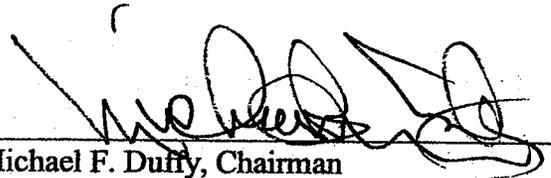
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On June 11, 2008, the Department of Labor's Mine Safety and Health Administration issued Proposed Penalty Assessment No. 000153277 to Luminant, proposing a civil penalty for Citation No. 4542218. In its request, Luminant states that it intended to timely contest the proposed penalty but that it failed to do so due to "inadvertence and mistake by Company personnel."

The Secretary opposes Luminant's request to reopen. She states that the conclusory assertion of the cause for Luminant's failure to timely file does not constitute a showing of the circumstances required to obtain reopening under Fed. R. Civ. P. 60(b). She requests that the Commission deny the operator's request 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 Luminant’s motion to reopen and the Secretary’s response, we agree with the Secretary that Luminant has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Luminant’s conclusory statement that its failure to timely file was due to “inadvertence and mistake” does not provide the Commission with an adequate basis to justify reopening. Accordingly, we deny without prejudice Luminant’s request. See, e.g., *Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).



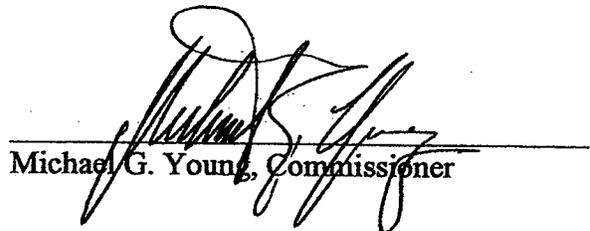
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Michael F. Duffy, Chairman



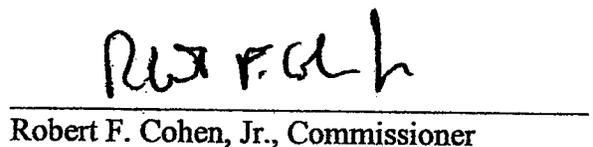
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Mary Lu Jordan, Commissioner



---

Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner

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Chief Administrative Law Judge Robert J. Lesnick  
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2007. *Id.* The Secretary appealed the judge's determination that Highland did not discriminate against Pendley when it suspended him on March 21, 2007. Pendley appealed the judge's determination that Highland did not discriminate against Pendley in his working conditions following his temporary reinstatement. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background<sup>3</sup>

A. Incidents at the Mine Involving Pendley and Creighton

Highland's No. 9 Mine is a large underground coal mine that employs approximately 300 miners on two production shifts that mine coal six days a week. R. Ex. 25 at 1-2. Highland's miners are represented by the United Mine Workers of America (UMWA). *Id.* at 1. Lawrence Pendley is a non-production miner who is classified as a "maintenance parts runner." 30 FMSHRC at 459-60. His responsibilities include delivering parts and supplies to underground miners. *Id.* at 462.

Beginning in May 2005, Pendley's job brought him in contact with Jack Creighton, who worked above ground as a supply man and hoist man and also maintained the bathhouse. *Id.*; Tr. 749. During the spring and summer of 2005, Pendley was involved in a series of events that he suspected Creighton had initiated. Pendley's truck was damaged while parked in the mine parking lot. 30 FMSHRC at 463. Around the same time as the damage to Pendley's truck occurred, someone opened his locker in the bathhouse and poured bleach on his clothes. *Id.* He reported these incidents to management. *Id.* Sometime after Pendley reported the damage to his clothes, Pendley found dirt piled in front of his locker in the bathhouse. *Id.* Also, during this time period, Creighton was hosing down the floor when Pendley walked between Creighton and a row of lockers. *Id.* at 464. Pendley was sprayed, and his pants and feet got wet. *Id.* Pendley had problems with his cap light caused by the light going out. *Id.* at 465. Pendley believed that the reason was that "bad" bulbs were being placed in his cap lamp. *Id.*

In the summer of 2005, Creighton admittedly knew that Pendley had gone to management and complained about him. *Id.* at 464. In the bathhouse, Creighton confronted Pendley and threw a paper towel on the floor and told Pendley, "[T]here is something to cry about, go cry about that." *Id.*; Tr. 764. Creighton then saw Pendley reach into his locker and pull out what Creighton thought was a gun. 30 FMSHRC at 464. Creighton told Pendley that he would shove

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<sup>3</sup> The record includes the transcript of the three days of hearing before Judge Barbour in this consolidated proceeding (Docket Nos. KENT 2007-383-D and KENT 2006-506-D). References to that transcript are designated "Tr." In addition, by agreement of the parties and the judge, the transcript of the one-day temporary reinstatement hearing (Docket No. KENT 2007-2650) was also included in the record. References to that transcript are designated "TRH Tr."

the gun down Pendley's throat. *Id.* Pendley responded by "mouthing" at Creighton, who walked away. *Id.* About two or three weeks later, Creighton complained to operations manager Webb that Pendley had threatened Creighton that he had a gun in his locker or acted as if he had a gun in his locker. *Id.*

Also during this period, Pendley complained about the operation of the "man," or hoist, cars on which he rode.<sup>4</sup> 30 FMSHRC at 465. Pendley complained numerous times to assistant superintendent Maynard that Creighton had unnecessarily stopped and then restarted the man cars when Pendley was on board. *Id.* Pendley also complained that, when Creighton was at the controls in the hoist shack, he would send cars below ground without Pendley even though Pendley was waiting to board. *Id.*

Pendley also spoke to Maynard about Creighton running too close to Pendley in the motorized cart, or golf cart. *Id.* According to Pendley, Larry ("Lap") Lewis told Pendley that he did not understand why management did not do something about Creighton's "close calls" with Pendley. *Id.* Pendley spoke to Maynard about Creighton trying to run him over, but Maynard could not find any witnesses who could confirm the incidents. *Id.*

Sometime later, another incident occurred involving Pendley and Creighton, who was operating a forklift. *Id.* at 466. Creighton had a pallet of materials on the forklift that Lap Lewis was preparing to load into the hoist cars. *Id.* According to Pendley, rather than waiting to board the car near the hoist shack, he went to board the car where Lewis was loading. When Lewis finished unloading, Pendley walked behind him, placing himself between the forklift and the car. *Id.* Pendley testified that Creighton threatened to run him over. Creighton was certain that Pendley had placed himself between the forklift and the car, thereby endangering himself in the event the brakes on the forklift failed or the throttle stuck. *Id.*; Tr. 776-79.

Assistant superintendent Maynard learned of the forklift incident and spoke to Creighton, who denied knowing what had happened. 30 FMSHRC at 466; Tr. 933-35. Highland's safety manager, James Allen, also became involved in reviewing the incident. He determined that Pendley did not have to walk where he did, that he could have sat in another row of seats in the car, and that he could have sat in another car. 30 FMSHRC at 467; Tr. 704-05.

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<sup>4</sup> Man cars served to transport miners and supplies in and out of the mine. *Id.* at 465. Three cars were usually hooked together to go into the mine. Only one car had brakes to stop the cars. *Id.* Controls for the hoist cars, which included an emergency stop button (the "e-stop" button) were located in the hoist shack (or slope shack) and in the hoist house, both on the surface, and at the bottom of the slope inside the mine. Also, some of the hoist cars had e-stop buttons on their front compartments. *Id.* If the e-stop button is pressed, the man cars stop quickly, generally causing the brakes on the brake car to lock. *Id.*; Tr. 69-70.

As a result of Pendley's complaints regarding Creighton and Creighton's reporting the gun incident, Highland management held a meeting with the two men in the early fall of 2005. 30 FMSHRC at 467. Present at the meeting, in addition to Pendley and Creighton, were Maynard, mine superintendent Jesse O'Rourke,<sup>5</sup> operations manager Dave Webb, union president Ron Shaffner, and union safety committee chairman Shugg Dyer. *Id.*; Tr. 75-76. Pendley and Creighton met separately with the management and union officials, and then all the attendees met together. 30 FMSHRC at 467. Pendley reiterated many of his complaints, and the gun incident was also discussed. At management's request, both Pendley's and Creighton's lockers were searched, and no guns were found. *Id.* & n.10. At the end of the meeting, Webb told Pendley and Creighton that he was giving each of them a warning letter. *Id.* at 467. Highland officials as well as the union officials agreed that the letter should contain a strongly worded warning that future incidents would not be tolerated and future altercations were not acceptable. *Id.*

In letters dated October 7, 2005, Highland issued written warnings to Pendley and Creighton. *Id.* at 468; R. Ex. 9, 10. The letters, which were identical in substance, stated that, as result of, "verbal abuse, disregard for safety rules, and threatened violent behavior to a co-worker, you are hereby issued this last and final warning." R. Ex. 9, 10 (emphasis in original). The letters further stated, "Any further abuse, altercations, or violations of Company Safety and Work Rules may lead to . . . suspension with intent to discharge." *Id.* The letters concluded by stating that, if either Pendley or Creighton had any questions that were not discussed at the meeting, he should contact Webb, who signed the letter. *Id.*

#### B. The Man Car Incident

No further incidents occurred between Pendley and Creighton for over a month. 30 FMSHRC at 468. On November 29, 2005, Pendley got into the front seat of the middle car of three cars. One of the other cars had supplies in it. When Pendley was ready to go into the mine, he pulled the cord adjacent to the cars that released them into the mine. Pendley was the only miner in the cars. *Id.* Creighton was on the surface when Pendley got into the car but apparently was not at the control panel in either the hoist house or the slope shack. *Id.*

After traveling about halfway into the mine, the cars in which Pendley was riding came to an abrupt stop. In order to prevent himself from falling out of the car, Pendley leaned to the right, and he felt his back and neck muscles pull. *Id.* at 468-69. Pendley stayed in the car approximately five to ten minutes, waiting for the cars to start back up again. The cars started back, continued the descent to the bottom of the mine, and came to a gradual stop in the usual manner. *Id.* at 469.

After Phillips, a miner waiting to unhook the supply car, assured Pendley that no one in the bottom area of the mine had pressed the e-stop button, Pendley resumed work, although his

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<sup>5</sup> Larry Millburg succeeded O'Rourke in the position of mine superintendent. *Id.*

back bothered him. *Id.* at 469-70. Pendley reported to his supervisor, Greg Moody, that his back hurt him. Moody asked Pendley to help in filling out an accident report, and the two went to the surface. When they got to the surface, they went to the common area where they filled out the report, which Pendley read and signed. *Id.* at 470.

A short time later, Pendley went to the hospital by ambulance where he had x-rays taken. In addition, he was given pain medication. *Id.* Pendley was also directed to visit a clinic in a nearby town. Pendley went to the clinic, and the doctor there instructed Pendley not to work for several days. *Id.* When Pendley returned to work, he asked Lap Lewis if he was in the area where the man cars were loaded. Lewis responded that he was not but that Creighton was. Lewis thought that Creighton had sent Pendley underground, but Pendley told Lewis that he had sent himself underground. *Id.*

Operations manager Webb heard about the man car incident the day after it happened. He retained an electrical company to ascertain that the hoist and its safety features had functioned properly. As Webb recounted, one of the theories being considered was whether the e-stop button had been pushed. The electricians concluded that the system was functioning as it should; however they were unable to ascertain if the e-stop button had been pushed. *Id.* at 471. After Webb received the electricians' findings, he learned that Pendley alleged that Creighton had pushed the e-stop button. *Id.* Based on the electricians' report, Webb did not believe that an e-stop button had been pushed, and he apparently did not ask Creighton about it. *Id.*

Pendley also requested a copy of the company accident report that he had assisted Moody in filling out. Highland safety manager Allen denied Pendley's request, stating that the report was company property. Allen also added that the Pendley's description of the accident could not be accurate. *Id.* at 470 n.11.

### C. Pendley's December 2005 Complaint to MSHA

On December 15, 2005, following the hoist incident, Pendley went to MSHA. *Id.* at 471. According to MSHA investigator Kirby Smith, Pendley spoke to him about a number of things at the mine, including operation of the hoist and the harassment about which he had been complaining to management. Pendley had been keeping detailed notes of events at the mine for the last five months because of the problems he had been having with Creighton. *Id.* & n.14. Pendley asked for a copy of Highland's accident report of the November 29 hoist incident, but MSHA had not yet received one. *Id.* at 471.

Thereafter, MSHA inspector Michael Moore went to the mine to inspect the hoist. *Id.* Moore found nothing wrong with the hoist or the brake car. Contrary to the conclusion reached by Highland's electrical consultants, Moore concluded that the man car incident could have occurred by someone hitting the e-stop button. *Id.*; Tr. 326-27. Smith accompanied Moore on the inspection and believed that it was common knowledge at the mine that Pendley had gone to

MSHA. 30 FMSHRC at 471-72. Similarly, Pendley said that another miner had overheard several miners saying that Pendley had gone to MSHA, initiating the inspection. *Id.* at 471 n.16.

During the inspection, inspector Moore asked Highland officials about the November 29 hoist incident and whether Highland had filed an accident report. *Id.* at 472. Safety manager Allen gave Moore an intra-company memorandum that stated that Highland had not yet determined whether the event was an accident. *Id.* On December 20, MSHA issued a citation to Highland for failing to report the November 29 incident within 10 days of its occurrence.<sup>6</sup> MSHA became concerned that Highland was not reporting all of its accidents as required by regulation. 30 FMSHRC at 472. As a result of its audit, MSHA issued four more citations that charged Highland with failing to report accidents. *Id.*

D. Pendley's December 21, 2005, Suspension

The sign-in book where miners record their times of arrival and departure is kept in the common area, a room that is approximately 20 by 30 feet that is furnished with tables and benches. *Id.* at 472, 473 n. 19; Tr. 115-116; R. Ex. 11. A miner's sign-in time determines when he begins to be paid under the union contract. 30 FMSHRC at 472 n.18.

During the latter part of 2005, Pendley routinely worked 12-hour days with eight hours at regular time and four hours of overtime. *Id.* at 472. On December 21, Pendley arrived at the mine around 12:30 p.m. *Id.* Pendley signed in between 12:50 and 12:55 p.m., but indicated that the time was 1:00 p.m. *Id.* Pendley then went to the bathhouse, picked up some supplies, and went to the man load area. *Id.* When he arrived at the man load area, he saw Lap Lewis, who told him that the man cars were underground and that it would be several minutes before they returned. *Id.* Because it was cold, Pendley did not want to wait outside. *Id.* He and Lewis went to the common area to wait. *Id.* at 472-73. Miner Joe Adamson, who had signed in immediately after Pendley, was also in the room. *Id.* at 473. It was common practice for miners to wait inside when it was cold outside. *Id.* at 473 & n.20, 490.

Adamson had indicated to Pendley that he wanted to go underground with him when the man cars arrived. *Id.* at 473. Adamson and Lewis were sitting in front of Pendley where they could see the man cars outside of a window. *Id.* About 15 or 20 minutes after 1:00 p.m., operations manager Dave Webb walked into the room and asked Pendley if he was being paid to sit there. *Id.*; Tr. 630. Pendley responded that he was waiting to go underground. 30 FMSHRC at 473. Webb stated to Pendley, "Not on my time[,] you're not." *Id.*; Tr. 117. Pendley walked over to the sign-in book and leaned over to examine it. 30 FMSHRC at 490. Because Pendley had done nothing out of the ordinary, he did not change the entry in the book. *Id.* Neither Adamson nor Lewis spoke to Webb. *Id.* at 473. Webb then turned and walked out of the room. *Id.* The man cars arrived at the load area around 1:30 p.m. *Id.* Adamson, Lewis, and Pendley

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<sup>6</sup> MSHA regulations require that reports of injuries or accidents must be filed within 10 days of their occurrence. 30 C.F.R. § 50.20-1.

left the common area and went outside where they boarded the man cars and went underground. *Id.*

Webb went back to the common area to see if Pendley had changed his time in the sign-in book. *Id.* at 474. The book still showed that Pendley had signed in at 1:00 p.m. *Id.* Webb felt that Pendley was being insubordinate by not changing his time and that he had falsified a company record.<sup>7</sup> *Id.* at 474. Webb called underground and notified Pendley that he wanted to see him in his office. *Id.* When Pendley arrived at Webb's office, in addition to Webb, assistant superintendent Maynard, safety committeeman Shugg Dyer, and union local president Ron Shaffner were there. *Id.*

Webb spoke about why Pendley had not caught the man load cars to go underground and then asked Pendley for his side of the story. *Id.* Pendley denied falsifying the sign-in book but stated that he needed better representation. *Id.* at 473, 490. Webb then announced that Pendley would be suspended for three days for falsifying a company record, the sign-in book. *Id.* at 474-75. Webb then handed Pendley a three-day suspension letter. *Id.* at 475.

E. MSHA's Settlement of Pendley's First Discrimination Complaint and His Commission Appeal

On December 22, 2005, Pendley filed a complaint with MSHA, alleging that he had been suspended on December 21 because he requested a copy of Highland's accident report. *Id.* at 476. On September 25, 2006, following an investigation, the Secretary filed her first discrimination complaint on Pendley's behalf (Docket No. KENT 2006-506), alleging that he was suspended for making safety complaints. *Id.* The Secretary entered into a settlement agreement with Highland to resolve the discrimination complaint arising out of the suspension. Docket No. KENT 2006-506. By order dated January 18, 2007, the judge approved the settlement.

Subsequently, Pendley filed a petition for review of the judge's order in which he argued that the settlement did not fully compensate him for his loss of wages. Letter dated Feb. 11, 2007. The Secretary then moved to reopen the proceeding. Mot. to Reopen, Feb. 26, 2007. The Commission directed review in the proceeding on February 26, 2007. On April 3, 2007, the Commission vacated the judge's dismissal order in Docket No. KENT 2006-506, vacated the settlement because Pendley was not a party to it, and remanded the case to the judge for appropriate proceedings. 29 FMSHRC 164, 165-66 (Apr. 2007).

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<sup>7</sup> Webb testified at trial that he agreed that miners could be paid while waiting for man cars. However, he objected to Pendley waiting inside, particularly for an extended period, because miners could wait outside at the slope shed. *Id.* at 474 nn.23 & 24.

F. Pendley's Meetings with the Office Staff on March 19 and 21, 2007

Sometime in early 2007, Pendley became aware that the employee at the mine in charge of payroll, Fay Hubbert, had questioned certain overtime pay that Pendley claimed. 30 FMSHRC at 476. On March 19, 2007, Pendley became upset over this and went to the office of Hubbert's supervisor, Sheila Gaines. *Id.* Pendley and Gaines discussed the matter, and Pendley became increasingly agitated over Hubbert's questioning of his pay. *Id.* Gaines, as Hubbert's supervisor, explained that part of Hubbert's duties was to review all claims for overtime and ensure that they were accurate. *Id.* According to Gaines, Pendley argued that Hubbert had no right to do this, that what she was doing was not right, and that Gaines would be held accountable, telling her that "You're going to take the fall." *Id.*; TRH Tr. 235. Gaines felt uncomfortable because of what Pendley said and how he said it; she felt as if he were planning something. 30 FMSHRC at 476; TRH Tr. 235. Another employee who worked down the hall from Gaines' office thought Gaines might need assistance, but Pendley left. 30 FMSHRC at 476. After the meeting with Pendley, Gaines reported the meeting to mine superintendent Larry Millburg because the meeting was "disturbing" to her and it made her "uncomfortable." TRH Tr. 237-38.

Two days later, on March 21, Pendley resumed the discussion about his overtime with Fay Hubbert. 30 FMSHRC at 476. It was shortly before 1:00 p.m., and Pendley had not yet signed in. *Id.* at 477. Sheila Gaines overheard a heated discussion in the payroll office and heard Hubbert tell Pendley that he needed to speak with mine superintendent Millburg, who was handling all questions regarding overtime pay. *Id.* Pendley then appeared at the door of Gaines' office and asked to speak to her. Gaines responded that she was very busy, but Pendley entered anyway. *Id.*; TRH Tr. 238. Pendley had a copy of the mine sign-in sheet and his pay stub. He told Gaines that he was not being properly paid, and Gaines told him to leave the sheet and stub with her and that she would check into it. Pendley continued to insist that his pay was inaccurate. He left when Gaines received a telephone call. 30 FMSHRC at 477.

After Pendley left Gaines' office, he looked for Millburg, but Millburg was unavailable. *Id.* Pendley then went to the bathhouse, dressed for work, and went to the man load area. *Id.* Pendley waited for a man car; however, the man cars passed him by without stopping. Lap Lewis explained to Pendley that MSHA inspectors were in the mine for a section 103(g) inspection.<sup>8</sup> Pendley noticed a federal inspector, Highland officials, and union personnel sitting in one of the cars. 30 FMSHRC at 477. Because he would have to wait 15 or 20 minutes for another car, Pendley decided to go back into the office area to look for Millburg. *Id.* at 477-78.

During that time, Gaines had called Fay Hubbert to come to her office. Account manager Roger Wise also came to her office. *Id.* at 478. Having gone into the building from the man load area, Pendley overheard the three talking, went into Gaines's office, and began discussing

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<sup>8</sup> Section 103(g) of the Mine Act provides for an immediate inspection of a mine upon the complaint of a miner or representative of miners. 30 U.S.C. § 813(g). The section further provides that the name of the complaining miner should not be disclosed.

Highland's rules for overtime pay and how they should be applied. *Id.* Gaines described Pendley as "agitated" and "very loud." *Id.*; TRH Tr. 241. While they tried to explain to Pendley that they applied the rules for overtime pay given to them by Larry Millburg, Pendley argued that what they did was "illegal." 30 FMSHRC at 478. Pendley "got in [Wise's] face." *Id.*; TRH Tr. 279. Hubbert felt very uncomfortable. 30 FMSHRC at 478; TRH Tr. 265.

Gaines then tried to end the discussion, telling Pendley that he needed to talk to Larry Millburg. Hubbert then left the office. Pendley continued to press the issue with Wise, who said that he was not going to continue to listen to Pendley and left. 30 FMSHRC at 478. When Wise left, he intended to find Millburg to handle the situation. *Id.* That left Pendley with Gaines, who felt intimidated by Pendley. *Id.* According to Gaines, Pendley was "mad" and "upset." *Id.*; TRH Tr. 243. Pendley continued to talk about the pay situation, and Gaines continued to instruct him to talk to Millburg. 30 FMSHRC at 478. Gaines finally turned her back to Pendley, and he left. *Id.* After Pendley left, Hubbert, Wise, and Gaines locked the doors to the offices to prevent Pendley from returning. *Id.*; TRH Tr. 266. Wise said he would get Millburg, who would take control of the situation. However, Millburg was underground at that time. 30 FMSHRC at 478. Later that afternoon, Gaines reported the incident to Millburg. *Id.*

#### G. Pendley's Altercation with Creighton

After Pendley left Gaines' office, he immediately returned to the man load area to go underground. *Id.* at 479. Pendley stood outside the slope shack waiting for Creighton to bring up the cars to the man load area. *Id.* Lap Lewis was working nearby. *Id.* Creighton was under the canopy of the slope shack, sitting on the golf cart in front of the man car controls.<sup>9</sup> 30 FMSHRC at 478. The slope shack is open ended with panels on either side, and Pendley stood outside the canopy on the end nearest the controls. *Id.* at n.31; R. Ex. 18. Pendley believed that Creighton was not going to call the man cars to the load area.<sup>10</sup> Therefore, Pendley decided to use the control inside the slope shack to bring the cars to the man load area. 30 FMSHRC at 479.

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<sup>9</sup> The hoist control panel contained about 15 buttons, including the red e-stop button and call button that could send the cars to the charging area or the man load area. In order to push the man load call button, one had to be positioned in front of the control panel. There was also a man load call button outside the slope shack that miners could use unless the cars were at the charger. Testimony established that, when Pendley was waiting for the cars, they were at the charger. *Id.* at n.31; Tr. 586-87; 1070-71.

<sup>10</sup> While Pendley testified that he waited outside the slope shack for "quite a period of time," Tr. 157, as the judge noted, the surveillance tape showed that Pendley waited for the man car for one minute and 20 seconds before moving into the slope shack to push the man car call button. 30 FMSHRC at 480 & n.33; see Gov't Ex. 3.

Pendley testified that he walked toward the slope shack with one hand up,<sup>11</sup> reaching between the golf cart where Creighton was sitting and the controls. He then looked at the control panel to see if the e-stop button was tagged out and reached to push the man load call button. According to Pendley, Creighton put his arm against Pendley's right arm to push it away from the controls. 30 FMSHRC at 479; Tr. 1055-56, 1070-71. Creighton then began yelling for foreman Rodney Barker. 30 FMSHRC at 479. Pendley stated that, after he pushed the call button, Creighton said that there was a hoist test going on. *Id.* at 479-80.

Creighton testified that the surface foreman and a mechanic informed him that they were on their way to the hoist house and, when the man cars came from underground, they were going to conduct a safety test of the hoist. After they left, the only other miner in the area was Lap Lewis, who was preparing to hook up a man car to take supplies into the mine. *Id.* at 480; Tr. 793-800. After the man cars came from the mine, the hoist test commenced. Creighton's role in the test was to monitor the slope shack control panel. Pendley was waiting for the man cars, standing about five to eight feet from Creighton. As Creighton was waiting for the call from the hoist house to tell him that the hoist test was completed, Pendley charged in with both hands raised and shoved Creighton out of the way. 30 FMSHRC at 480; Tr. 802-04. Creighton yelled out that there was hoist test going on and went to the telephone next to the control panel to call the surface foreman. 30 FMSHRC at 480; Tr. 805.

When foreman Rodney Barker arrived, he separated the two men. Creighton told Barker what had happened, and Pendley gave his version. 30 FMSHRC at 480-81. According to Pendley, Creighton put his finger in Pendley's face, and Pendley asked Barker to tell him to stop. *Id.* at 481. When the man cars appeared, Barker told Pendley to get on a car and for Creighton to move away. *Id.* Barker told them both to stay away from each other. Pendley then boarded a car and went underground. *Id.*

A short time later, superintendent Millburg came out of the mine, and Creighton motioned to speak to him. Creighton told Millburg that Pendley had come into the slope shack when a safety check was occurring, pushed Creighton aside, and taken control of the hoist. *Id.*; Tr. 1005-06. Millburg also talked to Lap Lewis, who confirmed what Creighton had said.<sup>12</sup> 30

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<sup>11</sup> Security tapes of the yard on March 21 show Pendley turning toward the slope shack with two arms raised. Gov't Ex. 3. Pendley explained that one of his hands was used for grabbing the pipe supporting the canopy roof to steady himself, while he used the other hand (the right hand) to push the man load call button. Tr. 1054-55.

<sup>12</sup> The judge noted that Lewis' trial testimony regarding the incident "was informed by watching the video surveillance tape." 30 FMSHRC at 480-81 n.34. However, the judge noted that, although the video showed "Pendley standing some distance from the shack and then advancing toward the slope shack[.]" the judge found the video "inconclusive as to who pushed first." *Id.* Lewis testified that he saw Pendley shove Creighton but admitted he was 25 feet away from the slope shack and that Pendley's back was facing Lewis. Tr. 555, 572, 594.

FMSHRC at 481. Millburg considered it significant that Pendley apparently shoved Creighton and interfered when the hoist test was going on. *Id.*; Tr. 1006-07. When Millburg went to his office, Sheila Gaines told him about the earlier incident involving the office employees. 30 FMSHRC at 481. Millburg drafted a letter, notifying Pendley that he was suspended, subject to discharge. *Id.* The letter gave as the reasons for the discipline: "harassment of office staff;" "interference with safety check;" and "assaulting another employee." Gov't Ex. 4.

Prior to summoning Pendley to his office and presenting him the suspension letter, Millburg telephoned David Webb, who at this time was director of several mines owned by Peabody Coal, including Highland. Millburg would speak to Webb about non-routine personnel matters. Millburg recounted the offenses that Pendley was charged with, and Webb agreed that discharge was appropriate discipline but indicated that it was Millburg's call since he was present at the mine. 30 FMSHRC at 481-82 n.35; Tr. 605, 673-75, 1028-29.

H. Pendley's March 21, 2007, Suspension and Discharge, His Second MSHA Complaint, and Temporary Reinstatement

Sometime between 3:00 and 4:00 p.m. on March 21, Pendley was directed to come out of the mine and report to Millburg's office. 30 FMSHRC at 481. Pendley met up with union officials Shugg Dyer and Ron Shaffner. *Id.* When the three miners arrived at Millburg's office, assistant superintendent Scott Maynard, union safety committee member David Acker, and Millburg were already there. *Id.* at 482. Millburg gave Pendley the suspension letter. *Id.* After receiving the letter, Pendley apparently left Millburg's office. *Id.*; Tr. 176. Thereafter, two of the union representatives came and got Pendley from the bathhouse to return to Millburg's office and respond to the charges in the letter. 30 FMSHRC at 482; Tr. 176-77. When they reached the office, Maynard was still there with Millburg. Pendley indicated that with regard to harassing the office staff, he had been discussing his pay. 30 FMSHRC at 482. As to interfering with the hoist test, Pendley stated that he had looked on the control panel for any indicators that a test was going on and did not see any. *Id.* Finally, with regard to assaulting Creighton, Pendley denied that it happened. *Id.* Pendley then left Millburg's office, changed his clothes, and went home. *Id.*

Sometime after Pendley's departure, MSHA inspector Fazzolare completed his section 103(g) inspection and issued a citation alleging a violation of 30 C.F.R. § 75.400 for accumulations of coal. *Id.* Inspector Fazzolare had not given anyone from Highland a copy of the section 103(g) complaint when he arrived at the mine, because he had inadvertently put Pendley's name on it. *Id.* at 482-3 n. 36. Millburg was later given a copy of the citation Fazzolare had written. *Id.* at 483.

The day after his suspension, Pendley filed a complaint with MSHA.<sup>13</sup> 30 FMSHRC at 483. Pendley's discharge became effective March 24. *Id.* at 460. Following an investigation, MSHA filed a second complaint against Highland (Docket No. KENT 2007-383-D). *Id.* The Secretary filed a petition for temporary reinstatement of Pendley, and, following a hearing, Highland was ordered to reinstate Pendley in June 2007. 29 FMSHRC 424 (May 2007) (ALJ).

I. Pendley's Post-Reinstatement Working Conditions

After Pendley returned to work at Highland following the judge's temporary reinstatement order, he complained about changed working conditions, including closer supervision ("birddogging"), additional job duties, and someone posting his job duties on the company bulletin board. 30 FMSHRC at 483.

Pendley's supervisor, Steve Bockhorn, testified that Pendley's attitude changed after he returned to work. Tr. 861-62. Both Bockhorn and shift foreman David Howell believed that Pendley was working more slowly than before his discharge. 30 FMSHRC at 484-85. Howell observed Pendley driving his vehicle "extremely slow" (sic). *Id.* at 485. Following his reinstatement, Pendley decided that he did not want to work overtime. *Id.* at 484. Assistant superintendent Maynard received complaints from managers about Pendley's slowness. In response, Maynard told the managers just to ensure that Pendley did his job. He never instructed anyone to be tougher on Pendley. *Id.*

Pendley believed that, after his reinstatement, he was given the additional assignments of washing equipment and taking oil to units in addition to his regular duties of delivering supplies. *Id.*; Tr. 184-86. All the jobs that Pendley was asked to do were within his job classification. 30 FMSHRC at 484. He had occasionally been asked to wash equipment before his discharge. *Id.* Foreman Howell told Pendley to let him know if he could not get all his work done by the end of the shift, so Howell could get someone else to do it. *Id.* at 485.

Bockhorn had Pendley's job duties specified in a letter after Pendley questioned one of his assignments when he returned to work. *Id.*; Gov't Ex. 5. According to Millburg, assistant superintendent Maynard told him there was some confusion about Pendley's job duties and Maynard thought it best to lay out Pendley's duties so there would be no confusion. 30 FMSHRC at 485. Other parts runners were given letters describing their duties. *Id.* However, Pendley's was the only one posted on the bulletin board. Bockhorn did not know who posted it, and he had it removed as soon as Pendley complained about it. *Id.* at 485-86.

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<sup>13</sup> Pendley also grieved his suspension and discharge under the union contract, and the matter was taken to arbitration. *See* R. Ex. 25 at 1. The arbitrator decided that Highland had shown "just cause" for disciplining Pendley for the reasons given in the March 21 letter and that discharge was appropriate discipline. *Id.* at 15.

## J. The Judge's Decision

Based on the credited facts and inferences drawn from them, the judge concluded that Pendley's three-day suspension on December 21, 2005, was discriminatory and in violation of the Mine Act. The judge concluded that Pendley was suspended because of his safety complaints to MSHA and because of his protected safety complaints to Highland management.<sup>14</sup> 30 FMSHRC at 489-94.

The judge further concluded that Pendley's March 21, 2007, suspension and discharge were not taken in response to Pendley's MSHA complaints, his pending litigation before the Commission, or his prior safety complaints. *Id.* at 494. The judge found that Pendley's "confrontations" with the office staff on March 19 and 21 played pivotal roles in Millburg's decision to discharge Pendley "and well they should." *Id.* The judge further noted that Pendley "was disruptive, irrational, and orally aggressive." *Id.* Moreover, the judge found that Pendley knew that, after the March 19 meeting with Sheila Gaines, he needed to meet with Millburg on the overtime issue but kept pressing the issue with the office staff instead. *Id.* at 495. The judge also noted that Pendley had previously been warned in the October 5, 2005, letter that "verbal abuse" would lead to his discharge. *Id.*

The judge found that Millburg had another "compelling" reason to discharge Pendley – the altercation with his long-time antagonist, Creighton. *Id.* While acknowledging that it was disputed as to who first pushed whom, the judge found that Pendley "did not have to charge the slope shack," and that the situation could have been avoided if Pendley had not chosen to place himself "toe to toe with Creighton." *Id.* The judge further noted that the October 5 warning letter indicated that further "altercations" could lead to Pendley's discharge. *Id.* Finally, the judge found that the Secretary failed to establish that the section 103(g) inspection, which occurred on March 21, had anything to do with Highland's decision to discharge Pendley. *Id.* at 495-96.

The judge dismissed the Secretary's allegations of discrimination that Pendley received additional job duties, was more closely supervised, and was treated adversely because a letter to him concerning his job duties was posted on the company bulletin board. *Id.* at 496-98. The judge found that Pendley's job duties were within his job classification and, as Pendley even agreed, properly assigned to him. *Id.* at 496-97. Further, the judge found that there was no evidence that Highland assigned Pendley job duties to punish him for seeking reinstatement or for other protected activity. *Id.* at 497. As to the allegation of more intense supervision, the judge found that Highland had legitimate concerns about Pendley's work pace when he returned and that its post-reinstatement supervision was not improper. *Id.* With regard to the letter, the judge found that it was taken down as soon as Pendley notified his supervisor of its presence. *Id.*

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<sup>14</sup> Highland did not appeal the judge's conclusion that it discriminated against Pendley when it suspended him on December 21, 2005. Accordingly, that matter is not before the Commission on review.

## II.

### Disposition

The Secretary appealed the judge's conclusion that Highland did not violate section 105(C) of the Mine Act, 30 U.S.C. § 815(C), when it suspended Pendley, with intent to discharge, on March 21, 2007. S. PDR at 1. The Secretary argues that extensive evidence supports a finding that Highland was motivated, at least in part, by Pendley's protected activity when it suspended him. The Secretary argues that Pendley's filing of a petition for review to appeal the Secretary's settlement of the December 21, 2005, suspension, culminating in the Commission's granting of the petition on February 26, 2007, was "the straw that broke the camel's back." S. Br. at 19. The Secretary further argues that Highland seized upon the events of March 19 and 21 to rid itself of Pendley because of his persistence in engaging in protected activity. S. Br. at 19-26. The Secretary also contends that the judge, in upholding the suspension, improperly relied on the October 2005 disciplinary warning letter to Pendley, reformulated Highland's accusations against Pendley, and erred by failing to correctly apply the Commission's legal test for mixed motive discrimination cases. *Id.* at 26-34. The Secretary concludes by asking the Commission to vacate the judge's decision and remand the proceeding for a complete and proper analysis. *Id.* at 34.

Pendley appealed the judge's determination that Highland did not discriminate against Pendley following his temporary reinstatement in addition to challenging the judge's conclusion regarding the March 21 suspension. P. PDR at 1. Pendley argues that the judge applied the incorrect legal standard in weighing whether the assignment of duties to Pendley following his reinstatement was discriminatory. P. Br. at 2-6. Pendley also argues that the judge misstated his testimony regarding his job duties. *Id.* at 4-5. Pendley concludes by requesting that the Commission vacate the judge's decision and remand the case to the judge to analyze the record evidence under the correct legal standard. *Id.* at 6.

In response, Highland argues that substantial evidence supports the judge's finding that the suspension and discharge of Pendley were not discriminatory. H. Br. at 8. In support, Highland asserts that there is nothing in the record to support a conclusion that management knew about Pendley's filing a PDR in the pending discrimination case. *Id.* at 8-12. Further, Highland argues that the Secretary essentially wants the Commission to overturn the judge's crediting of Highland's witnesses who testified concerning Pendley's misconduct. *Id.* at 13. Highland denies that it did not adequately investigate the incidents that led to Pendley's March 21 suspension and discharge. *Id.* at 13-15. Highland challenges the Secretary's position that the judge erred by improperly relying on the October 2005 disciplinary warning to Pendley, by reformulating Highland's reasons for suspending Pendley, or by improperly applying the Commission's legal test for discrimination cases. *Id.* at 15-22. Finally, Highland states that, during the period following Pendley's reinstatement, there was no change in Pendley's job duties that constituted adverse action. *Id.* at 22-23. Highland concludes that the Commission should affirm the judge.

A. The March 21 Suspension and Discharge

Section 105(c)(1) of the Mine Act states in relevant part that “[n]o person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner.” 30 U.S.C. § 815(c)(1). A complainant alleging discrimination under section 105(c)(1) of the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. See *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev’d on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. See *Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner’s unprotected activity and would have taken the adverse action for the unprotected activity alone. See *id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; see also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

On the record in this proceeding, the judge concluded that Pendley’s complaints to MSHA, including his prior discrimination complaint, were protected activities. 30 FMSHRC at 493. The judge also found that many of Pendley’s complaints to management about safety issues that arose out of his dispute with Creighton were also protected. *Id.* at 491-93. The judge further noted Pendley’s administrative appeal to the Commission in which he objected to the agreement between the Secretary and Highland that settled the complaint.<sup>15</sup> *Id.* at 494. Nevertheless, the judge rejected the Secretary’s position that Highland was motivated by “[k]nowledge of these factors” in taking adverse employment action against Pendley on March 21. *Id.* Rather, the judge relied upon direct evidence concerning the events on March 19 and 21 to conclude that the Secretary had failed to establish a prima facie case. Substantial credited evidence supports the judge.<sup>16</sup>

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<sup>15</sup> The judge specifically rejected any reliance on Millburg’s knowledge of the section 103(g) inspection that took place on March 21 because “Millburg did not know about the section 103(g) inspection and the resulting citation until after he made the decision to suspend Pendley.” 30 FMSHRC at 496. In addition to finding a lack of direct knowledge on Millburg’s part, the judge also noted that there was no basis for implying knowledge that Pendley requested the inspection. *Id.*

<sup>16</sup> When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh*

The credited testimony shows that on March 19, 2007, Pendley initially contacted Fay Hubbert, as payroll head, because she had questioned whether he was authorized to work overtime. TRH Tr. 261. He next showed up at the office of Highland controller Sheila Gaines. In Gaines' words, Pendley was "upset," "very vocal and very loud." *Id.* at 232-34. Pendley asserted that there were a lot of bad things going on and that Gaines would "take the fall." Gaines began to feel more and more uncomfortable. Before Pendley left, Gaines told him to discuss the matter with Larry Millburg. *Id.* at 237. Later that day, Gaines reported the confrontation to Millburg, told him that she felt uncomfortable with Pendley, and that she thought he was planning something. *Id.* at 237-38.

There is no record evidence that Pendley sought out Millburg to discuss the overtime issue, as Gaines had suggested. Rather, on March 21, Pendley again sought out Hubbert on the overtime issue. Gaines overheard Pendley talking to Hubbert in a heated manner. TRH Tr. at 239. Pendley then appeared at Gaines' office. He tossed his paycheck stub and a copy of the sign-in sheet onto her desk and asserted that he was not being paid properly. *Id.* at 240. After Pendley left her office, he signed in and got ready for work, but returned to the office area after he could not get in the man cars going underground. 30 FMSHRC at 477-78. Roger Wise and Hubbert had assembled in Gaines' office when Pendley came in. TRH Tr. 241. Pendley was very loud and agitated, arguing that the overtime policies were "illegal." Pendley was told repeatedly to take the matter up with mine superintendent Larry Millburg. *Id.* at 241, 278. At one point, Wise testified that Pendley moved toward Hubbert, who got up and left. Pendley then approached Wise and got within 10 to 12 inches of Wise's face. *Id.* at 278-79. Wise testified that "Normally, we don't have that type of aggression - - in the office." *Id.* at 280. Wise left to find Millburg. *Id.* Pendley then walked around the corner of Gaines' desk. She felt intimidated and that Pendley was "out of control." She turned her back to Pendley to work on her computer, and Pendley left. *Id.* at 243. Then, the doors to the office section of the building were locked so that Pendley could not return. *Id.* at 266. After Millburg returned from the mine, Gaines reported to him that there had been "another incident" involving Pendley." *Id.* at 245. At the time Gaines found Millburg in his office, he was investigating the shoving incident involving Creighton and Pendley. *Id.*

Our review of the record does not disclose any basis for overturning the judge's credibility resolutions.<sup>17</sup> Based on this credited testimony, the judge found that "The office

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*Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

<sup>17</sup> A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting

incidents of March 19 and 21 played critical roles in Millburg's decision to suspend Pendley with an intent to discharge, and well they should. Pendley was disruptive, irrational, and orally aggressive." 30 FMSHRC at 494. The judge further found that as of March 19, Pendley knew that Hubbert and Gaines did not have authority to resolve overtime pay issues. Rather, Pendley knew he needed to talk to Millburg. Yet, he persisted in raising the matter on March 21, "again in a loud, agitated and irrational way." *Id.* at 495.

In addition to his findings as to what occurred when Pendley confronted the office staff on March 19 and 21, the judge also noted that Pendley had been warned in the October 7, 2005, letter concerning his "continued verbal abuse" and that further abuse "may lead to your suspension with intent to discharge." *Id.*; R. Ex. 10. The judge found it significant that Pendley "was on notice" of the consequences of engaging in conduct noted in the letter. 30 FMSHRC at 495. Based on the letter, the judge noted that "Pendley acted at his peril" when he angrily confronted the office staff on two occasions. Thus, the judge further concluded that it was appropriate to consider the confrontations as a basis for discharge because of this notice to Pendley. *Id.*

The Secretary challenges the judge's findings and conclusions on several grounds. However, our review of the record and relevant precedents compels us to conclude that the Secretary's objections are without merit.

The Secretary contests the judge's consideration of the warning letter. The Secretary argues that the judge cannot rely on evidence that Millburg was unaware of when he made his decision to discipline Pendley on March 21. S. Br. at 27-29. However, the Secretary misunderstands the judge's limited reliance on the letter. The judge did not find or suggest that Millburg knew of the letter or could have relied on it. Rather, the judge noted that *Pendley* was aware of the consequences for engaging in similar conduct for which he was reprimanded in the October 2005 letter. Moreover, the judge's consideration of the prior disciplinary warning was appropriate under the *Pasula-Robinette* analysis.<sup>18</sup> See also *Bradley v. Belva Coal Co.*, 4

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*Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Nonetheless, the Commission will not affirm such determinations if they are self-contradictory or if there is no evidence or dubious evidence to support them. *Id.* at 1881 n.80; *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989).

<sup>18</sup> Our colleague concludes that she would remand this case for the judge to reconsider the discharge, "without the letter playing any part in [his] consideration of Millburg's mental process in arriving at his discharge decision." Slip op. at 25. However, such a remand would inevitably lead to the same result in light of the judge's findings regarding Pendley's confrontation with the office staff and his altercation with Creighton. Significantly, nowhere does our colleague indicate any disagreement with the judge's findings in these areas and the role they played in Millburg's decision to discharge Pendley.

FMSHRC 982, 993 (June 1982) (an operator can carry its burden under *Pasula* by showing, for example, past discipline consistent with that meted out, the miner's unsatisfactory work record, prior warnings to the miner, and personnel rules or practices forbidding the conduct in question).

As the judge further found, Pendley's misconduct on March 21 was not limited to his interaction with the office staff. Millburg had "another compelling reason" to discipline Pendley because of "yet another run-in" with Creighton. 30 FMSHRC at 495. On this matter, the judge did not resolve the conflicting testimony as to who first pushed whom. *Id.* The judge, however, found it persuasive that Pendley chose to "charge" the slope shack, "putting himself in a situation where an altercation was all but certain to occur." *Id.* The judge further noted that Pendley had been warned that further altercations could lead to his discharge. *Id.*; R. Ex. 10. Finally, the judge found it significant that Millburg knew of the recent confrontation with Hubbert, Wise, and Gaines that occurred just minutes before his altercation with Creighton. 30 FMSHRC at 495. Substantial evidence supports the judge's finding that Pendley's discipline was justified, and we see no reason to disturb his findings.

The Secretary also argues that the judge impermissibly "reformulated" Highland's justification for disciplining Pendley because the judge referred to the incident with Creighton as an "altercation" rather than an "assault." S. Br. at 29-36. We conclude that the specific label that the judge attached to that incident is not significant here.<sup>19</sup> The pertinent point is that the judge, in weighing the sufficiency of the reasons that Highland gave for Pendley's discharge, relied on the trial testimony given by the Secretary's and Highland's witnesses concerning who was the aggressor in the dispute and found facts indicating that Pendley was at fault because he put himself in a situation where an altercation with Creighton was all but certain to occur. 30 FMSHRC at 495. Although the judge did not resolve the conflicting testimony as to whether Pendley pushed Creighton, he made the critical determination that Pendley initiated the incident with Creighton when Pendley decided to "charge the slope shack," thereby precipitating the ensuing altercation. *Id.*

The Secretary additionally argues that the judge erred when he found that reliance on Pendley's interference with the hoist test was not "crucial to the validity of the disciplinary

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<sup>19</sup> In support of her position that the judge improperly recast the basis for Pendley's discharge, the Secretary relies on the Commission's decision in *Secretary of Labor on behalf of McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981 (Sept. 2001). The *McGill* case is readily distinguishable from the instant proceeding. In *McGill*, the judge had found that the operator had established an affirmative defense to a complaint of discrimination, notwithstanding that the reasons relied on at the time of discharge and established at trial (insubordination and use of profanity) were completely different substantively from the reasons relied on by the judge in his decision (threats to file a grievance, failure to stop walking away, and union status). *Id.* at 987-88. In contrast to *McGill*, the judge's findings with regard to the altercation between Pendley and Creighton are well within the parameters of, and consistent with, the assault charge in the March 21 letter. Compare *McGill*, 23 FMSHRC at 989.

action” because of the other more serious misconduct. S. Br. at 30-31; see 30 FMSHRC at 495 n.43. The judge concluded that the two other reasons Millburg relied on for discharging Pendley – his confrontation with the office staff and his altercation with Creighton – were sufficient grounds for determining the validity of the disciplinary action under the Mine Act. *Id.* With regard to the interference with the hoist test allegation, the judge noted that the control panel was not tagged and Creighton did not advise Pendley of the test until after he pushed the man car call button. *Id.* Contrary to the Secretary’s argument, S. Br. at 30, the judge did not find that the hoist test allegation was pretextual.<sup>20</sup> Rather, the judge simply found ample grounds for sustaining the discipline without relying on the interference allegation. Moreover, the judge’s role in examining the reasons for Pendley’s discharge under the Mine Act does not require that he adopt every reason given by the operator in order to sustain the discipline under the collective bargaining agreement.<sup>21</sup>

In addition to the Secretary’s arguments relating to the specific reasons given for Pendley’s March 21 suspension and discharge, she also argues that the judge failed to fully analyze the adverse action under the *Pasula-Robinette* test. Our reading of the judge’s decision indicates that he made findings that are sufficient with regard to the requirements in Commission discrimination cases. First, the judge found that Pendley engaged in activities protected under the Mine Act, including making safety complaints and filing a discrimination complaint. 30 FMSHRC at 491-94. The judge further noted Pendley’s subsequent protected activities, including his involvement in a section 103(g) investigation and his filing of an appeal with the Commission because of the Secretary’s and Highland’s settlement of his December 21, 2005, suspension. *Id.* at 494. Finally, and most significantly, the judge concluded that Highland’s

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<sup>20</sup> Pretext may be found where the asserted justification for discipline is “weak, implausible, or out of line with the operator’s normal business practices.” *Sec’y of Labor on behalf of Price & Vacha v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990) (citing *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1937-38 (Nov. 1982)); see also *Moses v. Whitely Dev. Corp.*, 4 FMSHRC 1475, 1481-82 (Aug. 1982) (pretext found where defense of poor performance was so weak as to make the defense pretextual). “Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. . . . If a proffered justification survives pretext analysis and meets the first part of the *Pasula* affirmative defense test, then a *limited* examination of its substantiality becomes appropriate.” *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516 (Nov. 1981).

<sup>21</sup> The arbitrator in the grievance proceeding, who addressed whether Pendley was terminated for “just cause” under the union contract, concluded that Pendley’s “unilateral, blatant failure to check with Creighton or Lewis as to the availability of the hoist car was reckless and in disregard of his own safety and others.” R. Ex. 25 at 14. Thus, even though the judge found that this reason for Pendley’s discipline was unnecessary for his determination, the arbitrator’s treatment of the defense offers substantial record support for concluding that the hoist test interference charge is not deemed pretextual under the rationale of *Chacon*.

knowledge of Pendley's protected activities did not motivate Highland to act adversely against Pendley. *Id.* Rather, the judge concluded that Pendley was disciplined on the basis of his unprotected activity alone. *Id.* at 494-95. Having concluded that, based on the evidentiary record before him, Highland was not motivated by Pendley's protected activities, the judge's analysis was complete under *Pasula-Robinette*. See *Driessen*, 20 FMSHRC at 329-31 (complainant failed to establish a prima facie case because substantial credited evidence supported judge's conclusion that the operator was in no part motivated by the complainant's safety complaints but rather complainant was terminated solely for insubordination).

The Secretary's argument that the judge's analysis was inadequate is premised in large measure on her disagreement with the fundamental conclusion that Highland's suspension and discharge of Pendley were not motivated in any way by protected activities. In particular, the Secretary in her brief relies extensively on *circumstantial* evidence to establish that Highland had an unlawful motive in suspending and discharging Pendley. S. Br. at 19-26, 32-33. However, in this proceeding the judge relied on *direct* evidence to establish Highland's non-discriminatory reasons for terminating Pendley. 30 FMSHRC at 494-96. Therefore, "use of circumstantial evidence to bypass the judge's fact findings on the pivotal issue of motivation is improper." *Driessen*, 20 FMSHRC at 330 n.9; see also *Sec'y of Labor on behalf of Garcia v. Colorado Lava, Inc.*, 24 FMSHRC 350, 354 (Apr. 2002) ("consideration of indirect evidence when examining motivational intent necessarily involves the drawing of inferences").

Moreover, even if the judge had found that Millburg was motivated in any part by Pendley's protected activities, the record amply supports the conclusion that Highland would have taken the adverse employment action in any event because of unprotected activity alone. *Sec'y of Labor on behalf of Price & Vacha v. Jim Walter Res., Inc.*, 14 FMSHRC 1549, 1555-56 (Sept. 1992). Indeed, in the Secretary's brief, she concedes that the judge rejected her position that Pendley was discharged because of his protected activities, noting, "The [judge] disagreed, finding either that Highland was not motivated in any part by Pendley's protected activity or that Highland would have discharged Pendley for his unprotected activity alone." S. Br. at 3 (citing 30 FMSHRC at 494-96). In this regard, we additionally find that substantial evidence supports a conclusion that Highland affirmatively defended against the Secretary's discrimination case by proving that it would have discharged Pendley solely because of his confrontation with the office staff and his altercation with Creighton for the same reasons that we have concluded Highland rebutted the Secretary's prima facie case of discrimination. See also *Chacon*, 3 FMSHRC at 2512-13, 2516-17 (operator's reason for miner's discharge analyzed as a rebuttal to Secretary's prima facie case and as an affirmative defense).

In sum, we conclude, in agreement with the judge, that Lawrence Pendley was suspended, with intent to discharge, on March 21, 2007, solely because of the incidents that occurred that day in connection with the office staff and Creighton.

## B. Post-Reinstatement Working Conditions

Pendley's allegations of changed conditions of employment essentially involved three areas – more intense supervision when Pendley returned to work (“birddogging”), changed job responsibilities, and Highland’s posting a letter identifying Pendley’s job responsibilities.

In addressing whether Pendley was more closely supervised, the judge found that credited trial testimony established that Highland supervisors were worried about the amount of time that it took Pendley to perform his assigned work after he was reinstated. *See* Tr. 869 (Bockhorn), 905-06 (Howell), 931 (Maynard). Based on this credited testimony, the judge found that “Pendley worked at a slower pace when he returned” and that Highland had “legitimate” concerns about Pendley’s work pace. 30 FMSHRC at 497. In light of these findings, the judge concluded that Highland’s post-reinstatement supervision of Pendley was not improper. *Id.* We see no reason to disturb the judge’s credibility resolutions in this area.

As to the allegation of increased workload, the judge found that none of Pendley’s work assignments involved jobs outside of his classification under the union-labor agreement.<sup>22</sup> 30 FMSHRC at 497; Tr. 257. Further, as the judge found, Pendley was never asked to complete more work assignments than he could accomplish during a regular shift of eight hours. 30 FMSHRC at 497; Tr. 255. Pendley admitted that, upon his reinstatement, he voluntarily chose not to work overtime, essentially decreasing his workday from 12 hours to eight. 30 FMSHRC at 497 n.46; Tr. 256; 919. Most significantly, the judge concluded that there was no evidence to support a finding that Pendley was assigned work to punish him for seeking reinstatement or for any other protected activity.<sup>23</sup> 30 FMSHRC at 497. *Compare Sec’y of Labor on behalf of Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1534-35 (Sept. 1997) (transfer of miners found to be unlawful where new position was less desirable and more hazardous and the adverse action was motivated by protected activity). Substantial evidence supports the judge.<sup>24</sup>

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<sup>22</sup> In particular, Pendley objected to the assignment of washing the “nurse” car that was used to deliver oil. Tr. 184. *See* Gov’t Ex. 5.

<sup>23</sup> At least one other supply runner at Highland testified at the hearing that he and the two other runners including Pendley (each runner worked on a different shift), were assigned the task of washing the oil car and supply centers. Tr. 837-40.

<sup>24</sup> Our colleague relies on an apparent incident involving Pendley being instructed to move a pallet of glue by hand to conclude that we should vacate the judge’s decision so that he can reevaluate the post-reinstatement evidence. Slip op. at 28. Pendley testified for the first time, during the Secretary’s rebuttal case, that an unidentified “man” told him not to take a forklift to load the glue. Tr. 1081-82. However, the Secretary did not address the incident in her post-trial brief to the judge (Pendley did not file a separate brief before the judge), S. Post-Hearing Br. at 51-54, and neither the Secretary nor Pendley raised the incident in their briefs to the Commission. *See* P. Br. at 1-5. In these circumstances, we do not see how the judge’s

Finally, with regard to the posting of Pendley's job duties, foreman Steve Bockhorn explained that Pendley's job duties were put in writing when he was reinstated because Pendley raised a question about his duties. Tr. 870-71, 926-28; Gov't Ex. 5. Other non-production employees received letters specifying their duties as well. Tr. 929; Gov't Ex. 6. Thus, mechanic Roger Grace also received a letter specifying his job duties, including the task of washing the oil car. Tr. 837-41. When Pendley saw his letter posted on the company bulletin board,<sup>25</sup> he spoke to Bockhorn, and the letter was immediately taken down. 30 FMSHRC at 497; Tr. 190-91, 876-77. In these circumstances, the judge properly concluded that the letter was removed as soon as Pendley complained to his supervisor and, therefore, "It would be a stretch indeed to find this mistake, which was quickly and fully rectified, constituted adverse action." *Id.*; see also *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-49 (Aug. 1984) (letter posting not deemed unlawful under section 105(C) where second element of prima facie case not proved in light of no adverse action; also mine management was found to be acting in "good faith").

Pendley argues before the Commission that the judge's analysis of the reinstatement conditions under *Pasula-Robinette* is inadequate. P. Br. at 3-4; P. Reply Br. at 4. More specifically, Pendley argues that the judge failed to address whether Pendley was involved in protected activity that led to the adverse employment conditions. The judge made extensive findings with regard to the protected nature of Pendley's activities that preceded his March 21 suspension and discharge. 30 FMSHRC at 491-93. In addition, the judge noted that the Secretary alleged new acts of discrimination "as a result of Pendley's reinstatement," and the judge pointedly referenced his conclusion of no discrimination "since his reinstatement." *Id.* at 496 & n.44. Moreover, the judge would not have addressed the second element of the *Pasula-Robinette* analysis – whether an adverse employment action occurred – if he had not found that Pendley was involved in protected activity. In sum, we agree with the judge that none of the post-temporary reinstatement events are discriminatory under section 105(C) and *Pasula-Robinette*.

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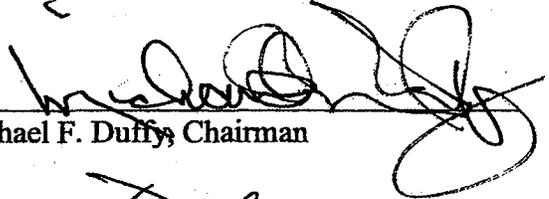
determination not to address this incident is reversible error or a basis for remand.

<sup>25</sup> The letter was actually taped to the *outside* of a locked glass case; Highland job postings were placed *inside* of the case. Tr. 275-76, 876-77.

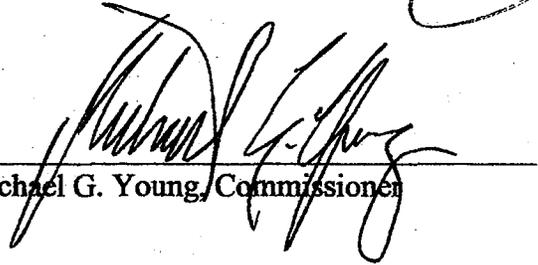
III.

Conclusion

For the foregoing reasons, we affirm the judge's decision.



Michael F. Duffy, Chairman



Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

In ruling that Highland was motivated solely by Lawrence Pendley's unprotected activity when it discharged him, the judge in this case improperly relied on evidence which the operator admitted was not a factor in its termination decision. In addition, the judge failed to consider certain testimony regarding work assigned to Pendley and other miners, testimony which could indicate anti-safety reporting animus by the operator. Finally, the judge applied an incorrect legal analysis to the evidence of Pendley's work assignments that he did discuss. Consequently, for the reasons outlined below, I would vacate the judge's decision and remand the case to him.

1. The Judge Improperly Relied on the October 2005 Disciplinary Letter

The judge found that Pendley's protected activity did not motivate Highland's decision to discharge him. 30 FMSHRC at 494. In reaching this conclusion, the judge focused primarily on conduct by Pendley that the judge believed warranted his termination. *Id.* at 494-95. In his analysis of the confrontational behavior the operator claimed was the basis for Pendley's discharge, the judge referred to the "last chance letter" that David Webb, Highland's operations manager, issued to Pendley in October 2005. *Id.* at 495<sup>1</sup>:

On October 7, 2005, Pendley was warned in writing [that] "verbal abuse" on his part might lead to his suspension with intent to discharge. Resp. Exh. 10. Although he was on notice of the consequences, he persisted in the very behavior about which he was warned. Perhaps he just could not help himself, but he certainly knew his behavior could lead to the discipline he ultimately received. Pendley acted at his peril . . . .

*Id.*

Although it appears that the judge took the letter into account in ruling that Pendley's protected activity played no role in Highland's decision to discharge him, it is undisputed that Larry Millburg, the Highland official who fired Pendley, did not know the warning letter existed until after he issued the termination letter. When asked if he knew of the warning letter at the time he issued Pendley the written suspension with intent to discharge, Millburg replied unequivocally, "No, I did not know about – about this last and final written warning." TRH Tr. 211-212.

The judge's consideration of the warning letter when examining Millburg's motivation was erroneous. Highland readily admits that, "[t]he law holds that Millburg's disciplinary

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<sup>1</sup> The judge had also discussed the letter at length in his factual findings. See 30 FMSHRC at 467-68.

decision must be judged on the basis of what Millburg believed *at the time of the decision . . .*” H. Br. at 17 (emphasis added). As counsel for Highland acknowledged at oral argument before the Commission “case law clearly says that when assessing a disciplinary action . . . you look at the mindset of the decision-maker.” O.A. Tr. at 62. Moreover, the First Circuit has emphasized, “an employer cannot avoid liability in a discrimination case by exploiting a weakness in an employee’s credentials or performance that was not known to the employer at the time of the adverse employment action (and that, therefore, could not have figured in the decisional calculus).” *Perkins v. Brigham & Women’s Hosp.*, 78 F.3d 747, 751 (1st Cir. 1996).<sup>2</sup>

The mindset of a supervisor determining the discipline to be meted out to an employee the supervisor knows to be the recipient of a “last chance letter” is obviously different from the mindset that would be employed if that supervisor was unaware of a prior warning. The supervisor in the first scenario is likely to engage in little or no weighing of factors – indeed might consider his or her hands to be tied. A supervisor in the second scenario, however, would undoubtedly consider him or herself to have more leeway in deciding the appropriate punishment. Such a supervisor would likely consider many factors before making a decision. The issue in this case is whether Pendley’s protected activity was a factor that entered into Millburg’s decision to discharge him. Close scrutiny of all pertinent evidence is required in order to answer that question. The manner in which the evidence is sifted and weighed, however, may well be affected by whether a judge believes the decision-maker was operating within the confines of a “last chance letter.”

Because Millburg was not aware of the letter when he terminated Pendley, his motivation for the discharge must be viewed without reliance on this evidence. The judge’s determination as to whether Millburg was motivated solely by Pendley’s unprotected activity should thus be performed without the letter playing any part in the judge’s consideration of Millburg’s mental process in arriving at his discharge decision. The judge’s reference to the letter leaves me unsure that this occurred.<sup>3</sup> Consequently, I would remand the case to the judge for such an analysis.

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<sup>2</sup> My colleagues claim that the judge’s consideration of the prior disciplinary warning was appropriate. Slip op. at 17. They rely on *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982), in which the Commission stated that an operator may carry its burden by showing past discipline consistent with that meted out, the miner’s unsatisfactory work record, prior warnings to the miner, and personnel rules forbidding the conduct in question. In *Bradley*, however, there was no indication that such evidence should be taken into account if it was unknown to the decision-maker who took the adverse action against the complainant.

<sup>3</sup> The majority defends the judge’s use of the letter, contending that he did not find that Millburg knew of it or relied on it. Rather, my colleagues emphasize that “the judge noted that *Pendley* was aware of the consequences for engaging in similar conduct for which he was reprimanded in the October 2005 letter.” Slip op. at 17 (emphasis in original). Pendley’s knowledge of the letter and the possibility that he could be discharged for future transgressions is not relevant to the analysis the judge was charged with performing. There was no other reason

2. In Analyzing Pendley's Retaliation Claim, the Judge Applied an Incorrect Legal Standard and Failed to Consider Relevant Evidence

The judge ruled that Pendley did not suffer any adverse action from Highland when, subsequent to the discharge, he returned to work as a result of the temporary reinstatement order. 30 FMSHRC at 496-98. However, the judge applied an unduly restrictive standard in reviewing evidence pertaining to the Secretary's claim that after his reinstatement, Pendley was assigned additional and more difficult job duties. *Id.* at 483-86; 496-98. The judge noted that:

While an assignment of duties outside the labor agreement or an assignment of more tasks than can be accomplished in a normal work period conceivably can constitute adverse actions, in this instance . . . the evidence establishes the tasks Pendley was assigned fit squarely within the labor agreement . . . [and] the record does not support finding Pendley was assigned more tasks than he reasonably could accomplish in an eight-hour work day.

*Id.* at 497 (footnote omitted). The judge's premise that different or additional job assignments do not constitute adverse action if they fall within a miner's normal job classification constituted legal error and his adoption of this incorrect legal principle tainted his analysis of Pendley's adverse action claim.

In *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982), the Commission emphasized that:

it is clear that section 105(c)(1) was intended to encourage miner participation in enforcement of the Mine Act by protecting them against "not only the common forms of discrimination, such as discharge, suspension, demotion . . . but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal." S. Rep. 95-191, 95th Cong., 1st Sess. 36 (1977) ["S. Rep."], reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978) . . . .

In *Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1534 (Sept. 1997), the Commission found that the complainants' transfer to section mechanic jobs involving more hazards and dangerous machinery than that used in their former positions, and heavy lifting not previously required, constituted adverse action. We acknowledged that "transfers to more

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for the judge to take into account whether the operator had given Pendley a warning except to use this information in deciding the question before him – whether Millburg's discharge of Pendley was motivated in any part by protected activity.

arduous or difficult work have been held to be discriminatory under the National Labor Relations Act.” *Id.* at 1534 (citations omitted).

I have found no case law qualifying the principles stated above in the narrow manner articulated by the judge. A transfer to more arduous job duties based on a miner’s protected activity may constitute adverse action even if the new task is permitted by a union contract and is within the miner’s job classification. Such a transfer may still have a chilling effect on miners’ willingness to make safety complaints.

The Supreme Court recognized this principle in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). In that case, the Court reasoned:

Burlington argues that a reassignment of duties cannot constitute retaliatory discrimination where, as here, both the former and present duties fall within the same job description. . . . We do not see why that is so. Almost every job category involves some responsibilities and duties that are less desirable than others. Common sense suggests that one good way to discourage an employee . . . from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable.

*Id.* at 70-71.

The judge’s error affected his analysis in two regards. First, it constrained his examination of the motivation behind the decision to discharge Pendley. A job assignment that might not rise to the level of adverse action can nevertheless indicate animus and therefore be relevant in analyzing whether the earlier decision to terminate Pendley was tainted by a retaliatory motive. Second, the error precluded the judge from correctly analyzing whether the job assignments Pendley received after he was ordered reinstated constituted a separate instance of discriminatory conduct in violation of section 105(c). Thus, a remand is needed to evaluate the evidence using the proper legal standard.<sup>4</sup>

The judge’s evaluation of the record led him to conclude that “the evidence offers no support for finding Pendley’s job assignments were designed to punish him . . . .” 30 FMSHRC

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<sup>4</sup> Pendley challenged his discharge and the job assignments that occurred after he was temporarily reinstated. Pendley also challenged his earlier three-day suspension as violative of section 105(c). 30 FMSHRC at 459-61. Pendley’s suspension was determined by the judge to be illegally motivated by Pendley’s protected activity. *Id.* at 461. This activity led to Highland receiving several citations for failing to comply with accident reporting requirements. *Id.* at 471-72. The judge’s ruling that Highland discriminated against Pendley when it suspended him in December 2005 was not appealed. Slip op. at 1 n.2.

at 497. In reaching this conclusion, however, the judge omitted any mention of one particular task assigned to Pendley following his temporary reinstatement – moving pallets of glue by hand. Pendley testified that he was told to move glue pallets without a forklift, and that when he arrived at his destination, there were already full pallets of glue on the unit. Tr. 1081-82.<sup>5</sup> The implications of this assignment were not lost on fellow miners. Clarence Powell, a mechanic at the mine who tried to help Pendley (Tr. 483, 489), commented that

[W]hat made it so ironic was the fact that they specified for him [Pendley] to specifically pick that up [the glue] and haul it to the unit when . . . there's low tracks or fork trucks passing by that area and they could just as easily scooped it up and took it themselves instead of making an individual pick it up and haul it like they did him.

Tr. 488.

Bernard Alvey, an outby support miner, Tr. 518, also observed Pendley moving the glue by hand that night. He confirmed that “[a]ny other time . . . [the glue] would have been picked up by a forklift or a scoop. It wouldn’t have been hand loaded.” Tr. 521. Alvey explained that a scoop was available and that in fact he “pulled around him [Pendley] twice that night with a scoop” while he was picking up the glue, but “[h]e told me that he was told to pick it up, that I couldn’t pick it up with a scoop.” *Id.*

The judge also failed to discuss other evidence of work assignments being changed after persons made safety complaints. Larry Geary testified that after some miners questioned their foreman, Steve Bockhorn, about something “a few weeks later they were on a roof bolter off their regular job.” Tr. 477. Asked why it would be bad to be assigned as a roof bolter, Geary explained, “the majority of us there are older people and we would rather have something other than a roof bolter because roof bolter basically is the hardest job in the mines.” *Id.*

Steven Tramel, Jr. testified that, as a battery maintenance worker, when he complained to the safety director about smoke he was transferred to work on the belts. Tr. 508-09. He also testified about a fellow miner, Robert John, who complained about the slope rope being dirty and then was assigned to it full-time. Tr. 511. The assignment was viewed as a retaliatory action by the miners, because although “[i]t wasn’t really a different type job . . . it was in the dead of winter,” and, according to Tramel, “you don’t need to be putting a man in the slope in the dead of winter all the time.” Tr. 512. Asked “why is that?” Tramel responded “[t]oo cold.” *Id.* Tramel

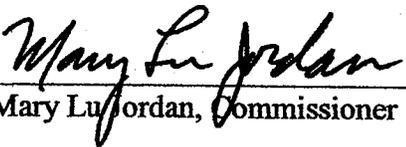
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<sup>5</sup> Despite the reluctance of my colleagues to address this evidence, slip op. at 21-22 n.24, I am mindful of the principle that “[i]n reviewing the whole record, an appellate tribunal must consider anything in the record that ‘fairly detracts’ from the weight of the evidence that supports a challenged finding.” *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

believed John got the slope rope assignment “[b]ecause he complained to the federal about it.”  
*Id.* In response to a question by the judge, the witness conceded the assignment was a job within the same classification. *Id.* Finally, James Morris testified that when he complained to federal officials about excessive exposure to rock dust, he was removed from his scoop job position and put on a roof bolter on the return side, which is exposed to more dust. Tr: 407.

Accordingly, I would vacate the judge’s decision and remand the case for a reevaluation of the post-reinstatement evidence. Such an analysis would be premised on the understanding that job duties assigned to a complainant may constitute adverse action, even if they are within his or her same job classification and permitted by the union contract. I would also have the judge consider this evidence in reevaluating whether the operator’s decision to discharge Pendley was in any way motivated by Pendley’s protected activity.

For the foregoing reasons, I respectfully dissent.

  
Mary Lu Jordan, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

February 2, 2009

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

v.

FREEMAN ROCK, INC.

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Docket No. WEST 2008-1548-M  
A.C. No. 35-01041-158346

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On September 16, 2008, the Commission received from Freeman Rock, Inc. (“Freeman”) a letter seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

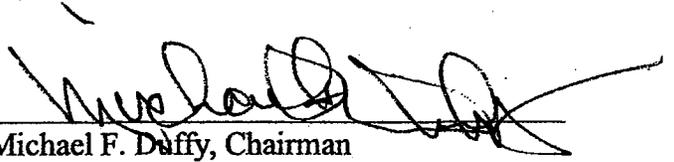
On July 29, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Penalty Assessment No. 000158346 to Freeman for seven citations. On September 16, 2008, Freeman filed a request to reopen this proposed assessment, stating that it is contesting the proposed assessment on the basis that it was not notified of unspecified changes in procedures at MSHA’s Albany Field Office. It further alleges that it had been building its defense in this case during a busy season and did not realize that the time to contest had passed.

The Secretary responds that the operator’s request for reopening should be denied. She states that the circumstances as stated by the operator, that the operator was not notified of changes in procedures at MSHA’s field office and that it did not realize that it was out of time, do not qualify as circumstances that warrant reopening under Rule 60(b) of the Federal Rules of Civil Procedure.

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 Freeman’s request to reopen and the Secretary’s response, we agree with the Secretary that, as its allegations are currently stated, Freeman has failed to show circumstances that warrant reopening the proposed penalty assessment. It is unclear from Freeman’s statements what alleged changes in the procedures at MSHA’s Albany Field Office Freeman is referring to, whether the alleged changes affected Freeman’s ability to timely contest the proposed penalty assessment, and, if so, what that effect was.

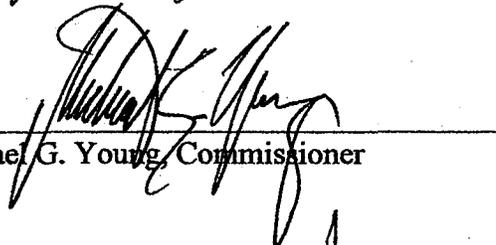
Accordingly, we deny without prejudice Freeman's request. See, e.g., *Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007). The words "without prejudice" mean that Freeman may submit another request to reopen the case so that it can contest the citations and penalty assessments.<sup>1</sup>



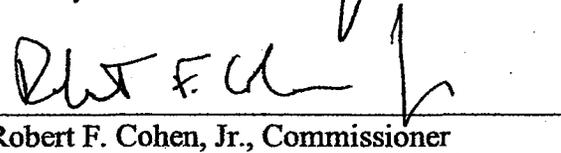
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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<sup>1</sup> If Freeman submits another request to reopen the case, it must identify the specific citations and assessments it seeks to contest. Freeman must also establish good cause for not contesting the citations and proposed assessments within 30 days from the date it received the proposed penalty assessments from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise or excusable fault on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation or other misconduct by the adverse party. Freeman should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented Freeman from responding within the time limits provided in the Mine Act, as part of its request to reopen the case. In addition, Freeman should submit copies of supporting documents with its request to reopen the case.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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February 2, 2009

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

Docket No. WEVA 2008-1861  
A.C. No. 46-09086-135505

v.

BRODY MINING, LLC

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On September 23, 2008, the Commission received from Brody Mining, LLC (“Brody”) a request 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 January 8, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000135505 to Brody proposing civil penalties for violations alleged in 15 citations. Brody states that on approximately January 24, 2008, its safety director mailed the proposed assessment and a check to MSHA to pay 11 of the 15 penalties. Of the 15 citations in the Proposed Assessment that was returned to MSHA, Citation Nos. 7280178, 7280180, 9967987, and 9967988 were checked for contest and blackened out. The operator submits that on the same date, the safety director also faxed copies of the Proposed Assessment and check to MSHA’s Civil Penalty Compliance Office and copied counsel on the fax. Counsel states that he mistakenly believed that the safety director was contesting the four citations, while the safety director believed that counsel would separately contest the citations. Brody states that

MSHA has since marked Citation Nos. 7280178, 7280180, 9967987, and 9967988 as delinquent and the remaining citations in the case, to which payment was applied, as closed.

In response, the Secretary states that she opposes the request to reopen. The Secretary explains that on April 3, 2008, MSHA sent the operator a notice indicating that the assessment had become a final order on February 14, 2008. She submits that the notice, which was sent to the address listed on the operator's legal identity form, was returned to MSHA as "undelivered."<sup>1</sup> The Secretary contends that the operator fails to explain why, after MSHA had informed it that it had not contested the Proposed Assessment, it took over half a year to request reopening.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessment forms 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).

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<sup>1</sup> The Secretary notes that the notice was sent to the same address as the Proposed Assessment, which the operator states that it received.

Having reviewed Brody's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Brody's failure to timely contest the penalty proposal and whether relief from the final order should be granted. We ask the Judge, in considering the matter, to ascertain the reasons for the delay of the operator in seeking relief from the final order. 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.



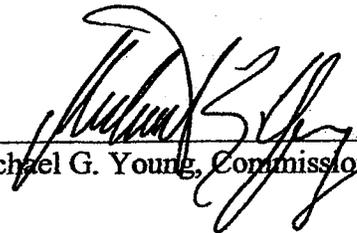
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Michael F. Duffy, Chairman



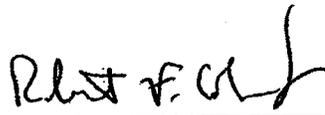
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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner

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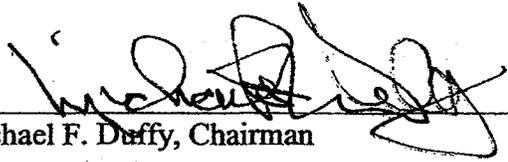
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601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001-2021

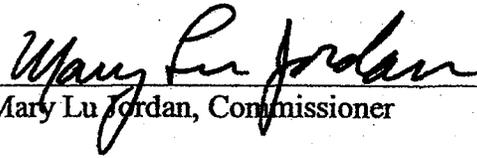


for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. See *Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Estacada's request and the Secretary's response, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Estacada'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.



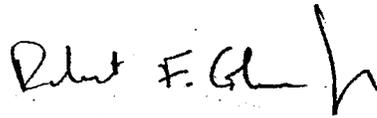
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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

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

February 4, 2009

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

v.

LAFARGE BUILDING MATERIALS, INC.

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Docket No. SE 2009-95-M  
A.C. No. 38-00305-161453  
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BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On November 12, 2008, the Commission received from Lafarge Building Materials, Inc. (“Lafarge”) 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).

The Secretary states that she does not oppose the reopening of the proposed penalty assessment.<sup>1</sup>

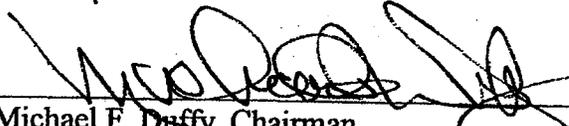
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to

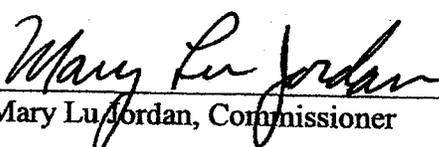
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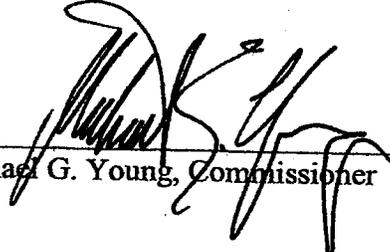
<sup>1</sup> The record indicates that a company official inadvertently forwarded the contest form to Lafarge’s financial services center for payment and that, as a result, the contest form was mailed one day late to MSHA.

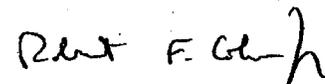
reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) (“the Commission 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 Lafarge’s request and the Secretary’s response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

  
Michael F. Duffy, Chairman

  
Mary Lu Jordan, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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

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

February 4, 2009

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

v.

ENDURANCE MINING

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Docket No. WEVA 2009-267  
A.C. No. 46-08549-157507

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On November 12, 2008, the Commission received from Endurance Mining (“Endurance”) a request 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 Secretary states that she does not oppose the reopening of the proposed 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 mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed

that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Endurance's request and the Secretary's response, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Endurance'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.



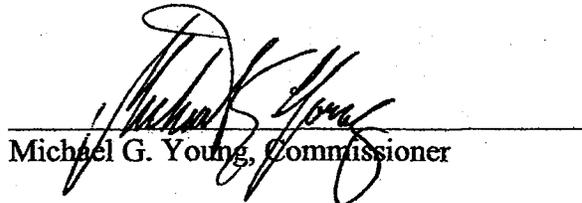
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Michael F. Duffy, Chairman



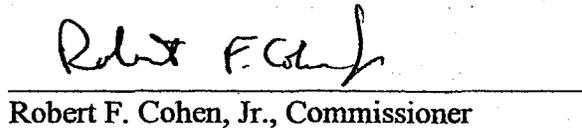
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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner

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



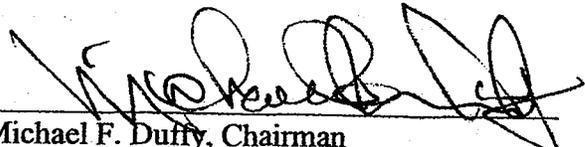
Silica's accounts payable department with the Check for Contest box checked to be sent in as proper procedure.”

Standard Sand further states that it never received MSHA's delinquency notice. It claims that the first time it learned that the assessment had not been contested was on March 28, 2008, when it received a collection notice from the Department of Treasury. On the same day, Standard Sand sent its initial letter to the Commission requesting reopening.

The Secretary states that although she does not oppose the reopening of the assessment, MSHA has no record of receiving the penalty contest form.

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 Standard Sand's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge. On remand, the judge should determine whether Standard Sand mailed its contest to MSHA, and if so, whether it did so prior to the 30-day deadline set forth in section 105(a). If the judge finds that the assessment was not timely contested, he should determine whether good cause exists for Standard Sand's failure to timely contest the penalty proposal and whether relief from the final order should be granted.<sup>1</sup> 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.



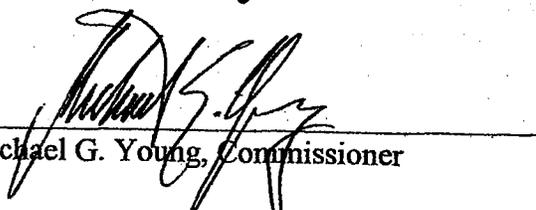
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Michael F. Duffy, Chairman



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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner

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<sup>1</sup> The judge should specifically determine what Standard Sand actually did to allegedly contest the proposed penalty assessment and when it did so. If Standard Sand failed to meet the 30-day deadline, it should provide reasons to the judge as to why its neglect is excusable.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

February 5, 2009

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

v.

RUSCAT ENTERPRISES, INC.

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Docket No. WEVA 2009-143  
A.C. No. 46-06843-159507

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 7, 2008, the Commission received from Ruscat Enterprises, Inc. ("Ruscat") a request 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 Secretary states that she does not oppose the reopening of the proposed penalty assessment.<sup>1</sup>

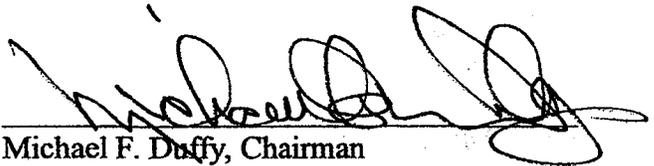
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to

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<sup>1</sup> The record indicates that the company, which has only one full-time office employee and relies in part upon an outside safety consultant, was only three days late in mailing the contest form, having mailed the contest form on a Monday rather than the preceding Friday.

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

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



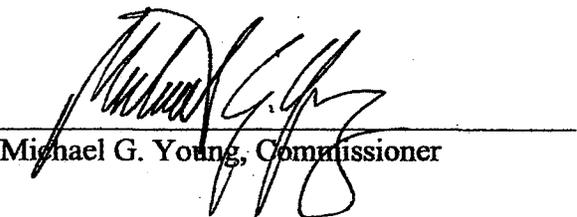
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Michael F. Duffy, Chairman



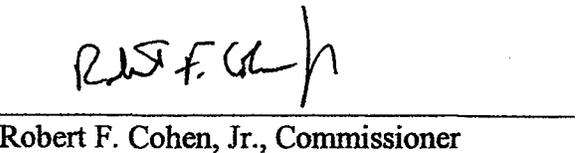
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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner



---

Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

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February 11, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE-2009-20
ADMINISTRATION (MSHA)	:	A.C. No. 01-00329-155698
	:	
v.	:	Docket No. SE-2009-21
	:	A.C. No. 01-00851-155699
OAK GROVE RESOURCES, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On October 9, 2008, the Commission received from Oak Grove Resources, LLC, (“Oak Grove”) a request to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>1</sup>

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 Secretary states that she does not oppose the reopening of the proposed penalty assessments.<sup>2</sup>

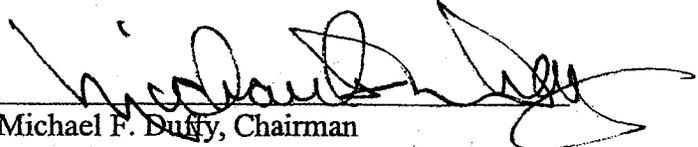
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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers SE 2009-20 and SE 2009-21, each captioned *Oak Grove Resources, LLC*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

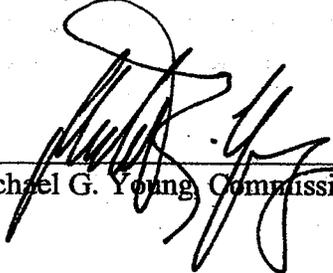
<sup>2</sup> The record indicates that, because of internal delays, Oak Grove filed its contests one day late, and promptly filed a motion to reopen upon discovering that the contests were untimely.

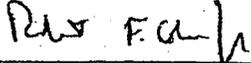
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the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

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

  
Michael F. Duffy, Chairman

  
Mary Lu Jordan, Commissioner

  
Michael G. Young, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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**Chief Administrative Law Judge Robert J. Lesnick**  
**Federal Mine Safety & Health Review Commission**  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

February 11, 2009

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

v.

J & T SERVICES

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Docket No. SE-2009-49-M  
A.C. No. 40-00864-157739 U424

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On October 10, 2008, the Commission received from J & T Services (“J & T”) a request 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 Secretary states that she does not oppose the reopening of the proposed penalty assessment.<sup>1</sup>

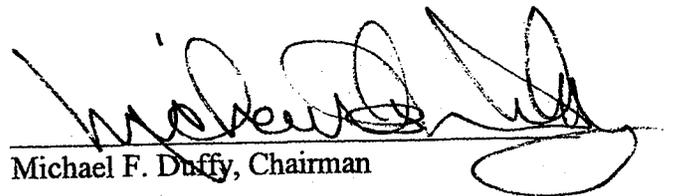
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to

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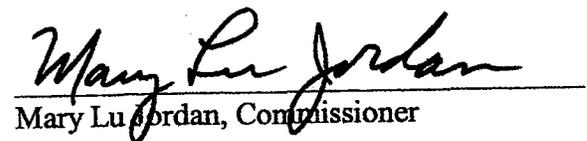
<sup>1</sup> The record indicates that the individual at the company who would have reviewed the assessment died in an accident during the 30-day period, and that the company was only two days late in filing its contest.

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

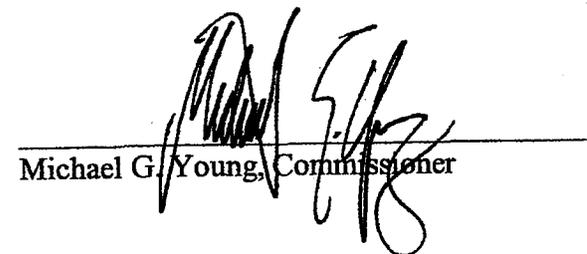
Having reviewed J & T's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.



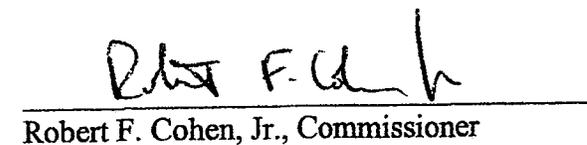
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

February 11, 2009

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

v.

BILL BALTRUSCH CONSTRUCTION, INC.

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:  
: Docket No. WEST 2009-203-M  
: A.C. No. 24-02318-156943  
:  
:

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 20, 2008, the Commission received from Bill Baltrusch Construction, Inc. ("Baltrusch") a request 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).

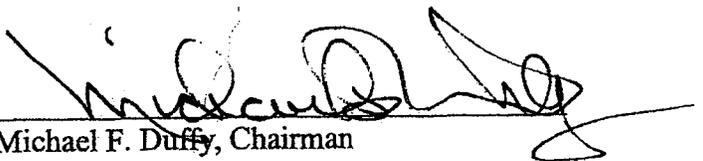
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

The Secretary states that she does not oppose the reopening of the proposed 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 mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed

that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Baltrusch's request and the Secretary's response, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Baltrusch'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.



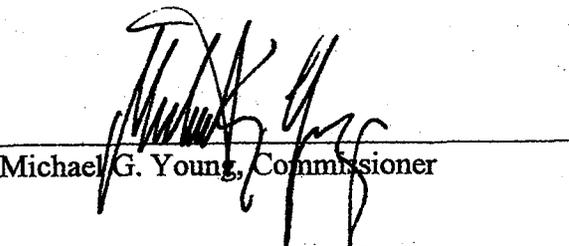
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Michael F. Duffy, Chairman



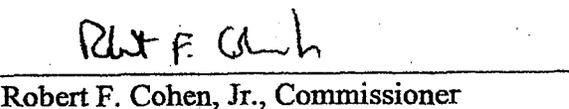
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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner

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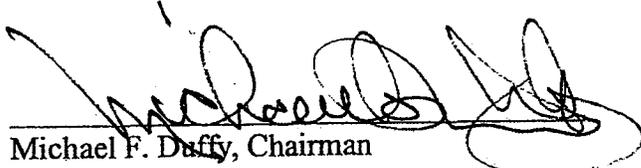
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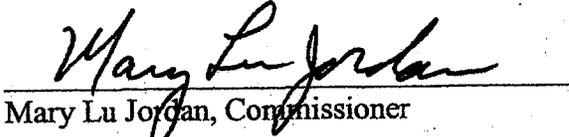
Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Wolf Run’s request and the Secretary’s response, 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 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.



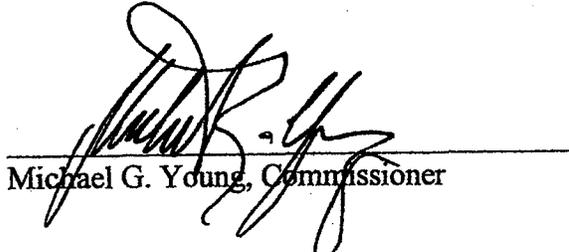
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Michael F. Duffy, Chairman



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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner

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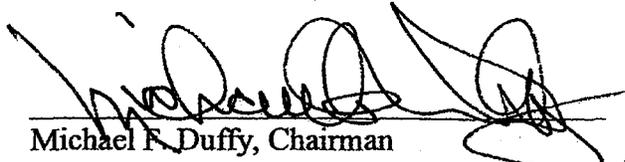
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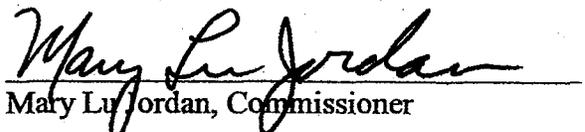
*Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of 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 Southern’s request and the Secretary’s response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.



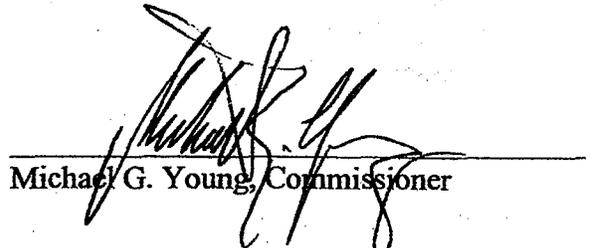
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Michael F. Duffy, Chairman



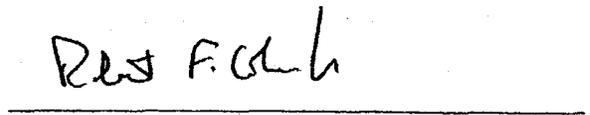
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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner

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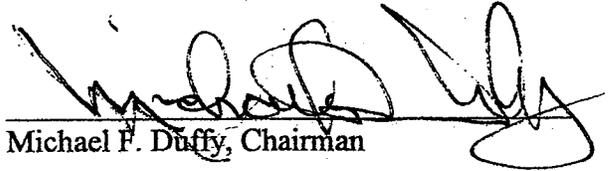
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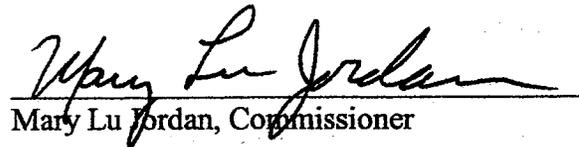


Given the circumstances and in the interest of justice, we conclude that service of the proposed assessment was never made, and thus there is no final order under section 105(a) of the Mine Act. Hence, ISP's motion is moot and the motion is dismissed.



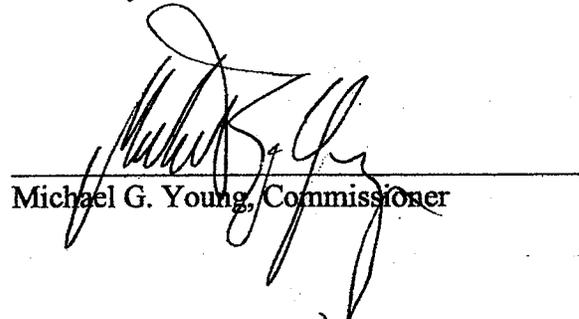
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Michael F. Duffy, Chairman



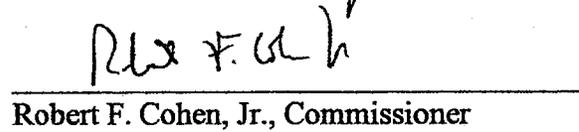
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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

February 17, 2009

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

v.

OMIS RICKY SMITH

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Docket No. KENT 2008-1482  
A.C. No. 15-18788-122198M

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

ORDER

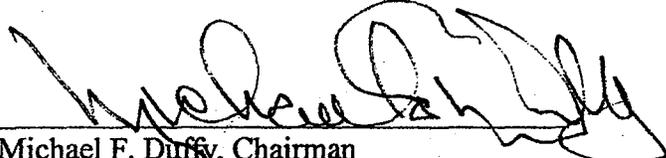
BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On August 21, 2008, the Commission received from Omis Ricky Smith (“Smith”) a letter 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 Secretary states that upon review of the record, she has found that service of the proposed assessment was not achieved, and as a result, the assessment did not become a valid final order. The Secretary plans to resend the proposed assessment to the correct address and then Mr. Smith will have 30 days after receipt to contest the penalty. Accordingly, the Secretary submits that the request to reopen should be dismissed as moot.

Given the circumstances and in the interest of justice, we conclude that service of the proposed assessment was never made, and thus there is no final order under section 105(a) of the Mine Act. Hence, Mr. Smith's motion is moot and his request is dismissed.<sup>1</sup>



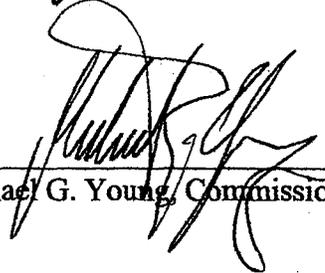
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Michael F. Duffy, Chairman



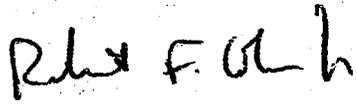
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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner

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<sup>1</sup> This means that at present, there is no order requiring Mr. Smith to pay a penalty. However, the Secretary has the right to send a copy of the proposed assessment to Mr. Smith at his correct address. Upon receipt of the re-sent proposed assessment, Mr. Smith will have to submit a notice of contest to MSHA. The matter will then be referred to the Commission for a hearing.

**Distribution:**

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601 New Jersey Avenue, N.W., Suite 9500  
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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  
WASHINGTON, DC 20001-2021  
202-434-9981/TELE FAX: 202-434-9949

January 2, 2009

CUMBERLAND COAL RESOURCES, LP :	CONTEST PROCEEDINGS
Contestant :	
:	Docket No. PENN 2008-51-R
:	Citation No. 7025468;10/04/2007
:	
v. :	Docket No. PENN 2008-52-R
:	Order No. 7025469; 10/04/2007
:	
:	Docket No. PENN 2008-53-R
:	Order No. 7025480; 10/22/2007
:	
SECRETARY OF LABOR, :	Docket No. PENN 2008-54-R
MINE SAFETY AND HEALTH :	Order No. 7025481; 10/11/2007
ADMINISTRATION, (MSHA), :	
Respondent :	Cumberland Mine
:	Mine ID 36-05018

**DECISION**

Appearances: Donald K. Neely, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Secretary of Labor;  
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, on behalf of Cumberland Coal Resources, LP.

Before: Judge Zielinski

These cases are before me on Notices of Contest filed by Cumberland Coal Resources, LP, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The notices challenge a citation and three orders issued by the Secretary's Mine Safety and Health Administration. A hearing was held in Pittsburgh, Pennsylvania, and the parties filed briefs after receipt of the transcript. For the reasons set forth below, the citation and orders are affirmed. However, Citation No. 7025468 and Order Nos. 7025469 and 7025480 are modified to citations issued pursuant to section 104(a) of the Act.

**Findings of Fact - Conclusions of Law**

Cumberland Coal Resources, LP, operates a large underground coal mine, the Cumberland Mine, in Greene County, Pennsylvania. The Cumberland Mine is a "gassy" mine, liberating over one million cubic feet of methane in a 24-hour period, and is subject to 5-day spot

inspections by the Secretary's Mine Safety and Health Administration pursuant to section 103(i) of the Act. On October 4, 2007, MSHA coal mine inspector, Barry Radolec, conducted a regular quarterly inspection of the mine. David Severini, Radolec's supervisor, accompanied him in order to conduct an evaluation of his performance. Tr. 170. Severini's supervisor, assistant district manager Anthony Guley was also present to evaluate Severini's performance. Ronald Duke, a United Mine Workers of America representative, and Michael Konosky, Cumberland's representative, completed the inspection party.

Before starting his inspection, Radolec reviewed the MSHA mine file and, when he arrived at the mine, reviewed the preshift and onshift report books for the 8 Butt section. He noticed entries for several previous days to the effect that areas of the belt entry from crosscuts #25 to #30 and #11 to #15 needed rock dusting. Tr. 66-67; ex. G-5. He traveled to the 8 Butt section, disembarking at the #11 crosscut so that he could walk the belt entry from that point to the working places near crosscuts #33 and #34. The conveyor belt transporting coal away from the section was five to six feet wide and its bottom rollers were 18-24 inches above the mine floor. Tr. 70. He found no hazardous conditions between crosscuts #11 and #15. Tr. 138. At the #17.5 crosscut, he observed that the belt had gone out of alignment. One side of the lower portion of the belt was rubbing on a metal belt stand. The abrasive action of the belt had cut into the steel stand approximately one-quarter to one-half inch. The stand was warm to the touch, and there was blue "smoke" rising about six to eight inches from the belt/stand contact point. Tr. 70-71. There was a small, pyramid-shaped pile of belt shavings, about six inches high near the point where the belt was rubbing the stand. Radolec believed that the belt was on fire and that the blue "smoke" was an indication that rubber was burning.<sup>1</sup> Tr. 71-72. When Duke, the miners' representative, observed the condition, he promptly took the belt out of service so that the misalignment could be corrected. Tr. 75. Radolec then proceeded with the inspection, traveling inby.

Radolec observed accumulations of dry black float coal dust, coal fines and loose coal in the entry between crosscuts #25 and #25.5, #26.5 and 50 feet outby #27, and #27 and #30.5. The coal and fines and loose coal were underneath the belt and ranged 4 inches deep in the center of the 16-foot wide entry and tapered out to one-half inch deep near the ribs. Between crosscuts #28 and #30.5 there were piles six to eight inches deep and 24 inches in diameter. Tr. 77-80, 137. There was a thin layer of float coal dust on the belt structures, electric cables and switches. Tr. 36, 80, 172. The float coal dust was deposited on "token" rock dust, such that, when wiped, it was gray in color. Tr. 49, 83, 160, 164, 172-73. Radolec determined that the condition was highly likely to result in a fire that would cause fatalities because the belt presented several potential ignition sources, including, the misalignment, the possibility of additional misalignments, and the possibility of a failure of a roller bearing resulting in sparking and friction. He also considered the presence of electrical cables, boxes and switches. Tr. 85-86.

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<sup>1</sup> Radolec issued Citation No. 7025467, alleging a violation of 30 C.F.R. § 75.1725(a), for failure to maintain machinery in a safe condition. Ex. G-2. That citation is not at issue in these proceedings.

He determined that Cumberland's negligence with respect to the violation was high because of the notations "needs dusted" that had been reported on records of preshift examinations from September 25 to October 4. At 9:30 a.m., he issued Citation No. 7025468, pursuant to section 104(d) of the Act, alleging a significant and substantial and unwarrantable failure violation of 30 C.F.R. § 75.400, which requires that combustible materials be cleaned up and not allowed to accumulate, and specified that the violation was to be terminated by 1:40 p.m., that day. Ex. G-4. A crew of eight to ten miners began shoveling the accumulations, worked for about an hour until the inspection party left, and continued thereafter. Tr. 52. Radolec also issued Order No. 7025469, alleging a significant and substantial and unwarrantable failure violation of 30 C.F.R. § 75.363(a), which requires that hazardous conditions found during preshift examinations be corrected immediately or be posted with a conspicuous danger sign. Ex. G-8. He left the mine after completing the inspection.

Radolec returned to the mine on October 9, to determine if the cited conditions had been abated.<sup>2</sup> He inspected the subject area and found that it had been approximately 75% cleaned. Tr. 104. Although a light layer of rock dust had been applied, coal fines were still present in the area of the #29 to #30 crosscuts. Radolec spoke to Fred Evans, a Cumberland safety representative, who instructed two miners to clean the area. Tr. 104-05. Radolec extended the time within which the violation was to be terminated to 2:45 p.m. on October 9, and then left the mine. He returned on October 11 to conduct a 5-day spot inspection for methane. Tr. 106. Accompanied by Walter Lemenovich, an MSHA trainee inspector, John Perry, a Cumberland safety representative, and Mickey Geisel, a miners' representative, he proceeded to the 8 Butt belt entry at the #29 to #30 crosscuts, expecting to terminate the accumulations violation. However, he found the area in the same condition it had been in on October 9. No more work had been done and there had been only token rock dusting. Tr. 107-08. At 10:30 a.m., he terminated the Citation and issued Order No. 7025481, pursuant to section 104(b) of the Act.<sup>3</sup> He told Perry to take the belt out of service, and to have the area cleaned and dusted immediately. Tr. 108-09; ex. G-10, G-7 at 14-15. At around 12:00 noon, Perry advised that the condition had been corrected. However, Radolec refused to terminate the Order until further rock dusting had been done. Tr. 111. The Order was terminated at 1:20 p.m.

On October 11, while en route to check on the area of the accumulations, Radolec inspected the track haulage entry because he had seen notations in the preshift book for at least five shifts to the effect that garbage was located at the #10 and #20 crosscuts. At crosscut #10, he observed wooden pallets, plastic containers, empty oil cans, paper bags and cardboard boxes,

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<sup>2</sup> October 4, 2007, was a Thursday, and Monday, October 8, was a holiday.

<sup>3</sup> Section 104(b) of the Act provides that, where an inspector determines that a violation cited under section 104(a) "has not been totally abated within the period of time as originally fixed or subsequently extended, and that the period of time for the abatement should not be further extended," he shall issue an order requiring the withdrawal of affected miners from the area. 30 U.S.C. § 814(b).

piled irregularly two to three feet high, half way across the crosscut for half of its length, an area about 8 by 35 feet. Tr. 449-51. At crosscut #20, he observed a large plastic trash bag hanging from the rib, filled with empty oil cans and plastic containers. At 9:45 a.m., he issued Order No. 7025480, pursuant to section 104(d)(1) of the Act, alleging a significant and substantial and unwarrantable failure violation of the combustible accumulations standard, 30 C.F.R. § 75.400. Upon his return to the MSHA field office, the Order was reviewed with Severini, and was modified to allege that an injury was unlikely, that the violation was not S&S and that no persons were affected.

Cumberland timely filed Notices of Contest with respect to the Citation and Orders. The parties have represented that disposition of these Contest Proceedings will facilitate resolution of any remaining issues, e.g., those associated with the determination of appropriate civil penalties, such that no further hearing will be required. The alleged violations are addressed below.

#### Citation No. 7025468

Citation No. 7025468, issued on October 4, 2007, alleges a violation of 30 C.F.R. § 75.400, which provides:

#### § 75.400 Accumulation of combustible materials

Coal dust, including float coal dust deposited on rock dusted surfaces, loose coal and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

The alleged violation was described in the "Condition and Practice" section of the Citation as follows:

An accumulation of dry black coal float dust and dry black coal fines existed in the conveyor belt entry on the active 8 Butt (027) M.M.U. development mining section of the mine. This accumulation existed starting at the number 25 cross-cut and continued to the number 30 1/2 cross-cut, the location of the conveyor belt tail roller. These accumulations of dry black coal float dust existed on the conveyor belt structure, metal 6-inch pipe line, roof support metal channels, mine roof and ribs, mine floor, electrical power cables, on/off electrical switches, dry black coal fines and plastic mesh installed on the ribs. The accumulations of dry black coal fines measured from 1/2 inches to 4 inches across the width of the 16 foot wide entry and for a distance of 75 feet from number 25 to 25 1/2 cross-cut. Also the same type coal fines existed from 26 1/2 cross-cut to 50 feet out by number 27 cross-cut. Number 27 to number 30 1/2 cross-cut the same type coal fines existed along side and under conveyor and in cross-cuts. Number 28 cross-cut to the tail roller coal piles existed under the bottom conveyor belt bottom

rollers that measured 6 inches to 8 inches in depth, 24 inches wide and 24 inches long. This type of condition creates a Highly Likely condition for a coal dust explosion and mine fire to occur. This condition has been reported in the pre shift record book since 9/25/2007, 8:00 P.M. to 8:40 P.M. and continued until this days pre-shift examination. This type violation has been issued 63 times in the last 2 years at this mine.

Ex. G-4.

Radolec determined that it was highly likely that the violation would result in a fatal injury, that the violation was S&S, that one person was affected, and that the operator's negligence was high. The citation was issued pursuant to section 104(d)(1) of the Act, and alleged that the violation was the result of the operator's unwarrantable failure to comply with the mandatory standard.

#### The Violation

Radolec and Severini testified about the conditions they observed, as documented in the Citation. Supervisory inspector Severini traveled to the section separately, and met Radolec near the feeder. Radolec informed him of the accumulations that he had found and the belt misalignment. They then walked back outby, from the belt tailpiece to crosscut #28. Severini observed the float coal dust on the roof, ribs and belt structure. Tr. 172-73. He also observed accumulations under the belt, almost rib to rib. Tr. 173. He and Radolec concluded that the conditions may have been the result of an inadequate cleanup in conjunction with the last belt move, and that the material had been dragged up the entry as the belt was extended. He saw "token rock dusting, at best." Tr. 173. He agreed that the area needed to be cleaned and bulk rock dusted.

In his capacity as a supervisory inspector, Severini reviews citations and orders written by inspectors. He agreed with Radolec's determination that the standard had been violated, and with his assessment of gravity, although he did not appear to regard the conditions as seriously as Radolec, stating that the condition "wasn't the worst I've ever seen. But it was unacceptable." Tr. 175. Duke, the miners' representative, assisted Radolec in taking measurements of the depth of the accumulations, and confirmed the existence of the conditions in the entry as described in the Citation. Tr. 36. He testified that after a belt move, the area is usually "fling dusted," but that it hadn't been done as far as he could tell.<sup>4</sup> Tr. 36-37. He believed that the condition was hazardous, primarily because of the float coal dust. Tr. 38. Duke disagreed with Radolec's instruction that material along the ribs and in the crosscuts had to be shoveled. "The stuff that was along the ribs is the draw slate, it flakes off. . . . I felt it wasn't that bad to where it needed

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<sup>4</sup> Fling dusting is done with a mechanical distributor mounted on a scoop, and is applied to the cleaned area before the belt tailpiece is moved inby. Bulk rock dusting is done with an air blowing system after a belt move has been completed. Tr. 174, 235, 243.

[to be] shoveled.” Tr. 47.

Konosky, a senior safety representative at Cumberland, traveled to the 8 Butt section with Severini and Guly, and met Radolec and Duke at the feeder. When informed that the accumulations citation had been issued, he examined the belt entry in the area of the #25 to #30 crosscuts. While he did not agree that there were dry black coal fines across the width of the entry, he confirmed that there were some spots with some spillage, and explained “that’s coal mining.” Tr. 223. He testified that the area had been fling dusted when the belt was moved, but did not know if there was float coal dust present, and explained that rock dust is darker when it is wet and could be mistaken for float coal dust. Tr. 221-22.

There is relatively little dispute concerning the existence of the conditions, as described by Radolec, Severini and Duke, each of whom has considerable mining experience. Konosky did not refute their testimony, and his explanation that rock dust, when wet, could be mistaken for float coal dust was unconvincing. Accumulations of loose coal and coal fines, one-half to four inches deep, were present across nearly the entire width of the belt entry in several locations from the #25 to the #30.5 crosscuts. There were irregularly spaced piles of coal from six to eight inches deep between crosscuts #28 and #30.5. In addition, there was a thin layer of float coal dust on stationary horizontal surfaces, deposited on an inadequate layer of rock dust that had been applied by hand. The area had not been fling dusted when the belt moves were done, and bulk rock dusting had not progressed to that area. While some of the material along the ribs and in the crosscuts was non-hazardous draw slate, and some rock dust had been applied in the area, a significant quantity of combustible material had been permitted to accumulate, in violation of the standard.<sup>5</sup>

### Significant and Substantial

A significant and substantial (“S&S”) violation is described in section 104(d)(1) of the Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

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<sup>5</sup> I also find that a reasonably prudent person, familiar with the mining industry and the protective purposes of the Act, should have realized that the conditions violated the standard.

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

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

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

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

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The fact of the violation has been established. The measure of danger to safety was contributed to by the presence of the combustible accumulations, which presented a hazardous condition, i.e., the possibility of a fire or explosion or an exacerbation of the effects of a fire or explosion that might occur in the area. Any injury resulting from such an event could be expected to be reasonably serious. The focus of the S&S analysis, as is often the case, is whether the violation was reasonably likely to result in an injury producing event. Cumberland also makes an argument that, even if there was an ignition and fire, there was no reasonable likelihood of a serious injury resulting. Because I find that the Secretary has failed to carry her burden of proof on the third element of the test, I need not reach Cumberland's argument on the fourth element. While it has some appeal, it appears to be foreclosed by Commission precedent.<sup>6</sup>

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<sup>6</sup> Cumberland's argument is based largely on an MSHA study, reporting that no fatalities or reportable injuries resulted from any of the 63 reportable belt fires that occurred from 1980 through 2005. Coupled with the presence of multiple safety features, some of recent origin, it contends that a potential belt fire cannot be found to be reasonably likely to result in a serious injury. The courts and the Commission have held, however, that such evidence does not

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

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

Radolec addressed the factors identified in *Enlow Fork* in explaining his determination that the violation was S&S. He described the accumulations, cited the presence of methane, and identified the conveyor belt system and related electrical equipment as potential ignition sources. Tr. 85 He also described a remarkably catastrophic sequence of events that he deemed was highly likely to occur as a result of the violation, beginning with the dust and coal fines igniting, resulting in a fire that would grow to such an extent that it would prevent effective ventilation, producing a buildup of methane which would explode, putting the float coal dust into suspension, resulting in another explosion, such that the entire mine and any miners in it would be caught up in the conflagration. Tr. 82-83, 146-47, 416-20. Radolec's opinion about the likelihood of a catastrophic event, which appears to have little, if anything, to do with the cited accumulations, will be discussed in conjunction with the *Enlow Fork* factors.

#### The Accumulations

While the accumulations existed over a significant area, they ranged from one-half to four inches deep, and were not close to the belt or bottom rollers. The deposits were not being added to as mining continued.<sup>7</sup> Radolec and Severini concluded that they were the product of loose coal that had been dragged up the entry during the last belt move. Tr. 173. While they existed over areas that could be described as extensive, they were not particularly extensive in volume, and were considerably removed from moving machine parts. There was a thin layer of float coal dust, deposited on previously rock dusted surfaces. However, the rock dusting that had been done was inadequate.

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establish that a violation is not S&S. See *Buck Creek Coal, supra*; *Amax Coal Co.*, 19 FMSHRC 846, 849 (May 1997). One problem with the argument is that the report did not correlate the incidence of belt fires with the presence of unlawful accumulations. Had unlawful accumulations been present, there may have been more serious consequences.

<sup>7</sup> Radolec confirmed that the deposits had not been added to between October 4 and October 11, and that it was a "pretty good belt." Tr. 133.

## Ignition Sources

Radolec identified potential ignition sources as friction from the belt going out of alignment, like he found at crosscut #17.5, and friction and sparks from belt rollers with bad bearings. Tr. 85. He also believed that it was highly likely that the conveyor belt itself would cause the coal dust to ignite, because of its capacity to generate heat. Tr. 83-85. He also mentioned dust on cables and electrical boxes, including belt switches, cables to the carbon monoxide ("CO") monitors, and the power cable for the feeder. However, he did not explain how the cables or the electrical boxes could produce an ignition, or the likelihood that such an event would occur. Tr. 85, 121. It appears that the cables and wires were stationary and insulated, and that the connections were enclosed in boxes. Aside from the power cable that had not been properly hung, he did not identify any defects in any of the electrical equipment. His belief that the cables could be ignition sources was apparently based upon the occurrence of some event that would result in damage and the creation of sparks or heat build-up. But, he did not identify the nature of such an event, or the likelihood of it occurring. The fact that electrical cables or equipment *could* somehow result in an ignition cannot establish that the violation was S&S. *Amax Coal Co.*, 18 FMSHRC 1355, 1358-59 (Aug. 1996) (to prove S&S nature of violation Secretary must prove that it is reasonably likely that an injury producing event *will* occur, not that one *could* occur – S&S finding reversed, in part, because ALJ did not consider that electrical cables in area were insulated and produced no heat).

Radolec considered the misalignment of the belt at crosscut # 17.5 as a potential ignition source. Tr. 84-85. However, his explanation of how the misalignment could affect the accumulations 1,000 feet inby, was difficult to follow. Tr. 416-18. He stated that a "hot area" on the belt would "increase" and "work its way all the way up to 25," causing an ignition that would, in turn, ignite "coal dust on the belt" and particles of coal on the belt, causing a fire in coal around the tailpiece that would spread throughout the "total belt entry." Tr. 416-18. Whether or not this scenario bears any relationship to reality, it is clear that he substantially misperceived the conditions at the #17.5 crosscut.<sup>8</sup> He testified that there was "blue smoke" coming from where the belt contacted the stand, and that: "The belt was on fire. It was burning." Tr. 71-72. His belief persisted, even though he admitted that he saw no flames, did not detect any carbon monoxide, the metal stand was warm rather than hot, and the belt was not burning when it was stopped by Duke. Tr. 116-17.

John Gallick, vice president of safety and health for Foundation Coal, of which Cumberland is an affiliate, testified that, from Radolec's description of the rubbing belt at crosscut #17.5, the belt was not on fire. He also testified, referencing earlier studies, that a belt cannot catch on fire by rubbing on a stand. Tr. 361-63, 440-43. Gallick has extensive education, training and experience in the field of safety, particularly as associated with fires,

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<sup>8</sup> Radolec did not explain, e.g., how a hot area on the belt could ignite the accumulations when it was moving at approximately 500 feet per minute and was more than one foot away from them.

including belt fires.<sup>9</sup> He explained that, in the absence of dust or accumulations in contact with the point of friction, the fire resistant belt is the only thing that could potentially begin to burn, and that it cools as it leaves the point of contact and continues around the circuit, such that it cannot be ignited by rubbing on a stand. Tr. 362, 440-43.

Cumberland offered Gallick as an expert witness on mine fires and risk analysis. Tr. 317-18. The Secretary objected, contending that general opinions on whether a violation was S&S or the likelihood of an injury occurring and its severity are not proper subjects of expert opinion and, as a person who did not observe the conditions associated with the violation, he should not be permitted to offer lay opinion testimony. Tr. 324-26. The testimony was allowed, in essence provisionally, subject to later challenge, e.g., on grounds that it was unreliable or irrelevant.<sup>10</sup>

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<sup>9</sup> Gallick has over 25 years of experience as a safety director for companies operating underground coal mines. While working for a safety consultant, he taught fire fighting and rescue teams at MSHA's training academy in Beckley, West Virginia, and has a Master's Degree in safety with an emphasis on management. He worked in command centers at two major mine fires, Marianna Mine 58 and the recent Aracoma fire. After his involvement in the Marianna belt fire, he became involved in research with consultants and with the then Bureau of Mines, National Institute for Occupational Safety and Health ("NIOSH"), on solutions to problems encountered at Marianna. He was involved in projects that generated research papers, which he did not author, many of which were cited and discussed in a recent MSHA report on belt fires from 1980 through 2005, referred to as the "Bentley Report." MSHA, *Reducing Belt Entry Fires in Underground Coal Mines* (2007). Ex. R-8. He also was an invited speaker by the chairman of a belt study group in 1989. Tr. 296-323.

<sup>10</sup> I declined to bar Gallick from testifying or to designate him as an "expert" in a specific field, and held that his testimony would be accorded whatever weight it was entitled to, based upon an evaluation of its relevance and reliability in light of his experience and qualifications. The parties were invited to make arguments on the relevance of his testimony in post-hearing briefs. Tr. 332-33. As I noted in *Cactus Canyon Quarries of Texas, Inc.*, 23 FMSHRC 280, 287 (Mar. 2001) (ALJ), the Commission, like most federal agencies, operates under far more liberal rules governing the admissibility of evidence than those set forth in the Federal Rules of Evidence. Commission Procedural Rule 63(a), 29 C.F.R. § 2700.63(a), provides that: "Relevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative is admissible." This is an entirely appropriate standard for litigation before the Commission's Administrative Law Judges. As one noted commentator has written:

The complicated rules of evidence applicable to judicial trials were designed to govern decisionmaking by juries. They are premised on the belief that lay jurors are likely to misuse large categories of relevant evidence if they become aware of that evidence. Whether or not the [Federal Rules of Evidence] are well-suited to that purpose, they are totally inappropriate for application either to agency adjudications or to judge-trying cases. . . .

Tr. 330-34. The Secretary argues, in her post-hearing brief, that Gallick's testimony on certain issues should be accorded little weight, because it is unreliable and contrary to established precedent. Sec'y Br. at 15-16. While some of Gallick's testimony should be accorded limited weight,<sup>11</sup> for the most part, his testimony was informative and well-supported.

I find Gallick's testimony regarding the probability of the belt catching fire because it was rubbing on the stand at crosscut #17.5, highly probative. The Secretary does not directly argue otherwise as to this part of his testimony. Gallick's statement that the fire-resistant belt could not catch on fire by rubbing on the stand was clearly explained, and was supported by references to studies. It also made sense. The belt was moving past the area of contact at approximately 500 feet per minute. A particular point on the edge of the belt came into contact with the stand, heated by the friction of the belt's rubbing, only for a fraction of a second. No significant amount of heat could transfer to the belt, because the stand was not particularly hot, and the length of time that any point on the edge of the belt was in contact with the stand was extremely short. That would be the case even if the stand became considerably hotter. Once passing the stand, a point on the belt edge made a complete loop of some 10,000 feet, before once again coming into contact with the stand. Any heat picked up by the edge of the belt would have been quickly dissipated as the belt moved through its circuit of travel.

Radolec agreed that the belt was not on fire when Duke stopped it, and he did not check to see whether it was hot. Tr. 116-17. The "warm" stand did not ignite the belt, even after it was stopped. As Gallick explained, while the belt cannot catch fire while moving, even from a hot roller, there is more potential for heating when the belt is shut down and a stationary portion of the belt is continuously exposed to a heat source. Tr. 362.

Clearly, the belt was not on fire, as Radolec believed, nor was there any realistic possibility that the belt could have caught on fire by rubbing against the belt stand. While the condition may have become somewhat worse as mining continued, there is no credible evidence that it would have been reasonably likely to cause an adverse effect, either directly or indirectly, on the accumulations cited, which were 1,000 feet away, and upstream in the 230 foot-per-minute ventilation flow.<sup>12</sup>

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II Davis and Pierce, *Administrative Law Treatise* 118 (3<sup>rd</sup> ed.). Accordingly, there was no need to perform a "gatekeeper" function, as discussed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Rather, Gallick's testimony was allowed, subject to later challenge.

<sup>11</sup> For example, Gallick's testimony that the conditions were not S&S or hazardous has been accorded virtually no weight. Tr. 337-38.

<sup>12</sup> Radolec estimated, without any real foundation, that it had taken about one day for the belt to wear into the stand about one-quarter inch. Tr. 155-58. He also noted that belts are examined three times each day. Tr. 412. It is likely that a belt examiner would soon have

Radolec also believed that a belt roller, the bearings of which had failed, could become overheated by metal-to-metal contact, and ignite the belt and the coal on it. Gallick testified that studies had shown that a moving belt will not be ignited, even if coal is burning. Tr. 441-42. I find Radolec's belt ignition scenario entirely speculative and unfounded for the same reasons discussed above. Certainly, a bad roller in the area of the cited accumulations could present an ignition source. Gallick noted that the Bentley Report demonstrated that a bad roller could be a source of ignition, even though reportable fires from bad rollers were relatively rare. Tr. 361. However, the Secretary offered no evidence that there was a bad roller anywhere on the belt, and no evidence to establish that it was reasonably likely that a roller would fail in the area of the accumulations. Radolec walked the belt from the #11 crosscut to the #17.5 crosscut, where it was rubbing the stand and was shut down. He did not see any bad rollers. Tr. 425. Nor did he mention seeing any obviously bad rollers as he continued to walk the belt out to the tailpiece. While he may not have been able to detect a roller that was starting to fail while the belt was not running, a failed roller would have been very hot and most likely would have been identified even with the belt stopped. Cumberland's belt examiners were equipped with heat gun sensors to identify any rollers that might be hot. Tr. 227. Consequently, the possibility of a roller's bearing failing and creating a potential ignition source was significantly reduced. In addition, the accumulations were 18 to 24 inches away from the rollers.

#### Methane

The presence of methane can be a significant consideration in the S&S analysis, and Radolec relied on the fact that the Cumberland Mine produced over one million cubic feet of methane in a 24-hour period. However, there was very little methane in the area of the violation, nor was there likely to be. Radolec tested the atmosphere in the belt entry and found 0.4% methane, well below the explosive range. Tr. 82. The presence of methane in any significant concentration was unlikely because the belt entry was ventilated with a split of intake air that had not coursed through any other active workings. The Secretary argues that liberation of methane is unpredictable and that dangerous concentrations could occur at any time. However, it is well recognized that most methane is liberated when coal is being cut, i.e., at the active faces. See, e.g., *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). In the Cumberland Mine, any methane liberated at the faces would be coursed out the return entry, not the belt entry. Moreover, the mine has virtually no history of methane ignitions.<sup>13</sup>

#### Equipment

The only equipment operating in the area was the belt system itself. The electrical cables, switches and boxes have been addressed above, as have the possibility of bad rollers and belt

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discovered the condition and shut the belt down, as Duke did when he saw it.

<sup>13</sup> Cumberland had a major mine fire in 1987, a gob fire approximately three years earlier, and a recent electrical fire in a load center that was not reportable. Tr. 62, 131-32.

misalignments. Radolec believed that an injury was “highly likely to occur because of the nature of the very equipment that operates in a confined area.” Tr. 408. Referring to the belt drive unit, he described “big motors with the enormous hydraulic equipment and the heat that they . . . put off.” Tr. 409. It is apparent from that testimony, and from other explanations offered by Radolec, that he believes that conveyor belts, particularly newer belt systems that are substantially larger and more powerful than older systems, in themselves, pose a significant potential for catastrophic belts fires. He stated that his fire – methane explosion – dust explosion progression was not just a statement of possibilities, but “things that happen in the coal mines,” and if something happens once it is highly likely to happen again. Tr. 131. He further opined that “[i]t’s highly likely we are to encounter a coal mine fire any place in a coal mine, being that we are completely surrounded with the fuel of coal which is enhanced by methane.” Tr. 131. If his statements are accurate, it was highly likely that a fire would occur in the belt entry at the #25 to #30 crosscuts, even after the accumulations had been completely removed and the area had been bulk rock dusted.

There are several problems with Radolec’s catastrophic scenarios. First, the accumulations played virtually no role in his assessment that a belt entry engulfing fire was highly likely to occur and result in multiple fatalities. His testimony reflects his general assessment of dangers posed by modern belt systems, regardless of whether safety systems, such as CO monitors and fire suppression systems, are in place or whether unlawful accumulations are present. Second, his assessment is not supported by actual occurrences in the thousands of underground coal mines that have operated under MSHA’s jurisdiction over the past 28 years. With one notable exception, there have been no fatalities and no reportable injuries resulting from any reportable belt fire since at least 1979.

The exception, of course, was the belt fire at Aracoma’s Alma #1 Mine on January 19, 2006, in which two miners perished. It is apparent that the Aracoma fire figured heavily in Radolec’s assessment of the dangers posed by conveyor belt systems. However, Gallick explained, and Radolec also admitted, that there were several conditions unique to the Aracoma mine that resulted in the disaster. The fire suppression system at Aracoma’s belt drive unit, where the fire originated, had been turned off. Tr. 97, 127. Stoppings separating the escapeways from the belt entry were missing, such that the miners attempting to evacuate the mine were not protected from the products of combustion in the belt entry, and there were delays in the system for alerting miners to a fire and commencing evacuation from the mine.<sup>14</sup> In contrast, the belt drive unit at the Cumberland Mine, which was located about 5,000 feet from the accumulations, was protected by a substantial fire suppression system, including a “wall of water.” Tr. 373. Permanent stoppings separated both escapeways from the belt entry, and there was an operational CO monitoring system that would provide an automatic early warning to the working sections,

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<sup>14</sup> Aracoma’s multiple flagrant violations of safety standards recently resulted in a negotiated settlement of criminal and civil enforcement actions, with Aracoma pleading guilty to several criminal violations and agreeing to pay criminal fines and civil penalties totaling 4.2 million dollars.

and prompt immediate evacuation of the mine. Tr. 351. Additional safety measures were also present as a result of recent legislation, including lifelines to assure that miners would not lose their way during an evacuation, like those who perished at Aracoma, additional self-rescuing devices to provide breathable air for a longer period of time, and additional training requirements for miners on escaping such hazards. Tr. 352-53, 378-79.

While the Aracoma fire demonstrates that a major belt fire can result in fatalities, the conditions under which it occurred bear no resemblance to the conditions at the Cumberland Mine. It has little significance on the question of whether the cited accumulations were S&S, and does not lend appreciable support to Radolec's determination that the accumulations were highly likely to result in a fatality.

The Commission and courts have observed that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995). Radolec certainly qualifies as an experienced MSHA inspector. He has been performing that function for fifteen years, and had 26 years of mining experience before becoming an inspector. However, aside from a general reference to his initial training, he did not relate his explanation of why he determined that the violation was S&S to his experience or training, nor did he cite any reports, studies or other information to support his determination. He was asked to explain the bases for his belief that the violation would be highly likely to result in fatalities, e.g., to cite personal experience, studies, reports, or other data, especially in light of MSHA's Bentley Report, which documented the fact that from 1980 to 2005 there were 63 reportable belt fires none of which resulted in a reportable injury, much less a fatality. Tr. 148-53, 415-20. His attempts to explain were largely non-responsive, and he felt that the Bentley Report actually enhanced his S&S finding. Tr. 95. He eventually made a general reference to his initial training as an inspector, some 15 years ago, and expressed his belief that the training had been based upon reported incidents. Tr. 426-28.

Severini, who also observed the accumulations, concurred with Radolec's determination on gravity. He has more limited experience as an MSHA inspector, having been an inspector for three years, and a supervisory inspector for one year. Tr. 166-67. He had over 25 years of previous mining experience, almost all of it as a manager. Tr. 167-69. Severini did not explain, in detail, why he agreed that the violation was S&S, or whether he believed that the catastrophic scenarios related by Radolec were reasonably likely to occur. When asked about ignition sources in the area of the accumulations, he identified only the "belt itself." Tr. 173. He later referred to the belt rubbing on the stand, but did not explain how that could have been an ignition source for the cited accumulations. Tr. 194. While he concurred with Radolec, his characterization of the violation and his assessment of whether other violations he had cited were S&S, suggest that he did not have a strong opinion that the violation was S&S.<sup>15</sup>

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<sup>15</sup> Severini had issued a violation in a track entry at the Cumberland Mine for an accumulation of float coal dust over an extensive area, rating it non-S&S and unlikely to result in

My impression of his testimony on this issue is that he reluctantly supported Radolec because he did not want to, in essence, overrule him on a second violation. As previously noted, and as discussed below, Radolec had also issued a section 104(d)(1) order, citing an accumulations violation based upon trash he had observed at two locations along the track entry. Ex. G-8. Radolec had evaluated the violation as S&S, determined that it was “highly likely” to result in a “permanently disabling” injury, and that 10 persons were affected. The following day, Severini reviewed the order with Radolec. As a result of that meeting, Radolec amended the violation to delete the S&S designation and changed the gravity findings to “unlikely” to result in a “No Lost Workdays” injury, and that no persons were affected. Ex. G-8. While Severini and Radolec explained that the changes were mutually agreed upon, it was Severini’s review that prompted the substantial amendments, and neither party cited any new information as a justification for the changes. Tr. 457-60; 507-08, 511-12.<sup>16</sup>

While it is possible that the fire/explosion sequence described by Radolec might or could occur, that is not sufficient to establish that it was reasonably likely that an injury producing event would occur as a result of the violation. Radolec’s and, to a lesser extent, Severini’s determinations that the violation was S&S are, by virtue of their positions, entitled to weight. However, their opinions were not based upon or explained in relation to their experience, or training, and they will be afforded weight only insofar as they are supported by the evidence.

Considering all of the *Enlow Fork* factors, I find that the violation was not S&S. The accumulations were not particularly extensive, only potential ignition sources were in the area, there was very little methane, and, aside from the remotely located belt rubbing the stand, there were no defects in the belt system. A significant factor is that the accumulations were not close to being in contact with the rollers or belt, and were not being added to. Here the focus is on the presence of an ignition source for these accumulations. While several possible ignition sources were identified, there was no evidence that any of them was reasonably likely to ignite the accumulations.<sup>17</sup> The potential ignition sources identified are present in all conveyor belt entries.

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a lost workdays injury, and cited conditions that differed from those on October 4. Tr. 181, 190-91. He also had issued a violation for accumulations that were in contact with several rollers and were being ground up in the tailpiece, and rated it as S&S, and highly likely to result in a lost workdays injury. Tr. 185-86. He explained the difference between his evaluation of the latter violation and Radolec’s evaluation of the instant violation as, being a judgment call and “everyone has to make that call themselves.” Tr. 192.

<sup>16</sup> Radolec’s initial evaluation of the violation was that the trash could propagate a fire and explosion originating in the belt entry, if it blew out a stopping between the belt and track entries. Tr. 458. Upon review, it was determined that that was not a “real reasonable case.” Tr. 459.

<sup>17</sup> The presence of float coal dust, even though it had been deposited on limited rock dust, enhanced the possibility of an injury producing event occurring *if an ignition occurred*.

If they are sufficient to make an accumulations violation S&S, then virtually all accumulation violations in belt entries would be S&S. Clearly, that is not the case. I find that the violation was unlikely to result in a lost workdays injury, and that one person was affected.<sup>18</sup>

The finding that the violation was not S&S is consistent with other cases decided by the Commission and its Administrative Law Judges. *See Solid Energy Mining Co.*, 30 FMSHRC 823 (July 2008) (ALJ) (accumulations violation, consisting of dry textured float coal dust on mine floor, belt structure and water lines for distance of 642 feet, in mine that liberates in excess of 250,000 cubic feet of methane in a 24-hour period, held not S&S - there was no loose coal, the dust was paper thin, inspector's conclusion regarding dust's explosive nature was based only on the color of the dust, he acknowledged that he observed no ignition sources in the vicinity of the dust, and he found no methane in the area); *Jim Walter Resources, Inc.*, 30 FMSHRC 834 (July 2008) (ALJ) (accumulations violation consisting of float coal dust, black in color, on top of rock dust, on roof, ribs, belt frame and floor extending 867 feet, with coal fines in layers of rock dust for 1,451 feet, up to 48 inches deep, potential ignitions sources consisted of electrical cables and possibility of belt roller going bad, but no evidence of the likelihood of an ignition by the electrical equipment or likelihood that a roller would go bad in a manner to cause an ignition, and no defects were found in electrical equipment or rollers); *Amax Coal Co.*, 19 FMSHRC 846 (May 1997) (S&S finding affirmed where accumulations were 6 inches to 3 feet deep for 85 along belt and 200 feet along intersecting belt, accumulations were covered with float coal dust and an ignition source was present where the belt was running for 15 feet on dry, packed coal and loose coal); *Clinchfield Coal Co.*, 21 FMSHRC 231, 238-42 (Feb. 1999) (ALJ) (accumulations 2 to 24 inches deep extending 3,000 feet, float coal dust extending 450 feet, ignition sources presented by 37 places where rollers were running in the accumulations or were stuck and 11 places where rollers were missing and the belt was rubbing on the stand); *Maple Creek Mining, Inc.*, 22 FMSHRC 742, 754-56 (June 2000) (ALJ) (accumulations 4 feet by 4 feet and 1 foot deep and ignition source presented by tail roller running in accumulations and belt rubbing on stand in close proximity to accumulations, and stand was too hot to touch).

#### Unwarrantable Failure - Negligence

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

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Radolec posited that the dust and fines would ignite, eventually resulting in a methane explosion that would put the dust into suspension producing a dust explosion. Tr. 82-84. Gallick opined that a dust explosion would almost always require a methane explosion to put the dust into suspension, and that it would need to be very thick in the air to be explosive itself. Tr. 369-70.

<sup>18</sup> The Secretary argues that several other violations issued by Radolec, which were not at issue in these cases, support the S&S finding. Tr. 86, 120-24. For the reasons cited by Gallick, I find that they are largely irrelevant on the S&S issue. Tr. 369, 394.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("R&P"); see also *Buck Creek [Coal, Inc. v. FMSHRC]*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

The Secretary argues that the violation was the result of an unwarrantable failure because the conditions were extensive, obvious, posed a high degree of danger, and existed for several days. Moreover, management was on notice of the conditions, because they had been repeatedly noted in reports of preshift examinations, and numerous prior violations had put Cumberland on notice that additional efforts were needed to address accumulations hazards. Not surprisingly, Cumberland disagrees with each of these arguments.<sup>19</sup>

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<sup>19</sup> The Citation was issued pursuant to section 104(d)(1) of the Act, which requires that a violation be both S&S and the result of an unwarrantable failure. Because the violation has been held not to have been S&S, it is technically unnecessary to decide the unwarrantable failure issue. However, it is necessary to address the issue of Cumberland's negligence, which is alleged to

As noted in the discussion of S&S, the accumulations were fairly extensive and, while they were only about one-half inch deep in the traveled areas of the entry, they should have been reasonably obvious to preshift examiners. The Secretary argues that, because the violation was highly likely to result in fatalities and was S&S, that it posed a high degree of danger. However, the violation was found not to have been S&S. Rather it was unlikely to result in an injury resulting in lost work days. The accumulations were not being added to. Some rock dust had been applied, and they were damp or wet in areas, particularly close to the feeder.<sup>20</sup> Tr. 49. The belt rubbing on the stand at the #17.5 crosscut did not pose a realistic possibility of an ignition of the accumulations, and there were no other ignition sources identified that presented a reasonable likelihood that an ignition would occur. Consequently, while the accumulations constituted a hazard, they did not pose a high degree of danger.

The Secretary places great emphasis on the fact that Cumberland's preshift reports for several days prior to the violation showed that the area in question needed rock dusting, and argues that Cumberland had ample knowledge of the conditions. As Radolec explained, his review of the operator's preshift reports showed entries dating back to September 22, 2007, stating that areas of the belt entry from various crosscuts to the tail piece "needs dusted." Tr. 66-67, 138; ex. G-5. The preshift reports are signed by the Assistant Foreman, the Mine Foreman and the Superintendent. Ex. G-5. Radolec and Severini determined, based on those notations, that Cumberland's higher level managers had actual knowledge of the violation for several days, and took no action to abate the condition. Tr. 89-90, 178-79.

Cumberland takes issue with the Secretary's argument. It points out that the "needs dusted" notations were made in a section of the report titled "Violations Observed and Reported; Violation or Condition." Immediately below that is another section of the report, entitled "Dangerous and Hazardous Conditions Observed and Reported." The word "none" was entered in the hazardous conditions section of the reports. Konosky testified that there was a very significant difference between the two sections of the report. Any dangerous or hazardous conditions would be reported in that section and would be immediately attended to, as required by the Secretary's regulations. He also related that mine managers reviewing the reports would pay particular attention to hazardous conditions and assure that they were addressed, whereas conditions noted in the "violation or condition" section, would be addressed in due course.

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have been high. Other citations and orders are also at issue, and the S&S finding may not become final. For the sake of judicial economy the issue of unwarrantable failure, as well as negligence, will be addressed.

<sup>20</sup> There was conflicting testimony on whether the accumulations were wet or dry. Radolec, Severini and Lemenovich testified that they were dry. Tr. 79, 175, 202. Konosky, Naim and Perry testified that they were wet. Tr. 223, 240, 286. Duke testified that they were generally dry, but may have been wet or damp near the feeder. Tr. 49. It is well settled that wet or damp accumulations can dry out and ignite, and do not establish that a violation is not S&S. See *Utah Power & Light*, 12 FMSHRC 965, 969 (May 1990).

Tr. 228-30. John Nairn, Cumberland's continuous miner manager, had over thirty years of mining experience, and also testified that there was a difference in the types of conditions that would be reported in the two sections of the preshift report. Hazardous conditions would be noted in that section, and would be immediately attended to, i.e., either corrected or the area dangered off. Other conditions reported in the first section would be looked at and dealt with in the regular course of business. Tr. 254-55. Based on this testimony, and the nature of the reports themselves, Cumberland argues that the "needs dusted" entries were merely routine notations that bulk rock dusting had yet to occur in relation to the most recent belt move, and did not indicate that a hazardous condition existed. Radolec and Severini were of the opinion that, in their experience, there was no difference between the two sections of the report, and that any entries were regarded as notifications of hazardous conditions. Tr. 100, 179-80.

As the section advanced, the feeder and belt tailpiece were periodically moved further inby, extending the belt. Belt moves were done about twice a week. Tr. 242. Cumberland's standard procedure was to clean up loose coal with a scoop from the tailpiece to the next crosscut inby, where the feeder was going to be moved. Loose coal around the feeder would be shoveled onto the belt. The area then would be fling dusted, using a mechanical duster mounted on a scoop, and the feeder and tailpiece would be moved inby one crosscut. The construction department would be notified and bulk rock dusting would be done after the move. Tr. 242-45. Cumberland argues that the entries, "needs dusted," merely are reports that the bulk dusting had not yet occurred. A comparison of the preshift reports with reports of bulk rock dusting introduced by Cumberland lends some credence to Cumberland's explanation. The miner crews that perform bulk rock dusting submit a report, identifying where rock dust was applied, and how much of it was dispensed. Tr. 245-50; ex. R-3. Preshift reports for September 22, 23 and 24, indicate that the 8 Butt belt entry from crosscut #17 to the tailpiece needed dusting. Ex. G-5 at 22-27. A rock dust report for September 24 indicates that bulk dusting was done that day from crosscut #17 to crosscut #19. Ex. R-3. A later preshift report for September 24, and subsequent reports, reflect that fact, because the #17 to #19 area is no longer identified as needing rock dust. Ex. G-5 at 29-33. Preshift reports for September 24 through 27 show the area from crosscut #19 to the tailpiece needing dust. A rock dust report for September 27, indicates that dusting was done from crosscuts #19 to #22. Preshift reports thereafter indicate that that area no longer needed dusting. Likewise, a rock dust report for October 2 indicates that the area from crosscuts #23 to #25 was dusted, and preshift reports thereafter indicate that the area from crosscut #25 outby no longer needed dusting.<sup>21</sup> Curiously, preshift reports from September 25 through October 4 state that the area between crosscuts #11 and #16 needed dusting, and there are no rock dust reports showing that that occurred. On his October 4 inspection, Radolec walked the area from crosscut #11 inby and found no hazardous conditions. Tr. 69, 93.

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<sup>21</sup> The reports are not entirely consistent. A rock dust report for October 3 states that bulk dusting was done in the belt entry between crosscuts #24 and #27. Ex. R-3. However, preshift reports 9:00 p.m. on October 3 and 5:00 a.m. on October 4 continue to show a need for bulk dusting from crosscut #25 inby. Ex. G-5 at 84, 87.

Preshift examiners are required to "examine for hazardous conditions," make a record of any hazardous condition found, and either immediately correct it or post the area with a conspicuous danger sign. 30 C.F.R. §§ 75.360(b), (f), 75.363. Cumberland's records of preshift examinations reported that no "Dangerous and Hazardous Conditions" were found during the examinations. Those conducting the examinations and reporting the results, noted conditions in the "violation or condition" section of the report that they did not consider hazardous, and mine managers reviewing the reports did not consider them to be reports of hazardous conditions. Neither preshift examiners, nor higher level managers, took steps to immediately correct such conditions, or to bar miners from entering the areas until the conditions were corrected. They obviously did not consider them to be hazardous conditions that required such attention.

The notations that portions of the belt entry needed rock dusting, and that the condition had been reported, do not, on their face, indicate the existence of a hazardous condition. A manager, reviewing the reports in sequence, would have seen a need for the application of bulk rock dust, that the condition had been reported, and that bulk rock dust application was progressing in the entry. The area reported as needing dusting progressed from #17 crosscut on September 22, to the #22 crosscut on September 27, to the #25 crosscut on October 2.

I find that, while the preshift reports put higher level mine managers on notice that bulk rock dusting was yet to occur, they did not notify them that any hazardous condition existed, or that the cited accumulations existed. Cumberland is, nevertheless, chargeable with knowledge of the accumulations, because preshift examiners act as agents of the operator when conducting such examinations. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-96 (Feb. 1991); *Pocahontas Fuel Co.*, 8 IBMA 136, 146-48 (Sept. 1977), *aff'd*, 590 F.2d 95 (4th Cir. 1979). From September 30 through October 3, eight different preshift examiners noted that the conditions in the belt entry from crosscut #25 inby needed to be bulk rock dusted. Ex. G-5 at 63-84. They obviously did not regard the conditions as hazardous, and needing immediate attention. While the preshift examiners are chargeable, as agents of Cumberland, with knowledge of the accumulations, higher level managers had no such knowledge.

The Secretary argues that Cumberland was put on notice that increased efforts to address accumulations were needed because it was cited 63 times in the prior two-year period for violations of section 75.400. Radolec took that into account in determining to cite the violation as an unwarrantable failure. Tr. 93, 140-41. However, he acknowledged that the standard applies to a wide variety of situations, and is the most cited standard in the nation. Tr. 140-41. While Severini agreed with Radolec's assessment of negligence, he did not find the fact that Cumberland had been cited for 63 violations of section 75.400 to be of significance. It did not affect his assessment of whether the violation was the result of an unwarrantable failure, because section 75.400 covers a broad range of conditions, such that 63 violations was "just not a true number to this situation." Tr. 177-78. I agree with Cumberland's argument that to establish that it had been put on notice that additional compliance efforts were needed, the Secretary was required to show more than a history of prior citations for violations of the broad standard, and find that Cumberland had not been put on notice that additional compliance efforts were needed.

Considering all of these factors, I find that the violation was not the result of Cumberland's unwarrantable failure, and that its negligence was moderate to high. The fact that eight different preshift examiners, including Naim, did not regard the conditions as hazardous reflects more an honest disagreement over whether a hazardous violation existed than aggravated conduct constituting more than ordinary negligence.

Order No. 7025469

Order No. 7025469, which was issued in conjunction with Citation No. 7025468, alleges a violation of 30 C.F.R. § 75.363(a), which requires that hazardous conditions found during preshift examinations be corrected immediately or be posted with a conspicuous danger sign and remain so posted until the hazardous condition is corrected. The alleged violation was described in the Condition and Practice section of the Order as follows:

The mine operator failed to correct immediately a hazardous condition reported in the pre shift examination book. The hazardous condition recorded stated the condition 8 Butt conveyor belt needed rock dusted from No. 25 to 30. This hazardous condition was first recorded in the pre shift record book on the surface on 9/25/2007, 8:00 P.M. to 8:40 P.M. and [continued] to be recorded with out any corrective action being taken to correct the condition including this days pre shift examination 10/04/2007 day shift. An inspection of this hazardous condition was conducted this day and as a result of this days inspection, Citation No. 7025468 was issued for a violation of 75.400 (accumulations of combustible materials existing). Also during the time the inspection was being conducted no miners were observed working to correct the hazardous condition recorded in the pre shift record book. This type of violation has been issued 0 times during the last 2 years at this mine.

Ex. G-6.

Radolec determined that it was highly likely that the violation would result in a fatal injury, that the violation was S&S, that 13 persons were affected, and that the operator's negligence was high. The Order was issued pursuant to section 104(d)(1) of the Act, and alleged that the violation was the result of the operator's unwarrantable failure to comply with the mandatory standard.

As noted in the discussion of Citation No. 7025468, I found that notations in the preshift reports that areas of the belt entry needed rock dusting did not report a hazardous condition that required immediate correction under the preshift regulations. However, I did find that the accumulations violated section 75.400. While the violation was not S&S, the accumulations presented a measure of danger to safety, and should have been specifically identified and reported as such by the preshift examiners. As Radolec stated, to be properly reported in the preshift report, the specific conditions, as noted by him, should have been reported. Tr. 99, 161.

Consequently, the regulation was violated.

For the same reasons that I found the accumulations violation was not S&S, I find that this violation was not S&S, but was unlikely to result in a lost workdays injury to one miner. Likewise, I find that it was not the result of Cumberland's unwarrantable failure and that Cumberland's negligence was moderate to high.

Order No. 7025481

Order No. 7025481, which was issued on October 11, 2007, pursuant to section 104(b) of the Act, alleges that Cumberland failed to timely abate the accumulations violation that was the subject of Citation No. 7025468. Radolec's rationale for issuing the Order was described in the Condition and Practice section as follows:

No effort was made to remove accumulations of dry black coal fines in the conveyor belt entry of the 8 Butt 027-0 (M.M.U.) number one entry between number 29 and 30 cross cut, after an extension of time had been granted from the initial citation termination time. An extension of time was granted on 10/09/2007, 12:45 P.M. for the condition to be corrected by 2:45 P.M. Upon inspection of the area on 10/11/2007 10:30 [A].M. the accumulation of coal fines still existed at the same location and no miners were at work to correct the condition when inspected. This type of violation has been cited 65 times at this mine during the past two years.

Ex. G-10.

Section 104(b) of the Act provides:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(b).

The Secretary contends that, in the area between the #29 and #30 crosscuts, the original accumulations cited on October 4 had not been cleaned up adequately, were present on October 9

when additional time for abatement was granted, and remained in their original condition on October 11 when Radolec issued the section 104(b) order. Cumberland argues that the original accumulations in that area had been cleaned up and that any accumulations present on October 11 were most likely deposited on October 10, such that issuance of the order was an abuse of discretion.

In order to present a prima facie case that a section 104(b) withdrawal order was properly issued, the Secretary must prove that the originally cited condition continued to exist after the period allowed for abatement expired. *Mid-Continent Resources, Inc.*, 11 FMSHRC 505, 509 (Apr. 1989). The operator may rebut the Secretary's prima facie case by showing that the conditions in the citation had been abated within the period allowed, but that they recurred. The operator may also challenge the reasonableness of the time period set for abatement, or the Secretary's refusal to extend the period. *Energy West Mining Co.*, 18 FMSHRC 565, 568 (Apr. 1996). The burden is on the operator "to bring to MSHA's attention any specific abatement measures justifying extension of the abatement period." *Energy West Mining Co. v. FMSHRC*, 111 F.3d 900, 904 (D.C. Cir. 1997). In evaluating whether an inspector has abused his discretion in issuing a section 104(b) withdrawal order, in lieu of extending the abatement period, the following factors should be considered: 1) the degree of danger that extension would have caused to miners; 2) the diligence of the operator in attempting to meet the date originally set for abatement; and, 3) the disruptive effect that an extension of time, or a failure to extend the time, would have had upon operating shifts. *Youghiogheny and Ohio Coal Co.*, 8 FMSHRC 330, 339 (Mar. 1986).

The underlying citation was issued on October 4, 2007, at 8:40 a.m., and identified in detail the affected areas. The originally specified abatement deadline was 12:00 noon, on October 4. However, because Radolec did not return to the mine until October 9, the abatement time was, in effect, extended from three hours and 20 minutes to five days, including a weekend and a holiday. On October 4, when the citation was issued a crew of eight to ten miners began to clean up the accumulations. They were told by Konosky to clean from rib to rib, and worked for about an hour until the inspection party left, and continued to work thereafter. Preshift reports for October 4 examinations noted that the area was being worked on. The 9:00 p.m. report showed that the area from #25 to #29.5 had been "corrected," and that the area from #29.5 to the tailpiece at #30.5 had been "reported." Ex. G-5 at 92. The report of the 5:00 a.m. examination on October 5 noted that the #29.5 to tailpiece conditions had been "corrected," and subsequent reports noted no conditions in the area. Ex. G-5 at 93. Rock dust reports purport to show that bulk dusting was done on October 4 from crosscut #25.5 to the tailpiece. Ex. R-3.

When Radolec examined the area on October 9, he was satisfied that about 75% of the cleanup had been done and the area had been well dusted. However, he believed that the area between crosscuts #29 and #30 had not been cleaned. He spoke to Fred Evans, a Cumberland safety representative, about the failure to clean, and gave Cumberland another two hours, until 2:45 p.m. to complete the abatement. Ex. G-4. Evans believed that the area was clean, under any realistic standard, noting that "you would have had to scrape it to get it any cleaner."

Tr. 267. He explained that the continuous miner's round cutting head left indentations in the mine floor that a scoop could not completely clean. Tr. 271. In his opinion, the only difference between the areas #29 to #30 and #25 to #29 was that the latter had been heavily rock dusted. Tr. 274. He got two miners to scrape and clean the area. Radolec gave the men a safety talk and, with Evans, marked where cleaning needed to be done with red tape. Evans checked with the shift foreman later, and was told the cleanup had been completed. He also told the afternoon shift foreman to check on the area, and was advised the next day that it "looked alright." Tr. 269. Preshift reports for October 9 show that the area from crosscut #29 to the tailpiece needed dusting, and by 9:00 p.m. had been "corrected."

When Radolec returned on October 11 he observed what he believed to be the same conditions he had observed two days earlier, and concluded that no more work had been done after he left. At 10:30 a.m., he issued the section 104(b) order, which effectively shut down the belt and ceased production on that section. He wanted the fines removed and the area blanket dusted. At noon he was advised that the work had been done and that the order should be lifted. However, he required that more rock dust be applied, and eventually terminated the order at 1:20 p.m. Five miners had worked on the cleanup effort, and others carried 40 pound rock dust bags to the area.

Walter Lemenovich, an MSHA trainee inspector, accompanied Radolec on October 11, and confirmed the existence of dry accumulations of coal fines under the belt ranging from zero to four inches deep. Radolec told him, upon seeing the conditions, "this is where they stopped cleaning." Tr. 203. Lemenovich overheard miners in the "dinner hole" questioning why they were shoveling, apparently suggesting that they did not feel that whatever loose coal was there needed to be removed. Tr. 205. Perry, who was with Radolec on the 11th, thought that the area from #25 to #30 looked "pretty nice." Tr. 286. He could see shovel marks in the #29 to #30 area, and small irregularly spaced piles of wet fines 18 to 24 inches in diameter and 0 to 2 inches deep, for about 80 feet. Tr. 287-89. Radolec kicked at the piles, and inquired "what's this?" To which Perry responded I think it's pretty good. According to Perry, Radolec then whirled and showed him a 104(b) order. Tr. 288.

Cumberland's first argument is that its documented abatement efforts prove that the conditions were completely abated, and that any coal fines present on the 11th could not have been the same material that was cited on the 4th or was there on the 9th. It notes that a preshift report for October 10 shows spillage at the tailpiece. However, that report also shows that the condition had been "corrected," and no one suggested to Radolec that the material that was under the belt on the 11th between crosscuts #29 and #30 was the result of spillage that occurred on the 10th at the tailpiece which was located at crosscut #30.5. As noted above, Radolec testified, under questioning by Cumberland's counsel, that no additional material had been deposited between the 4th and the 9th, i.e., there was no ongoing spillage in the area, and that it was a "pretty good belt." Tr. 133. I find that there were irregularly spaced "piles" of coal fines and loose coal, approximately 24 inches in diameter, ranging from zero to two to four inches deep, located under the belt from the #29 to the #30 crosscut, and that it was part of the accumulations

that had been cited on October 4. Cumberland's argument that the material was newly deposited is not supported by the evidence.

In deciding to issue the section 104(b) order, Radolec necessarily decided that no additional time should be allowed to abate the condition. It is appropriate, therefore, to assess whether he acted reasonably, or arbitrarily, by analyzing the factors identified in *Youghiogheny*. A further extension of time, e.g., two more hours, would have allowed the limited accumulations to remain in a decreasing amount over another one-to-two-hour period.<sup>22</sup> I have held, in relation to the October 4 citation, that the entirety of the accumulations on October 4 did not present a high degree of danger to miners. While Radolec determined that the violation was S&S, he did not consider issuing an imminent danger order pursuant to section 107(a) of the Act. By October 9, at least 75% of the area had been cleaned and heavily dusted, and some rock dust had been deposited in the #29 to #30 area. While there were some irregular piles of coal fines present, the measure of danger to miners by allowing additional abatement time, e.g., four hours, would have been minimal.

Cumberland had been reasonably diligent in abating the violation, at least up to a point. Substantial effort was expended on October 4, when the violation was cited. Preshift and rock dust reports confirm efforts to correct the cited conditions. Additional efforts were expended on October 9, when Radolec determined that the condition had not been completely abated. Radolec was convinced that the two miners who were shoveling on the 9th stopped when he left the area and that no further work was done. Completion of the abatement effort on October 11 consumed about three hours of work by a crew of five miners, plus rock dust carriers. About half of that time was devoted to cleaning up the accumulations. As noted above, I find that Cumberland exhibited diligence in abating the violation, but that it could have been more diligent by assuring that the miners who started cleaning on the 9th completed the job.

Issuance of section 104(b) order is a very powerful tool in the Secretary's enforcement arsenal. An inspector can force stoppage of production, without prior notice and opportunity for a hearing, and substantial disruption of mining operations can occur. Shutting down the belt caused disruption of that regular production shift. However, it may not have been as disruptive as if it had happened at a different time. Lemenovich testified that Cumberland normally shut down for a half day on Thursdays (October 11, 2007, was a Thursday). No witness contradicted that testimony. The 104(b) order was issued at 10:30 a.m. While it was not terminated until 1:20 p.m., its actual impact may have been limited to a shorter period.

Whether Radolec abused his discretion by issuing the withdrawal order is a very close question. There is evidence that he may have been unreasonable in insisting on excessive

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<sup>22</sup> From the evidence regarding the abatement effort, it appears that the fines would have been cleaned up in approximately four hours, considering that a smaller crew would have been available. Distribution of rock dust would have had to occur after the cleanup.

abatement measures.<sup>23</sup> The measure of danger to miners that would have attended another brief extension of the abatement period would have been small, and the disruption caused by issuing the order was significant. Had he issued it on October 9, when he first observed that accumulations remained in the area, it is doubtful that the order could have been sustained. However, he did not do so. Rather, he explained in some detail what he believed to be necessary abatement actions, and marked specific areas in question with red tape to assure that there was no misunderstanding about what needed to be done. Two days later, the area had still not been cleaned and dusted to his satisfaction. Bohach protested that issuing the order was “very strong” enforcement action and that the problem may have been the result of miscommunication. Tr. 435. The order certainly was strong enforcement action, but the conditions that lead to its issuance were not the result of miscommunication.

Upon consideration of all the evidence, I find that Radolec did not abuse his discretion in issuing the section 104(b) withdrawal order.<sup>24</sup> I am troubled by the fact that, in deciding to issue the order, he apparently did not specifically weigh the three factors identified in *Youghioghny*. However, on balance, the lack of diligence that he perceived following his specific instructions on October 9, coupled with the small measure of danger to miners that would have been posed by briefly extending the abatement time, outweighed the disruption caused by issuance of the order.

#### Order No. 7025480

Order No. 7025480 was issued on October 11, 2007, and alleges a violation of 30 C.F.R. § 75.400, which was described in the “Condition and Practice” section of the Order as follows:

An accumulation of combustible material consisting of wooden pallets, plastic 1 gallon containers, open empty 5 gallon oil cans, card board boxes, ventilation cloth, brown paper bags, resin glue boxes, 3 sheets of card board and 6 crushed 5 gallon oil cans existed at number 10 cross-cut. Also an accumulation of combustibility material consisting of a large garbage bag full of 8 open empty 5 gal hydraulic oil cans and plastic 5 gallon containers existed in the cross-cut of number 20 cross-cut. This condition exist along the active coal producing 8 Butt 027-0 (M.M.U.) intake escapeway ventilation air course and track haulage. This condition was reported in the pre-shift record book on the surface dated 10/06/2007 08:00 P.M. to 09:25 P.M. at number 10 cross-cut and then on

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<sup>23</sup> As noted above, Duke thought that some unnecessary shoveling of rib sloughage had been required on October 4. In addition, several Cumberland managers, including Evans, who had retired by the time he testified, were of the opinion that the area was clean under any reasonable definition of the term.

<sup>24</sup> Cumberland argues that section 104(b) orders cannot be issued for failures to abate citations issued pursuant to section 104(d) of the Act. I reject that argument, as one other ALJ has. *Pretzel Excavating*, 12 FMSHRC 1308, 1317-18 (June 1990) (ALJ).

10/09/2007, 12:35 P.M. to 01:35 P.M. report of garbage at number 20 cross-cut along with the garbage at number 10 cross-cut and continued including in the pre-shift record book for this dayshift, 10/11/2007. This type of violation has been cited 64 times at this mine in the past two years. Also this is a mine that liberates methane in excess of 1 million Cu. Feet of methane gas in a 24 hour period and is on a M.S.H.A. 5 day spot inspect schedule.

Ex. G-8.

As issued, the Order alleged that it was highly likely that the violation would result in a permanently disabling injury, that the violation was S&S, that 10 persons were affected, and that the operator's negligence was high. The Order was issued pursuant to section 104(d)(1) of the Act, and alleged that the violation was the result of the operator's unwarrantable failure to comply with the mandatory standard. However, when Severini reviewed the Order with Radolec on October 12, 2007, it was modified to allege that it was unlikely that the violation would result in an injury, that the violation was not S&S, and that no persons were affected. The reasons for the modification of the Order were stated as:

After farther review and evaluation by the issuing coal mine inspector. Of all the facts surrounding. For this type of accumulation of combustible material and there location. To add into a acceleration of a coal dust or methane gas explosion. It has been determined that this type and amount of combustible materials and location of these materials. That they would not be a farther enhancement to a coal dust or methane gas explosion propagation. This determination has been evaluated for this particular condition, location and time. This order is being modified to reduce the gravity of the subject order. (no corrections made)

Ex. G-8.

#### The Violation

There is no dispute that the materials cited as trash were present, as Radolec described them, at the #10 and #20 crosscuts, in the track entry. Perry agreed that the materials were at those locations. Tr. 517. Radolec noted in the Order that the trash at crosscut #10 had been noted on preshift reports since October 6, and that the trash at crosscut #20 had been noted since October 9. Ex. G-8. At the hearing he testified that the conditions had been reported since September 28. Tr. 463. He was mistaken. While the preshift reports show that trash had been noted in the haulage entry at crosscuts #10 and #20 from September 28 to October 1, the condition was noted as "corrected" on October 1, and there are no reports of trash at either location until 9:00 p.m. on October 5, when trash was noted at crosscut #10. Ex. G-5 at 62-70, 97. Trash was not noted at crosscut #20 until October 9. Ex. G-5 at 13.

The Secretary's regulations require that mine operators establish a program for regular cleanup and removal of combustible materials. 30 C.F.R. § 75.400-2. The provisions of the program are not subject to MSHA approval, and thus are largely within the mine operator's discretion. Cumberland's cleanup program provided that trash was to be hauled to the section supply point "as necessary to facilitate its removal from the mine." Ex. G-9. Nairn explained that active mining generates a great deal of trash, as is evident from the descriptions of the cited trash deposits. Tr. 533-34. Removal of trash is an ongoing process, and is done on a shift-by-shift basis. Tr. 532. Typically, it is done on the midnight shift, when supplies are delivered to the section. An empty supply car, or garbage car, would be loaded with trash and taken out of the mine. Tr. 529-30. There is no set schedule for trash removal. Tr. 463, 521. It might occur during the same shift it was deposited, or could take several shifts if an empty car on which to load the trash was not available. Tr. 533-34. The section's trash was accumulated at crosscut #20, a designated location, and was placed in a large plastic bag hung on the rib. Tr. 513-14. Unbeknownst to Radolec, Cumberland also had an outby work site where a de-gas hole was being drilled. Tr. 467, 515. Crosscut #10, at the track entry, was the designated location for the temporary deposit of trash generated by that operation. Tr. 515, 527-31. Crosscuts #10 and #20 were designated areas for the accumulation and removal of trash under Cumberland's cleanup program, and the preshift reports show periodic notations of trash at those locations. Radolec placed considerable significance on the fact that the trash was not at crosscut #25, which he believed was the section supply point. Tr. 484. However, whether the #20 and #10 crosscuts were "section supply points," is not material to whether a violation was committed. As Radolec explained in response another question, you have to apply common sense to an evaluation of the process, and it appears that designating those points as trash collection locations was not a deviation from the cleanup program. Tr. 491-92.

As observed in other reported decisions, the standard does not require that trash be removed from a mine immediately. *See, e.g., Basin Res. Inc.*, 19 FMSHRC 711, 717-18 (Apr. 1997) (ALJ). However, if a significant accumulation of combustible trash is allowed to remain in the mine for an unreasonable period of time, section 75.400 may be violated. *Basin Res. Inc.*, 19 FMSHRC 1391, 1403 (Aug. 1997) (ALJ). As described by Cumberland's witnesses, while there was no set schedule for removal of trash, it typically would have been removed within 24 hours. Tr. 533-34. As Perry stated, it generally doesn't sit for days, and if it has not been removed in a week, someone is not doing his job. Tr. 521.

I place little significance in the fact that there was trash at crosscut #20. That was a designated trash accumulation site for the section, and had been cleaned on October 1. No notations of the existence of trash at that location appear in the preshift reports until October 9, less than two full days before the issuance of the Order.<sup>25</sup> While its presence for that length of time is of concern, the fact that the trash was collected in a large bag which was practically full,

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<sup>25</sup> Severini observed trash at the #20 crosscut on October 4, and discussed its presence with Cumberland personnel. The condition was not cited as a violation, and there is no evidence that the trash, which was at the section's trash collection site, remained there until October 11.

and was located at a designated point for removal appears to be consistent with the established cleanup program. The trash at crosscut #10, however, is a different matter. That trash was associated with the outby de-gas operation. It made sense to designate crosscut #10 as a place to accumulate the trash, rather than haul it inby to crosscut #20. However, it was a significant accumulation of largely combustible material and, judging from the preshift reports, had been allowed to remain in place since October 5, about 6 days. I find that Cumberland allowed a significant accumulation of combustible material to remain at the #10 crosscut in the track entry for several days. The trash was allowed to accumulate and was not cleaned up, in violation of section 75.400.

Cumberland makes several arguments challenging the violation. At least two do not require extended discussion. It argues that trash is not a hazard intended to be prevented by section 75.400, because it was not likely to cause a fire. Cont. Br. at 63-64. However, as noted in *Utah Power & Light Co.*, 12 FMSHRC 965 (May 1990), the case cited by Cumberland for the proposition, the standard addresses accumulations of combustible materials that can cause a fire “if an ignition source is present.” 12 FMSHRC at 968 (emphasis added). Certainly, the paper bags, wooden pallets, cardboard and plastic items could readily catch fire in the presence of an ignition source. Cumberland also contends that no reasonable person could anticipate that accumulations of trash that remain in a mine for several days could amount to a violation of the standard. However, the Commission has sustained violations of section 75.400 based upon accumulations of trash, and Cumberland itself has been cited for such violations in the past. *Jim Walter Res. Inc.*, 18 FMSHRC 508, 509-10 (Apr. 1996); Tr. 518.

Cumberland argues that there is no evidence to establish that the trash present on October 11 had been there six days earlier or at any point in the past. However, while I agree that Radolec’s reference to September 28 was an erroneous reading of the preshift reports, those reports indicate the presence of trash accumulations at the #10 from October 5 to October 11. While the Secretary’s witnesses did not personally observe the trash at those earlier times, and could not testify that it was, in fact, the same trash, it is reasonable to infer from the continuous reports of trash at that location, that a large portion of the trash observed on October 11 had been there since October 5.

#### Unwarrantable Failure

The violation, as modified, was not S&S, and was determined to be unlikely to result in an injury, involving “No Lost Workdays.” Ex. G-8. At the hearing, Radolec and Severini retrenched a little on their evaluation of gravity, stating that one miner was affected, rather than none, and describing a potential injury as smoke inhalation or burns. Tr. 460, 486, 509. Nevertheless, I find that the violation presented a low degree of danger to miners.<sup>26</sup> The trash

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<sup>26</sup> Radolec cited the fact that the mine is “gassy,” and is subject to 5-day spot inspections. He did not note that he tested the atmosphere in the track entry and found no methane. Tr. 470. Without more, I find the fact that the mine was gassy does not enhance the

accumulation at crosscut #10 was significant, occupying an area approximately 8 feet by 35 feet, as of October 11. It most likely was not that large on October 5, because it would have been added-to until the 11th. It was bagged or stacked at the trash loadout point for the de-gas project. Tr. 514-15, 528. I find that the condition was not extensive. It existed for six days, and mine management was on notice that the trash needed to be picked up and transported out of the mine. Cumberland appears to have been following its cleanup program. However, the intervals between trash pick-ups, particularly at the #10 outby work site, had been allowed to grow too long. As with the initial accumulations violation, Radolec placed great significance on the noting of the conditions in the preshift reports, believing that they had been identified as hazards to upper level management. Tr. 463-65, 467. However, as pointed out in the discussion of the initial citation, the notations were not in the "hazards" section of the reports, and Cumberland's examiners noted non-hazardous conditions in the reports.<sup>27</sup> Radolec also noted the fact that Cumberland had been cited 64 times for accumulations violations in the last two years. However, for the reasons expressed by Severini with respect to the coal accumulations citation, I find that fact insufficient to put Cumberland on notice that greater efforts were needed to address accumulations of trash.

On the whole, considering all of the factors addressed above. I find that the violation was not the result of Cumberland's unwarrantable failure, but that its negligence was moderate.

### ORDER

Order No. 7025481 is **AFFIRMED**, and Citation No. 7025468, Order No. 7025469 and Order No. 7025480 are modified to citations issued pursuant to section 104(a) of the Act, and are **AFFIRMED, as modified.**



Michael E. Zielinski  
Administrative Law Judge

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danger to miners of this violation.

<sup>27</sup> Nairn testified that he would not note the presence of trash at a loadout point on a preshift report, except to pass information on to a supervisor of an area he was not responsible for. Tr. 536-39.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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WASHINGTON, D.C. 20001

January 26, 2009

R S & W COAL COMPANY, INC., Contestant	:	CONTEST PROCEEDING
	:	
	:	Docket No. PENN 2009-97-R
	:	Citation No. 7011308; 11/03/2008
v.	:	Order No. 7011310; 11/05/2008
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH Respondent	:	R S & W Drift
	:	Mine ID 36-01818
	:	
	:	
	:	
B & B COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	
	:	Docket No. PENN 2009-98-R
	:	Citation No. 7001051; 11/03/2008
v.	:	Order No. 7001053; 11/05/2008
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH Respondent	:	Rock Ridge No. 1 Slope
	:	Mine ID 36-07741
	:	
	:	
	:	
BEAR GAP COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	
	:	Docket No. PENN 2009-99-R
	:	Citation No. 7011309; 11/03/2008
v.	:	Order No. 7011311; 11/05/2008
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH Respondent	:	N & L Slope
	:	Mine ID 36-02203
	:	

**DECISION**

Appearances: Lynne Bowman Dunbar, Esq. and Thomas A. Paige, Esq., U.S. Department of Labor, Arlington, Virginia, on behalf of the Respondent  
Adele L. Abrams, Esq., Law Office of Adele L. Abrams, P.C., Beltsville, Maryland, on behalf of the Contestants

Before: Judge Barbour

The captioned contest proceedings arise under Section 105(d) of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 815(d). In the cases RS&W Coal Company, Inc. (RS&W), B&B Coal Company (B&B) and Bear Gap Coal Company (Bear Gap) contest the validity of citations issued to each company for alleged violations of mandatory safety standard 30 C.F.R. § 75.370(a)(1).<sup>1</sup> The citations allege the companies violated the standard when they failed to revise their ventilation plans to require the main mine fans at the mines to be run for 1-½ hours prior to any persons entering the mines.

The citation issued to RS&W, which is substantially identical to the other two citations, states in pertinent part:

On October 29, 2008, the approved ventilation plan [for the RS&W mine] was revoked, however the operator is continuing to operate without an approved ventilation plan in violation of . . . [section] 75.370(a)(1). On July 1, July 9, and December 11, 2007, MSHA sent letters to . . . [RS&W] requesting . . . a revised ventilation plan be submitted to the district manager. The operator was notified that, based on the results of the analysis of air samples, MSHA has determined that the ventilation plan in effect is not adequate and, in MSHA's view, the plan should require that the main mine fan be run continuously, i.e., during both active and idle shifts. In September[,] 2008, following extended negotiations, the Independent Miners Association and MSHA agreed that . . . [RS&W] would operate the main mine fan for 1 ½ hours before each shift, turning off the fan daily. On October 21, 2008, MSHA sent a letter to . . . [RS&W] giving [it] until October 28, 2008 to submit the revised ventilation plan and warning . . . that failure to submit the revision would result in revocation of the approved plan. The operator failed to submit the revision. The condition has been designated non-S&S [i.e., not a significant and substantial contribution to a mine safety hazard] because the

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<sup>1</sup>The standard requires operators to "develop and follow a ventilation plan approved by the [MSHA] district manager." Once filed and approved, the agency retains the right to request revisions of the plan and the right to revoke the plan if, after good faith negotiations, the district manager and the operator fail to agree on the revisions. If the plan is revoked, the operator may not operate its mine until it adopts a revised plan that is approved by the district manager.

violation is the result of an impasse between the parties in negotiating changes to the ventilation plan. During the period in which the operator is attempting to achieve abatement, it shall follow the terms of the original ventilation plan.

Gov't Exh. 2A.

As the citation indicates, once MSHA, acting through its district manager, determined revised ventilation plans were necessary, the agency and the companies entered into protracted negotiations. During the negotiations the companies were represented by the Independent Miners Association (IMA).<sup>2</sup> At one point, the agency believed the representative and, thus, the companies agreed to revise their plans in a way that would be acceptable to MSHA. However, the companies maintained no such agreement was reached, and they did not submit revised plans to the district manager. This led the agency to notify the companies by letter dated October 21, 2008, that they had until October 28 to submit the plans and, if they failed to do so, their existing plans would be revoked. On October 29, MSHA revoked the companies' existing plans because the companies had not complied with the agency's demands.

The contested citations were issued on November 3, 2008, and the agency gave the companies until November 5, 2008, to submit acceptable plans (i.e., plans containing the provision that the main mine fan would be run for at least 1-½ hours before the miners entered the mines at the start of the workday and before underground power circuits were energized). The companies were warned if they did not submit acceptable plans, orders would be issued closing their mines. Revised plans were not submitted, and the closure orders were issued.

The orders prompted the companies to request their contests of the validity of the underlying section 104(a) citations be heard on an expedited basis. The cases were consolidated and assigned to me, and following discussions with counsels, MSHA agreed to suspend enforcement of the orders until the contest proceedings could be heard and decided.

The matters were called for trial on December 9, 2008, in Pottsville, Pennsylvania. At the commencement of the hearing I summarized the issues.

The issues involved include whether the companies violated [s]ection 75.370(a)(1). As I understand the law, the Secretary will have the burden of proving the unsuitability of the provision [of the ventilation plans] . . . [to which she objects] and the . . . suitability of the provision upon which she . . . insist[s]. This

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<sup>2</sup>The IMA is an organization of small, independent anthracite mine operators whose purpose is to protect the interests of its members and to promote the use of anthracite coal.

means the Secretary must prove a specific mine hazard . . . that is not addressed in the previously approved plan[s], and she must establish that the hazardous condition, assuming she proves one, is corrected by the [provision] she is insisting upon. The Secretary cannot use the . . . approval process . . . to impose . . . requirement[s] . . . well suited to all or nearly all mines so . . . the Secretary must show the provision addresses specific conditions in the mines involved.

Tr. 6-7.

Opening statements then were offered by counsels, and one and one-half days of trial followed, during which the Secretary presented the principal part of her case-in-chief and one of the companies' witnesses was heard. During the noon break on the second day of the hearing (December 10), the parties resumed negotiations to determine if they could resolve their differences. At the beginning of the afternoon session, counsel for the companies announced the parties had reach an agreement. Counsel stated:

[T]he parties . . . have come to an agreement after good faith negotiations that will modify the existing plans and also modify the position taken by MSHA . . . . [T]he same provisions will apply to the revised plans for all three mines and everything will remain the same[,] with the change being made to the portion of the plan[s] that stipulates how long the fan must run following resumption of mining in an idle period . . . . The current plans say the main mine fan will be operated for a minimum of one half hour after the pressure recorder indicates that the normal mine ventilating pressure has been reached prior to any person entering the mine. That will be changed to one hour. The Secretary's position [originally] had been one and one half hours . . . [In addition,] the main mine fan will be operated for a minimum of one hour after the pressure recorder indicates . . . the normal mine ventilating pressure has been reached prior to energizing power circuits entering underground areas of the mine [and] prior to any person entering

the mine. . . . All other provisions of the currently approved plans will remain in effect.

The Government has agreed . . . the operators will have until 5[:00] p.m., Eastern Standard Time on Friday, December 12, 2009[, ] to submit a revised . . . section of the plan[s] to the MSHA District . . . office, that . . . [they] can be submitted by facsimile [copy] but . . . [the companies] will also mail a hard copy to the MSHA office for inclusion in the official mine ventilation plan.

Tr. 421-422.

Counsel for the companies further requested the contested citations be vacated, but[,] if they were not vacated[,] that the violations of section 75.370(a)(1) contained in the citations be assessed at not more than \$112, which amount the operators agreed to pay. Tr. 423-424. Counsel for the Secretary agreed with the provisions of the settlement as stated by counsel for the companies, and the hearing was closed. Tr. 424.

#### **ORDER**

The settlement, which conforms in all respects with the letter and spirit of the Act, **IS APPROVED**. I note the companies have filed with the agency revisions of their ventilation plans containing the agreed-upon provisions, and the agency has approved the revised plans. Nothing more remains to be done with regard to revising the plans.

With regard to the civil penalties for the violations of section 75.370(a)(1), in a letter dated January 9, 2009, one of the Secretary's counsels stated the agency assessed a civil penalty of \$162 against B&B Coal Co., and the company paid the amount. She further stated, upon issuance of this decision approving the settlement, MSHA will amend B&B's penalty to \$112 to conform to the settlement and will credit or refund \$50 to B&B. Counsel also stated MSHA assessed civil penalties of \$100 each against RS&W and Bear Gap for their violations of section 75.370(a)(1) and will consider payments in that amount as fully satisfying the agreement.

**ACCORDINGLY**, within 30 days of the date of this decision, the Secretary **IS ORDERED** to credit or refund \$50 to B&B in compliance with the terms of the settlement, and, if they have not already done so, within the same 30 days, RS&W and Bear Gap **ARE ORDERED** to pay \$100 each to the Secretary for the violations of section 75.370(a)(1) contained in the contested citations. Upon the Secretary's credit or refund to B&B of \$50 and RS&W's and Bear Gap's payment to the Secretary of \$100 each, these proceedings **ARE DISMISSED**.



David F. Barbour  
Administrative Law Judge

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January 27, 2009

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 2007-335  
Petitioner : A.C. No. 46-01456-111046  
v. :  
: :  
EASTERN ASSOCIATED COAL CORP., :  
Respondent : Federal No. 2

**DECISION**

Appearances: John M. Strawn, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, 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 ("Secretary"), alleging violations by Eastern Associated Coal Corporation ("Eastern") of various mandatory standards set forth in Title 30 of the Code of Federal Regulations.

On July 17, 2006, MSHA Inspector Jason Rinehart inspected Eastern's Federal No. 2 Mine, an underground coal mine. He observed seven areas of unsupported roof in the 7 Right empty track and issued Order No. 6602108 under Section 104(d)(2) of the Federal Mine Safety and Health Act of 1977 ("The Act"), alleging a violation of 30 C.F.R. § 75.202(a).

On October 4, 2006, MSHA Inspector David Severini observed accumulations of loose coal and float coal dust while inspecting a belt entry near the longwall face. These conditions had not been noted in the pre-shift examination record book. Severini issued Order No. 6603046 under Section 104(d)(1) of the Act, alleging a violation of 30 C.F.R. § 75.360(a)(1).

On July 9 and 10, 2008, a hearing was held on this matter in Washington, Pennsylvania.<sup>1</sup> Subsequent to the hearing, the parties each filed proposed findings of fact and a brief.

**I. Order No. 6602108**

**A. Introduction**

The 7 Right empty track is a track entry with two rails running down the center of the entry. One side of the entry (“the wire side”), between the rails and left rib facing inby, contains an overhead trolley wire that supplies power to vehicles traveling on the rails. The other side of the entry between the rails and the right rib facing inby is used as a walkway for foot traffic (“the walk side” or “walkway”). The track is approximately 7,000 feet long and is utilized to store unused coal cars.

The roof in the entry, which has been in existence for over thirty years, is supported by a series of roof bolts located generally in the center of the entry, and straps located between the bolts. After the initial bolting when the entry was developed, additional bolts, post, and cribs were installed in the area.

**B. Findings of Fact and Discussion**

**1. The Secretary’s Case**

According to Rinehart, when he made his inspection on July 17, 2006, the roof and ribs had deteriorated at seven<sup>2</sup> locations in the entry, and the roof was not adequately supported.

Rinehart observed that in an area<sup>3</sup> that extended fifteen feet parallel to the last row of bolts, there were not any bolts or other means of roof support for a seven foot distance between the bolts and the wire side rib. According to Rinehart, a hazard was created inasmuch as subsequent to the initial installation of roof bolts when the entry was first developed, the width of the entry and the distance between the last row of bolts parallel to the rails and the ribs had increased, due to rib sloughage. Rinehart opined that miners who worked or traveled on the wire side of the entry, such as examiners, pumpers, electricians and maintenance men, were exposed

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<sup>1</sup> At the hearing, the parties filed a Motion for Decision and Order Approving Partial Settlement setting forth their agreement to settle nine of the eleven citations at issue. The Motion is granted for the reasons set forth below. (III, *infra*)

<sup>2</sup> He testified regarding his observations at six locations. The seventh location is set forth in the order as follows: “Between No 14 and No. 15 car marker, there is an area 7 feet by 7 feet not bolted. The roof has deteriorated and potted out.” (Government Exhibit 1)

<sup>3</sup> The left rectifier area.

to falling rock from the roof. In addition, he alleged that falling material could bring down the trolley wire and cause a fire or an ignition.

According to Rinehart, the ribs had sloughed off on the inby and outby corners of the intersection on the wire side at the No. 2 car marker.<sup>4</sup> The sloughage had also enlarged the width of the entry. Rinehart indicated that the roof had potted out between roof bolts, leaving an unsupported area eight to ten feet wide and more than sixteen feet long through the intersection. Rinehart observed objects on the floor under this portion of the roof. He opined that they had fallen from the roof, and were "nothing like a total roof falling," but were "softball, basketball size." (Tr. 39)

Rinehart indicated that an area of roof to the right of the cited area looking inby had begun to pot out. He opined that intersections are a "weak point" for support and are "typically an area where a roof would fall." (Tr. 52) According to Rinehart, as potting increases due to weathering of the roof between the bolts, the bolts will eventually lose their effectiveness as support. Also, material from the roof will fall down and could cause injury to miners in the area. He also opined that should the roof in the intersection "fall in," it could pull out some bolts, causing injury to persons outside the intersection. (Tr. 51)

Rinehart observed that at the No. 215 car marker, in an area six feet by twelve feet, coal had potted out between the existing roof bolts. He opined that if mining operations would continue, the roof would eventually fall out around the bolts, which would result in inadequate support, and someone in the area could suffer an injury.

According to Rinehart, at the No. 108-110 car marker, he observed a sixteen foot long area on each side of the last line of bolts where there was not any roof support in the seven foot wide distance between the ribs and the last row of bolts on both sides of the entry, i.e., the walkway and the wire side. He opined that a miner in the cited area could be hurt by falling roof material.

Rinehart indicated that at the No. 108-107 car marker, for a distance of twelve feet, the rib had sloughed off on the wire side. There was a seven foot distance between the last row of bolts and the rib line that was not supported. Thus, miners walking under this area of the wire side could have been injured by falling material.

According to Rinehart, at the No. 105 car marker on the walkway side, as a result of roof sloughage, the distance between the rib line and the last row of bolts in the entry had increased to seven feet. This condition extended for a linear distance of twelve feet. Accordingly, miners in that area could have been injured by a roof fall. Rinehart opined that when the roof pots out around a roof bolt, it eventually becomes loose and will no longer be tight against the roof. As a

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<sup>4</sup> Locations in the entry are designated by reference to a car marker number. The car markers are twenty-one feet apart.

consequence, it will not be able to continue to compress various roof strata, resulting in decreased roof support.

As a result of his inspection, Rinehart issued an order under Section 104(d)(2) of the Act, alleging a violation of Section 75.202(a), which provides as follows: “[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs.”

## 2. The Respondent’s Case

Daniel Edwin Kurry, Eastern’s safety supervisor, was with Rinehart on the date of his inspection. He indicated that in addition to the number of bolts that were initially installed, posts have been set, and cribs have been built in the entry to provide additional support. Also, straps were provided between bolts located in the center of the entry above the track, which provide further compression of the roof. He opined that the entry has undergone “normal weathering” (Tr. 150), and there have not been any reportable roof falls in the entry. He testified that “to my knowledge” (Tr. 152), the roof in the entry is at its original height. He opined that this “tells him” that “roof stresses” or “pressure” on the roof is “very limited.” (Tr. 152) In general, he indicated that he did not hear any sounds, or observe cracks or small pieces falling from the roof in the cited areas.

Kurry indicated that the maximum allowable distance from the last bolts to the rib is six feet. He opined that an increase of this distance in some areas to only seven feet is “not a distance that I feel will allow a roof fall to propagate into the supported area.” (Tr. 156)

James Poe, who was a track boss in July 2006, indicated that fifteen bolts had been installed at the top end of the entry at issue on July 16, 2006. He examined the entry at the end of the midnight shift on July 17, 2006, prior to Rinehart’s inspection. He traveled down the entry in an open jeep. He indicated that he did not see any cracks or “hooving” (sic.). (Tr. 185)

## 3. Discussion

### a. Violation of Section 75.202(a)

In essence, it is Respondent’s position that it was not in violation of Section 75.202(a) because of the following factors:

The height of the roof in the Seven-Right empty track has remained at the same height since the original mining occurred in the 1970s, indicating little pressure on the roof.

There was no visible evidence that the bolts in the cited areas were faulty or otherwise unsatisfactory.

The 7 Right empty track was maintained by track bolting, posts, and cribs.

There were steel straps, and possibly also wooden straps, installed between the original bolts that aided in the support of the bolts and the roof.

Additional roof bolts have been installed throughout the length of the entry of the 7 Right empty track. Eastern has consistently installed supplemental support since the original mining as recently as the day before the subject inspection when fifteen roof bolts were installed.

Mine personnel have not observed any evidence of stress in the roof or pillars, such as floor heave, changes in the roof height, or cracks.

To the extent there has been any change in the distance between the last row of roof bolts to the rib, that change has been minimal.

Even Inspector Rinehart agreed that some areas he cited had sufficient support:

At the No. 239 Car Marker, Inspector Rinehart noted two posts and at least four roof bolts that were in contact with the roof.

At the No. 215 Car Marker, Inspector Rinehart testified that all bolts were in contact with, and supporting, the roof.

Respondent's Brief, at 38–39 (citations omitted).

30 C.F.R. § 75.202(a) states in pertinent part that “[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.” This standard is broadly worded, and, as such, the Commission has held that:

[T]he adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard. We emphasize that the reasonably prudent person test contemplates an objective – not subjective – analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue.

*Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987).

More recently, the Commission has held that:

The Secretary's roof control standard is broadly worded. *See* 30 C.F.R. § 75.202(a). Accordingly, we have held that "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard."

*Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998) (following *Canon Coal*, 6 FMSHRC at 668).

For the reasons that follow, I find that a preponderance of the evidence establishes that Eastern violated Section 75.202(a).

The area of inadequately supported roof at the No. 239 car marker was located at an intersection which, according to the uncontradicted testimony of Rinehart, is typically a "weak point for roof support" (Tr. 52), because the intersection lacks continuous rib support.<sup>5</sup>

According to Rinehart, in the more than sixteen foot long cited area that was between eight and ten feet wide, the roof had potted out between bolts, creating gaps between the original and the existing roof height. (Government Exhibit 4-A) As a result, some bolts were loose and their bearing plates were not up against the roof, and as such they were not providing support. Additional potting out was observed at the No. 215 car marker.<sup>6</sup>

In addition, fifteen square feet of unsupported roof existed at both the walk and wire sides of the track at the Nos. 108-110 car marker. As a result, according to Rinehart, the width of the entry was increased, making it more susceptible to roof failure.<sup>7</sup> Significantly, Rinehart observed some material on the floor. He described the material as not like a total roof fall but as "softball, basketball size." (Tr. 39) His testimony in these regards was not impeached or contradicted. I

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<sup>5</sup> Respondent argues in its brief that the roof at the No. 239 car marker was sufficiently supported by "two posts and at least four roof bolts that were in contact with the roof." However, this argument, while factually correct, does not acknowledge that this area is located at an intersection and subject to the problems discussed above.

<sup>6</sup> Additionally, another area of unbolted roof, seven feet by seven feet, located between the Nos. 13 and 14 car markers, was described by Rinehart in the order at issue as "deteriorated" and "potted out." (Government Exhibit 1) This statement in the order, admitted into evidence, was not impeached or contradicted, and therefore I accept it.

<sup>7</sup> Respondent argues in its brief that the height of the roof is the same as it was in the 1970s. This argument is based on Kurry's testimony on direct examination. However, Kurry has only been employed at the mine for five and a half years and, as such, has no personal knowledge of the height of the mine roof prior to his tenure.

thus accept it.

Additionally, there were three areas, fifteen square feet each,<sup>8</sup> where unsupported roof exceeded the maximum allowable distance between the last row of bolts and the rib. According to Rinehart, the increase in width of the cited entries due to sloughage compromises the integrity of the roof support system. Respondent argues that, as testified to by Kurry, this increase in the width of the entries was only one foot, and the roof would not be likely to fall because of this increase. However, on cross-examination, Kurry agreed that the bolt support system is designed to create a compression beam from rib to rib, and that the original design regarding roof support was being exceeded.<sup>9</sup>

Within the above framework, I conclude that a preponderance of the evidence establishes that there was inadequate roof support in the cited areas of the entry. This lack of roof support presented the discrete safety hazard of a potential roof fall.

I further conclude that this hazard existed on both the wire and the walkway side of the track, subjecting miners to potential exposure. Examiners traverse the 7,000 foot entry daily. Also, repairmen and wire maintenance persons are required to access the track and wire side of the entry respectively.<sup>10</sup> Further, pumpers are required to traverse the entry to repair and inspect three pumps that were located in the entry.<sup>11</sup>

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<sup>8</sup> The 5-left rectifier, the Nos. 107-108 car marker, and the No. 105 car marker.

<sup>9</sup> Respondent also argues in its brief that there was no visual evidence that any of the roof bolts in the cited areas were faulty, citing page 119 of the transcript. This page contains the testimony of Kevin Luketic, one of Eastern's roof bolters, who was with Rinehart during the latter's inspection. Luketic's testimony relating to the condition of roof bolts is as follows: "Your bolts maybe—you know, because you have no visual evidence there that, you know, that I could say that they're bad, you know, but there's that chance." (Tr. 119) I find that it is not clear whether his testimony refers to what he actually observed during the inspection, or whether his testimony is based generally on his experience as a bolter. Also, it is significant to note that he agreed that there was an unsupported area at the cited left rectifier.

In addition, Respondent advances the argument that the roof had sufficient support at the No. 215 car marker. However, the area at the No. 215 car marker was subject to a separate and distinct problem of being potted out.

<sup>10</sup> Rinehart also pointed out that "[e]xaminers, possibly building the track, track men, motor men," may be on the track itself. (Tr. 67)

<sup>11</sup> One pump was located in a cross-cut on the wire side at the No. 70 car marker. The record does not indicate the exact location of the other two pumps. In Supplemental Stipulations, filed after the hearing, the parties indicated that it could not be conclusively determined whether these pumps were on the wire or walkway side of the entry.

Based on all the above, I further conclude that a reasonably prudent person familiar with the mining industry and the protective purpose of Section 75.202(a) would have provided additional roof support in the areas cited. See *Canon Coal Co.*, 9 FMSHRC 667 (Apr. 1987). Failure to do so has resulted in a violation of Section 75.202(a).

b. Significant and Substantial

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

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) ("*Mathies*"), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

In *United States Steel Mining Co.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission stated further as follows:

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

(emphasis added)

As set forth above, the record establishes a violation of a mandatory standard, i.e., Section 75.202 (a), and that this violation contributed, to some degree, to a discrete safety hazard of a

roof fall. Thus, the record has established the first two factors set forth in *Mathies*. Regarding the third element, the Secretary has the burden of establishing that the hazard contributed to herein, a roof fall, was reasonably likely to have occurred and to have resulted in an injury of a reasonably serious nature.

In support of its position, Respondent asserts that Rinehart did not provide any opinion regarding the likelihood of an event such as a roof or rib fall that would have reasonably resulted in an injury. Respondent maintains that additional timbers, bolts, straps, and cribs were installed subsequent to the initial bolting of the entry. Further, although the entry had been developed approximately twenty years ago, the record does not contain any evidence of any roof falls. Lastly, when the entry was inspected, there was not any evidence of conditions which would indicate some instability in the roof or ribs, such as cracks in these areas or heaving of the floor.

Also, according to Kurry, any deterioration in the roof resulting in material falling from the roof would not propagate and cause a fall outside the area of deterioration. In this connection, he cited the absence of roof problems in areas adjacent to portions of roof that had potted out.

However, the fact that the roof had potted out in three areas and sloughage increased the width of the entry for a total of approximately ninety feet in the cited areas lends credence to Rinehart's opinion that potting is caused by a weathering or deterioration process, that the roof will continue to deteriorate, and eventually the roof support bolts in the area will no longer be in contact with the roof. I note that, in the main, this specific testimony was not contradicted by Eastern's witnesses.

Moreover, as explained more fully above ((I)(B)(3)(a), *infra*), in the intersection at the No. 239 car marker, some bolts were loose, and their bearing plates were no longer in contact with the roof and were not providing support.

In addition, as set forth above, there was unsupported roof at both sides of the track at the 108-110 car marker. The width of the entry was thus increased, resulting in the area becoming more susceptible to roof failure. Further, according to the uncontradicted testimony of Rinehart, material that had fallen from the roof was observed.

Also, for the reasons set forth above, I find that the increase in the width of the entries due to sloughage at three different areas compromises the integrity of the roof support system. In this connection, I note that Rinehart explained that sloughage is a continuous process eventually leading to potting out of bolts. It thus can be concluded, given continued mining operations in the entry, that sloughage will continue to increase the width of the entry, further reducing roof support.

Finally, I note, as elaborated above, that miners regularly travel the entry at issue.

Within the context of all the above, in combination, I conclude that, given continued mining operations, accompanied by the passage of time, it was more likely than not that there was a reasonable likelihood that the cited violative conditions contributing to the hazard of a roof fall will result in an injury-producing event, i.e., material falling from the roof. Further, considering the exposure of miners in the entry, the size of materials that had already fallen, and the height of the roof, i.e., approximately six feet, I find that there was a reasonable likelihood of a reasonably serious injury occurring. I thus find that the Secretary has established the third and fourth elements set forth in *Mathies*. Accordingly, I find that the Secretary established by a preponderance of the evidence that the violation was significant and substantial.

c. Unwarrantable Failure

The Secretary also alleges the violation was the result of the Respondent's "unwarrantable failure" to comply with the cited standard.

In *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure. *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). These include the extent of the violative condition, the length of time that it has existed, the operator's efforts at abating the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's knowledge of the existence of the violation, whether the violation is obvious, and whether the violation poses a high degree of danger. *Id.* *See also San Juan Coal Co.*, 29 FMSHRC 125, 128 (Mar. 2007).

i. Extent of the cited conditions

The Secretary argues that the violative conditions were extensive because seven separate areas of unsupported roof were cited, "each of which covered a substantial section of the roof" (Secretary's Post Hearing Brief, at 30), and that sixty-six roof bolts and three jacks were needed to abate the conditions. Three of the cited locations, the No. 215 and No. 239 car makers, and between the No. 13 and 14 car markers, involved conditions of potting in areas of approximately seventy feet and forty-nine feet respectively. The remaining four areas cited each contained an area approximately fifteen feet in length where the allowable maximum width set forth in the applicable roof control plan had been exceeded by one foot, or a total of ninety square feet in five

separate locations.<sup>12</sup> I find that the total area cited was not significant compared to the total roof area of the entry in question, which extended approximately seven thousand feet and was sixteen feet in width, i.e., 112,000 square feet of roof. Thus, I find that the violative conditions were not extensive compared to the total area of the roof in the entry in question.

ii. The length of time the violation existed

Respondent argues that the cited conditions had not existed for a significant period of time prior to Rinehart's inspection. As support for its position, Respondent cites the pre-shift mine examiners' report of an examination of the entry in question by James Poe on the midnight shift, July 17, which does not note any hazardous condition in any of the areas cited by Rinehart. However, it is significant to note that Poe, who testified on behalf of Eastern, was not asked to describe his specific observations of the cited areas during that, or prior examinations. On the other hand, Rinehart opined that the cited conditions existed for a week and provided his reason as follows: "[s]even areas just don't fall within the shift or don't get wide within the shift." (Tr. 72) I note that Kurry, who was with the inspector, did not proffer any contrary opinion regarding the length of time the cited conditions had been in existence.

Therefore, based on the above, and considering the increase in width in the entry due to sloughage at six different locations including the wire and walk sides at the No. 215 car marker, as well as two separate areas where the roof had potted out, I conclude that the cited conditions had existed for more than a few days.

iii. Whether the conditions cited were obvious or posed a high degree of danger

Respondent asserts, in essence, that its personnel had a good faith believe that the area was well-supported and safe. It argues that accordingly the existence of the violative conditions was not obvious. It further asserts that there was not a high degree of danger inasmuch as, *inter alia*, the twenty year old roof in the entry has not evidenced any roof falls or signs of instability.

I have considered Respondent's arguments. However, for the reasons, set forth above ((I)(B)(3)(b) *infra*), I find that the violation presented a high degree of danger to miners. Further, according to Rinehart, the conditions were obvious and could be seen when walking up the entry. It is significant that Kurry, who was with Rinehart, did not contradict this testimony. Therefore, based on the above, I find that the cited conditions were obvious.

iv. Whether the operator was placed on notice that greater efforts were necessary for compliance, and whether the operator had knowledge of the existence of the violation

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<sup>12</sup> The fourth location cited, the No. 108-110 car marker, cited two unsupported areas, one on each side of the entry.

The Secretary cites Eastern's having performed supplemental bolting in the entry in question on July 16, 2008, shortly before the inspection, as evidence that it was aware of the need to maintain the roof in the entry. I note, however, that this supplemental bolting was performed approximately 1,000 feet away from the nearest area cited by Rinehart.

As additional support for its position that Eastern was on notice that further efforts were required for compliance, the Secretary cites the testimony of Kurry, Eastern's safety supervisor, that the entry which was approximately twenty years old and had undergone weathering. However, according to Kurry, the weathering was "normal" (Tr. 150), and did not involve roof falls that had pulled out any bolts.

Significantly, the record does not contain any evidence that Eastern had actual knowledge of the violative conditions. Further, the record does not indicate that there was any history of previous roof falls in the cited entry. Nor was any evidence adduced that, previous to issuance of the instant order, any MSHA officials had communicated to Eastern the need for any additional efforts at compliance with Section 75.202(a). (c.f. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (Jan. 1997)).

I find that the record has failed to establish that Eastern had knowledge of the violative conditions or had been put on notice of the need for greater efforts to achieve compliance with Section 75.202(a).

v. The operator's abatement efforts

The Secretary does not assert there was any deficiency in Eastern's efforts in abating the violative conditions. The record does not contain any evidence as to any deadline that Rinehart had set for completion by Eastern of its efforts to abate the order. Subsequent to the issuance of the order in question, Eastern installed sixty-six additional roof bolts and three jacks in the cited areas. As a result, the order was terminated five days after its issuance. Significantly, the record does not contain any evidence that any MSHA personnel or agents had, prior to termination, expressed to Eastern any dissatisfaction relating to its abatement efforts, or the time being taken to achieve compliance. Considering all of the above, I find that it has not been established that there was any deficiency relating to Eastern's efforts in abating the violative conditions.

vi. Further discussion

In the context of all of the above, I find that the violative conditions were obvious and posed a high degree of damage. However, the violative area of roof cited was not extensive in comparison with the total area of the roof in the entry. Moreover, it has not been established that Eastern had knowledge of the conditions, or was aware that greater efforts were needed for compliance. Further, although the conditions existed for more than a few days, there is insufficient evidence regarding their existence beyond that limited time period. Thus, I find that Eastern's negligence was mitigated and did not reach the level of aggravated conduct.

Accordingly, I find that it has not been established that the violation was the result of Eastern's unwarrantable failure.

### C. Penalty

I find, for the reasons set forth above ((I)(B)(3)(b), *infra*), that the gravity of the violation was relatively high. I find that the history of violations does not warrant either an increase or decrease in the penalty to be assessed. However, for the reasons set forth above (I)(B)(3)(c) *infra*), I find that Eastern exhibited no more than a moderate level of negligence which was below the level of aggravated conduct. Considering all of the above, and the parties' stipulations regarding the remainder of the factors set forth in Section 110(i) of the Act, I find that a penalty of \$3,000 is appropriate.

## II. Order No. 6603046<sup>13</sup>

On October 4, 2006, MSHA inspector David Severini inspected the 9 Left section of the Federal No. 2 Mine, owned and operated by Eastern. In general, the latter was involved in mining bleeders which had to be completed prior to the start of a longwall section. Severini examined the 9 Left coal conveyor belt which conveyed coal outby, and was approximately 6,000 feet in length. He noted accumulations of loose coal and float coal dust that had not been recorded in the pre-shift examination report for the examination conducted earlier that day. He issued an order under Section 104(d)(1) of the Act, alleging a violation of 30 C.F.R. § 75.360(a)(1), which provides, as pertinent, that "a certified person designated by the operator must make a pre-shift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground."

### A. The Secretary's Evidence

According to Severini, the accumulation of loose coal began under the tail piece and extended under the belt approximately two hundred feet to the outby end of the No. 59 block. He indicated that the accumulations were approximately five to six feet wide, and varied between two to twenty inches in depth. According to Severini, the tail roller was turning in an accumulation of loose coal four to eight inches deep, and five inches wide, and was grinding the loose coal into dust that was black in color and was suspended in the air. Also, the first two bottom rollers outby the tail roller were turning in coal from six to sixteen inches deep, and six feet wide. The bottom belt was also running in the coal accumulations. The dust coated the roof,

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<sup>13</sup> Five minutes prior to the issuance of Order No. 6603046, Severini had issued a Section 104(d)(1) Citation No. 660304, alleging a violation of 30 C.F.R. § 400 for coal and dust accumulations. These conditions were the predicate for Order No. 6603046. Respondent is challenging the existence of the conditions cited in Citation No. 660304. However, the validity of the issuance of this citation, and any penalty to be assessed for the violation, are not before me in the case at bar, as it is the subject of a separate penalty proceeding (Docket No. WEVA 2008-944).

ribs, floor, belt structure, and pipeline, for a distance of approximately one hundred feet outby the tail roller.

**B. The Respondent's Evidence**

Daniel Kevin Conaway, Eastern's safety supervisor, was with Severini on October 4 when the latter made his inspection of the area in question. He essentially corroborated Severini's testimony regarding the accumulations observed by the latter. However, Conaway indicated that he found it difficult to believe that the material that he observed had been there for three shifts. He explained his opinions as follows:

A. The reason that you don't want coal around belt rollers is because it will create friction on the belt or on the rollers, and that will generate heat, which, in turn, can start a fire.

We did not find any hot rollers. We did not find any hot stands, and the belt was not running out of alignment, so my issue was what's the heat source?

Q. So you didn't see--when the rollers were checked, they were not hot or warm?

A. Not the ones we checked, no, sir.

Q. What would that indicate to you about how long that material had been there?

A. It would lead me to believe that it hadn't been there that long.

Tr. 285.

Conaway indicated that the belt had been raised approximately one hundred feet outby the tail to allow traffic to travel under the belt in setting up the long wall. He indicated that the raising of the belt is not a normal configuration and it "[put] friction on the belt. Thus material is more prone to accumulate at the tail." (Tr. 281)

On October 4, 2006, between 4:30 a.m. and 5:10 a.m., Theodore Echols examined the 9 Left belt. His pre-shift examination report noted various conditions under the heading violations and other hazardous conditions observed and reported, including "spillage" which was described as being "[b]etween stands 26 to tail." (Government Exhibit 15) Echols indicated that when he was at the tailpiece on October 4, the belt was running and "[t]hey were loading on it." (Tr. 371) Echols testified that he observed spillage on the belt line, but none around the tail. He indicated that the tail roller was not running in coal. He did not identify any

coal dust in the air, nor did he observe any coal dust on the roof or rib. Specifically, he indicated that he did not see any accumulations that were sixteen to twenty-one inches deep “[a]t or around the tail area, either the tail roller or the two rollers that are near there.” (Tr. 375)

John Kucish, Eastern’s mine manager, indicated that on October 4, during the midnight shift, which usually runs from approximately 1:00 a.m. to 8:30 or 9:00 a.m., 407 tons of coal were produced. Kucish indicated that on October 4, 2006, during the entire day shift which typically runs from 9 a.m. to 4 p.m., 120 tons of coal were produced. Four hundred and nineteen tons were mined during the afternoon shift on October 4.

### C. Discussion

Essentially it is the Secretary’s position that the dust and coal accumulation at the tail of the belt had not been reported in the pre-shift examination report on October 4, 2006, and as such Eastern was in violation of Section 75.360(a)(1). The record clearly supports the testimony of Severini regarding the extent of the coal and dust accumulations, observed by him at 11:55 a.m. on October 4. Also, I find that there was not any notation of these accumulations in the pre-shift examiner’s report for the day shift, October 4. The critical issue for resolution is whether the Secretary has established that the accumulations observed by Severini were in existence at the time that Echols made his examination and subsequent report between 4:30 and 5:00 a.m. on October 4. In this connection, the Secretary relies on the dimensions of the accumulations of coal, and the fact that the belt and rollers were running in the accumulations. Also, the Secretary cites testimony that the float coal dust, which was black, coated all surfaces of the belt entry ranging in depth from a “film” to a “measurable thick[ness].” (Tr. 212) In this connection, Severini and MSHA inspector Melbourne Robinson, who was with Severini during the inspection, opined that it took several shifts for the accumulations to occur. Severini provided the following as the basis for his conclusion: “Just experience and, again, the amount of float coal dust that accumulated on the ribs and the mine roof at that time, it would take – it would take a few shifts to get that dark, that black and in some places on that structure that thick.” (Tr. 228) Robinson’s testimony on this point is as follows:

Q. Now, there was some issue raised about the condition of the coal, whether it was wet or dry, what kind of moisture content it had. Can you tell me based on your observation of the coal that the rollers were turning in, what was it?

A. I believe it was dry, dry coal.

Q. And with regard to the float coal dust accumulation, where was the float coal dust?

A. It pretty much covered everything, like, the belt structure, roof, floor, ribs, pipeline.

Q. And was there anything significant about this accumulation? How did it look?

A. It was a serious accumulation problem.

Q. Okay. How would you compare the scene, this accumulation that you saw with Mr. Severini on your experience in the industry?

A. I would have to rate -- it was probably one of the worst conditions I've seen on a belt with nobody working on it. You always have spills along the belt line, but you usually have people in attendance.

Q. And when you came upon this, was anybody working on it?

A. No.

Q. All right. Now, also based on your experience in the industry, how long did it take this accumulation of float coal dust, the coal accumulation to occur?

A. The float dust seemed extensive enough in my opinion it would have been three shifts to accumulate that bad.

Tr. 316-18.

I find that the weight to be accorded to the inspectors' opinion on this critical issue is to be diminished inasmuch as, aside from a reference to their experience, they did not explain how the existence of the conditions that they observed led to their opinion as to the length of time the accumulations had existed.

Further, according to Severini, in essence, the extent of dust accumulations resulted from the effect of the tail rollers grinding accumulations of coal which, as observed by him, produced fine dust that was thrown up into the air and carried throughout the entry. Robinson opined that, based on his experience, due to the extensive condition of dust in the entry, it took three shifts to accumulate. Thus underlying the inspectors' testimony is an assumption that the rollers had been grinding coal dust during and before the pre-shift examination. In this connection, I note that according to Conaway, when rollers have been turning in and grinding coal accumulations, heat would have been generated as a result of the friction that was produced by this action. Thus, the absence of any evidence of hot rollers or stands tends to significantly diminish any inference that the rollers had been grinding coal and producing dust since before Echols' examination seven hours earlier. Further, since the record establishes that 120 tons of coal were produced on the entire day shift, it is incumbent upon the Secretary to prove that the observed accumulations did not result from coal being run on the belt after Echols' examination, and prior

to Severini's inspection. I note that when Severini arrived "on the section," although the belt was in operation, it was not running coal. Although the parties stipulated that the inspection party arrived "on the section" at 9:00 a.m., the record is not clear when Severini first observed that coal was not being transported on the belt, i.e., when he first entered the belt entry and had the ability to make this observation.

Subsequent to the hearing, the parties stipulated as follows: "On October 4, 2006, the inspection party arrived on the section at approximately 9:00 a.m. The party proceeded up the 9 Left Track Entry and went to the longwall setup face before entering the 9 Left Coal Conveyor Belt Entry." (Supplemental Stipulations, B(1)) (emphasis added). However, there is not any evidence in the record as to when Severini and the inspection party actually arrived at the entry. Hence, since the record fails to establish when Severini arrived on the belt entry, there is not any basis to predicate a finding, based upon his observations, as to the length of time the coal had not been run on the belt prior to 11:55 a.m. Moreover, due to the operation of the withdrawal order at issue, the belt was not in operation, and coal could not have been run on the belt between the issuance of the order at approximately 11:55 a.m. and its termination later that day at "1500." (Government Exhibit 10, p. 3). There is not any direct evidence in the record as to whether coal was produced and transported on the belt (1) between Echols' examination and Severini's inspection and/or (2) between the termination of the withdrawal order and the end of the day shift. There is not any basis in the record to allow a specific allocation of the total production of 120 tons for the shift to either of these periods. Therefore, I find that the Secretary has failed to establish that coal, in quantities sufficient to produce the accumulations observed by Severini, was not transported on the belt after Echols' examination.

Therefore, considering all the above, I find that the Secretary has not established by a preponderance of the evidence that the accumulations observed by Severini at approximately 11:55 a.m. had been in existence at the time of the pre-shift examination by Echols. I thus find that the Secretary has not met her burden of establishing a violation of a failure to perform a pre-shift examination as required by Section 75.360(a). Accordingly, I find that Eastern did not violate Section 75.360(a)(1).

**III. Citation Nos. 6602109, 6601079, 6601841, 6601849, 6602565, 6602567, 6602568 and 6602569**

At the hearing, the Secretary filed a motion for decision and order approving partial settlement relating to these citations. In the motion, it is represented that the parties reached a settlement regarding these citations and seek a reduction in penalties from \$11,045 to \$6,200. I have reviewed the representations set forth in the settlement agreement, and conclude that its terms are appropriate and are consistent with the terms of the Act. Accordingly, the motion is granted.

**ORDER**

It is **Ordered** that Order No. 6603046 be dismissed. It is further **Ordered** that the Respondent pay a total civil penalty of \$9,200 within 30 days of this decision.

  
Avram Weisberger  
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

January 28, 2009

COAL RIVER MINING, LLC, Contestant	:	CONTEST PROCEEDINGS
	:	
v.	:	Docket No. WEVA 2006-125-R
	:	Citation No. 7249165; 01/30/2006
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 2006-126-R
	:	Order No. 7249166; 01/30/2006
	:	
	:	Docket No. WEVA 2006-127-R
	:	Order No. 7249167; 01/30/2006
	:	
	:	Docket No. WEVA 2006-128-R
	:	Order No. 7249168; 01/30/2006
	:	
	:	Tiny Creek No. 2
	:	Mine ID: 46-08835
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
v.	:	Docket No. WEVA 2007-196
	:	A.C. No. 46-08835-103740
	:	
COAL RIVER MINING, LLC, Respondent	:	Tiny Creek No. 2 Mine
	:	

**DECISION**

Appearances: Ronald Gurka, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of the Secretary  
F. Thomas Rubenstein, Esq., Dinsmore & Shohl, LLP, Morgantown, West Virginia, on behalf of Coal River Mining, LLC

Before: Judge Barbour

These consolidated cases are before me pursuant to four notices of contest filed by Coal River Mining, LLC (Coal River) and one petition for assessment of civil penalty filed by the Secretary of Labor against Coal River. The proceedings arise under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Mine Act or Act). 30 U.S.C. § 815(d). In the contest proceedings, Coal River challenges the validity of one citation and three orders issued at its Tiny Creek No. 2 Mine, a bituminous underground coal mine located in Lincoln County, West Virginia. In the civil penalty proceeding, the Secretary proposed civil penalties totaling \$34,400 for the violations alleged in the citation and orders. The cases were tried in Charleston, West Virginia.

### **THE CITATION, THE ORDERS AND THE PENALTY PETITION**

Section 104(d)(1) (30 U.S.C. §814(d)(1)) Citation No. 7249165 (Docket No. WEVA 2006-125-R) asserts the company violated 30 C.F.R. § 75.340(a), a mandatory safety standard requiring in pertinent part “underground . . . battery charging stations . . . [to] be housed in noncombustible structures or areas or be equipped with a fire suppression system.” Section 104(d)(1) Order No. 7249166 (Docket No. WEVA 2006-126-R) asserts the company violated 30 C.F.R. § 75.360(b)(9), a mandatory safety standard requiring the preshift examiner to “examine for hazardous conditions . . . at . . . [u]nderground electrical installations.” Section 104(d)(1) Order No. 7249167 (WEVA 2006-127-R) asserts the company violated 30 C.F.R. § 75.512, a mandatory safety standard requiring all electric equipment to be “frequently examined, tested and properly maintained . . . to assure safe operating conditions.” Section 104(d)(1) Order No. 7249168 (WEVA 2006-128-R) asserts the company violated 30 C.F.R. § 75.503, a mandatory safety standard requiring an operator to keep electric face equipment in “permissible condition.”

The citation and orders contain findings the alleged violations were significant and substantial contributions to mine safety hazards (S&S) and were the result of the company’s high negligence and unwarrantable failure to comply with the standards. The company contests all of the allegations.

The Secretary seeks penalties of \$10,300 each for the violations alleged in Citation 7249165 and Orders No. 7249166 and 7249167 and a civil penalty of \$3,500 for the violation alleged in Order No. 7249168 (Docket No. WEVA 2007-196).<sup>1</sup> In the civil penalty proceeding, as in the contest proceedings, the company denies it violated the cited standards. It also challenges the inspector’s gravity and negligence findings.

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<sup>1</sup>Counsel for the Secretary explained the lower proposed penalty was the result of an error. When the inspector issued the order, he indicated one person was endangered by the alleged violation. According to counsel, he should have indicated eight persons were affected. Counsel’s explanation was supported by the inspector’s testimony, and the Secretary’s motion to modify the order to indicate eight persons were affected was granted. Tr. 282, 414. According to counsel, if the alleged violation had been assessed as endangering eight miners the proposed penalty would have been \$10,300, not \$3,500. Tr. 24-25.

## STIPULATIONS

The parties stipulated as follows:

1. Coal River . . . is an operator as defined in Section 3(d) of the . . . [Act].
2. Operations of Coal River . . . at [the mine] are . . . subject to the jurisdiction of the . . . Act.
3. [T]his proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated administrative law [judge] pursuant to Sections 105 and 113 of the . . . Act.
4. [T]he products of the . . . mine . . . affected interstate commerce within the meaning and scope of Section 4 of the . . . Act.
5. True copies of each citation and order . . . at issue . . . in this proceeding were served on . . . [Coal River] or its agent as required by the . . . Act.
6. The total proposed penalty for the citation and orders at issue in this proceeding will not affect . . . [Coal River's] ability to continue in business.
7. [F]or the purpose of assessing a penalty in this case, . . . [Coal River] has a low history of previous violations.

Tr. 38-40. After these stipulations were read into the record, counsels agreed on one additional fact – that from January 1, 2005, to January 27, 2007, no citation or order was issued at the mine alleging a violation of section 75.340(a). Tr. 41-42.

## THE BACKGROUND OF THE CITATION AND ORDERS

The subject enforcement actions arose out of MSHA's investigation of an incident that occurred at the mine on January 27, 2006, when batteries allegedly overheated during the evening shift. The batteries had been taken off a scoop, placed on the ground, and connected to a battery charger at a battery charging station.<sup>2</sup> The batteries were located just outby the battery charger,

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<sup>2</sup>MSHA inspector, Bobby Moreland, described the scoop as "a rubber-tired machine that . . . has a bucket on one end, [and] batteries on the other [end]." Tr. 138. The scoop in question

and the charging station was located at Spad No. 1965. Tr. 597. Air ventilating the charging station did not travel to the face, but was routed outby. *Id.*, Tr. 602. The charging and/or overheating of the batteries apparently caused them to release hydrogen gas, which in turn triggered the mine's carbon monoxide (CO) sensors. This resulted in an alarm sounding, which in turn resulted in all underground miners being evacuated and rescue teams being called.<sup>3</sup> There were no injuries.

Bobby Moreland has been an MSHA inspector since approximately 1991. Tr. 47-48. On January 27, Moreland was acting as an accident investigator and an electrical specialist for the agency. In addition to his MSHA duties, Moreland is a certified electrician. He also holds mine foreman's papers. Tr. 47. Since becoming an electrical specialist for MSHA, his primary area of responsibility has been accident investigations. Moreland estimated he has investigated 30 to 40 accidents for the agency, three of which involved electrical incidents. Tr. 49.

Moreland had inspected the Tiny Creek No. 2 Mine in the past, but at the time of the incident it had been "several years" since he had been underground there. Tr. 50; *see also* Tr. 92. On January 27, Moreland was at home when he received a telephone call from his supervisor, Terry Price. Price told Moreland there had been an incident at the mine.<sup>4</sup> Price instructed Moreland to go to the mine. Tr. 52. Price also decided to go to the mine.

Moreland and Price were not the only ones who received calls that evening. B.K. Smith, the mine superintendent, was at home when he, too, was called. Smith was advised the mine's CO monitoring system was reporting "real high" CO levels underground. Smith, who was well aware of recent mine explosions and fires involving other mines and operators, was "scared to death." Tr. 773; *see also* Tr. 772. He ordered all miners evacuated, and then he immediately left for the mine.<sup>5</sup> Tr. 771-772.

When Moreland arrived at the mine, he discovered no one knew exactly what had happened. Some miners still were underground. Tr. 59, 94-95. Both Price and Smith arrived

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was used "to carry supplies or to do cleaning." *Id.*

<sup>3</sup>Larry Blackburn, Coal River's production manager, estimated a total of 30 miners were evacuated. Tr. 629.

<sup>4</sup>Terry Price learned something had happened when, at about 8:30 p.m., Terry Chapman, the mine's safety director, called Price and reported the event. Tr. 56; *see* Gov't Exh. 8.

<sup>5</sup>On January 27, in addition to Smith, who had been the superintendent since August 1995 (Tr. 170), the mine management team included the manager of operations, Larry Blackburn; and the third shift mine foreman, Mark Blackburn. The team generally received good marks from MSHA enforcement personnel. For example, Moreland believed they did a "good job" managing the mine. Tr. 93.

shortly after Moreland. Tr. 773. Moreland first spoke with the chief electrician, Ryan Browning. Then, Moreland went to the CO monitor station to get a printout of the underground CO levels.<sup>6</sup> Tr. 60. A printout was not available, but Moreland could tell from the system that its alarm had sounded. Moreland thought the alarm could have been triggered by gases produced by a fire or released from a battery or batteries.<sup>7</sup> Tr. 61.

Smith also checked the monitor station. He was very concerned about a possible underground fire. Tr. 814. However, as he continued to check, he could see the gas levels beginning to diminish. Tr. 773-774. The gas was moving outby and out of the mine, and new gas was not being produced.<sup>8</sup> Tr. 780. In the meantime, MSHA took control of the situation by issuing a section 103(k) order (30 U.S.C. § 813(k)) to Coal River.<sup>9</sup> Tr. 776-777.

Moreland stayed at the mine until after midnight. After he confirmed all miners were safely accounted for and none were left underground, Moreland prepared to go home.<sup>10</sup> Before leaving, Moreland listened to the miners being “debriefed” as they came out of the mine. Tr. 63. From what he heard, he believed the high gas levels were the result of a “possible battery fire.” *Id.*

In the meantime, third shift mine foreman, Mark Blackburn, had traveled underground to

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<sup>6</sup>The station was located in the main mine office.

<sup>7</sup>Everyone agreed although the system was designed to signal a fire by detecting the resulting CO, the system also could be triggered by the release of high levels of hydrogen given off by batteries while they were charging or when they overheated. Tr. 61-62.

<sup>8</sup>Moreland explained that by looking at the system, “You could follow [the gas] . . . from one sensor to another” as air traveled outby to exit the mine. Tr. 96.

<sup>9</sup>Section 103(k) provides in part:

In the event of an any accident occurring in a coal . . . mine . . . [an inspector], when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal . . . mine, and the operator of such mine shall obtain the approval of . . . [the inspector] . . . of any plan to recover any person in such mine . . . or [to] return affected areas of such mine to normal.

<sup>10</sup>Smith was so concerned about what might have happened underground, he ordered four head counts to make sure everyone was out. Tr. 778.

find out what happened. Blackburn first determined there was no active mine fire, and he then made his way to the battery charging station at Spad No. 1965. Blackburn was familiar with the station because, at the direction of Smith, Blackburn had ordered the battery charger and the batteries moved to the area. Tr. 679, 683, 717. The move was motivated by less than ideal roof conditions in the area where the station was previously located.<sup>11</sup> Tr. 682, 693; *See also* Tr. 784. According to Blackburn, he had the equipment moved to Spad No. 1965 “probably a couple of days” before January 27. *Id.*; Tr. 708.

Blackburn explained when batteries are charged, they “emit gases . . . because that’s the nature of . . . batteries.” Tr. 680. Therefore, when setting up a charging station, the charger is located in neutral air, but gases given off by the batteries are ventilated out of the mine with the return air.<sup>12</sup> Tr. 685, 787.

Blackburn described in general how charging stations were established at the mine. He stated, either before or after a battery charger was moved into an area designated as a charging station, the ribs of the station were fireproofed by spraying them with Pyro-Chem, a fire retardant coating. Tr. 684. The company then applied rock dust to the area. Tr. 687. Blackburn’s description of how a charging station was set up was echoed by Smith. Tr. 790-791.

With regard to the charging station at Spad No. 1965, Blackburn explained that the first thing moved to the area was the battery charger. Next came the batteries. After this, Blackburn instructed the crew to “run the cable [to the charger] and . . . spray the area.” Tr. 689. Blackburn thought the area would be sprayed by the incoming shift. (“I moved the charger and the batter[ies] . . . I didn’t spray . . . because I didn’t have time. The other boss was going to take his people down there and do it. I basically got it started.” Tr. 703.) Ronald Byans was the incoming section foreman, and Blackburn believed it was Byans’ job to make sure the area was sprayed. Tr. 719-720. However, after the next shift ended, Blackburn learned there was a problem. Contrary to his instructions, Pyro-Chem had not been applied to the ribs. Tr. 689. At first, Blackburn thought the spray machine had malfunctioned, but later he learned the Pyro-Chem, which had been stored on the surface, was frozen and was not brought into the mine soon enough to thaw. Tr. 699-700, 707. According to Blackburn, when Smith learned the area had not been sprayed, he said, “[O]kay we’ll get someone to take care of it.” Tr. 707. Smith told a foreman about the situation. Smith expected the foreman to pass on the information and to

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<sup>11</sup>Smith confirmed the charging station was moved to Spad No. 1965 after bad roof conditions were encountered. Tr. 784.

<sup>12</sup>Moreland testified that the air at Spad No. 1965 was moving at least 50 feet per minute. This velocity was slow, but it did not violate any MSHA requirements. *See* Tr. 353.

rectify the problem. Tr. 832. However, the area was never sprayed.<sup>13</sup>

Blackburn described spraying charging stations at the mine as a “common practice.” Tr. 708. In the past four years, he could not recall any other instance when a charging station was not sprayed and, thus, when a charging station was deprived of a fire suppression system. Tr. 711. (At the mine, Pyro-Chem served as a means by which the company provided charging stations with their required fire suppression systems.)

Because everyone was accounted for and the incident did not result in any injuries, MSHA did not begin its on-site investigation of the events of January 27 until Sunday, January 29. That Sunday Moreland returned to the mine, where he was scheduled to meet MSHA’s lead accident investigator, Fred Willis. Willis arrived between 9:00 a.m. and 9:30 a.m. He was briefed by James Maynard, another agency investigator. Maynard was assigned to assist Willis and Moreland. Smith also was at the mine. Tr. 782. Maynard had reviewed some of Coal River’s records, and he gave Willis copies of pre-shift, on-shift and weekly examination reports, as well as gas readings. Tr. 227.

Willis asked Moreland to interview “certain individuals.” Tr. 64. Willis gave Moreland a list of questions suggested to Willis by the MSHA District Manager. Tr. 64; *see* Gov’t Exh. 13. *Id.*; *see* Tr. 98, Tr. 229; *see also* Gov’t Exhs. 13 at 17. As a result, Moreland interviewed nine miners. From the interviews, Moreland concluded: “[s]ome of the people knew about [the battery] charger installations. Some of them didn’t. . . . Not everyone knew the exact requirements of charger installations. . . .” Tr. 69. Moreland concluded the charging station had been at Spad No. 1965 for two or three weeks prior to January 27. Tr. 73, 120, 136-137. However, he agreed it was possible the station had only been at Spad No. 1965 for couple of days. Tr. 121; *see also* Tr. 137.

Later that day a joint MSHA-company inspection party proceeded underground. Willis and Moreland were among those representing MSHA. Larry Blackburn was one of the company’s representatives. Tr. 228. According to Willis, one of the first things the team did was travel to Spad No. 1965 to look at the battery charging station. Tr. 231. The scoop batteries, which were on the ground to one side of the battery charger, were in their metal case. The lid on the case was closed.<sup>14</sup> Tr. 232-233; Gov’t Exh. 17. As the party gathered around the case, the lid

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<sup>13</sup>Smith testified, when he learned the area had not been sprayed, it was “just like a smack in the face.” Tr. 801. Blackburn, could not explain why the Pyro-Chem was not applied to the ribs. He stated, “for whatever reason it didn’t get taken care of, I guess we dropped the ball. Somebody, somewhere, somehow, didn’t spray it.” Tr. 706. He added, he was “sure it wasn’t intentional.” *Id.*

<sup>14</sup>According to Daniel Bickey, whose company, Mine Power Systems (MPS), supplied the batteries, when batteries are charged, they should not be confined so the hydrogen which is given off by the batteries during charging does not reach explosive concentrations. Tr. 453-454.

was lifted. Willis testified he noticed evidence of “extreme heat” on one the batteries. Tr. 233, 369, 372. One battery’s inby end was discolored. Willis stated, “it appeared . . . the [batteries’] cells had ruptured, spilling the contents out of the batteries. Tr. 233; Gov’t Exh. 18. Although the on-site investigation revealed there never was a fire at Spad No. 1965 (Tr. 369), Willis believed removing power from the charger as soon as the CO monitors gave the alarm – which is what Coal River personnel had done – allowed the charger to cool and “prevent[ed] a major fire” or explosion.<sup>15</sup> Tr. 314; *see also* Tr. 250.

Willis recalled that the caps over two battery cells had been removed. Willis speculated the caps could have been “blown off” when the fluid in the battery cells overheated. Tr. 242. Further, Willis testified some of the permanent insulation around the edges of the batteries’ case was missing.<sup>16</sup> Tr. 243-244; Gov’t Exh. 18. In addition, insulation on the inside of the case lid was “gone.” Tr. 243. According to Willis, the heat had melted it. *Id.*; Tr. 246.<sup>17</sup>

Additionally, Willis thought seven or eight of the batteries’ cells looked like they had been damaged by heat. (“Heat had built up within those cells. The . . . [cap covering] the cell ha[d] sunk down inside the cell as if a piece of plastic had heated and went down into the cell.” Tr. 243.) Willis remembered looking into the cells. He could see “nothing except the plates in them.” Tr. 249. If water had been above the plates, the batteries would not have overheated. Tr. 250. According to Willis, eight cells had simply melted from the “extreme heat.” Tr. 250.

Maynard also testified about damage that had been done to the batteries. He recalled seeing melted rubber connections between the batteries. Tr. 173.

The MSHA inspectors’ belief the batteries overheated was challenged by Coal River’s witnesses. A large majority of the plastic caps on top of the batteries’ cells remained intact, and maintenance manager, Carl Estep, asked if the batteries had gotten as hot as MSHA’s witnesses maintained, why had not most of the plastic caps melted? Tr. 973. Daniel Bickey’s theory was the incident resulted from over watering the batteries’ cells. He testified, when batteries are

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<sup>15</sup>Willis’s view the batteries had been subjected to “extreme heat” was disputed by Bickey. Bickey was not a member of the investigation team. However, he had spent almost all of his working life involved in the sale and service of batteries, and he testified the danger of a fire or explosion was minimal during charging because “[t]he temperatures don’t get that high. A high temperature in a battery is 115 degrees Fahrenheit . . . .” Tr. 576. Even battery temperatures as high as 160 or 180 degrees Fahrenheit were not dangerous in his view. *Id.*

<sup>16</sup>Steven Curry, who conducted the weekly electrical examinations for the company, disagreed. Tr. 880.

<sup>17</sup>However, Bickey thought the lid appeared to have been treated with ScotchCast, a black spray-on insulation. Tr. 475-477. Thus, while he agreed the black color showing on the inside of the lid could have been evidence of heat, he did not think it was. Tr. 477.

watered before they are charged, the batteries' cells overflow, battery acid spills onto the top of the batteries, and the acid flows out of the ventilation openings (cut out parts of the batteries' case). Tr. 479; see Gov't Exh. 19. Rather than evidence of heat, Bickey believed the corroded area at the end of the subject case was produced by acid due to too much water in the cells. Tr. 479, 577. Looking at a photograph that purportedly showed damage to the batteries, Bickey testified, "This is an over-watered battery and that's why you have that over-flow over the side." Tr. 577. According to Bickey, over-watering is not dangerous and would not have caused excessive hydrogen to be liberated and the CO monitors to trigger an alarm. Tr. 578.

In addition to trying to determine the cause of the incident, MSHA's investigators found specific conditions at Spad No. 1965 violated the previously-mentioned, mandatory health and safety standards. Willis and Maynard were sure there was no Pyro-Chem on the charging station's walls (Tr. 29, 200-201) and Willis concluded Coal River violated section 75.340(a) because with no Pyro-Chem on the walls there was no fire suppression system for the batteries when they were charged off the scoop. Tr. 385-386. Maynard acknowledged, however, the area at Spad No. 1965 was well rock dusted, that five bags of rock dust were stored at Spad 1965, and that the rock dust could act as fire suppression material. Tr. 200-201, 298. Therefore, in Maynard's opinion, the rock dust at Spad No. 1965 somewhat minimized the hazard from the lack of Pyro-Chem. Tr. 201, 211. Still, Maynard emphasized the primary purpose of the rock dust was to "prevent float coal dust from getting suspended in the air and blowing up," not to prevent the ribs from catching fire. Tr. 210.

Because of the lack of Pyro-Chem, Citation 7246621 was issued to Coal River. Gov't Exh. 1. Maynard believed the lack of Pyro-Chem at Spad 1965 was reasonably likely to contribute to an accident. According to Maynard, "it's a hazard changing . . . batteries, period . . . . That's why you have to have all the fire protection there." Tr. 180. In his opinion, the hazards inherent in charging batteries were "fires, hydrogen buildup, explosion, things of that nature." Tr. 181.

It was clear to Moreland that company personnel, including the pre-shift examiners, had missed the fact Pyro-Chem had not been applied to the ribs. He thought one reason was because the ribs were covered with rock dust. Tr. 112. This view was shared by weekly electrical examiner, Steven Curry, who stated when Pyro-Chem is first sprayed on the ribs it looks "like wet mud," but "when they come in there and rock dust . . . it dries . . . so it's just like regular rock dust." Tr. 885.

The investigators further found the condition of the scoop's battery cables and the batteries themselves indicative of a violation of section 75.503, because the scoop was not maintained in permissible condition. In addition to missing insulation on the batteries' case lid, two of the battery cables were spliced and the cables used on the batteries were not approved by MSHA. Further, some of the batteries' cells were dry, and accumulations of combustible materials were found on the batteries. These conditions were set out in Order No. 7249168.

As far as the missing insulation was concerned and, as previously noted, Willis testified insulation on the inside of the battery case lid was simply “gone” (Tr. 243) due to “extreme heat.” *Id.*, Tr. 246. Willis also testified insulation was missing around the edges of the batteries’ case. Tr. 243-244; Gov’t Exh. 18. Moreland stated the conditions could have existed before the January 27 incident or they could have resulted from the incident, “depending on how the batteries [were] maintained.” Tr. 134. Moreover, referring to a photograph of the batteries, Willis identified failed insulation where one of the battery cables connected to the battery. Tr. 268; Gov’t Exh. 23. The cable had not melted, but it appeared to have been subjected to a lot of heat. *Id.*

Moreland identified a splice on a battery cable that ran across the top of one of the batteries. Tr. 145, 169; Gov’t Exh. 19, Gov’t Exh. 21. Moreland testified splices in battery cables were “not allowed” because a splice “weakened” the cable and created “the possibilities of arcing [and] heating.”<sup>18</sup> Tr. 145. Moreland believed those examining the batteries for the company, for example, the certified electrician who conducted the weekly examination of electrical equipment, should have known splices were not allowed. Tr. 148.

In addition to the splice about which Moreland testified, Willis identified “a very badly damaged splice that had melted.” Tr. 263; Gov’t Exh. 21. The splice was open, revealing the insulated conductors. The cable containing the splice served the second of one of the two batteries being charged. *Id.*; Gov’t Exh. 20. The splice was wrapped in low-voltage tape. Tr. 265, 363. Some of the tape had melted. Tr. 265. Willis believed the defective splice contributed to the cause of the accident. *See Id.* However, Coal River’s maintenance manager, Carl Estep, looking at a picture of the splice (Gov’t Exh. 21), pointed out that much of the splice was still in tact and “[t]he tape on both sides of the splice . . . [had] not burned.” Tr. 953. To Estep, this showed the splice was not a contributory factor. If the splice had gotten hot enough to spark the incident, all of the tape used to make the splice would have melted or been distorted. Tr. 953-954.

According to Willis, the splices were dangerous because hydrogen given off when the batteries are charged is explosive when it is between 3% to 75% of the atmosphere. Tr. 331. Battery cases vibrate when the battery-operated equipment is activated. The vibration can cause a hole or holes to be worn in the insulation, exposing the conductors. The conductors can arc and cause an explosion (Tr. 257) and, in Willis’s opinion, a hydrogen explosion can be “catastrophic.” Tr. 256. Like Moreland, Willis maintained splices never are allowed in battery cables. Tr. 251. Willis read from MSHA’s Program Policy Manual (PPM), which, in explaining MSHA’s enforcement policy for section 75.503, states in part: “Splices shall not be made in

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<sup>18</sup>Steve Curry, the company’s weekly electrical inspector, agreed to some extent. He testified splices offer resistance to electrical current and the resistance heats the spliced area of a cable. Tr. 983.

external wiring of permissible equipment.”<sup>19</sup> *Id.*; Gov’t Exh. 28. Because the splice was lying on top of part of the metal frame of the battery case, the only thing between the case and the conductors was the tape that was wrapped around the splice. Tr. 276. The tape was low-voltage tape, the kind used for general electrical repairs. *Id.* In Willis’s opinion, the splice was a poorly made repair of a cable that should not have been spliced in the first place. Tr. 277.

Daniel Bickey testified the splices probably were made by one of his employees. *Id.* Until the splices were cited for violating section 75.503, Bickey believed battery cables could be spliced. Tr. 450. Larry Blackburn, the company’s production manager; Carl Estep, its maintenance manager; and Steven Curry, the weekly electrical inspector, held similar beliefs. Tr. 611-612, 866, 903, 935, 943. Bickey testified, from a pragmatic standpoint, splicing sometimes was preferable to replacing a damaged cable because splicing “took less time” and, thus, production was less disrupted. He was certain a properly prepared splice would not compromise safety. Tr. 452.

MSHA’s inspectors found something else wrong with the cables used on the batteries. The cables were not approved by the agency. Tr. 146; Gov’t Exh. 20. An MSHA-approved cable bears an approval notice or stamp, and Moreland knew the cables were not approved, because they lacked the agency’s official imprimatur. Tr. 146. In Moreland’s opinion, miners examining the batteries should have known approved cables were required. *Id.*

Like Moreland, Willis, too, testified there were no MSHA markings on the cables. Tr. 257. The type of cable used on the batteries was 600-volt welding cable. Tr. 259, 260, 356. Willis did not believe insulation around the welding cable’s conductors was designed to be effective for the long time period a scoop battery was typically used. Tr. 260. Moreover, unlike an MSHA-approved cable, the 600-volt welding cable was not tested for flame resistance. Willis feared insulation used on the non-approved cables would break down. Tr. 261. He recognized MPS supplied the batteries and cables to Coal River, but he did not think this in any way lessened the company’s negligence for failing to use approved cables.

Bickey testified 600-volt welding cable (also referred to as “2/0 cable”) was used at mines prior to 1989. After 1989, MSHA required used of cable that had a thicker “skin.” Tr. 430-431; *see* C.R. Exh. 9. However, according to Bickey, cable used after 1989 actually withstood less heat (210° Fahrenheit, as opposed to 240° Fahrenheit) than cable used prior to 1989. Tr. 431. The older cable was “better” because of this. Tr. 432; *see also* Tr. 527, 528. Nonetheless,

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<sup>19</sup>Larry Cook, an MSHA supervisory electrical engineer, explained if an operator had reason to believe equipment would be used in the face area or in return areas, the equipment had to be maintained in permissible condition. Among other things, this meant that battery cables could not be spliced. Tr. 667-668. It was clear from the testimony that prior to the incident neither company personnel nor Daniel Bickey understood this. They consistently testified that they were not familiar with the referenced part of the PPM and with the “no-splice” requirement. *See, e.g.*, Tr. 948.

Bickey described 2/0 cable and MSHA-approved cable as “functionally equivalent.” Tr. 435. In Bickey’s view, using non-approved cable did not jeopardize safety ( Tr. 443), whereas using approved cable created a “cost issue” for suppliers. Tr. 529. He stated, “We . . . [paid] double because MSHA was printed on it.” *Id.*

Like Bickey, the company’s maintenance manager, Carl Estep, also thought 2/0 cable and MSHA-approved cable were functionally equivalent. He could “not see any difference in either cable.” Tr. 937. He knew of no problems at any of Coal River’s three mines from using 2/0 cable. Tr. 938.

Bickey testified it was not until after the January 27 incident that MPS learned the cable it used was not compliant. “[N]ot until this incident had we ever had any complaints about the 2/0 cable, the . . . [MSHA] people have come through our shop, they’ve seen this [2/0] cable, [they have] never said a word to us and to my knowledge, we have never been contacted by . . . [MSHA] . . . to put this . . . [MSHA-approved] cable on the batteries.” Tr. 433; *see also* Tr. 524. Bickey added, “We’re not about looking up laws.” Tr. 522.

Larry Blackburn, Coal River’s operations manager, also did not know until the incident that the cable supplied with the batteries should not have been used. Tr. 610. He had “never heard anybody say there was [such a thing as] MSHA approved cable.” *Id.* He just “did not know that.” *Id.* Rather, he “took it for granted” cables supplied by MPS were acceptable. Tr. 614. He testified the company never experienced safety or operational difficulty using the non-approved cable.<sup>20</sup> Tr. 610-611.

Each of the two batteries was composed of numerous battery cells. The cells were distinct compartments containing lead plates. For the batteries to function properly, the cells had to be “watered” so each cell had enough water to reach and interact with the cell’s lead plate. (The resulting chemical reaction produced the batteries’ electrical charges.) According to the inspectors, the investigation revealed some of the batteries’ cells contained either no water or insufficient water. Moreland agreed with Willis that the water in several of the cells was low or the cells were dry, but he could not say for sure which of the cells were dry. Tr. 149. Maintenance manager Carl Estep looked at the batteries after they were taken out of the mine. He could not see any water in the cells. However, he believed some must have contained water because they “[had] to have water in [them] . . . to charge.” Tr. 952. Nonetheless, he acknowledged the water in some of the cells was “low.” *Id.*

Willis believed low water in the cells could have caused the batteries to overheat. He also testified once the cells overheated the loss of water would have accelerated, which, in turn

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<sup>20</sup> Like Blackburn, Steven Curry did not know cable provided by MPS was not acceptable. Tr. 865. Nor did the company’s maintenance manager or its superintendent. *See* Tr. 807, 935, 944.

would cause more heat. Tr. 287. Because of the danger of overheating if water was too low, Moreland stated he “definitely [would] add water [to the cells] prior to charging [the batteries].” Tr. 152. Willis agreed (Tr. 324-325) and stated proper maintenance of the batteries required monitoring their water level. Tr. 284-286.

The government’s assertions regarding when to water the batteries was challenged by Daniel Bickey. Bickey identified a sticker MPS attached to the batteries it sent to mines. The stickers stated in part: “Water me after charging only.” C.R. Exh. 10. Bickey thought adding water prior to charging the batteries was “almost criminal.” Tr. 458. He stated, “All batteries that are on charge are going to have low water because they’ve been discharged. So our rule is you water after [a] charge.” Tr. 460. He explained, “[I]f you water before a charge . . . you bring acid and water to the surface of . . . [the] battery, and that’s where it’s dangerous because when acid is on the top of . . . [the] battery it will go to ground and short to the steel from the connector and create a very hazardous situation.”<sup>21</sup> Tr. 461. According to Bickey, low water prior to charging was not the sign of a battery maintenance problem.

Willis understood the last weekly examination of the scoop was on January 24, 3 days before the incident. Tr. 291. At that time the examiner indicated the scoop was “OK.” Gov’t Exh. 15 at 4. The lack of adequate water levels indicated to Willis that despite the “okay” given by the examiner, the water levels were low on the 24<sup>th</sup> and the examiner or another company employee had not corrected the defect. Tr. 292. Willis believed the failure to properly maintain the scoop’s batteries was the result of “high negligence” because of the obviousness of the conditions.

Willis also maintained there were accumulations of combustible materials on the batteries. On the second of the two batteries, Willis thought he saw evidence of smouldering, fine coal and/or coal dust in the form of white ash. Tr. 266; Gov’t Exh. 20, Gov’t Exh. 22. Bickey challenged Willis’s belief the ash was residue from combustible material. Bickey thought the “ash” identified by Willis could have been baking soda that “wasn’t washed off really good.” Tr. 465. Maintenance manager Carl Estep essentially agreed. Tr. 940. He added, “We clean the batteries with baking soda. It dilutes the acid when it builds up on top of the batteries.” *Id.*

Finally, and as previously noted, during the course of the investigation Moreland asked for and was given copies of various company reports, including the pre-shift reports from the morning shift of January 19 to the hoot owl shift of January 27 (Tr. 73; Gov’t Exh. 14) and the weekly electrical equipment examination reports covering various days between January 4 and January 24. Tr. 73; Gov’t Exh. 15. According to Moreland, Jerry Vance was one of the pre-shift examiners who inspected the area at Spad No. 1965 for the company. Tr. 126-127. Vance recalled conducting the pre-shift examinations prior to the incident. Vance agreed he did not

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<sup>21</sup>Weekly electrical examiner Steve Curry, who “watered” batteries, agreed with Bickey. Curry testified it was his practice to add water to the batteries’ cells if the water level was low, but he did not do so if the batteries were going to be charged. Tr. 862

notice fire retardant material was missing from the ribs at the battery charging station.<sup>22</sup> Rather, he remembered the area at Spad No. 1965 as being well rock dusted, and as containing fire extinguishers and extra bags of rock dust. Tr. 754. To Vance, these conditions alone meant batteries could be charged in the area because, as Vance then understood the requirements of section 75.340(a), fire retardant material on the ribs was not necessary to comply with the standard's requirements. He believed the application of Pyro-Chem as an additional precaution the company voluntarily undertook to "further fireproof [the] area." Tr. 754-755. Therefore, at the time of the inspections he thought the area was in compliance. Tr. 754. MSHA's investigators disagreed, and charged the company with a violation of section 75.360(b)(9), for failing to perform an adequate pre-shift examination (Order No. 7249166). They further charged the failure of the weekly electrical examiner to note, among other things, that the batteries were not properly maintained meant the weekly examination was inadequate (Order No. 7249167).

### **RESOLUTION OF THE ISSUES**

**WEVA 2006-125-R**

**WEVA 2007-196**

Section 104(d)(1) Citation No. 7249165 states:

The unattended 35 C scoop charger . . . located at [S]pad No. 1965 was not provided with a fire suppression system or enclosed in a noncombustible structure. Batteries were being charged on the bottom of the scoop and were not provided with fire suppression systems required by [§] 75.1107-3 through [§] 75.1107-16. . . . Through interviews this charger station has existed for 2 to 3 weeks.

Gov't Exh. 1.

### **THE VIOLATION**

Among other things, the standard requires battery charging stations to be "housed in noncombustible structures or areas or to be equipped with a fire suppression systems meeting . . . [specified] requirements." I find the requirements of the standard were not met. There really is

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<sup>22</sup>After the incident, when he was informed the retardant in fact was missing, he viewed the condition as an aberration because, as he put it, Coal River "always Pyro-Chem'd [its] charging stations." Tr. 753; *see also* Tr. 755. Production manager Larry Blackburn agreed. He could not recall the company ever receiving a prior citation for failing to provide a fire suppression system at a battery charging station. Tr. 606.

no question about this. The battery charger was not “housed in noncombustible structure;” nor was the area in which it was located rendered noncombustible by the application of Pyro-Chem to the walls. Since the batteries were charged on the floor at Spad No. 1965 rather than on the scoop itself, the charging station was not equipped with a “fire suppression system” within the meaning of the standard, and for these reasons I find the violation occurred as alleged.

### S&S GRAVITY

An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). A violation is properly designated S&S, “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). To establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (January 1984); *accord Buck Creek Coal Co., Inc.* 52 F. 3d 133, 135 (7<sup>th</sup> Cir. 1995); *Austin Power Co., Inc. v. Sec’y of Labor*, 81 F. 2d 99,103 (5<sup>th</sup> Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985). Further, an S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (August 1985); *U.S. Steel*, 7 FMSHRC at 1130.

Finally, the S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September 1996).

The Secretary established a violation of section 75.304(a). She also established a safety hazard contributed to by the violation. In this regard, I find Maynard’s testimony concerning the hazards associated with charging batteries logical and pertinent. He persuasively explained how charging batteries can result in “fires, hydrogen buildup, [and] explosion[s].” Tr. 181. The requirements of section 75.304(a) are designed to greatly minimize these hazards. If an explosion and/or a fire had occurred at Spad No. 1965 while the batteries were being charged, little was in place to minimize the chance the ribs would catch fire and the fire would spread.

Without the protections required by the standard, it is reasonably likely the hazard would have contributed to an injury. The splices in the battery cables provided a potential ignition source for hydrogen liberated while the batteries were charging. If an explosion and/or a fire occurred, smoke and/or fume inhalation or burns were reasonably likely to result. Miners likely to be injured would either have worked in the vicinity of the accident or would have been sent to fight the accident's results. In this regard, I note the mine superintendent's candid admission that eight or nine miners could have been affected in the event of an explosion. Tr. 834; *see also* Tr. 823-824. B.K. Smith maintained no miners would have been affected in the event of a fire because, if the stoppings remained intact, smoke would have traveled away from the miners. *Id.* However, his contention is highly speculative and too problematic. The fact is, underground mine fires can disrupt ventilation and send smoke and fumes over the miners working in fresh air. Inhalation and/or burn injuries were reasonably likely to be serious, even fatal, and for these reasons I conclude the violation was S&S. Moreover, in view of the kind of injuries that were likely to happen to miners if the hazard occurred, I find the violation also was serious.

### UNWARRANTABLE FAILURE AND NEGLIGENCE

Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence . . . in relation to a violation of the Act." *Emery Mining Corp.* 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or "a serious lack of reasonable care." *Id.* 2003-2004; *Rochester & Pittsburg Coal Co.*, 13 FMSHRC 189, 193-194 (February 1991); *see also Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 157 (2d Cir. 1999); *Buck Creek Coal, Inc. v. MSHA*, 53 F.3d 133, 136 (7<sup>th</sup> Cir. 1995) (approving Commission's unwarrantable failure test). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure, and recognized that a heightened standard of care is required of such individuals. *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987) (section foreman held to demanding standard of care in safety matters); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995) (heightened standard of care required of section foreman and mine superintendent). Negligence, of course, is the failure to meet the standard of care required by the circumstances.

I conclude the violation was not caused by Coal River's unwarrantable failure to comply with the standard. I do not entirely agree with Willis that the charging station was "set up . . . without . . . regard to fire suppression." Tr. 284. I accept Mark Blackburn's essentially unchallenged testimony that the Pyro-Chem the company intended to apply to the walls of the charging station was frozen, and I find, as Blackburn testified, that when he learned of the situation, B.K. Smith ordered the area to be sprayed. Tr. 699-700, 707. The record reveals nothing "aggravated," "reckless," or "intentional" in the company's failure. Indeed, Superintendent Smith throughout the course of the hearing impressed me as a caring, careful, and conscientious supervisor, one any company would be lucky to employ and any miner would be lucky to work for. I fully believe he was as surprised as anyone when he learned his instructions had not been followed and the area had not been sprayed. As he stated, it was "just like a smack

in the face.” Tr. 801.

The record also does not support a finding of heightened neglect. There was no showing the failure to provide fire protection was a habitual practice at the mine (*see, e.g.*, Tr. 696, 802). Further, the rock dust that covered the ribs clearly made the absence of Pyro-Chem difficult, although not impossible, to detect. In this regard, Larry Blackburn’s testimony regarding the similarities in the color of rock dust and Pyro-Chem was persuasive. Tr. 603-604. I agree with Blackburn that the lack of Pyro-Chem would not have “jumped out” at anyone.<sup>23</sup> Tr. 634.

In sum, I conclude the failure to apply Pyro-Chem to the ribs at Spad No. 1965 reflected a lack of care, but not one so heightened as to constitute unwarrantable failure. Rather, the violation occurred due to Coal River’s moderate negligence, and I will order the citation to be modified to reflect this fact.

**WEVA 2006-126-R**  
**WEVA 2007-196**

Section 104(d)(1) Order No. 7249166 states in part:

[An in]adequate pre-shift examination was conducted for the 35 C Scoop charger . . . located at [S]pad [No.] 1965. The pre-shift examiners did not record obvious hazards that existed at this location. [The] charger station was not provided with a fire suppression system or enclosed in a noncombustible structure. Through interviews with management and miners [the] charger has been at this location for two to three weeks. No hazardous conditions [have] been recorded in the pre-shift records concerning the [charger] during this period of time.

Gov’t Exh. 2.

**THE VIOLATION**

Section 75.360(b)(9) requires the pre-shift examiner to “examine for hazardous conditions” at “[u]nderground electrical installations,” and section 75.360(d)(f) requires the keeping of a record of “hazardous conditions and their locations found by the examiner during each examination.”

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<sup>23</sup>The testimony of Mark Blackburn and Jerry Vance, both of whom were familiar with the chemical and with rock dust, corroborated that of Larry Blackburn in this regard. Tr. 694, 695, 713, 756.

The order states that the charging station was located at Spad No. 1965 “for two to three weeks,” but this is not certain from the record. Moreland acknowledged the two- to three-week period was based on what he remembered hearing others say, and Moreland later agreed it was possible the station had been at the spad for only a few days before the accident. Tr. 121; *see also* Tr. 136-137. In fact, no one testified exactly when the station was moved to the area. Mark Blackburn believed it was moved “probably a couple of days” before January 27. Tr. 708. Jerry Vance, who conducted the pre-shift examinations immediately prior to the incident, stated it was “a week, a couple of weeks, maybe” (Tr. 738-739) and “[i]t could have been less.” Tr. 739.

Although it is impossible to establish with certainty when the station was moved, it is reasonable to assume the station was located at Spad No. 1965 when Vance conducted his pre-shift examination immediately before the incident. Vance testified he did not notice fire retardant material was missing from the ribs. Tr. 754. This oversight was confirmed by his pre-shift reports, none of which reference the missing Pyro-Chem. *See* Gov’t Exh. 19. The lack of the fire retardant material on the ribs at the charging station was a “hazardous condition.” It should have been reported. In failing to do so, Vance, and through Vance, the company, violated section 75.360(b)(9).

### **S&S GRAVITY**

I have found the Secretary established a violation of section 75.360(b)(9). She also established a safety hazard contributed to by the violation. The failure to conduct an adequate pre-shift examination in this instance meant a hazardous condition was not reported. Reporting is an essential step in the elimination of hazards, because pre-shift reports are reviewed by management personnel (usually the incoming shift foremen) and reported conditions are corrected. When the incident occurred on January 27, the explosion and/or fire hazard was augmented by the lack of Pyro-Chem on the ribs, a condition that presumably would not have existed had Coal River fully complied with section 75.360(b)(1). Moreover, I find it reasonably likely as mining continued the failure to report the lack of fire retardant material on the ribs would have contributed to an injury. The ongoing charging of batteries whose cables were spliced and improperly clamped (*see* discussion of Order No. 7249168, *infra*) meant it was reasonably likely an explosion and/or fire would occur. The failure to identify the lack of fire retardant material on the ribs also meant it was reasonably likely serious injuries would result. This is especially true in the context of continued mining operations. The area had been rock dusted, and Jerry Vance did not look under the rock dust for Pyro-Chem. Tr. 741. Therefore, as mining continued there was little likelihood the lack of material ever would have been reported as a hazard and corrected. For these reasons, I conclude the violation was both S&S and serious. In finding the violation was serious, I reject the suggestion offered by Vance that rock dust alone could afford sufficient fire protection for the charging station. *See* Tr. 749. As Maynard pointed out, the purpose of the rock dust was to inert potentially explosive coal dust, not to retard a fire.

**UNWARRANTABLE FAILURE AND NEGLIGENCE**

I conclude the violation was not the result of Coal River's unwarrantable failure. Certainly, Vance was not guilty of reckless disregard, intentional misconduct, or indifference to his obligations. He relied on the fact that it was the practice at Coal River to spray Pyro-Chem on the ribs and then to rock dust over the Pyro-Chem. While his reliance was misplaced and did not meet the standard of care required, it was not the kind of serious lack of reasonable care that justifies an unwarrantable failure finding. The record established the practice on which Vance relied was a fact. It was repeatedly testified to by other of the company's witnesses, and the Secretary did not offer evidence of frequent, previous failures to apply fire retardant material where it was required. (For example, she did not introduce previous citations alleging the same violation of section 75.360(b)(9).) The similarity in color between Pyro-Chem and rock dust once both were applied meant its absence was not readily apparent. Had the company's pre-shift examiner exercised the care required, he would have observed and recorded the fact the material was missing. However, because the lack of Pyro-Chem was not the kind of condition that would have "jumped out" at him and because it was reasonable to assume Pyro-Chem had been applied as usual, I conclude the lack of care in failing to note its absence was ordinary and was not unwarrantable.

**WEVA 2006-127-R**  
**WEVA 2007-196**

Section 104(d)(1) Order No. 7249167 states in part:

[An in]adequate weekly examination was conducted at the 35 C Scoop charger . . . located at [S]pad [No.] 1965. Numerous and obvious hazards existed at this location including no fire suppression provided, damaged charger cables, and batteries not being maintained. Records of weekly examination[s do] not reveal any hazardous conditions existing. Through interviews of management and the miners this charger station has existed at this location for two to three weeks. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov't Exh. 3.

**THE VIOLATION**

Section 75.512 requires "[a]ll electric equipment" to be "frequently examined," and

when a “potentially dangerous condition is found on electrical equipment,” for the equipment to be “removed from service until such condition is corrected.” Moreover, “[a] record of [the] examination” is required to be kept. 30 C.F.R. § 75.512. Under section 75.512-2 the frequency of the required examination is defined as “at least weekly.”

I conclude the Secretary established a violation of section 75.512, although not as extensive a violation as she alleged. It is clear from the order and from the testimony of Inspector Willis that MSHA regarded the failure of the weekly electrical examiner to note the absence of Pyro-Chem on the ribs at Spad No. 1965 as violative of the standard. Gov’t Exh. 3; Tr. 294, 299. The problem is the allegation focuses on a condition extraneous to the cited electrical equipment. It would be a stretch indeed to regard the ribs at the charging station as part of the charger and batteries, and I find the weekly examiner’s failure to note the condition did not violate the standard.

The order also charges the examiner should have noted the batteries were not “being maintained.” Gov’t Exh. 3. To Willis, this meant low water levels of the battery cells should have been reported by the examiner, as should the accumulations of combustible materials on the batteries. Tr. 296, 336.

Willis understood the last pertinent weekly electrical examination was on January 24, three days before the incident. With regard to the water levels in the battery cells, Willis clearly stated his opinion the water levels were low or nonexistent at the time of the last inspection. Tr. 291-292; Gov’t Exh. 15 at 4. Willis’s belief was reasonable in the light of what happened on January 27. Although there was a great deal of testimony about the right time to add water to the batteries’ cells – before or after charging – I find the most probable deduction to draw from the incident is when the batteries were being charged that the water in several of the cells was too low – in fact, a few of the cells might have had no water at all – and this caused the batteries to overheat and release gas, which in turn activated the CO sensors. The electrical examiner, Steven Curry, should have checked the batteries on January 24 to make sure the water in the cells was at an appropriate level for the batteries to be charged.<sup>24</sup> At no point in Curry’s testimony did he indicate he conducted such a test as part of his examination. I find that his failure to do so violated the standard.

As for the alleged accumulations, as I have previously found, in my view, the Secretary did not carry her burden of proving they existed. The testimony offered by the Secretary was almost entirely restricted to the existence of white “ash,” and, as discussed above, whether the substance was ash from combustible material or was residue from baking soda, cannot be

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<sup>24</sup>Carl Estep’s assertion, watering battery cells before they are charged causes the water and acid to overflow the cells (Tr. 950) may be true if, after watering, the level of water is too high in the cells. But, water has to be in the cells for the batteries to take a charge, and it logically follows there has to be a proper level for the water, one that will not cause them to overflow.

determined from the record. For this reason, I find any failure of the weekly examiner to report the presence of the alleged combustible material on the batteries did not violate the standard.

Finally, the order asserts the examiner should have reported the presence of "damaged charger cables," and I agree. The testimony established the spliced battery cables were present when Curry conducted the examination on January 24. I have found the spliced cables posed a hazard. The hazard should have been reported by the examiner. The spliced cables represented a "potentially dangerous condition" (section 75.512), a condition that could have posed an ignition source and/or a shock hazard as mining continued.

### **S&S GRAVITY**

The Secretary established a violation of section 75.512. She also established a safety hazard contributed to by the violation. The failure to conduct an adequate weekly electrical examination in this instance meant that two potentially dangerous conditions were not brought to the attention of mine management: insufficient water in the battery cells prior to charging and spliced cables in use on the batteries. As previously stated, the reporting of a hazardous condition is an essential step in eliminating a hazard. Weekly electrical examination reports are reviewed by management personnel and reported conditions are corrected. Here, Curry's failure to report low water in the battery cells before they were charged meant the batteries overheated during charging, a condition that triggered the January 27 incident. Fortunately, no injuries occurred as a result of the incident, but a very real potential for injuries either through an explosion and/or fire existed, and, in my opinion the hazard was reasonably likely to occur as mining continued.

Moreover, the failure to report the spliced battery cables meant that as mining continued, the spliced areas would have been exposed to more vibration and strains. The insulation at the spliced areas could have ruptured, and the conduits could have been exposed and presented a potential ignition source for the gas given off during charging. The spliced cables also presented a continuing shock hazard to miners working with the batteries. Serious injuries were reasonably likely. The company's unquestioned acceptance of whatever MPS provided and the lack of knowledge of the electrical examiner that splicing was prohibited meant the spliced cables would in all likelihood have remained indefinitely on the batteries. (In this regard, I again note Curry's testimony he was unaware battery cables could not be spliced. Tr. 866.) The injuries most likely to result from an explosion and/or a fire or from being shocked would have been serious, even fatal. For these reasons, I find the violation was both S&S and serious.

### **UNWARRANTABLE FAILURE AND NEGLIGENCE**

The failure of the weekly examiner to make sure sufficient water was in the battery cells was an unwarrantable failure. Because of the potential dangers involved in charging the batteries when the cells contained insufficient water, it should have been a practice at the mine to have the weekly examiners always check the water in batteries of electrically powered equipment. It is

clear no such practice existed. In all likelihood the lack of such a practice directly contributed to the January 27 incident.

Moreover, Curry's and the company's failure to detect and report the use of spliced cables on the batteries went beyond a lack of observation. The testimony established the company officials and Curry did not even know the use of spliced cables was prohibited. As previously discussed, the record fully supports finding the company totally relied on MPS to provide it with compliance ready batteries and did nothing beyond that to ensure compliance. This serious lack of reasonable care resulted in the violation here at issue and it reflected both Coal River's unwarrantable failure and its high negligence.

**WEVA 2006-128-R**

**WEVA 2007-196**

Section 104(d)(1) Order No. 7249168 states:

The 35 C scoop batteries located at [S]pad [No.] 1965 were not being maintained as approved. Insulation on the battery lids and areas near cells [was] damaged and missing . . . cables within the battery box . . . [were] found damaged and two were found spliced, cables also were not approved . . . in that . . . [they] must be accepted by MSHA as flame resistant under [P]art 18[.] [A]lso[,] battery cables must be protected from abrasion by effective means. Scoop batteries were also not being maintained in that cells were dry of water and accumulations of combustible materials were found present on the batteries. These are obvious and extensive hazards that should have been addressed by management . . . this violation is an unwarrantable failure to comply with a mandatory standard.

Gov't Exh. 4.

**THE VIOLATION**

I conclude the Secretary properly charged the company with a violation of section 75.503. Coal River does not dispute the subject scoop was taken into and used in by the last open crosscut. As such, the scoop was "electric face equipment" required to be maintained in "permissible condition." The permissibility requirement extends to the components of the scoop, including its batteries, and the evidence clearly establishes the batteries were not permissible in several ways.

First, at least two battery cables were spliced. The splices were testified to by Moreland and Willis and were shown in the Secretary's exhibits. Tr. 145, 169,263; Gov't Exhs. 19, 20, 21. Moreover, the Secretary established that under section 75.503, no splices are allowed in battery cables. This ban on splices is, as Willis testified, MSHA's policy and the policy reflects the requirements of the regulation. Tr. 251; *see* Gov't Exh. 28. Second, the cables used on the scoop's batteries were not approved by MSHA. Moreland and Willis testified to this fact, and their testimony was not disputed by Coal River's witnesses. Tr. 146, 257; *see* Gov't Exh. 20. Third, and as the order alleges, the lack of proper clamps securing the cables also violated section 75.503. The testimony supports the charge. Willis's contention a non-approved Buncy clamp was used to hold the conductors at one of the splices was not refuted, and even Bickey agreed tape, not a clamp, was used at another of the splices. Tr. 267; 568; *see* Gov't Exh. 21.

Finally, the order asserts the batteries were "not being maintained" (presumably in permissible condition), in that the battery cells were "dry of water" and "accumulations of combustible materials" were found on the batteries. There are problems with these charges. The record reveals the Secretary's witnesses actually did not know if the cells were totally without water, that is, if the cells were "dry." (Moreland admitted he could not say which of the cells in each battery was without water. Tr. 149.) The inspectors could not see to the bottom of the cells because of the cells' lead plates. Furthermore, Carl Estep's contention the battery cells had to have at least some water in them for the cells to make a circuit for the charger to function was not refuted (Tr. 949), and Moreland and Willis essentially agreed some of the cells contained water, although the level was insufficient. *See, e.g.*, Tr. 149, 287. Thus, the record does not support finding the cells were "dry of water", as the order charges. Gov't Exh. 4.

Further, the evidence falls short of establishing the presence of accumulations of combustible materials on the batteries. True, Willis's testimony confirmed the presence of white residual "ash" on the batteries, but, as I have noted, whether the "ash" was the result of incinerated combustible accumulations, as he maintained (Tr. 266), or was the residue of baking soda used to clean the batteries, as Bickey and Estep testified (*see* Tr. 266, 465, 940), cannot be determined.

For these reasons, I conclude the Secretary established the scoop's batteries were not maintained in permissible condition as alleged, but only insofar as the cables were spliced, were not approved by MSHA, and were not permissibly clamped.

### S&S GRAVITY

The Secretary established a violation of section 75.503. She also established a safety hazard contributed to by the violation. I find Moreland's testimony that splices in battery cables "weakened" the cables and created "the possibilities of arcing and heating" to be compelling. Tr. 145. The danger was heightened in this instance because one of the splices had been damaged to the extent it was open and revealed the spliced cable's inner conductors. Tr. 263; Gov't Exh. 21. However, I do not find the Government offered sufficient evidence to find any of the splices was

causally linked to the incident of January 27. In this regard, I note Estep's observation that most of the tape used in making the ruptured splice showed no evidence of being affected by heat, in that it was not burned or distorted. Tr. 953-954. Nonetheless, I agree with Willis that the splices were very dangerous because of their potential to ignite a hydrogen explosion. Tr. 256-257; *see also* Tr. 331. He persuasively described the result of any such explosion as "catastrophic." Tr. 256. It also is obvious to me the splices could have contributed to a dangerous fire. Given the fact the spliced cables were subject to vibration and abrasion as mining continued, were not clamped properly, and one of the splices already had ruptured, revealing its conductors, I find in the context of continued, normal mining operations, an explosion and/or fire was reasonably likely to occur, and serious, even fatal, injuries to miners caused by gas, smoke and/or fume inhalation or fire were reasonably likely to result. For these reasons, I conclude the violation was both S&S and serious.<sup>25</sup>

### **UNWARRANTABLE FAILURE AND NEGLIGENCE**

I conclude the company unwarrantably failed to prevent use of the spliced, improperly clamped and non-approved battery cables. Coal River unquestionably relied on MPS to provide it with batteries meeting all of the applicable MSHA requirements. As Estep stated, company officials believed MPS to be a "quality vendor." Tr. 933. The attitude of mine operations manager Larry Blackburn was typical. He stated he just "took it for granted" the batteries supplied and serviced by MPS were acceptable to MSHA. Tr. 614; *see also* Tr. 807, 865, 935, 944 (testimony of other company officials regarding unquestioned reliance on MPS). I also accept as credible the testimony of Larry Blackburn, Estep, and Curry that they were unaware battery cables could not be spliced (Tr. 611-612, 866, 903, 935, 943), and the testimony they did not know the battery cables supplied by MPS were not approved by MSHA. Tr. 807, 865, 935, 944. However, I fully agree with Inspector Willis that the company's reliance on MPS did not lessen the company's culpability. *See* Tr. 356. Coal River's responsibility for compliance was not subject to contract. In failing to ensure MPS provided it with batteries that complied with the law, the company exhibited a serious lack of reasonable care. There was no evidence of a system established by the company to check on the compliance-readiness of the equipment it was provided. Coal River simply abrogated its responsibilities in this regard. As such, I conclude the violation of section 75.503 was the result of its unwarrantable failure and high negligence.

### **OTHER CIVIL PENALTY CRITERIA**

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<sup>25</sup>I do not find use of the non-approved cables contributed significantly to the hazard. While Willis expressed fear about the insulation of the non-approved cables breaking down due to long use (Tr. 261), Bickey testified without dispute that the 2/0 cable used on the batteries was more heat tolerant than MSHA-approved cable. Tr. 431-432. Moreover, I accept Estep's testimony non-approved cable had long been used at the mine without problems. Tr. 938. Thus, while use of the cable supplied by MPS violated the standard, it did not add to the S&S nature of the violation or to its gravity.

The parties stipulated the proposed penalties for the alleged violations would not affect Coal River's ability to continue in business (Stip. 6) and that Coal River had a "low" applicable history of previous violations. Stip. 7. The parties also stipulated Coal River abated in good faith the violations alleged in the citation and orders. Tr. 397-398. Exhibit A of the Secretary's civil penalty assessment petition indicates Coal River is of a moderately large size, an assertion not disputed by the company. Finally, the record reveals Coal River exhibited much more than ordinary good faith in abating the violations. For example, Larry Blackburn described how Coal River complied with the requirement to use MSHA-approved cable on its batteries. He stated, as soon as management became aware of the requirement, the company "had . . . [MPS] come in and change all batteries at all three [of its] mines with the MSHA approved cables." Tr. 613. The company also discontinued spraying the ribs and chose instead to have dry chemical fire suppression systems at each of its battery charging stations. Tr. 617-618. The heat activated systems were hung from the roof over the chargers. Tr. 710. As Blackburn stated, the company did "everything . . . [it] could to avoid having . . . [an] incident [similar to that of January 27] happen in the future." Tr. 659. He added, "We tried to make a positive out of this and learn from it." Tr. 660. Mark Blackburn described the new fire suppression system as "a better system." Tr. 714; *see also* Tr. 808, 810. In addition, pre-shift examiner Jerry Vance noted after the January 27 incident, additional training was given at the mine regarding pre-shift examinations and how they should be conducted. Vance stated he "learned a lot." Tr. 762. With regard to battery cables and splices, weekly electrical examiner Steven Curry noted after the subject citation and orders were issued, things were done differently at the mine.

We [charged] every cable on every battery.  
 We put certification tags on every battery.  
 [The] batteries are always ventilated and  
 we make sure the water's maintained, the  
 epoxy's maintained, and we never splice  
 the cables.

Tr. 887; *see also* Tr. 959-960 (testimony of maintenance manage, Carl Estep). Curry stated if he found a splice on a scoop battery cable, he would "shut the scoop down" until the cable was replaced, even if the splice had been made by MPS personnel. Tr. 923. Maynard agreed, under the management team of B.K. Smith and Larry Blackburn, there had been improvements at the mine. He described Smith and Blackburn as "good," even "excellent," when it came to safety. Tr. 205. From all of this, I conclude the company's attitude toward compliance and safety warrants recognition and encouragement, and I will give much more weight than normal to the good faith criteria when I assess penalties in this case.

**WEVA 2007-196**  
**CIVIL PENALTY ASSESSMENTS**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 CFR §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>
7249165	1/30/06	75.340(a)	\$10,300

I have found the violation occurred, that it was serious, and that it was due to Coal River's moderate negligence. Given the other civil penalty criteria, especially the company's low history of prior violations and its greater than ordinary good faith, I conclude a civil penalty of \$2,000 is appropriate.

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED ASSESSMENT</u>
7249166	1/30/06	75.360(b)(9)	\$10,300

I have found the violation occurred, that it was serious and that it was due to Coal River's moderate negligence. Given the other civil penalty criteria, especially the company's low history of prior violations and its greater than ordinary good faith, I conclude a civil penalty of \$2,000 is appropriate.

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED ASSESSMENT</u>
7249167	1/30/06	75.512	\$10,300

I have found the violation occurred, that it was serious, and that it was due to Coal River's high negligence. Given the other civil penalty criteria, especially the company's low history of prior violations and its greater than ordinary good faith, I conclude a civil penalty of \$4,000 is appropriate.

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED ASSESSMENT</u>
7249168	1/30/06	75.503	\$5,300

I have found the violation occurred, that it was serious, and that it was due to Coal River's high negligence. Given the other civil penalty criteria, especially the company's low history of prior violations and its greater than ordinary good faith, I conclude a civil penalty of \$4,000 is appropriate.

### ORDER

Within 40 days of the date of this decision Coal River **IS ORDERED** to pay civil penalties totaling \$12,000 for the violations found above. Within the same 40 days the Secretary **IS ORDERED** to modify Citation No. 7249165 from a citation issued pursuant to section 104(d)(1) of the Act to a citation issued pursuant to section 104(a) of the Act and to modify the inspector's negligence from finding from "high" to "moderate." She also **IS ORDERED** to modify Order No. 7249166 from an order issued pursuant to section 104(d)(1) of the Act to a citation issued pursuant to section 104(a) of the Act and to modify the inspector's negligence

finding from "high" to "moderate." Finally, she **IS ORDERED** to modify Order No. 7249167 from an order issued pursuant to section 104(d)(1) of the Act to a citation issued pursuant to section 104(d)(1). Upon payment of the penalties and modification of the citation and orders, these proceedings **ARE DISMISSED**.<sup>26</sup>

*David F. Barbour*

David F. Barbour  
Administrative Law Judge

Distribution: (Certified Mail)

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

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<sup>26</sup>These cases were tried despite my strong belief they should have been settled. Following the trial, I orally advised the parties I still believed a settlement was the best way to resolve the issues, and I outlined my view of a reasonable compromise. The parties considered my suggestions, but were unable to reach an agreement. I have heard many disputes under the Mine Act, but rarely have I been as impressed with the commitment to safety and to the well-being of miners as I was with that displayed by B.K. Smith and the Blackburns. I doubt if the trial enhanced their commitments, and I doubt if Coal River's miners, the company, the industry, the government, or the taxpayers gained much, if anything, from the extended proceedings. With more flexibility on the part of all involved and with more appropriate and timely intervention on my part, the matters should have been resolved prior to the day we convened or, at the latest, immediately after the hearing. Since these cases were initiated, the Commission has established an office of Settlement Counsel. I am convinced the counsel's mediation would have been helpful here, and, in the future, I will aggressively recommend parties seek the counsel's assistance in cases such as this.

**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 2, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2007-451
Petitioner	:	A.C. No. 15-02132-122679
v.	:	
	:	Docket No. KENT 2008-73
	:	A.C. No. 15-02132-127206
	:	
WEBSTER COUNTY COAL, LLC,	:	Dotiki Mine
Respondent	:	

**DECISION**

Appearances: Christian P. Barber, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner;  
Noelle Holladay True, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, and Gary McCollum, Esq., Lexington, Kentucky, on behalf of the Respondent.

Before: Judge Melick

These cases are before me upon petitions for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Webster County Coal, LLC, (Webster County) with violations of mandatory standards and proposing civil penalties of \$21,403.00 for the violations. The general issue before me is whether Webster County violated the cited standards and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Additional specific issues are addressed as noted.

At hearings, the parties advised that all but two of the charging documents at issue had been settled and a motion confirming that settlement was filed post-hearing. Considering the representations and documentation submitted therewith, I am able to conclude that the proffered settlement is acceptable under the criteria set forth in section 110(i) of the Act. Approval of that settlement will be incorporated in this decision. The two citations remaining at issue are addressed below.

Citation No. 6693541, issued May 30, 2007, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.604(b), and charges as follows:

The Trailing Cable on Joy Shuttle Car co. no. B 4000ET-16403 located on unit #1 has an opening in a permanent splice exposing the inner insulated conductor. This is a 300VDC cable and the floor in this area is damp. Trailing cables are sometimes handled by the miners to allow other mobile equipment to pass under the cable.

The cited standard provides that “[w]hen permanent splices in trailing cables are made, they shall be... (b)effectively insulated and sealed so as to exclude moisture...”.

At hearings, Webster County admitted the violation as charged and challenged only the “significant and substantial”, gravity and negligence findings and the amount of the Secretary’s proposed civil penalty.

Edward Nichols, an inspector for the Department of Labor’s Mine Safety and Health Administration (MSHA) has an associate degree in mining technology from Madisonville Community College and extensive industry experience. He has been an MSHA inspector for eight years. According to Inspector Nichols, the subject citation was issued when he observed the cited trailing cable with what he considered to be a bad splice. The subject trailing cable supplied power from the power station to various mobile equipment. The cable consisted of an outer jacket of hard rubber and two inner cables with dielectric insulation. The cable carried 300 volts direct current and power was engaged at the time of the violation.

More particularly, Nichols set forth the basis for his “significant and substantial” findings in the following colloquy at hearings:

Q And do you believe this condition contributed to a safety hazard?

A Yes, sir.

Q And what was that hazard?

A The hazard is that, as I stated, the mining floor is wet down to allay the dust and application of this water, cable laying on the ground, that the cable is also being watered -- water has been applied to it, and the use of the mining -- piece of mining equipment back and forth will allow the cable to pick up moisture.

Q And how would that pose a hazard to a person?

A Sometimes these cables are handled by miners to allow other mobile equipment to pass under them. The miners physically pick the cables up and hold them up out so that the mobile equipment can pass under them or they take a spad type nail and hang it up that way by wire.

Q In order to achieve the same objective?

A Yes, in order to achieve the same purpose.

Q Now, how did you conclude that it was reasonably likely that this hazard would contribute to an injury?

A Because of the moisture there at the ground and the continued use of this cable will just further deteriorate the splice. The inner insulation is a dielectric strength type insulation. It has no mechanical value as far as hardness to insulate.

Q So what's the purpose of that inner insulation?

A The purpose of the inner insulation is to separate the two conductors from coming in contact with each other. It's just a dielectric strength insulation only.

Q And what protects the cable from the mining environment?

A The outer jacket of the cable, the hard -- hardened rubber protects it.

Q Why did you conclude that miners sometimes handle these cables?

A Because I have seen them handle the cables.

Q At this particular mine?

A Yes.

Q Now, if you knew that a shuttle car operator would routinely do a preoperational check before using a car on a particular shift, would that in any way change your opinion about the likelihood of an injury here?

A No.

Q Why is that?

A Starting time for day shift is 7:00 o'clock, given the time that it would take to transport the miners from -- from the opening of the mines, say, approximately 8:00 o'clock in the morning. This violation was cited at 11:25. If the operator had done his preop check at 8:00 o'clock, then approximately three -- three hours and 25 minutes had passed since he had done his first preop check.

Q And I think -- when you observed miners handle these cables, were they wearing gloves?

A Most of the time -- it's a company policy that the miners there at that mines wear gloves. I had at different occasions cautioned miners when they go to reach -- it's just kind of a reactive response. Sometimes they'll reach to grab ahold of a cable to move it out of somebody's way or to help somebody move a piece of equipment, but I have at times cautioned them before they grabbed ahold of the cable bare handed.

Q And do you recall or do you have any knowledge of what type of gloves these were?

A These are common type leather -- leather gloves. The company I think also issues a rubber type glove which is a cloth type glove with a rubber application put over top of the glove. It's kind of a spray on type or a dipping process to apply this rubber coating over the glove to make it somewhat insulated.

THE COURT: Who was responsible at that mine for the preoperational check of the cable?

THE WITNESS: The equipment operator, sir, would be.

THE COURT: Miner operator?

THE WITNESS: Yes, sir.

THE COURT: Do you know who that was that day?

THE WITNESS: At that time, no, sir. I didn't note the person's name.

THE COURT: I see. All right.

Q (By Mr. Barber.) Does the fact that the the company has a policy for miners wearing gloves and that you've actually observed miners handling cables with gloves on, does that in any way change your opinion about the likelihood of an injury here?

A No, sir. Perspiration and gloves handling other pieces of equipment and so forth, moisture may gather on the gloves and make it conductive.

Q How did you conclude that the injury here would result in lost workdays or restricted duty?

A From receiving an electrical shock, burns or the shock itself to the body.

Q And how would that occur? What would have to happen for that to occur?

A Sometimes permanent splices and even the bare trailing cable itself under excessive wear creates an air gap situation where the metals actually separates from one another. This air

gap then is where the cable -- the conductor in the cable will actually arc and try to keep its path of electricity going, but in this arcing situation, the cable actually burns and burns the rubber, and it's an explosive type.

Q And the condition --

THE COURT: You mean even with the insulation in place? Are you saying --

THE WITNESS: Yes, sir.

THE COURT: -- even if the inner insulation is in place, you know of situations where there is arcing?

THE WITNESS: I've seen permanent splices -- one time at another mines when I was giving a safety talk, one of the car cables was laying up -- pulled up against the rib, and during that safety talk, some of the miners and I were discussing some of the safety issues, that the permanent splice itself just arced and it exploded.

On cross examination Nichols acknowledged however that without "pinholes" or other exposure to the inner wires, there was no hazard or risk of injury and for someone to be injured they would actually need to be in contact with a defective splice. Nichols did not perform any test to determine whether there were any pinhole leaks. He also acknowledged that the cable was not wet and that this area of the mine was dry.

MSHA electrical supervisor, Michael Moore, has a bachelors degree from Western Kentucky University in electrical engineering technology. He also has significant industry experience as an electrician and electrical inspector for MSHA. Moore's testimony in support of his "significant and substantial" findings with respect to this citation was intermixed with his testimony regarding Citation No. 6693992 and is set forth therein.

Mr. Donnie Gatten is training director for Alliance Coal, Respondent's parent company. He has a bachelors degree in electronic engineering technology, several electrical certifications and industry experience. Gatten testified that permanent splices on trailing cables have been damaged in the past. If a piece of equipment struck a cable, it could result in a cable explosion due to a phase to phase contact as described by Mr. Moore. The Dotiki mine's policy with respect to handling trailing cables requires miners to wear gloves and to avoid trying to pick up any energized cable in a spliced area. Dotiki policy also requires miners to wear boots with protective insulation of up to 14,000volts.

Gatten opined that it was not likely that a person would be injured by the described conditions because there was no break in the insulation, and the mine has no practices that would create a pinhole in conductors. Mr. Gatten opined that the inner insulation would not wear from contact with the mine floor because the outer jacket was still on the cable. Gatten agreed that under

continued mining operations the shuttle car cable and the damaged splice would continue to suffer damage.

Gary Thweatt is Respondent's director of training and safety. He has been a miner since 1993, as a section foreman, an assistant safety director, and as the safety director. Thweatt testified that the shuttle car cable at issue would not be handled very often because a mobile equipment operator would ordinarily have to wait less than a minute for the shuttle car to return from the face to the feeder, and its cable to reel in, allowing the other equipment to pass.

It is not disputed that Respondent performs weekly examinations of the equipment, including trailing cables, and that equipment operators perform preoperational checks on equipment, including trailing cables, on every shift. Thweatt has seen miners pick up cables without gloves, although he could not recall observing that practice at the Dotiki mine. The continuous miner operator's feet or legs could contact the cable inadvertently during the mining process. There could be inadvertent contact with either the miner cable even if someone is not intentionally picking up the cable. Miners intentionally step on cables to cross over them.

Citation No. 6693992, issued August 5, 2007, as amended, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.604(b), and charges as follows:

The trailing cable on Joy continuous miner co, no. 6345 located on MMU-029-0 #4 unit has an opening in the outer jacket exposing the inner insulated conductor. The permanent splice 4 inches from this exposed insulated conductor was rolled back from the splice, continuous use of this cable will cause ware[sic]. Miners handle this cable to hang the cable. The floor in this are[sic] is damp.

As previously noted, the cited standard provides that "[w]hen permanent splices in trailing cables are made, they shall be "...(b) effectively insulated and sealed so as to exclude moisture...".

At hearings, Webster County admitted the violation as charged and challenged only the "significant and substantial", gravity and negligence findings and the amount of the Secretary's proposed civil penalty.

Inspector Nichols described his "significant and substantial" findings in the following colloquy at hearings:

Q (By Mr. Barber) Can you tell us - - what's the difference between a continuous miner cable and the shuttle car cable that we just finished discussing.

A Physically the miner cable is a much larger cable. It is a three phase cable that conducts in this case 995 volts of AC in comparison to the DC cable which is a much smaller two conductor cable that conducts approximately 300 volts DC.

Q Any other differences in the way this cable is constructed versus the shuttle car cable?

A There is more -- there's more outer insulation I think on this particular cable than there is on a trailing cable. There's a -- each one in the Dotiki mine, they use shielding over each one of the phases.

Q And what's shielding?

A Shielding is a grounding. If the ground opens, the shielding is supposed to detect this electricity and knock the breaker at the substation.

Q What's the shielding made out of?

A It's a metal construction, a web like constructed metal material that is tube like that fits on the outer side of the dielectric insulation of the phase.

Q Does it provide any mechanical protection for the cable such as protection from abrasions and --

A No.

Q How long was this cable?

A This cable is approximately 750 foot in length.

Q And was it energized and in use when you observed it?

A Yes, it was.

Q And do you recall where it was located? Was it suspended or on the ground or --

A It was laying on the ground.

Q And were there people in the area of this cable?

A The miner helper was in this area. Other people who passed by would be -- would be in the area.

Q And who might those be? Would those be the same people that --

A Yes.

THE COURT: Well, maybe you ought to finish your question.

Q Those would be the same people that you spoke of in discussing the previous citation?

A Yes.

Q Does this particular cable -- would it be your testimony that this cable is exposed to the same conditions of the mine environment during use as the shuttle car cable?

A Yes. This cable is mostly on the ground. Sometimes it is hung over the entries to allow other mobile equipment to pass under it but miner cables are mainly up close. The miner itself -- if you need more cable to reach farther -- another place or the next place and so forth, they carry loops of trailing cable and they pull this cable with the miner itself so it is subjected to -- due to its weight and the weight of the other parts of the cable laying on it, it is subjected to kind of a sandpapering like effect.

(Tr. 45-47)

\* \* \* \* \*

Q (By Mr. Barber.) Did this particular condition create a hazard?

A Yes, sir.

Q And what was the hazard?

A The hazard was the exposed inner -- the opening in the outer jacket exposing the inner insulated conductor.

Q How could that injure a person?

A Through the contact with this area and the continued use of this cable which in my opinion would continue throughout the day that it would be further damaged.

(Tr. 49)

\* \* \* \* \*

Q (Mr. Barber.) What's the basis or how did you conclude that it was reasonably likely that this condition would result in an injury?

A Because of the exposed inner insulation -- insulated conductors.

Q Well --

THE COURT: Go ahead. You can continue. Did you have further response to that?

A With continued use -- the dielectric portion of a cable is a very soft material, and through continued use of it, it will deteriorate the insulation of the conductors.

Q When you say dielectric material, are you referring to the inner insulation?

A Yes.

Q And I believe you testified that miners sometimes handle this cable, and what's the basis for that testimony?

A Miners handle the cable to hang the cable up. The cable will be hung from the transformer where it receives its power over the crosscuts to allow scoops, supply jeeps, and other normal pieces of mining equipment that are used to travel. Sometimes it's hung even at the face for a pinner if the pinner/roofer bolters don't have crossover pads to cross over the cable. They hang it temporarily.

THE COURT: Same reasons as you stated for the prior violation?

THE WITNESS: Yes, sir.

Q (By Mr. Barber.) And I assume then for your conclusion that the injury would result in lost workdays or restricted duty, the basis would be the same as with the prior violation?

A Yes, sir.

(Tr.50-51)

Electrical Inspector Moore's findings in support of his "significant and substantial" findings for this citation were discussed in the following colloquy at hearings:

Q And you heard Mr. Nichols' testimony earlier today with respect to that citation; is that correct?

A Yes, sir.

Q And do you have an opinion about whether the condition described in that citation and by Mr. Nichols here today was reasonably likely to contribute to an injury?

A Yes, sir, I do.

Q And what is that opinion?

A The outer jacket of a trailing cable is designed to-- for abrasion only, and the inner

conductors has a dielectric strength rating around each phase conductor. Also that shielding that's around that particular phase is copper. It's soft alloy. And there's about a three to one ratio as far as the insulation. Insulation in comparison like -- I think the insulation -- all cables are designed by IPCEA ratings.

THE COURT: What does IPCEA mean? What does that stand for?

THE WITNESS: IPCEA is Industrial Power Cable Engineering Association, and that has changed. ICEA is Industrial -- excuse me. Insulated Cable Engineering Association. It gives a design for all cables that are used underground and MSHA accepts that design.

THE COURT: Sets an industry standard?

THE WITNESS: Yes, sir. It's -- and by that standard, I'm saying that the insulation around each phase conductor is, for example, 80,000 in thickness versus the outer jacket which is 250,000ths in thickness, which would be a three to one ratio --approximately a three to one ratio.

THE COURT: Are you talking about the cables here we're talking about today?

THE WITNESS: Yes, sir.

THE COURT: You know the dimensions of these cables?

THE WITNESS: Yes, sir.

THE COURT: Okay. Go ahead.

Q (By Mr. Barber.) And we're talking right now about the continuous miner cable that's described in Government Exhibit 6?

A Yes, sir, that's correct.

Q As part of your answer you just explained that the inner insulation is dielectric strength insulation. What's the purpose of that inner insulation?

A Insulation on each phase conductor is rated for 2,000 volts. Insulation is -- and the voltage that's in the cable is 995 volts. That insulation which is rated for 2,000 volts contains that working current and voltage from the unit transformer to the miner, and the shielding on the outside of each -- each phase conductor is in case you get any type of damage to the phase conductor itself that when it -- when that power exits the insulated conductor and makes contact with the shielding, there will be a phase to ground fault and the ground to phase protected device that the circuit breaker will open. And, again, you have -- and not

only is that designed -- or that particular trailing cable has got two grounding conductors inside, and they are contacting the copper shielding around each phase conductor, and then we have this outer jacket which is for abrasion because the cable is flexed and twisted and carried on and bent and looped and dragged.

THE COURT: What was the question? I think I lost track of the question. We seem to be going on here beyond any question. What was the precise question you asked him?

Q (By Mr. Barber.) The precise question was why he agreed that this condition was reasonably likely to lead to an injury. So why -- given all the substance of that answer, why do all those facts lead you to conclude or to agree with inspector Nichols that injury was reasonably likely here?

A Because the fact that the cable was a poorly designed -- poorly made splice that rolled up the way he described it, if the company had their preop, normally a cable that -- spliced and on a 995 miner cable is designed in such a manner that it would roll back like that in a short period of time of four hours, and that it's obvious that the phase conductors were exposed with that copper coating on the outside of each phase, and that with continuous working -- or continuous dragging of this cable, it will deteriorate that soft copper shielding and also that soft inner insulation around each phase conductor.

THE COURT: Then what would happen in your opinion?

THE WITNESS: Somebody could touch that particular damaged spot and receive electrical shock or it could explode if it was a phase to phase of those. Those phase conductors are -- if they're damaged for a low KBA rating on that transformer --

THE COURT: What kind of rating?

THE WITNESS: Low rating on that --

THE COURT: I thought you said APA or something. What was that? A low rating?

THE WITNESS: KBA.

THE COURT: What does KBA stand for?

THE WITNESS: A thousand volt amps. We've got -- if you've got a transformer --

THE COURT: I don't want to go beyond --

THE WITNESS: I'm trying to explain why that would blow up.

THE COURT: All right. Go ahead.

THE WITNESS: Okay. I've got a transformer that's got 1,000 KVA transformer and it's got a cadence of five percent, then you're going to have 11,000 amps that's going to be generated when you have a phase to phase fault, and this has happened time and time again in the industry. Any time we get 11,000 amps flowing, you're starting to take that soft copper and you're vaporizing it, you're creating copper metal alloys that are flying off of that stuff, you're going to have a cloud of dust, you're going to have an explosion type, like an arc welder, and if anybody is anywhere close to that, they could be damaged, their hands, even if they've got rubber gloves or leather gloves or cotton gloves on, they're going to get damaged. That damage can burn all the way up their hands and arms which has happened in our district.

Q (By Mr. Barber.) How does this condition that the inspector described in this citation contribute to that hazard? Is it your testimony that it does contribute to that?

A Yes, because it's -- my outer jacket is gone now and it's done rolled up on this poorly made splice and you've got everything exposed now. If that continues to operate like that, the outer -- the protection of that cable is going to be gone, which is the copper outer shielding which is soft copper and that soft insulation which has dielectric strength -- dielectric rating of 2,000 volts.

Q What is that soft insulation made out of? Do you know?

A It's just a rubber compound that's designed by -- it can be bought by the company and different compounds can be ordered for that particular insulation.

THE COURT: So you don't know exactly what this insulation was in this case?

THE WITNESS: I don't know the brand name. If I know the brand name and the number on it, then I can get that -- get the --

THE COURT: But regardless of the nature of the material, your testimony would be the same?

THE WITNESS: Yes, sir. Regardless if it's Tiger or whatever brand, Anaconda or whatever brand they use, they're normally a compound that's rated for 2,000 volts.

Q (By Mr. Barber.) Is there a particular reason why that material is soft?

A Because the -- the reason why the inner -- why the phase insulation is soft because of the -- because of the abrasive outer jacket is designed by the ICEA program that MSHA recognizes.

Q But in order to do its job, the inner insulation, does it have to be a softer material?

A It's designed that way.

Q This particular cable, does it have a feature that would cause it to de-energize if somebody contacted a bare wire or contacted the energized portion of the conductor?

A If that particular area that was in question here on this citation 6693992, if -- let's say, we had a damaged spot in there and had a fault condition there, phase to ground, the breaker would -- or when that has a phase to ground fault on it to that shielding, that shielding vaporizes, and you go back down there and they put the breaker back up. Now I've got a damaged place in that 995 where the shielding is gone, and a man touches that, he's going to be electrocuted or -- go ahead.

Q What would happen -- if he touches it, would the breaker knock?

A No.

Q Why?

A It will not break. It will not open. Even though it would cause -- a human body for a man is usually 1,000 ohms. That's what we calculate that at, all our electrical measurements that we go by. So if I have a damaged spot in that cable and if I contact it, I will be -- receive 575 volts of voltage through me and into -- because I'm standing on -- or -- which is the same potential that's all the grounding median in that mines. It don't make any difference if that ground --

THE COURT: What would that do to a person?

THE WITNESS: It would kill them.

THE COURT: I see. All right.

Q (By Mr. Barber.) And that would happen before the cable would be de-energized by any sort of safety feature?

A Yes, sir, that's correct.

Q If a person touched the cable in that same manner but they were wearing gloves, if they touched the bare copper on this cable, would the gloves protect them from being injured?

A No, sir, they will not, not that kind of voltage -- not that 995, no.

Q Are there any -- are you aware of any type of gloves that would --

A We wear gloves that is rated for 750 volts. When we're working with circuit breakers --

THE COURT: The question was, are you aware of any gloves that would protect you from that voltage?

THE WITNESS: Yes, sir.

THE COURT: Okay. Next question.

Q (By Mr. Barber.) What are those gloves?

A They're -- they're dielectric rated gloves with leather coating, leather cover on the outside that I wear.

Q I believe you heard Mr. Nichols testify about the gloves that he has observed miners in the Dotiki mine wear. Is that the same type of glove that you're talking about here, the dielectric strength?

A No, sir, it is not.

Q And what's the difference between the gloves?

A My gloves are rated at 750 volts. The gloves they wear are not rated for any type of electrical -- dielectric strength -- dielectric rating.

THE COURT: I didn't hear that testimony from the other witness. Did he testify that they didn't have those kind of gloves at the mine?

MR. BARBER: I believe he testified --

THE COURT: Well, you're satisfied that he did testify to that? If it's not in the record, then it's not in the record. All right.

Q (By Mr. Barber.) Have you been to the Dotiki mine?

A Several times.

Q And have you observed miners wearing gloves when they handle cables?

A Yes, sir.

Q And do you know what kind of gloves those are?

A They're cotton gloves or they're rubber gloves or they're leather gloves.

Q Are they the -- is that the same type of glove that would protect them from injury if they contacted this cable?

A No, sir.

Q This particular citation notes that the floor in this area is damp. Does that have any relevance to your opinion that it would be reasonably likely that this condition would result in an injury?

A It has -- ask me that again, please.

Q If the floor in this area was damp, does that have any relevance -- is that relevant to your opinion that it was reasonably likely that this condition would result in an injury?

A Reasonably likely whether it's wet or damp.

THE COURT: Restate the question. Listen carefully to the question.

THE WITNESS: Yes. Sorry, sir.

Q (By Mr. Barber.) If the floor in this area was damp, how is that relevant to your -- is it relevant and how to your opinion that it was reasonably likely that this condition would result in an injury?

A It wouldn't change my opinion. It still would be reasonably likely.

Q If the floor was dry --

A Or wet.

Q -- would your opinion be the same?

A Yes, sir.

Q Why is that?

A Because if it's wet or dry, the only value of that mine floor that we stand on is always less than three -- less than three ohms. Therefore, the water in the mines is contaminated which gives it as the same potential as the dry ground is due to the fact that I've took numerous

earth meager type readings in our area and I know that that -- at Dotiki, they drill the bore hole down below the fire clay and that's what the men stand on which is the mine floor.

THE COURT: All right. Did you want a full explanation or just the answer?

Q (By Mr. Barber.) If I understand you correctly -- in other words, are you saying that the ground --

THE COURT: It's difficult for lay people to follow you sometimes.

THE WITNESS: But we need to know --

THE COURT: That's why we want to know basically what your conclusion is, and on cross examination, if she wants a further explanation, she can ask it.

Q (By Mr. Barber.) Are you saying that the dry ground is as good a conductor as damp ground?

A Yes, sir, absolutely, due to my tests.

(Tr. 67-78)

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

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

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

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC

1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

It is undisputed, of course, that, with respect to both citations, the Secretary has established a violation of a mandatory safety standard. With respect to both citations, I find that damage to the outer jacket and to the permanent splice on the cited cables contributed to the discrete safety hazard of contact with exposed energized conductors inside the cables and phase-to-phase contact between the conductors. There also can be little dispute that damage to, and contact with, the conductors inside the cables would result in reasonably serious injury such as electrical shock and burns. The Secretary has therefore established the first, second, and fourth elements of the *Mathies* test.

With respect to the third element of the *Mathies* inquiry, I find that for both citations the credible evidence establishes a reasonable likelihood that the hazard contributed to would result in an injury. There is no dispute that when Inspector Nichols observed the violative conditions described in these citations that the cables were in use, energized, and subject to continued wear. I find therefore that during continued normal mining operations the cables would likely sustain further wear and that the splices would likely deteriorate.

The credible record evidence also shows that miners will pick up cables for various reasons. Inspector Nichols credibly testified that he has observed miners handling cables at this mine, and on different occasions he has cautioned miners as they reached for cables bare-handed. The credible evidence also shows that the miner cable is subjected to an abrasive environment in the mine

I also note that although the inspector observed no pinholes or bare wire when he wrote the citations that does not bar a finding that the violations were of a significant and substantial nature. *See Harlan Cumberland Coal Company*, 20 FMSHRC at 1286 (Dec. 1998) and *U. S. Steel Mining Co.*, 6 FMSHRC 1573 (July 1984). In reaching my conclusions herein I have also not disregarded Respondent's claims that protective gloves and boots worn by its miners would prevent electrical shock, however, such equipment would not in any event protect from explosions from phase to phase contact. I also note that the cases cited by Respondent, i.e. *Oak Grove Resources, LLC*, 29 FMSHRC 1089 (Nov. 2007) (ALJ), and *Lone Mountain Processing, Inc.*, 29 FMSHRC 957 (June 2007) (ALJ), are factually distinguishable. Accordingly, those cases provide no support to its argument. For the reasons noted above I also find that the violations were of significant gravity.

I further find that the violations were the result of the operator's moderate negligence. It is apparent from the record evidence that the cited splices were obvious. Moreover, the record shows that this operator had a number of violations of the same standard at issue herein i.e. 30 C.F.R. § 75.604(b), during relevant times preceding these violations.

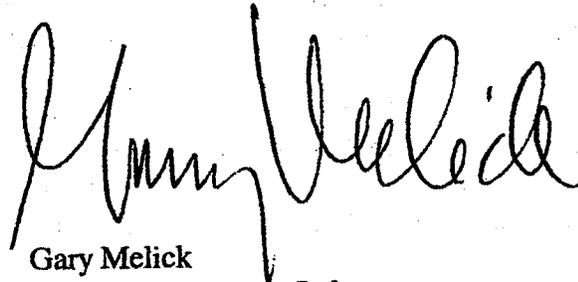
### *Civil Penalties*

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. It has been stipulated that the Dotiki Mine is a large mine and Alliance Resources Partners LP is a large controlling entity. It has been further stipulated that the Secretary's proposed penalties would not affect Respondent's ability to remain in business. Respondent has a significant history of violations (Exh G-2). The gravity and negligence findings have previously been discussed.

**ORDER**

Citation Numbers 6693541 and 6693992 are affirmed with "significant and substantial" findings and Webster County Coal, LLC is directed to pay civil penalties totaling \$17,531.00 (which includes penalties of \$1,900.00 and \$2,000.00, for the violations charged in Citation Numbers 6693541 and 6693992, respectively).



Gary Melick  
Administrative Law Judge  
(202) 434-9977

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/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE N. W., SUITE 9500

WASHINGTON, D.C. 20001

February 2, 2009

RICHARD JAIMES, : DISCRIMINATION PROCEEDING  
Complainant :  
 :  
v. : Docket No. LAKE 2008-486-DM  
 : NC-MD-08-05  
 :  
 : Robinson Run No. 95 Mine  
STANSLEY MINERAL RESOURCES, INC.: Mine ID 11-00176 D170  
Respondent :

**DECISION**

Appearances: Richard Jaimes, Adrian, Michigan, *pro se*;  
Richard B. Stansley Jr., Sylvania, Ohio, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a complaint of discrimination filed by Mr. Richard Jaimes alleging that he was discharged by Stansley Mineral Resources Inc.(Stansley Minerals), on September 19, 2007, in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. § 801 et seq., the "Act."<sup>1</sup> Stansley Minerals denies the allegations of unlawful discharge and, alternatively, seeks dismissal of the complaint on the grounds that the complaint was not filed within the time limits set forth in Section 105(c)(2) of the Act.

---

<sup>1</sup>Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act, because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to the Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

Section 105(c)(2) provides that “any miner...who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary [of Labor] alleging such discrimination...”. The Commission has long held, however, that this 60-day limit is not jurisdictional and a judge is required to review the facts on a case-by-case basis, taking into account the unique circumstances of each situation in order to determine whether a miner’s late filing should be excused. *Hollis v. Consolidation Coal Company*, 6 FMSHRC 21, 24(January 1984), aff’d mem. 750 F.2d 1093 (D.C. Cir. 1984); *Herman v. Imco Services*, 4 FMSHRC 2135 (December 1982).

In this case there is no dispute that Mr. Jaimes’ alleged protected activities began in August 2007 and continued until shortly before his discharge on September 19, 2007. There is also no dispute that Mr. Jaimes’ complaint of unlawful discharge to the Department of Labor’s Mine Safety and Health Administration (MSHA) was dated April 9, 2008, or almost five months after the 60-day deadline set forth in Section 105(c)(2). At hearings, Mr. Jaimes explained that he delayed filing his complaint to MSHA because:

I wanted to be very determined, I mean, very reasoned in my, you know, redress. I wanted to make sure that I wasn’t, frivolous. So, I waited for the EEOC [Equal Employment Opportunity Commission] to make a rendering on their case. And when they, when they made their rendering, then I figured, that I determined I would just, you know, follow that up through the Mine Safety Health Administration. And that’s why - - and that’s the thing that I noted on the, on my request is that I was trying to be very prudent and very, you know, measured. I wasn’t just, I wasn’t just throwing everything up, you know, on the wall and seeing what would stick. (Tr. 99-100).

Significantly, Mr. Jaimes does not claim that he was unaware of the filing deadlines under the Act and bases his excuse for late filing solely on his election to give priority to his EEOC complaint wherein he asserted that his discharge was the result of age discrimination. I do not find this reason to be a grounds to excuse his late filing in this case. See *Wilson v. CSR Southern Aggregates*, 22 FMSHRC 1218 (ALJ)(October 2000). Under the circumstances the complaint herein must be dismissed.

Even assuming, *arguendo*, that the complaint was filed timely, I find that Mr. Jaimes would have, in any event, failed to sustain his burden of proving that his discharge was in violation of the Act. He alleges in his complaint to MSHA on April 9, 2008, as follows:

On Sept 18, 2007, I was hauling brown clay to a dump site under construction. While in the process of lifting my load, the load shifted resulting in the truck box flipping on its side. The failure of the company to properly train me to operate the haul truck along with the absence of a safety berm on an uneven slope contributed to the accident. In addition, my repeated requests to replace bad tires and leaking wheel cylinder all went unheeded leading to this accident. My safety concerns were noted on the daily vehicle report. As a result of this accident on (9-18-2007) and the accumulative effect of other discrinitaory[sic] practices, I was terminated [as] of (9-19-2007) I am seeking recovery of lost wages and compensation to be made whole.

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on grounds, *sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3<sup>rd</sup> Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis on the miner's unprotected activity alone. *Pasula, supra; Robinette, supra*. See also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639 (4<sup>th</sup> Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 194, 195-196 (6<sup>th</sup> Cir. 1983) (specifically approving the Commissions' Pasula-Robinette test). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act.)

The record shows that Mr. Jaimes was hired by Stansley Minerals in April 2007, as a loader operator/customer service representative, loading semi-trucks and checking them in and out of the mine. A month or two after he was hired, he was transferred to the mine at issue where he operated the 30-ton No. 4 haul truck. Jaimes was discharged on September 19, 2007, following verbal and written warnings issued as a result of several vehicular accidents (Exhibits R-1, R-2, and R-3). These incidents were summarized by Respondent's president, Richard Stansley, as follows:

On 6/20/2007, Mr. Jaimes was involved in a haul truck rollover accident exposing his co-workers and himself to unwarranted hazardous condition [sic] which could have resulted in loss of life or limb. The accident resulted in substantial damage to the equipment and lost production time. The disciplinary action included verbal discussion and a written warning.

On 8/31/2007, Mr. Jaimes was involved in a backing incident where he was in a haul truck that was backed into by a co-worker. After an investigation and review of witness statements, it was found that Mr. Jaimes [sic] actions contributed to the accident which was found to be avoidable. The accident exposed his co-workers and himself to unwarranted hazardous condition [sic] which could have resulted in loss of life or limb. The accident resulted in substantial damage to the equipment and lost production time. The disciplinary action included verbal discussion and a written warning.

On 09/18/2007, Mr. Jaimes was involved in a second haul truck rollover accident exposing his co-workers and himself to unwarranted hazardous condition [sic] which could have resulted in loss of life or limb. The accident resulted in substantial damage to the equipment and lost production time. The incident resulted in termination of employment.  
(Exhibit R-18)

At hearings, Jaimes acknowledged that, prior to his discharge, he did not in fact make any complaints about his alleged lack of training and the alleged absence on September 18, 2008, of a berm at the accident site. He clarified and amplified his other allegations of protected activity as

follows: (1) beginning in early August of 2007, he reported on an almost daily basis on his daily vehicle reports that the tire treads on the No. 4 truck were "in very bad shape", (2) that two or three times he verbally told his supervisor, Mr. Francis Tandoh, that he needed new tires, (3) that he reported in his daily vehicle reports that he had a leaking wheel cylinder, and (4) that he reported to his supervisor that other employees were acting irresponsibly by "playing chicken" and using their cell phones (Tr.42-43).

### *Tire Complaints*

There is no dispute that Mr. Jaimes frequently reported on his daily vehicle, reports, complaints about the tires on his haul truck. (See Exhibit R-15). Mr. Jaimes' supervisor, Francis Tandoh, holds a university degree in mining engineering and is experienced in the mining industry. Tandoh testified that he was aware of Jaimes' complaints regarding the condition of the tread on the tires of his haul truck. As a result of these complaints Tandoh inspected the tires himself and brought in an outside contractor to examine the tires. Both found the tires to be in safe condition. Jaimes also acknowledged that on August 30, 2007, MSHA performed a complete inspection at the mine and that no citations were issued. Jaimes admitted that even though the MSHA inspector examined his truck he (Jaimes) did not report any problem with his tires. On the daily inspection report earlier that same date, Jaimes had reported several defects i.e. "Tires Damage/Low" and "Body, Blade, Bucket" (Exhibit R-15).

Mr. Tandoh testified that the same tires remained on the No. 4 haul truck following the MSHA inspection and even after Mr. Jaimes' discharge on September 19, 2007. According to Tandoh, when an employee reports a safety condition, it is Tandoh's obligation to make sure it is corrected. Tandoh maintained that he does not interfere with the employees' right to report conditions the employee feels are unsafe. Tandoh checks out those conditions but if found not to be unsafe he, in essence, does nothing further. Tandoh testified that he made no recommendation as to whether Jaimes should be discharged following his third accident on September 18, 2007. It was his opinion, however, that Jaimes was not competent to operate either the front end loader or the haul truck. According to Tandoh, Jaimes was a safety risk to himself and others.

### *Complaints about a leaking wheel cylinder*

Jaimes testified that he had a leaking wheel cylinder on his haul truck but did not know whether it affected safety. The leaking wheel cylinder was apparently reported on his daily inspection reports under the category "Body, Blade, Bucket (Exh. R-15).

Jaimes' supervisor, Mr. Tandoh, testified that he was aware of the oil leak of which Jaimes was complaining but testified, without contradiction, that it was, in fact, not a safety issue and that they maintained the appropriate level of oil on the No. 4 haul truck. Under the circumstances, I do not find that Jaimes' complaint regarding a leaking wheel cylinder was a protected activity under the Act.

### *Complaint about employees acting irresponsibly*

In this regard, Jaimes testified that, about a week before his accident on September 18, 2007, he had complained to Mr. Tandoh about other employees acting irresponsibly in using cell phones in violation of company policy and trying to race other truck drivers into line.(Tr. 42-43). Significantly, Mr. Jaimes failed to cite this allegation in his complaint to MSHA and in his complaint to this Commission, and, since Mr. Tandoh credibly testified that he received no such complaints from Jaimes, I give no weight to the allegation.

### *Analysis*

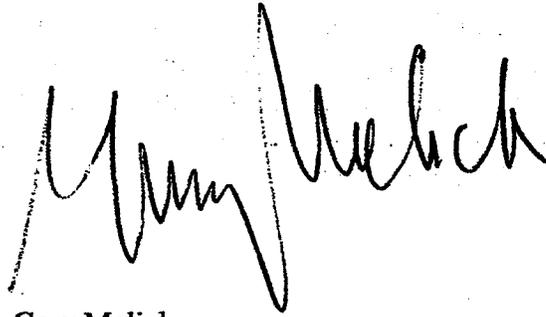
As previously noted, the mine operator may rebut a *prima facie* case of discrimination by showing that the adverse action, (in this case Mr. Jaimes discharge on September 19, 2007), was in no part motivated by the protected activity. In this regard this Commission observed in *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981) that “[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect.” The Commission considered in that case the following circumstantial indicia of discriminatory intent: knowledge of protected activity; hostility toward protected activity; coincidence of time between the protected activity and the adverse action; and disparate treatment.

Richard Stansley, president of Stansley Minerals, testified at hearings that Jaimes was terminated on September 19, 2007, because of his unsafe operation of the haul truck. Stansley testified, and it is undisputed, that Jaimes was involved in three accidents prior to his discharge and had twice before been issued verbal and written warnings(Exhibits R-1, R-2 and R-3). These warning reports confirm the credible testimony of Jaimes’ supervisor, Francis Tandoh, that Jaimes was not competent to operate the haul truck. Tandoh opined that Jaimes was indeed a safety risk to himself and others. I find that the asserted unprotected grounds for Mr. Jaimes discharge to be credible and convincing and, in the absence of any evidence of hostility toward Jaimes’ protected activity or other improper motivation by Stansley Minerals, I conclude that Mr. Jaimes would have, in any event, failed to establish that his discharge was motivated in any part by his protected activity.

Even assuming, *arguendo*, that Jaimes’ discharge was motivated in part by his protected activity, it is clear that the operator would have successfully affirmatively defended by establishing that the adverse action would have been taken in any event on the basis of Jaimes’ unprotected activity alone. Under all the circumstances, I conclude that Mr. Jaimes would not, in any event, have met his burden of proving that his discharge was in violation of Section 105(c)(1) of the Act, and his complaint must, for this additional reason, be dismissed.

**ORDER**

Discrimination complaint Docket No. LAKE 2008-486-DM is hereby dismissed.

A handwritten signature in black ink, appearing to read "Gary Melick". The signature is written in a cursive, somewhat stylized font.

Gary Melick  
Administrative Law Judge  
202-434-9977

Distribution: (Certified Mail)

Richard Jaimes, 2712 Lenawee Hills Highway, Adrian, MI 49221

Richard Stansley, Stansley Minerals Resources, 5648 N. Main Street, Sylvania, OH 43560

/lh

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

February 4, 2009

POWDER RIVER COAL, LLC., Contestant	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. WEST 2007-898-R
	:	Citation No. 7610571; 08/24/2007
v.	:	
	:	
	:	Docket No. WEST 2007-899-R
	:	Citation No. 7610725; 08/24/2007
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	North Antelope Rochelle Mine Id. No. 48-01353
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. WEST 2008-242
	:	A.C. No. 48-01353-130970-01
v.	:	
	:	
	:	Docket No. WEST 2008-243
	:	A.C. No. 48-01353-130970-02
POWDER RIVER COAL, LLC., Respondent	:	North Antelope Rochelle Mine

**DECISION**

Appearances: Karen L. Johnston, Esq., Jackson Kelly PLLC, Denver, Colorado,  
for Powder River Coal, LLC;  
Gregory W. Tronson, Esq., Office of the Solicitor, U.S. Department  
of Labor, Denver, Colorado, for the Secretary of Labor.

Before: Judge Manning

These cases are before me on two notices of contest filed by Powder River Coal, LLC (“Powder River”) and two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). Powder River contested eight citations in these proceedings. An evidentiary hearing was held in Denver, Colorado. The parties introduced testimony and documentary evidence and filed post-hearing briefs.

Powder River operates the North Antelope Rochelle Mine, a large open-pit coal mine in Campbell County, Wyoming. Just prior to the hearing, the parties agreed to settle four citations. The Secretary agreed to vacate Citation No. 7610571. The Secretary also agreed to reduce the gravity in Citation No. 7610570 from "fatal" to "permanently disabling" and Powder River agreed to pay a penalty of \$1,684.00. Powder River agreed to withdraw its contest of Citation Nos. 7610731 and 7610640. Finally, Powder River agreed to the terms and conditions set forth in paragraph 6 of the parties' motion to approve partial settlement.

## **I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **A. Citation No. 7610725, Testing Conveyor Pull Cord Switches.**

On August 24, 2007, Inspector Wayne Johnson issued Citation No. 7610725 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 77.502-2 as follows:

The examinations and tests required under the provision of this section 77.502 shall be conducted at least monthly. The mine has not examined and tested monthly pull cord inspections.

The inspector determined that an injury was unlikely but that any injury would likely be permanently disabling. He determined that the violation was not of a significant and substantial nature ("S&S") and that the company's negligence was high. Section 77.502-2 provides that the "examinations and tests" required by section 77.502 shall be conducted "at least monthly." Section 77.502 provides, in part, that "[e]lectric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions." The Secretary proposes a penalty of \$643.00 for this citation.

A pull cord switch is a shut off device used along conveyors. (Tr. 12; Exs. G-3, G-4). The pull cords are set up along walkways next to the conveyor and they can be activated ("pulled") in an emergency to stop the belt from running. The switch is activated by pulling the cord. When the cord is pulled, a signal is sent to the computer in the control room and that section of the conveyor is instantly shut down. Other sections may also be sequentially shut down so that coal does not continue to run and spill off the belt. Inspector Johnson estimated that there are several hundred pull cord switches in the mine. (Tr. 14).

Inspector Johnson inspected the pull cords because a miner filed a safety complaint with MSHA. He testified that he spoke to several employees and managers regarding the allegations of the complaint. (Tr. 15). He was told that the mine only performs a visual inspection of the pull cord switches on the daily walk-around examinations and during the monthly electrical inspection. Inspector Johnson testified that a functional test must be performed in order to determine if the activating arm on the switch is operating properly. If the activating arm is frozen, the conveyor will not shut down when the cord is pulled. (Tr. 16-17). He spoke with

Donnie Blackburn, a team leader and electrician for Powder River, and was told that the mine never shuts down conveyors to test pull cord switches.

Inspector Johnson said that he discussed the methods of testing pull cord switches with several other mine operators. He testified that these operators told him that they include a monthly switch functional test in their inspection. (Tr. 19). The inspector believes that the safety standard requires that a functional test be included as part of the monthly inspection of all switches in the mine. He said that it is not necessary that the conveyor be running when the functional test is conducted. The main purpose of the test would be to make sure that the activating arms are functional and not frozen. (Tr. 21). A miner in the control room would be able to determine if the switch has been activated for a particular belt. The company's on-shift report recorded problems with pull cord switches, including stuck switches, that were repaired. (Tr. 23-24; Ex. G-5). A review of the inspection books after the citation was issued indicates that several pull cords needed to be repaired by an electrician.

The inspector determined that the violations were the result of Powder River's high negligence because mine managers were not able to recall ever conducting a complete functional test on the switches. (Tr. 26). In Inspector Johnson's opinion, a defective condition would not be discovered by a visual inspection as one could not tell just by looking at the switch whether it was working properly.

On cross-examination, Inspector Johnson discussed his interpretation of section 77.502. He stated that the term "examine" in the safety standard means a visual inspection while the term "test" means a functional test. (Tr. 34). It is his understanding that employees of Powder River walk along the conveyor systems to look at the pull cords to ensure they are connected and to look for visible abnormalities. This examination would include looking at both sides of the switch to make sure all electrical components are connected. (Tr. 38).

Blackburn testified on behalf of the company. Blackburn has been employed by Powder River for 16 years and has been the electrical team leader for one year. He is an MSHA certified electrician. His job duties include overseeing all the electrical equipment and personnel at the pit and the plant. (Tr. 88). Blackburn explained that the pull cord system at the mine is installed at unguarded portions of the conveyor and is used throughout the mine. The pull cord switches are made by different manufacturers, but they use the same general system and setup. (Tr. 91). There are approximately 35,000 feet of conveyor pull cords throughout the mine. He described the pull cord system as having two components to it: (1) the aircraft cable that runs through metal posts mounted on the conveyor, and (2) the switch. The cables loop through the indicator arm on the switch. (Tr. 93). He explained that the system is wired in a fail-safe manner. When a switch is pulled a signal is sent to the computer which instantly shuts down the conveyor. There is a redundancy built into the system.

Taking into consideration manufacturers' recommendations, the mine has the switches placed about 185 feet apart making the total number of switches in the mine between 200 and

250. (Tr. 95). Blackburn stated that the computer system monitors the circuits so if the electrical circuit in the pull cord switch fails, then the conveyors are automatically shut down and they cannot be restarted until repairs are made. (Tr. 95).

The Conveyor Components Company is the manufacturer of the most recently installed pull cord system. It recommends testing once installation is complete to make sure that the switches are mounted correctly and operating properly. However, there is no recommended testing after that point. (Tr. 97). After the initial installation, the system was checked by physically pulling on the cord to make sure it was operating. The cables were checked to assure they were in place and that all parts were mounted correctly. The system was also checked by pulling each pull cord and matching it with the computer to show that the proper switch was tripped. Blackburn said that this test is only required when a pull cord system is first installed. (Tr. 97). He has not performed a functional test for the purposes of complying with section 77.502-2 and has not directed anyone else to perform this test. He feels that the functional test is unnecessary as the computer system monitors the electrical system 24 hours a day and there is a person in the control room at all times. (Tr. 98). He believes that Powder River complied with the standard by conducting a visual inspection. The electrical team inspects the area as do the on-shift supervisor and on-shift technician on a daily basis. Any problems are recorded in the log books. (Tr. 100). If there is a problem, a work order is generated and the problem is corrected. Blackburn stated that he has never been told by an MSHA inspector that a functional test of the pull cord system needed to be performed on a monthly basis. (Tr. 101). He has also spoken with other mines and they stated that they do not perform monthly functional tests. (Tr. 103).

Blackburn testified that Inspector Johnson permitted Powder River to conduct the test with the belts stopped as the equipment is not meant to be started so many times in a short period of time. (Tr. 108). Inspector Johnson watched in the computer room while the cords were pulled and saw that they were functioning properly. Blackburn does not feel that the system should be tested on a monthly basis as it is designed to be used in emergency situations only and the life of each switch would be shortened if it were tested monthly. (Tr. 111).

Michael Stephens, production manager for the plant, also testified on behalf of the company and he reiterated much of Blackburn's testimony. (Tr. 127-146). He has been employed by the company for 24 years and has held his current position since February 2008. Given the complexity of the conveyor system, he estimated that it would take at least one full day to test all of the pull cord switches at the mine in the manner initially required by Inspector Johnson. (Tr. 129). After negotiation with the inspector, the conveyor system was shut down and mine employees pulled each switch as someone made sure that a signal was being received by the computer in the control room. (Tr. 132).

The Secretary argues that the plain language of the safety standard requires more than a visual inspection of electrical equipment. The standard clearly provides that a "test" is required. The pull cord switches are not tested when miners merely examine them. If a switch handle is stuck in place, pulling on the cord will not activate the switch. This defect cannot always be

detected by a visual inspection. She also maintains that her interpretation of the standard is reasonable because it is consistent with the language and purpose of the standard. As such, her interpretation is entitled to deference by the Commission.

Powder River contends that it has never been advised by MSHA, during all of the years that the mine has been inspected, that it must physically pull each and every pull cord switch on a monthly basis in order to comply with the safety standard. It argues that the electrical examination standard does not apply to pull cord systems and the citation should be vacated. Powder River also argues that its method of monitoring and inspecting the pull cord system makes a functional test unnecessary. The electrical portion of the pull cord system is monitored by the computer at all times, the computer control room is manned at all times, and the mechanical portion of the pull cord system can be effectively inspected visually. The inspector failed to recognize that the "electronics" in the pull cord system is being constantly monitored by the computer and that the system shuts down if it is not working properly. (P.R. Br. 15). "The pull cord system is designed to be pulled on an as-needed basis and, much like a sprinkler system in an office building, its computer monitoring system is sufficient to advise when an electrical problem exists." *Id.* The pull cord switches were not designed to be regularly pulled with the result that repeatedly performing the test required by the inspector would shorten their lives. The on-shift examinations performed at the mine are adequate to note any mechanical problems with the switches.

Powder River also maintains that it was not put on notice that the cited standard requires the operator to perform a functional test of the pull cord system on a monthly basis as part of the electrical equipment examination. A reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not have recognized that a functional test was required. *See Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). Powder River had never been cited for a violation of the standard because it failed to perform a functional test, notwithstanding the fact that the conveyor system contains between 200 and 250 pull cord switches along 35,000 feet of cord. MSHA inspectors have also regularly reviewed the company's record of electrical examinations. Blackburn also testified that he talked to other coal mine operators in Wyoming's Powder River Basin and was advised that these mines also have not been required to perform functional tests on pull cord switches. Finally, Powder River contends that the placement of the safety standard within the standards for electrical equipment indicates that section 77.404 is concerned with electrical issues rather than mechanical problems with a switch.

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. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted); *see also Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). In the absence of a regulatory definition or technical usage of a word, the Commission would normally apply the ordinary meaning of the word. *See Bluestone Coal Corp.*,

19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997) (table).

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 . . . 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." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted).

The safety standard provides that "[e]lectric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions." The Secretary's regulations do not define the term "electric equipment" and they do not indicate what is meant by "examined, tested, and properly maintained." As a consequence, I find that the safety standard is not clear on its face. It is particularly ambiguous when applied to pull cord switches along conveyor systems.

The next issue is whether the Secretary's interpretation of the safety standard is reasonable. As stated above, the Secretary's interpretation is reasonable if it is logically consistent with the language of the regulation and serves a permissible regulatory function. The Secretary interpreted this safety standard in her *Program Policy Manual* as follows:

For purposes of this section, "electric equipment" shall include all control circuits, control switches or devices, circuit breakers, fuses, conduits, wiring, motors, transformers, lighting equipment, hand-held tools such as drills, wrenches, and saws, etc. The tests, examinations, and proper maintenance required by this section shall include all items mentioned above and all other such equipment at the mine.

(V MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 77) (*PPM*). This interpretation is consistent with the position the Secretary took at the hearing in that "control circuits" and "control switches" are included in the definition in the *PPM*. I find that the Secretary's decision to include "switches" in the definition of electric equipment in the *PPM* is reasonable and consistent with the language of the safety standard. *See, U.S. Steel Mining Co., Inc.*, 15 FMSHRC 1541, 1543-44 (Aug. 1993). As a consequence, I also find that the subject pull switches are covered by the safety standard.

The Secretary's *PPM* does not provide any guidance with respect to the phrase "examined, tested, and properly maintained" used in the safety standard. In the present citation,

there is no allegation that the switches were not properly maintained. The term “examine” is defined as “to closely inspect, to test the condition of” and the term “test” is defined as “a critical examination, observation, or evaluation.” (<http://www.merriam-webster.com/dictionary>). By themselves, these definitions do not provide much guidance.

The preponderance of the evidence clearly shows that the pull switches were inspected on a daily and monthly basis by various people. Every day, the on-shift supervisor inspects the pull cord system and an on-shift plant technician performs a safety check. (Tr. 98-99, 135-38, 140-44). These inspections include a visual examination of the cable, cable attachments, and the mechanical parts of the switch. The tension on the cable is checked and adjusted as necessary. The electrical department also performs a visual inspection of the system on a monthly basis and documents these inspections in the electrical exam log book, as required by the safety standard. (Tr. 99-100, 136). This inspection makes sure that the pull cable is properly supported and tight, the electrical connectors going into and out of the electrical switches are properly secured, the covers on the switches are secured, and that all components are properly mounted. (Tr. 105-06). In addition, the electrical components in the pull cord system are continuously monitored by the computer system for the conveyors. If the electrical circuit for a pull cord switch fails for any reason, the conveyor belt automatically shuts down and cannot be restarted until the problem is corrected. (Tr. 93-96, 106-07, 130, 144-45). Each pull cord switch is enclosed in a sealed box so the switch itself cannot be physically examined, but the electrical system is being monitored by the computer at all times and an employee is in the control room at all times.

It is not clear that Inspector Johnson was aware that the electrical components are continuously monitored by the computer system. Nevertheless, the Secretary takes the position that each switch must be pulled into an open position to see if such action registers on the computer. She argues that the standard requires Powder River to test all 200 plus pull cord switches in this manner on a monthly basis and record the results in the electrical examination book. The Secretary argues that without a functional test, there is no way for the operator to determine if the activating arm for a switch is frozen in place, which would prevent the conveyor from shutting down during an emergency. (Tr. 17, 24). Inspector Johnson testified that he has observed activating arms that do not function because they are stuck and will not move when the pull cord is yanked.<sup>1</sup> (Tr. 40-41). Stephens and Blackburn acknowledged that the computer monitoring system will not detect a stuck activating arm and that a visual inspection will also not indicate if an arm is stuck. (Tr. 121, 139, 156).

I find that the Secretary’s interpretation of section 77.512 requiring a monthly functional test is reasonable in this instance. Powder River “closely inspects” the pull switches on at least a

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<sup>1</sup> Inspector Johnson also argued that a functional test is required because, during a previous inspection of the mine, a pull cord came completely out of its attachment point when pulled. (Tr. 26). A competent visual inspection and examination would be able to detect such a defect in the pull cord system.

monthly basis. By monitoring the electrical components, the mine's computer system "tests the condition of" the pull cord switches on a continual basis. Taken together, the daily inspections, monthly electrical inspections, and the computer monitoring system constitute a "critical examination, observation, and evaluation" of the pull cord switches. As a consequence, these switches were "frequently examined, tested and properly maintained by a qualified person to assure safe operating conditions," except that the activating arms were never tested to make sure they were not stuck in place. The Secretary established that requiring the mine operator to examine and test the pull cord switches to ensure that the activating arms work "serves a permissible regulatory function" and is consistent with the purposes of the Mine Act. I need to point out, however, that Powder River may be able to determine whether the activating arms are frozen in place without having to shut down the conveyor system or perform the test in the exact manner required by Inspector Johnson.

Powder River also argues that it did not have adequate notice that the safety standard required it to perform a functional test of the pull cord system on a monthly basis as part of the electrical equipment examination. Where the imposition of a civil penalty is at issue, considerations of due process prevent the adoption of an agency's interpretation "from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (citations omitted). An agency's interpretation may be permissible but nevertheless may fail to provide the notice required to support imposition of a civil penalty. See *Gen. Elec.*, 53 F.3d at 1333-34; *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982); *Phelps Dodge Tyrone, Inc.*, 30 FMSHRC 646, 656 (Aug. 2008).

In order to avoid due process problems stemming from an operator's asserted lack of notice, the Commission has adopted an objective measure (the "reasonably prudent person" test) to determine if a condition is violative of a broadly worded standard. That test provides:

[T]he alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.

*Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982); see also *Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992). As the Commission stated in *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990), "in interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement," but whether a reasonably prudent person would have ascertained the specific prohibition of the standard and concluded that a hazard existed. The "reasonably prudent person" is based on an "objective standard." *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983).

In *Alan Lee Good d/b/a Good Construction*, 23 FMSHRC 995 (Sept. 2001) (“*Good Construction*”), the opinion of Commissioners Jordan and Beatty included the following analysis:

In applying the reasonably prudent person standard to a notice question, the Commission has taken into account a wide variety of factors, including the text of a regulation, its placement in the overall enforcement scheme, its regulatory history, the consistency of the agency’s enforcement, and whether MSHA has published notices informing the regulated community with “ascertainable certainty” of its interpretation of the standard in question. Also relevant is the testimony of the inspector and the operator’s employees as to whether the practices affected safety. Finally, we have looked to accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator’s mine.

23 FMSHRC 1005 (citations and footnote omitted).

To support its argument, Powder River relies on the fact that it had never been cited for not conducting a functional test. The North Antelope Rochelle Mine is one of the largest surface coal mines in the United States and it has an extremely large conveyor system. MSHA has a field office in Gillette and the mine has been inspected by MSHA on a regular basis. MSHA inspectors regularly inspected the conveyor system and reviewed Powder River’s electrical examination records. Nevertheless, no MSHA official has ever mentioned that the mine was required to pull every pull cord switch in the mine as part of its monthly examination of electrical equipment. After it received this citation, Blackburn contacted electrical supervisors at several large coal mines in Wyoming’s Powder River Basin. He talked to electrical supervisors at Peabody Energy’s Rawhide and Caballo mines, Big Sky Energy’s mine, Thunder Basin’s Black Thunder Mine, and Rio Tinto Energy’s mine. (Tr. 102-03). These electrical supervisors are responsible for overseeing compliance with MSHA’s electrical standards and would have knowledge of electrical examination practices used at their respective mines. (Tr. 103). These individuals advised Blackburn that they did not perform functional tests of the pull cord switches as part of their monthly electrical examinations and that MSHA had never advised them that they were required to do so. Powder River also relies on the placement of the standard in the regulations dealing with electrical issues. The functional test required by Inspector Johnson is really designed to address mechanical rather than electrical problems with the pull cord switches. Finally, Powder River points out that MSHA has not issued any interpretive material that would provide notice to the regulated community that functional tests of pull cord switches is required under the safety standard.

I vacate this citation because the Secretary failed to provide fair notice of the requirements of this standard with respect to pull cord switches. Although the Secretary’s broad

interpretation of the standard is reasonable, she failed to give adequate notice that each pull cord must be pulled on the monthly basis to make sure that each switch is functioning properly and is not stuck in position. A reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not necessarily recognize that this functional test was required, given the visual inspections that were performed and the computerized electrical monitoring system that was in use at the mine. The text of the safety standard is broadly written and does not describe what testing is required in this context. The agency's *PPM* does not provide any guidance on this issue and the Secretary has not issued any other interpretive materials. Powder River has been mining at this location since the mid-1980s and MSHA has never advised the company that the safety standard requires a functional test of each pull switch. In addition, it appears that other mines in the area have likewise not been required to perform such tests. It appears that the Secretary has not consistently interpreted this safety standard to require a functional test of each and every pull cord switch at coal mines in the United States on a monthly basis.<sup>2</sup> Consequently, this citation is vacated.

**B. Citation No. 7610727, Accumulation of Coal at the Top of a Silo.**

On August 26, 2007, Inspector Wayne Johnson issued Citation No. 7610727 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 77.1104 as follows:

Combustible materials (coal fines and chunks) were allowed to accumulate where they can create a fire hazard on the S-3 belt on the West sample system, on top of silo 3. Two sets of troughing idlers were observed turning in coal. Accumulations were measured from under the rollers up to 8 inches deep for the length of two feet along the rollers. The coal was within 3 feet of the tail pulley and dry to the touch. The examinations and tests required under the provision of this section 77.502 shall be conducted at least monthly. The mine has not examined and tested monthly pull cord inspections.

The inspector determined that an injury was reasonably likely and that any injury would likely be permanently disabling. He determined that the violation was S&S and that the company's negligence was moderate. The safety standard provides that "[c]ombustible materials . . . shall not be allowed to accumulate where they can create a fire hazard." The Secretary proposes a penalty of \$1,795.00 for this citation.

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<sup>2</sup> Inspector Johnson testified that he is aware of other coal mines that perform functional tests on pull cord switches on a monthly basis, but his testimony was rather vague. (Tr. 19, 42-44). Nevertheless, even if some mines perform a functional test, it is clear that MSHA's interpretation of the standard has been neither clear nor consistent.

Inspector Johnson observed coal eight inches deep for a length of two feet along the rollers under a sample system belt within three feet of the tail pulley. The accumulation was dry to the touch, and posed a fire and/or smoke inhalation hazard. (Tr. 28). The coal was located on top of the silos in an enclosed building. The conveyor was running at the time and the rollers were turning in the coal. This violation was designated as S&S as the inspector felt it was reasonably likely that the condition would contribute to a hazard where there is foreseeable potential for illness or injury if not corrected. Inspector Johnson was particularly concerned about a smoke inhalation hazard that could occur due to the equipment turning in the coal.

After the condition was discovered, Inspector Johnson spoke with Lynn Snyder, step-up supervisor, and he learned that the accumulation was present for at least three hours. He also learned from miners that they wash down the facilities every three hours. (Tr. 29). To terminate the citation, the company washed off the accumulation. (Tr. 31).

Michael Stephens, who was the production manager for the plant, testified on behalf of the company. He stated that the accumulation cited was located at the S3 belt which is the last belt in the system where a sample is taken. (Tr. 147). Before reaching this point, the coal went through a hammer mill where it was crushed to eight mesh making it between 85 and 95 percent eight mesh. Eight mesh coal is similar to the size of coffee grounds. Stephens would not characterize it as coal dust but it was similar to coal fines. He explained that generally eight mesh coal is less combustible than coal dust. (Tr. 148). He did not feel the citation was warranted as there was no heat source present. The citation alleged there were idlers present. Idlers are rollers with bearings that support the moving belt in a V position to keep the coal in the center of the belt. The belt moves at a rate of about 17 feet per minute making it a slow-moving belt. (Tr. 149). He stated that when the belt comes into contact with the idlers there is little friction created and little heat generated. He does not believe it would be enough to ignite the coal fines.

Several employees continuously wash down the three floors of the silo. These employees start at the top and work their way down to the bottom and then start over again. (Tr. 152). The cleanup cycle takes about three hours. The inspector testified that the employees had started cleaning the top level again when he issued the citation (Tr. 52).

The Secretary argues that she is only required to establish that there were sufficient accumulations present to create a fire hazard or add to a fire hazard if an ignition source were to be introduced. Here the accumulation was substantial and was near the tail pulley. The accumulation had existed for several hours and was at least partially dry. Finally, the idler rollers were turning in the accumulation, which had the potential to heat the coal dust to the ignition point.

Powder River maintains that the plain language of the standard provides that an accumulation is permitted, at least for short periods of time, as long as a fire hazard is not created. Where the Secretary is unable to establish an ignition source, there is no violation of the

standard. In this instance there was no ignition source in the area. The turning idlers were not an ignition source because the belt moved so slowly that heat would not be created. There were no other ignition sources in the area. The accumulation did not create a fire hazard. In addition, the spill was partially wet and no coal dust or float coal dust was present.

I find that the Secretary established a violation of section 77.1104. The Secretary is not required to show that an ignition or explosion was reasonably likely to occur. *Pittsburg & Midway Coal Mining Co.*, 15 FMSHRC 2250 (Nov. 1993). She is only required to show that it is possible that the accumulation would create a fire. The phrase "create a fire" in the standard is best interpreted broadly because, otherwise, the Secretary will never be able to establish a violation. I find that at least one ignition source was present and it was possible that the presence of the accumulation could create conditions in which a fire could be propagated. The term "fire" may include the smouldering of coal fines where flames are not present. *See Phelps Dodge Tyrone, Inc.*, 30 FMSHRC 646, 657, 663-64 (Aug. 2008). Although it was not reasonably likely, it was possible that the turning rollers could generate enough heat to start a fire.

I find, however, that the Secretary did not establish that the violation was S&S. A violation is classified as S&S "if based upon the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). Although the Secretary established the first two elements, I find that the third and fourth elements of the *Mathies* test was not present in the case. Consequently, I modify the citation to delete the S&S determination.

I also find that Powder River's negligence was low. The company had an established cleanup program and the cited accumulations would have been removed shortly after the inspector observed them. The accumulations had existed for less than three hours and the hazard created was not very great. Consequently, I reduce the level of negligence attributed to Powder River. A penalty of \$300.00 is appropriate for this violation.

**C. Citation No. 7610574, Welding Operations That Were Not Shielded.**

On August 29, 2007, Inspector Todd Jaqua issued Citation No. 7610574 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 77.408 as follows:

Welding operations were not shielded to prevent injuries to the eyes to four persons working within ten feet of this operation in progress. The operations were to be performed for a full shift of ten hours. This poses burn type injuries to the eyes from flash and/or arc exposure.

The inspector determined that an injury was unlikely but that any injury would likely be permanently disabling. He determined that the violation was not S&S and that the company's negligence was moderate. The safety standard provides that "[w]elding operations shall be shielded and the area shall be well-ventilated." The Secretary proposes a penalty of \$138.00 for this citation.

Inspector Jaqua saw that welding operations were occurring as he and Inspector Scott Markve were driving to the mine office. The inspectors stopped their vehicle to inspect the welding operation because they did not see welding shields in place between the welder and other people in the area. The welder was using a welding stand to cut support for cable struts for a new conveyor. (Tr. 60). The welding work was being performed by an independent contractor. In addition to the welder, two contractor employees were standing about 10 to 20 feet from the welding operations. (Tr. 62). In addition, two Powder River employees were about 50 feet away, over near the conveyor that was under construction. Inspector Jaqua found out from Scott Markve that the Powder River employees were there to instruct the contractors where to place the brackets on the conveyor. The conveyor was part of a new loadout facility that was being constructed.

After observing the welding operations, Inspector Jaqua questioned the welder as to whether he was aware that he was required to have a shield between him and the other people. (Tr. 63). The welder nodded indicating that he was aware and pointed the inspector in the direction of his supervisor.

Welding without a shield presents a hazard associated with flash burns to the eyes. Inspector Jaqua explained that the person doesn't even have to look directly into the welding operations or the flash arcs to be affected by the reflection. He felt that it would have been possible to have shields in the area as they are easy to install. (Tr. 66). Inspector Jaqua issued a citation to Powder River and to the independent contractor who was doing the fabricating work on the conveyor.

Dave Hendricks, plant maintenance supervisor, testified on behalf of the company. He has been employed by the company for 22 years and has held his current job for 12 years. He

stated that the welding was being performed by CCC Group which is a construction company that was installing the conveyor system. (Tr. 176). The welding was being performed in the southwest lay-down yard which is an area where all the pan sections, idlers, and iron were being stored for the new conveyor system. This area is not in an enclosed building, but rather out in the open. (Tr. 177). This area is not regularly used by Powder River employees, but the CCC contractors have done some work there.

Hendricks and Kevin Johnson, an electrical technician, went out to the southwest lay-down area around 8:00 a.m. on August 29, 2007, to take a look at the pan section and to determine where to run the electrical cable. (Tr. 177-178). They did not see the CCC Group employees welding at any time while they were in the area. (Tr. 180). Hendricks estimated that the end of the pan was about ten feet away from the CCC Group employees and the welding table was an additional ten feet away. (Tr. 184). Hendricks and Johnson were preparing to leave the area when two MSHA inspectors pulled up. Johnson and Hendricks were not supervising the CCC Group workers on that day and stated that CCC Group management was responsible for their work. Hendricks stated that he was not exposed to any potential hazards such as flash burns because welding was not being performed while he was present. (Tr. 186). Hendricks also explained that welding could have begun as he and Johnson were walking back to the truck but the conveyor pan would have been blocking their view so they would not have been exposed to any hazard. The violation was abated when the CCC Group employees put shields up without help from Powder River employees. (Tr. 187).

The Secretary argues that the safety standard is clear on its face when it states that welding operations shall be shielded. There are no exceptions to this requirement. Inspector Jaqua observed the welding and testified that there were people within 20 feet who were providing assistance to the welder. The welder told Jaqua that he was working a 10-hour shift and that he would be welding during that shift. Two Powder River employees were within 50 feet of the welding operation. The Secretary also argues that it was appropriate for Inspector Jaqua to cite Powder River for the violation. Powder River employees were in the area and these employees were management officials. One of them was the plant maintenance supervisor. Hendricks testified that, although he did not see any welding flashes, it looked like the CCC Groups employees were getting ready to weld and he did not see any shields. Hendricks should have advised the CCC Group employees that a welding shield is required. As a consequence, he contributed to the violation.

Powder River maintains that the lay-down yard is not an area where Powder River employees work on a regular basis. The area is a storage yard and an area where CCC Group occasionally works. When Hendricks and Johnson traveled to the area they walked around the pan section of the conveyor. Their position in relation to the welding work is illustrated on Ex. R-5. They did not observe any welding while they were in the vicinity of the CCC Group employees. They were near Hendricks' pickup truck when the MSHA inspectors arrived. Powder River argues that under the facts presented in this instance it was not appropriate for the Secretary to issue a citation to Powder River under her guidelines in her Program Policy Manual

(III PPM Part 45-1). Powder River's employees were not exposed to the hazard and Powder River did not contribute to the existence of the hazard. It is clear that neither Hendricks nor Johnson observed any welding occurring while they were in the area. In addition, they were not exposed to the hazard and they did not contribute to the hazard.

I find that the Secretary established a violation and that it was appropriate for the Secretary to cite Powder River as well as CCC Group for the violation. I have no difficulty finding that a shield was required under the safety standard. I note that the Secretary has broad "discretionary authority to cite the owner operator, the independent contractor, or both for contractor violations." *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 152 (D.C. Cir. 2006). The guidelines set forth by the Secretary in the PPM are not binding on the agency. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986). As a consequence, I examine the Secretary's decision to cite Powder River using an abuse of discretion standard. As stated above, the Secretary contends that Powder River violated two of the guidelines because its employees were exposed to the potential hazard and Hendricks contributed to the violation by failing to make sure that the welding operations were shielded. I find that the Secretary did not abuse her discretion when she determined that Powder River should also be cited for the violative condition.

The Secretary determined that it was unlikely that an employee of Powder River would be injured by the violation. The two Powder River employees were to be in the lay-down area for a short period of time and they were not directly involved in the fabricating activities. As a consequence, I find that Powder River's negligence should be reduced slightly. A penalty of \$130.00 is appropriate for this violation.

**D. Citation No. 7610576, Frayed Cable on Back of a Haul Truck.**

On August 29, 2007, Inspector Todd Jaqua issued Citation No. 7610576 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 77.210(a) as follows:

Hitches and slings used to hoist materials [were] not suitable for handling the types of materials being hoisted on the Caterpillar 793 haul truck. The two inch safety bed cable attached to the rear of the box was severely frayed at the cast eyelet. The truck was located in camp #4 fuel station.

The inspector determined that an injury was unlikely but that any injury would likely be fatal. He determined that the violation was not S&S and that the company's negligence was moderate. The safety standard provides that "[h]itches and slings used to hoist materials shall be suitable for handling the type of materials being hoisted." The Secretary proposes a penalty of \$425.00 for this citation.

During his inspection, Inspector Jaqua observed a Caterpillar 793 haul truck located at the Camp Four fuel station with a frayed cable attached to the box of the truck. The cable was present so that the dump box could be secured when in a raised position in the event the hydraulics failed during repairs. When attached between the box and the frame of the truck, the cable would prevent the box from falling. (Tr. 68). The truck was not tagged out for repair. The cable was severely frayed.

Dave Wickett, safety supervisor, testified on behalf of the company. At the time of the inspection, the haul truck was not under repair and was not being used in a way that the cable would be needed. (Tr. 167). Instead, the truck was hauling dirt when the inspector asked to inspect the truck. The safety cable is never used while the haul truck is in production and it does not have anything to do with the operation of the equipment. Indeed, the driver of the haul truck would have no way to get to the cable because it is too high off the ground. A maintenance employee would inspect the cable before using it during repairs at the shop. This policy is in the company's safety handbook. (Ex. R-4). The cable would never be used to support the dump box in the field. (Tr. 169). Because the cable serves no function while the truck is in production, company policy now provides that the cable be removed at the shop once all repairs are completed.

I vacate this citation for two reasons. First, the cable was not a "hitch or sling used to hoist materials." It was a safety device used at the shop when the dump box needed to be in a raised position during repairs. This safety device secures the dump box so that it does not fall in the event the hydraulic system and other safety devices fail while the box is raised during repairs. There is no evidence that the cable was ever used to hoist materials. Second, there is no evidence that the cable was used as a safety device while it was in the condition observed by the inspector or that it would ever be used in that condition. Mr. Wickett credibly testified that the cable is now removed from the back of the dump box before the truck leaves the shop because the movement of the truck causes the cable to bang against the truck thereby damaging it. This banging action may have frayed the cable in this instance. I credit Wickett's testimony that the mechanics in the shop would have used a different cable if the dump box needed to be kept in a raised position during repairs. This citation is vacated.

## **II. APPROPRIATE CIVIL PENALTIES**

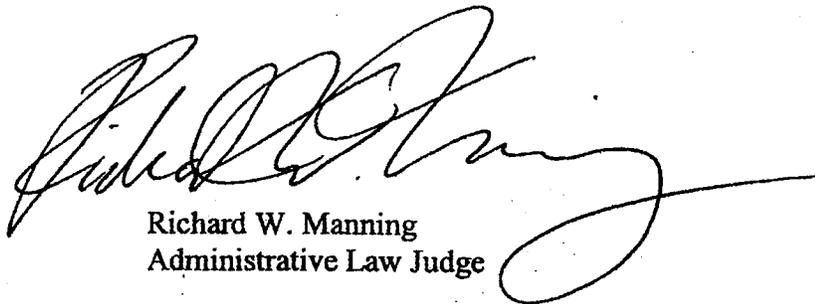
Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. Powder River is a large mine operator and its parent company (Peabody Energy) is also large. The record shows that the North Antelope Rochelle Mine was issued about 35 citations and orders in the 24 months prior to late August 2007. (Exhibit A to Petition for Penalty). The citations at issue in this case were rapidly abated in good faith. The penalties assessed in this decision will not have an adverse effect on the operator's ability to continue in business. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

### III. ORDER

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

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
WEST 2007-898-R, WEST 2007-899-R, WEST 2008-242		
7610570	77.205(b)	\$1,684.00
7610571	77.516	Vacated
7610725	77.502-2	Vacated
7610727	77.1104	300.00
7610731	77.1104	362.00
WEST 2008-243		
7610640	77.1110	\$127.00
7610574	77.408	130.00
7610576	77.210(a)	Vacated
TOTAL PENALTY		\$2,603.00

For the reasons set forth above, the citations are **AFFIRMED**, **MODIFIED**, or **VACATED**, as set forth above and Powder River Coal, LLC, is **ORDERED TO PAY** the Secretary of Labor the sum of \$2,603.00 within 30 days of the date of this decision.<sup>3</sup>



Richard W. Manning  
Administrative Law Judge

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<sup>3</sup> Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

Distribution:

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RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

February 11, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-124
Petitioner	:	A.C. No. 48-01353-127627-01 B96
	:	
v.	:	Docket No. WEST 2008-125
	:	A.C. No. 48-01353-127627-02 B96
CCC GROUP, INC.,	:	
Respondent	:	North Antelope Rochelle Mine

**DECISION**

Appearances: Gregory W. Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary of Labor; Gary Klatt, Safety Manager, CCC Group, Inc., San Antonio, Texas, for Respondent.

Before: Judge Manning

These cases are before me on two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”) against CCC Group, Inc., pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). A hearing was held in Denver, Colorado and the parties introduced testimony and documentary evidence.

Powder River Coal, LLC, operates the North Antelope Rochelle Mine, a large open-pit coal mine in Campbell County, Wyoming. CCC Group was an independent contractor performing services at the mine.

**I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**A. Citation No. 7610573, Welding Operations at Lay-Down Area.**

On August 29, 2007, Inspector Todd Jaqua issued Citation No. 7610573 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 77.408 as follows:

Welding operations were not shielded to prevent injuries to the eyes to four persons working within ten feet of this operation in progress. The operations were to be performed for a full shift of

ten hours. This poses burn type injuries to the eyes from flash and/or arc exposure. All welding operations are stopped until shields are put in place to protect persons from contact.

The inspector determined that an injury was highly likely and that any injury would likely be permanently disabling. He determined that the violation was of a significant and substantial nature (S&S) and that the company's negligence was high. The safety standard provides that "[w]elding operations shall be shielded and the area shall be well-ventilated." The Secretary proposes a penalty of \$25,163.00 for this citation.

Inspector Jaqua saw that welding was occurring soon after he and Inspector Scott Markve entered the mine property. The inspectors stopped their vehicle to inspect the welding operation because they could not see a welding shield in place between the welder and other people in the area. The welding was taking place outside in the lay-down area. There was a conveyor on the ground nearby that was to be included in a new coal loadout facility. There were five people in the area including three CCC Group employees and two Powder River Coal employees. Two CCC Group employees were standing at a vise about 10 feet from another CCC Group employee who was welding. The employees at the vise were cutting channel iron with an electric band saw and the welder was then fabricating brackets out of the cut iron. (Tr. 11). Inspector Jaqua testified that the CCC Group employees were fabricating cable support trays and attaching them to the adjacent conveyor, which was about 20 to 30 feet away. There was a pile of channel iron near the band saw. Apparently the two Powder River Coal employees were present to determine where the brackets being fabricated should be attached to the conveyor.

Jaqua testified that the safety standard required an opaque shield be placed between the welder and the other two CCC Group employees. The shield could be made out of any kind of material, including plywood or a canvas tarp. The shield must be present to prevent employees from being exposed to the arc and flash of the welding unit. Arcs and flashes from welders can cause serious eye damage. Safety glasses do not protect employees from this hazard.

Inspector Jaqua determined that the violation was S&S because he believed that it was highly likely that someone would be seriously injured by the hazard. Based on discussions he had with the employee doing the welding, Jaqua determined that the CCC Group employees would have been exposed to the hazard for the entire 10-hour shift. (Tr. 23-24). He also determined that these employees would be working close by the welder during the shift. As a consequence, Jaqua testified that "there was no doubt in my mind whatsoever that there would have been damage to the eyes of both of the persons that were . . . working in that area . . ." (Tr. 24). Inspector Markve testified that the citation was S&S because an eye injury was reasonably likely to occur given how close the other employees were to the welding operation. (Tr. 49).

Inspector Jaqua determined that the negligence of CCC Group was high based on a conversation he had with Jody Kaylor, CCC Group's supervisor at the site. Jaqua testified that Kaylor told him that the employee performing the welding had been trained and he was or should

have been aware that a shield was required. (Tr. 18, 25). Jaqua believed that Kaylor did not take the steps necessary to make sure that the work area was safe for welding. Because it was a clear violation of the safety standard, Kaylor should have been aware that a shield was required and he should have made sure that a shield was in place before work began.

CCC Group argues that the standard is quite vague as to when a shield is required. It also argues that its employees would not be exposed to the welding operations the entire 10-hour shift because as the parts were fabricated, the employees would be attaching the parts to the conveyor structure. As a consequence, its employees would not be looking at the arc for any length of time, if at all. Ronald Segura, a site safety supervisor for CCC Group, testified that CCC Group's employees would only have been near the welding for short periods of time. (Tr. 81). They were not going to be working "side by side within ten feet" of the welder. *Id.*

I find that the Secretary established a violation. The safety standard is broadly written to cover a wide variety of situations. It requires shielding in all situations. *See Consolidation Coal Co.*, 10 FMSHRC 1702, 1703 (Dec. 1988)(ALJ). Its application is not limited to indoor welding operations. CCC Group argues that the standard is too vague to be meaningful to mine operators. It points out that if welding were occurring a quarter of a mile away, the literal language of the safety standard would still require a screen and that cannot be the intent of the safety standard. The standard for metal/nonmetal mines provides more clarity because it states that "[w]elding operations shall be shielded at locations where arc flash could be hazardous to persons." (§ 56/57.14213). I agree that section 77.408 could be applied to situations where a serious hazard is not created, but that is not the case here. Indeed, the conditions observed by Inspector Jaqua would easily violate the metal/nonmetal standard if it were applicable to coal mines.

I recognize that the two other CCC Group employees were not going to be standing right next to the welder the entire shift. They were going to be walking around, taking fabricated components to the conveyor that was being assembled, and walking back to the vise to cut more iron. I agree with Inspector Jaqua that such a situation would seriously expose the miners to the hazards of the welding arc. (Tr. 31-32). There was nothing present to shield the miners from the arc produced by the welder.

I also find that the Secretary established that the violation was S&S. A violation is classified as S&S "if based upon the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and

(4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

Although welding would not be performed continually for the entire ten-hour shift, welding would be occurring for a significant length of time. In addition, miners would be moving around in the vicinity of the welding operations. As a consequence, the eyes of the miners would be exposed to the hazard presented by the arc of the welder. I credit the testimony of Inspector Jaqua with respect to the serious hazard presented when the eyes of miners are exposed to the flash arc of welding. Retina damage can occur when people are exposed to welding arcs. (Tr. 44). Given these facts, I find that the Secretary established all four elements of the *Mathies* S&S test. There was a reasonable likelihood that someone would suffer an injury of a reasonably serious nature. I recognize that if the miners working around the welder studiously avoided looking at the flash arc, the likelihood that they would suffer retina damage would be reduced. (Tr. 43). Nevertheless, this safety standard was promulgated so that miners would not be exposed to the hazards associated with welding. The Secretary is not required to show that it was more probable than not that someone's eyes would be damaged that day.

The Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10<sup>th</sup> Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i). This legal standard also applies to independent contractors performing services at a mine. Inspector Jaqua based his high negligence determination on the fact that the CCC Group supervisor did not specifically tell the welder to put up a screen before he started working. Jaqua determined that the supervisor's attitude was rather cavalier because he relied on the welder to perform his job in a safe manner. The supervisor told Jaqua that the miners were trained on safe welding procedures. I find that the company's negligence was moderate. There has been no showing that CCC Group did not adequately train its welders on safe welding procedures. In addition, the welding was being performed outside where the need for a shield would not be as obvious. Moreover, Mr. Kaylor was not in the area when the welding started. The evidence in the record does not support a high negligence finding.

The penalty proposed by the Secretary is much too high for this violation, especially since I have reduced the level of negligence attributable to the company. Taking into consideration the penalty criteria set forth in the Mine Act, I find that a penalty of \$8,000.00 is appropriate for this violation.

**B. Citation No. 7610642, Welding Operations at Loadout Construction Area.**

On August 29, 2007, Inspector Scott Markve issued Citation No. 7610642 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 77.408 as follows:

Welding operations were not shielded on the blending load out construction area located at the northwest corner of the building. A welder was welding on the staircase from the second level to the third level.

The inspector determined that an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the company's negligence was moderate. The Secretary proposes a penalty of \$425.00 for this citation.

CCC Group stated at the hearing that it was withdrawing its contest of this citation. (Tr. 79). CCC Group's representative stated that the company has paid the Secretary's proposed penalty of \$425.00. *Id.* The records on the data retrieval system at MSHA's website indicates that this penalty has not been paid. Consequently, I have included the penalty in the total due at the bottom of this decision. CCC Group is not required to pay the penalty twice so it should double check its records and contact MSHA if it has any questions.

**C. Citation No. 7610643, Overhead Work at Loadout Construction Area.**

On August 29, 2007, Inspector Scott Markve issued Citation No. 7610643 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 77.203 as follows:

Adequate protection was not provided for three miners working below the overhead work area above them. A miner was using a sledge hammer while setting beams on the south end of the blending loadout construction area. The miner was located at the 85 foot level. Two miners were located about 30 feet below that level and one miner was located 25 feet below those two. The sledge hammer was not on a lanyard and there was nothing to prevent the hammer from falling onto any of the miners located below the work activity.

The inspector determined that an injury was highly likely and that any injury would likely be fatal. He determined that the violation was S&S and that the company's negligence was moderate. The safety standard provides that "[w]here overhead repairs are being made at surface installations and equipment or material is taken into such overhead work areas, adequate protection shall be provided for all persons working or passing below the overhead work area in

which such equipment or material is being used.” The Secretary proposes a penalty of \$19,793.00 for this citation.

Inspector Markve testified that the safety standard is designed to protect miners from the hazards presented by falling objects. (Tr. 58). He stated that he saw a miner at the top of the steel structure being constructed for the coal blending loadout facility. The building was “pretty much a skeleton” at that point in time. (Tr. 59). The miner at the top of the facility was in a double-lanyard safety harness and he was setting guide bolts for steel beams that were to be added. He was straddling an I-beam at the 85-foot level. He was using a sledge hammer to install the bolts. The inspector believed that he was using a 20 pound sledge that was not tied off. The area below his work area was open to the next level of the structure. (Tr. 61). There were beams, tubes, and other components in the structure but, if he were to drop his hammer, it would go at least to the first floor above ground. *Id.*

Markve testified that there were two miners 30 feet below the miner working on the beam and one miner working 25 feet below that point. Inspector Markve believed that these miners were “pretty much all in a line,” with the result that if the miner at the top were to drop his hammer it could have hit one of the miners below. (Tr. 62, 76). He also believed that if the hammer hit an object on the way down, it could still bounce around and hit a miner below. The inspector testified that the hazard could have been avoided if the hammer had been attached to a lanyard, or a net had been installed below the miner, or all work below him had been suspended. Inspector Markve does not deny that there may have been pipes or other obstructions below the miner working on the beam but he still believes that the violation created a serious safety hazard. He testified that it was reasonably likely that someone would be seriously injured or killed by hazard. The miner working on the beam would have his hammer in one hand and a bolt in the other as he worked. (Tr. 76). He would pick up the hammer and set it down on a regular basis as he worked. The miners working below were not paying any attention to what the miner above was doing. If someone had been hit by the hammer, a fatal injury was highly likely. (Tr. 66). Fatal accidents have occurred at other mines over the years under similar circumstances.

CCC Group introduced photos of the loadout facility under construction. (Ex. R-3). The company represented that the photos were taken a day or two after the citation was issued, but the inspector thought that more construction work had been completed when the photos were taken. (Tr. 71-72, 77). Ronald Segura testified that he was with the inspector when he issued the citation. (Tr. 83). He recalls that other employees in the structure were on a lower level of the loadout facility. That is, there were no employees on an intermediate level that was 30 feet below the employee working on the beam. (Tr. 83). In addition, there were many impediments between the employee working on the beam and anyone working on the lower level, including Q-decking, walkways, piping, and various structural members. *Id.* The Q-decking was used as a base on which a concrete walkway would subsequently be poured. As a consequence, Segura did not believe that it was probable that anything accidentally dropped would hit a miner working at a lower level. (Tr. 85). In addition, nothing had fallen from upper levels of the structure as it was being constructed. Finally, the employees of CCC Group typically use sledge hammers that

weigh four to six pounds because anything heavier would be too cumbersome to use. (Tr. 86). Employees put the hammer in their tool belt or pouch when not in use. He admitted that if a hammer were to fall, it could hit a structural member and then keep falling. The hammer could also land on decking or another obstruction and fall no further. (Tr. 89-90).

I find that the Secretary established a violation. I credit the testimony of Mr. Segura that the hammer weighed four to six pounds. Even though there were some obstructions below the employee on the beam, if he were to drop his hammer, it could have bounced around and hit one of the men working below. Adequate protection was not being provided for all persons working or passing below the overhead work area.

Whether the violation is S&S is a close question. I find that the Secretary did not establish the S&S nature of this violation. The inspector issued the citation after looking at the structure under construction from a significant distance. He did not closely examine the work areas to see how likely it was that a falling object would reach the lower level of the structure. He could not state with any certainty if workers were below the man on the beam. (Tr. 76). Consequently, I find that the Secretary established the first, second, and fourth elements of the Mathies S&S test but that she did not establish that it was reasonably likely that a hazard contributed to by the violation would result in an injury. I find that the violation was serious because the cited condition created a potential for a fatal accident.

I affirm the inspector's determination that the violation was the result of the moderate negligence of CCC Group. A penalty of \$5,000.00 is appropriate for this violation.

## II. APPROPRIATE CIVIL PENALTIES

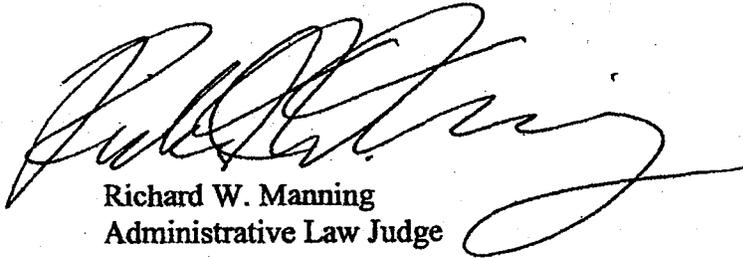
Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. CCC Group is a rather large independent contractor that worked over a million hours nationwide in 2007 and employed over 600 people in the third quarter of 2007. (Data Retrieval System at MSHA's Website). CCC Group was issued about 8 citations at coal mines and 19 citations at metal/nonmetal mines in the 24 months prior to August 29, 2007. *Id.* The citations at issue in this case were rapidly abated in good faith. The penalties assessed in this decision will not have an adverse effect on the operator's ability to continue in business. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

**V. ORDER**

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

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
WEST 2008-124		
7610573	77.408	\$8,000.00
7610643	77.203	5,000.00
WEST 2008-125		
7610642	77.408	\$425.00
	<b>TOTAL PENALTY</b>	<b>\$13,425.00</b>

For the reasons set forth above, the citations are **AFFIRMED** or **MODIFIED** as set forth above and CCC Group, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$13,425.00.00 within 30 days of the date of this decision.<sup>1</sup>



Richard W. Manning  
Administrative Law Judge

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Gary D. Klatt, CSP, Safety, Health & Environmental Manager, CCC Group, Inc., P.O. Box 2000350, San Antonio, TX 78220-0350

RWM

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<sup>1</sup> Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

February 12, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2007-154-M
Petitioner	:	A.C. No. 22-00313-101052
v.	:	
	:	
HOLCIM (US) INCORPORATED,	:	Holcim Artesia Plant
Respondent	:	

**ORDER OF DISMISSAL**

Before: Judge Feldman

This civil penalty matter concerns 104(d)(1) Citation No. 6243289 and 104(d)(1) Order No. 6243291 issued to Holcim (US) Incorporated (Holcim) on May 2, 2006. Holcim timely contested the citation and order in contest proceedings in Docket Nos. SE 2006-190-M and SE 2006 -191-M. The contest proceedings were stayed on June 12, 2006, pending the anticipated assignment of the related civil penalty case. On October 18, 2006, the Secretary proposed a total civil penalty of \$6,700.00 in satisfaction of the citation and order.

Pursuant to section 105(a) of the Federal Mine Safety and Health Act of 1977, an operator that wishes to contest a proposed civil penalty must notify the Secretary within 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).

Holcim failed to notify the Secretary within the required 30 day period. On February 8, 2007, Holcim filed a Motion to Reopen Penalty Proceeding with the Commission because it reportedly did not receive the Secretary's October 18, 2006, proposed \$6,700.00 penalty assessment.<sup>1</sup> On March 23, 2007, the Commission remanded Holcim's request to reopen to the Chief Administrative Law Judge (Chief ALJ) for a determination as to whether good cause existed for Holcim's failure to timely notify the Secretary.

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<sup>1</sup> Holcim alleges that it may not have been served with the Secretary's proposed assessment because of a typographical error in the caption of the June 12, 2006, Stay Order in Docket Nos. SE 2006-190-M and SE 2006 -191-M. Although an error in the caption cannot affect MSHA's mailing of a proposed assessment, it should be noted that a corrected stay order was issued eight days later on June 20, 2006, after Holcim reported the error in the original caption.

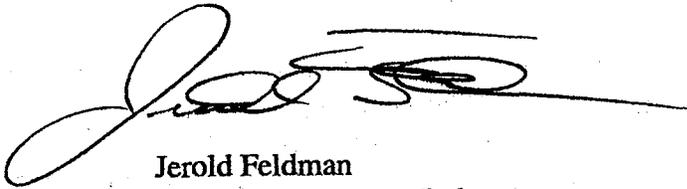
Finding excusable neglect, on September 4, 2008, the Chief ALJ granted Holcim's request to reopen, and ordered the Secretary to file a petition for the assessment of civil penalty. The Secretary filed the petition on October 21, 2008, once again seeking a total civil penalty of \$6,700.00. Holcim responded to the petition on October 27, 2008. This matter was assigned to me by the Chief ALJ on November 30, 2008.

The records of the Mine Safety and Health Administration's (MSHA's) Office of Assessments reflect that on October 23, 2008, Holcim paid a civil penalty of \$6,700.00 in satisfaction of 104(d)(1) Citation No. 6243289 and 104(d)(1) Order No. 6243291.<sup>2</sup> Consequently, on January 7, 2009, the contest proceeding in Docket Nos. SE 2006-190-M and SE 2006 -191-M were dismissed.<sup>3</sup>

Thus, MSHA records reflect that Holcim paid the civil penalty *after* its successful efforts to reopen this civil penalty matter. Holcim's excusable neglect has been compounded by its subsequent payment of the \$6,700.00 that has rendered consideration of its motion to reopen an unnecessary expenditure of scarce Commission resources.

**ORDER**

Accordingly, **IT IS ORDERED THAT**, the \$6,700.00 civil penalty having been paid, the civil penalty proceeding in Docket No. SE 2007-154-M **IS DISMISSED** with prejudice.



Jerold Feldman  
Administrative Law Judge

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<sup>2</sup> Holcim's payment documentation is of record. Holcim paid a civil penalty of \$6,700.00, in addition to interest of \$19.53. Holcim's total payment of \$6,719.53 was by Check No. 12750298 drawn on Wachovia Bank, dated October 15, 2008.

<sup>3</sup> The contest proceedings in Docket Nos SE 2006-190-M and SE 2006 -191-M had not yet been consolidated with the civil penalty proceeding in Docket No. SE 2007-154-M.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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February 19, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-219-M
Petitioner	:	A.C. No. 12-02399-139528-01
	:	
v.	:	Docket No. LAKE 2008-220-M
	:	A.C. No. 12-02399-139528-02
D & H GRAVEL,	:	
Respondent	:	D & H Gravel

**DECISION**

Appearances: Wayne L. Lundquist, Conference & Litigation Representative, Mine Safety and Health Administration, Duluth, Minnesota, for Petitioner; James R. Salts, Owner/Operator, D & H Gravel, Williamsport, Indiana, for Respondent.

Before: Judge Manning

These cases are before me on two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against D & H Gravel pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The cases involve 21 citations issued by MSHA on July 24, 2007, under section 104(a) of the Mine Act and 1 order of withdrawal issued under section 104(g)(1). The parties presented testimony and documentary evidence at the hearing held in Lafayette, Indiana.

At all pertinent times, D & H Gravel operated a quarry in Warren County, Indiana. D & H Gravel is a sole proprietorship owned by James R. Salts. (Tr. 102). The quarry mines sand and gravel on an intermittent basis. The quarry operates in the summer months only with one hourly employee, Brian Powell, who works no more that 20 to 30 hours a week. (Tr. 103). The quarry mines material and then screens it. The quarry has been in operation for only a few years. (Tr. 104). Mr. Salts is also a federal employee. (Tr. 108-09, 130). He stated that paying a large civil penalty will have an adverse affect on his business. (Tr. 129-30). He further stated that in 2006 he did about \$31,000.00 worth of business and that, when the bills were paid, he “may have broken even.” (Tr. 130).

Mr. Salts testified that he did not know anything about MSHA until Inspector Jerry Spruell arrived at the mine on July 24, 2007, to inspect the quarry. (Tr. 104). At the hearing, Salts questioned why MSHA did not send him a letter to advise him that he was subject to

inspection by the agency. He said that Inspector Spruell was aware of his quarry before he arrived to inspect it on July 24; he drove by the quarry to inspect other mines and yet he did not attempt to tell Mr. Salts that the quarry was subject to inspection by MSHA. (Tr. 21).

## I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Discussion of General Issues

D & H Gravel is a very small, seasonal operation. It employed one part-time miner besides Mr. Salts. I credit the testimony of Mr. Salts that he was unaware of MSHA's jurisdiction over the quarry and that he did not have personal knowledge of the Secretary's regulations and safety standards. As set forth below, the Mine Act imposes strict liability on mine operators so I cannot vacate citations on that basis. I affirm all of the citations except as discussed below. I find, however, that the operator's negligence was low in each citation, except where noted. Mr. Salts acted in good faith when he learned about MSHA's requirements and he corrected the cited conditions.

The Secretary proposed a penalty of \$100.00 for each citation and a penalty of \$112.00 for Order No. 7810806. I have substantially reduced the penalties primarily because the quarry is a small, intermittent operation and I have determined that the operator's negligence was low in most instances. Information at MSHA's website indicates that the mine has been "abandoned" and that the citations at issue are the only ones ever issued at the quarry.

The Federal Mine Safety and Health Review Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10<sup>th</sup> Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

*Allied Products, Inc.*, 666 F.2d 890, 892-93 (5<sup>th</sup> Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i). Thus, a violation is found and a penalty is assessed even if the chance of an injury is not very great.

The Commission interprets safety standards to take into consideration "ordinary human carelessness." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (September 1984). In that case, the Commission held that the guarding standard must be interpreted to consider whether

there is a "reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Id.* Human behavior can be erratic and unpredictable. For example, someone might attempt to perform minor maintenance or cleaning near an unguarded tail pulley without first shutting it down. In such an instance, the employee's clothing could become entangled in the moving parts and a serious injury could result. Guards are designed to prevent just such an accident. This principle applies to all violations of safety standards that could potentially injure a miner. The fact that no employee has ever been injured at the D & H Quarry is not a defense because there is a history of such injuries at quarries throughout the United States. "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions. . . ." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

## **B. Contested Citations and Order**

1. Inspector Jerry Spruell issued Citation No. 7810801 alleging a violation of section 56.18013. The citation alleges that there was no communication system at the mine to obtain assistance in the event of an emergency. The citation states that the quarry was about five miles from the nearest town and there was only one person working at the mine. Inspector Spruell determined that an injury was unlikely but that any injury would result in lost workdays or restricted duty. He determined that the violation was not of a significant and substantial ("S&S") nature and that the negligence was moderate. The safety standard provides that a "suitable communication system shall be provided at the mine to obtain assistance in the event of an emergency."

Inspector Spruell testified that there was no phone at the mine. (Tr. 13). An accident was unlikely because there were no immediate hazards present at the mine. The inspector recognized that Mr. Salts and his wife lived about 500 feet from the quarry. (Tr. 15). He marked the negligence as moderate because the operator should have known that a phone was required. (Tr. 17). Mr. Salts testified that his home is about 500 feet away from the mine and his wife is always there. (Tr. 105, 108). She can see down into the mine and see anything that happens. Thus, a communication system was present because, if a miner were hurt, someone could go to the house or the injured person could signal to his wife. He also testified that when he is at the mine, his cell phone is available in the event of an emergency. (Tr. 107).

I find that the Secretary established a violation. There was no way to directly contact emergency personnel in the event of an accident. The means suggested by Mr. Salts is clearly not sufficient. A penalty of \$20.00 is appropriate.

2. Inspector Spruell issued Citation No. 7810802 alleging a violation of section 46.3(a). The citation alleges that the operator failed to develop and implement a written training plan for his employee. The mine has been in operation for more than a year and the operator did not notify MSHA. Inspector Spruell determined that there was no likelihood that there would be an injury. He determined that the violation was not S&S and that the negligence was low. The

regulation requires that every mine “develop and implement a written [training] plan approved by” MSHA.

The inspector testified that the operator advised him that he was not aware of the requirement of have a training plan for his employee. (Tr. 19). Mr. Salts testified that if MSHA had notified him that such a plan was required, he could have had a plan in place. (Tr. 108). He also stated that his employee was experienced and well trained. Inspector Spruell knew about the D & H Gravel operations for some time and he could have made a courtesy call to the pit to advise him of the requirements of the Mine Act. The inspector was more interested in issuing citations than improving the safety of miners. (Tr. 109).

I find that the Secretary established a violation. A penalty of \$20.00 is appropriate.

3. Inspector Spruell issued Citation No. 7810803 alleging a violation of section 41.11(a). The citation alleges that the operator failed to submit a completed legal identity form to the nearest MSHA office within 30 days after it opened the quarry. Inspector Spruell determined that there was no likelihood that there would be an injury. He determined that the violation was not S&S and that the negligence was low. The regulation provides that an operator of a mine “shall, in writing, notify the appropriate [MSHA] district manager” of the legal identity of the operator.

Inspector Spruell testified that the quarry had been open for a little over a year. (Tr. 24). The operator was not aware of the requirement of this regulation. As with the previous citation, Mr. Salts testified that if he had known that he was subject to inspection by MSHA, he would have filed an identity report. Inspector Spruell had driven by this operation prior to July 24, 2007, and he could have told him about MSHA. (Tr. 109). Salts testified that he was not trying to skirt the law, he just did not know about the Mine Act and its requirements.

The Secretary established a violation. A penalty of \$10.00 is appropriate.

4. Inspector Spruell issued Citation No. 7810804 alleging a violation of section 56.15001. The citation alleges that adequate first-aid materials, including a blanket, a stretcher, and a first-aid kit, were not provided at the mine. Inspector Spruell determined that an injury was unlikely but that any injury would result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that “[a]dequate first-aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas.”

The inspector did not find any first-aid supplies at the mine. (Tr. 27). Mr. Salts testified that he was trained in first aid at his other job and he had a first-aid kit in his truck. (Tr. 109). He was not aware of the requirements of this safety standard.

The Secretary established a violation. A penalty of \$20.00 is appropriate.

5. Inspector Spruell issued Citation No. 7810805 alleging a violation of section 56.18010. The citation alleges that an individual trained to provide first aid was not available at the mine. Inspector Spruell determined that an injury was unlikely but that any injury would result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that an "individual capable of providing first aid shall be available on all shifts."

Inspector Spruell testified that no employee was trained to provide first aid. (Tr. 28). Mr. Salts testified that he was trained in first aid but that he was not always at the mine. His employee was trained, but his certification was not current. (Tr. 110).

I find that the Secretary established a violation. A penalty of \$20.00 is appropriate.

6. Inspector Spruell issued Order No. 7810806 under section 104(g)(1) of the Mine Act alleging a violation of section 46.5(a). The order alleges that Bruce Powell, a new miner, had not been given any new miner training before being employed as a miner at the quarry. Inspector Spruell determined that an injury was reasonably likely and that any injury would result in lost workdays or restricted duty. He determined that the violation was S&S and that the negligence was low. The safety standard provides that each new miner must receive not less than 24 hours of training prior to working at a mine

The inspector testified that history has shown that miners who are properly trained have fewer accidents. (Tr. 31). There were no training records at the mine. He determined that the violation was S&S because it was reasonably likely that an untrained miner would be seriously injured. Mr. Salts testified that his employee had "a lot of training, but it wasn't on paper to meet the citation." (Tr. 110). The employee has been working with heavy equipment all of his life and he has been operating the loader at the mine for over a year. Salts believes that because the employee was well trained, the citation should not be designated as serious and S&S.

I find that the Secretary established a violation. Mr. Salts did not offer any testimony that specifically described the training the Mr. Powell received. It is highly unlikely that Powell received the safety training required by the Secretary in Part 46. On that basis, I also find that the Secretary established that the violation was S&S. A violation is classified as S&S "if based upon the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable

likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). In this instance, it was reasonably likely that, assuming continued mining operations, Powell's lack of training would result in an injury of a reasonably serious nature. A penalty of \$50.00 is appropriate.

7. Inspector Spruell issued Citation No. 7810807 alleging a violation of section 56.14132(a). The citation alleges that neither the horn nor the backup alarm were operational on the Caterpillar 988 loader. When the transmission was placed in reverse no alarm sounded and the manually-operated horn would not work. Inspector Spruell determined that an injury was unlikely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that "[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

Inspector Spruell testified that when these safety devices were tested, they did not work. (Tr. 35). He said that an injury was unlikely because there was usually only one person working at the quarry. Salts testified that there was a horn button in the loader, but it was apparently not working. (Tr. 112). He did not know that these audible warning devices were not working properly.

The Secretary established a violation. Although the cited condition was not S&S it presented a safety hazard. The operator's negligence was moderate. A penalty of \$40.00 is appropriate for this violation.

8. Inspector Spruell issued Citation No. 7810808 alleging a violation of section 56.14103(b). The citation alleges that the right front windshield on the Caterpillar 988 loader was not replaced or removed after it had become damaged about a month earlier. There was a spider-web-type break in the glass. The equipment operator could have cut his hand while trying to clean this section of the window. Inspector Spruell determined that an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides, in part, that "[i]f damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed."

Inspector Spruell testified that the hazard presented to the loader operator was the risk that he could cut his hand while cleaning the window. (Tr. 39; Ex. G-1). The cracks also partially obstructed the loader operator's view. Mr. Salts testified that the cracks would not obscure the view of the operator and the chance of anyone cutting his hand on the cracks was minimal. (Tr. 113-14).

I credit the testimony of Mr. Salts. The photograph shows that the cracked window did not present a hazard. (Ex. G-1). The cracks were at the edge of a side window. The loader

operator could easily see through the window. The risk of someone cutting his hand when cleaning the window was pretty insignificant. This citation is vacated.

9. Inspector Spruell issued Citation No. 7810809 alleging a violation of section 56.14130(a). The citation alleges that, although there were seat belts in the Caterpillar 988 loader, they were not installed in a way that would allow them to function. The original seat belt was stuck beneath the operator's seat and was not functioning because the ends could not be latched. An additional seat belt was present but the right half of the belt was not connected to the bracket. Inspector Spruell determined that an injury was reasonably likely and that any injury would likely result in lost workdays or restricted duty. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides, in part, that seat belts shall be installed in wheel loaders.

The inspector testified that it was obvious that the seat belt was not being used on the loader because the belt was damaged so that it could not be used. (Tr. 41, 43). The ends of the original seat belt could not be connected and latched. The belt was stuck underneath the seat, which indicated to the inspector that it had not been used. (Tr. 46). At some point in time another seat belt was installed, but could not be used as well. (Tr. 44). The inspector did not personally observe the loader operator using the equipment without wearing a seat belt. It was reasonably likely that the loader operator would be injured in the event of an accident.

Mr. Salts testified that the original seat belts in the loader worked properly. (Tr. 114). They latched together in a way that is different from seat belts used today. The other belt that had been installed was not working, but the original set was functional. This set may have fallen under the seat. The violation was also neither serious nor S&S and there was no negligence. Salts testified that the employee has worn the seat belt in the past. (Tr. 115).

I credit the testimony of Mr. Salts that there was a functioning seat belt in the loader. Because the latch operated differently than is typical, the inspector may not have recognized that it could be used. Consequently, this citation is vacated.

10. Inspector Spruell issued Citation No. 7810810 alleging a violation of section 56.14101(a)(3). The citation alleges that the left, rear brake on the loader had been disconnected and the line leading to the brake chamber had been plugged off. When tested, the brakes stopped and held the loader on an incline without a load in the bucket. Inspector Spruell determined that an injury was reasonably likely and that any injury would likely result in lost workdays or restricted duty. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that "[a]ll braking systems installed on [self-propelled mobile] equipment shall be maintained in functional condition."

Inspector Spruell testified that the left, rear brake had been disconnected and the line from the actuator had been plugged off. (Tr. 47-48). He believed that because one of four brakes had been rendered inoperable, an injury was reasonably likely. The loader stopped when it was tested

on an incline, but the safety standard requires that all the braking systems be functional. (Tr. 51-54).

Mr. Salts testified that he was not aware that the line leading to the left, rear brake on the loader had been plugged off. (Tr. 116). Nevertheless, he testified that the brakes worked fine. When the brakes were tested by the inspector, the loader held on an incline. The citation should not have been designated as serious or S&S and there was no negligence because he was not aware of the condition. All the braking systems on the loader were working.

I find that the Secretary established a violation. Although the brakes could stop the loader when tested, not all of the brakes on the loader were working. If the loader operator had to stop the vehicle quickly in an emergency, he would likely need all of the brakes to work. I find, however, that the violation was not S&S. It was not reasonably likely that someone would be injured as a result of this violation. The operator's negligence was moderate because an inspection of the loader would have revealed the condition. A penalty of \$40.00 is appropriate.

11. Inspector Spruell issued Citation No. 7810811 alleging a violation of section 50.30(a). The citation alleges that work was performed at the quarry in March 2007 and a quarterly employment report was not completed or submitted for the first quarter of 2007. Inspector Spruell determined that there was no likelihood of an injury and that the operator's negligence was low. The regulation requires, in part, that every mine operator prepare and submit to MSHA a quarterly employment report.

The inspector testified that a miner worked at the quarry during the first quarter of 2007 and the required quarterly employment report was not submitted to MSHA. (Tr. 55). Mr. Salts testified that he did not know about this requirement.

I find that the Secretary established a violation, but the violation was not serious. A penalty of \$10.00 is appropriate for this violation.

12. Inspector Spruell issued Citation No. 7810812 alleging a violation of section 50.30(a). The citation alleges that work was performed at the quarry during April, May and June 2007 and a quarterly employment report was not completed or submitted for the first quarter of 2007. Inspector Spruell determined that there was no likelihood of an injury and that the operator's negligence was low.

The inspector testified that a miner worked at the quarry during the second quarter of 2007 and the required quarterly employment report was not submitted to MSHA. (Tr. 58). My findings here are the same as with the previous citation.

13. Inspector Spruell issued Citation No. 7810813 alleging a violation of section 56.13015(a). The citation alleges that there was no record to indicate that the air receiver tank on the air compressor at the shop had been inspected by a certified inspector. The compressor was

fairly new and had been recently installed. No adverse conditions were observed by the inspector. Inspector Spruell determined that an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was low. The safety standard provides, in part, that “[c]ompressed-air receivers and other unfired pressure vessels shall be inspected by inspectors holding a valid National Board Commission.”

The inspector testified that there was no indication that the air receiver had ever been properly inspected. (Tr. 60-61). The violation was not S&S because the compressor appeared to be fairly new and in good shape. Mr. Salts testified that he was not aware that these tanks had to be inspected, especially on compressors that are new. (Tr. 117). He testified that the tank was on a “brand-spanking-new compressor.” *Id.* The manufacturer placed a metal tag on the side of the pressurized vessel to show that it was pressure-tested before it was sold. He testified that he bought the compressor in 2006 or 2007. (Tr. 119).

I credit the testimony of Mr. Salts that the compressor was new and that it had been recently pressure-tested and inspected by the manufacturer. The citation is vacated.

14. Inspector Spruell issued Citation No. 7810814 alleging a violation of section 56.12028. The citation alleges that there was no record to indicate that testing for continuity and resistance of the grounding system had been performed at this quarry. Electrical equipment was present at the mine. No ungrounded circuits were discovered. Inspector Spruell determined that an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was low. The safety standard provides, in part, that “[c]ontinuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification, and annually thereafter.”

The inspector testified that the resistance and continuity of the grounding circuits for electrical motors had never been tested at the quarry. (Tr. 64). No ungrounded circuits were found. The inspector considered this to be a paperwork violation. (Tr. 66). Mr. Salts testified that all equipment was properly grounded. (Tr. 119). He said that he was not aware he was required to do this test.

The Secretary established a violation. All electric equipment was properly grounded. A penalty of \$20.00 is appropriate.

15. Inspector Spruell issued Citation No. 7810815 alleging a violation of section 56.12034. The citation alleges that there were no guards on the two lights in the shop. There was nothing in place to prevent contact with the bulbs. Inspector Spruell determined that an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was low. The safety standard provides, in part, that “[p]ortable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded.”

Inspector Spruell testified that the unguarded lights were about 6 ½ feet above the floor of the shop. The hazard the inspector was concerned about was getting burned by contacting the bulbs. (Tr. 67). Mr. Salts testified that, given the height of the bulbs, it was highly unlikely that anyone would come into contact with the lights. (Tr. 120).

I agree that contact with the bulbs was unlikely, but they were not so high that they did not present a hazard. The Secretary established a violation. A penalty of \$20.00 is appropriate.

16. Inspector Spruell issued Citation No. 7810816 alleging a violation of section 56.4201(a)(1). The citation alleges that the fire extinguishers on the loader and at the shop were not being inspected monthly to determine if they were fully charged and operable. The gauges showed that the extinguishers were fully charged and they appeared to be operable. Inspector Spruell determined that an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was low. The safety standard provides, in part, that “[f]ire extinguishers shall be visually inspected at least once a month to determine that they are fully charged and operable.”

The inspector testified that the extinguishers had not been inspected, but they appeared to be fully functional. (Tr. 71). Mr. Salts testified that he was not aware of this requirement. He stated that he regularly checks them but there are no tags on the extinguishers to indicate when they were tested. (Tr. 120-21). They were all in working order.

The Secretary established a violation. I credit the testimony of Mr. Salts and find that the violation was not serious. A penalty of \$20.00 is appropriate.

17. Inspector Spruell issued Citation No. 7810817 alleging a violation of section 56.12032. The citation alleges there was no cover on the main breaker panel for the quarry. This condition meant that energized electrical parts would be exposed to anyone who opened the panel door. Inspector Spruell determined that an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was low. The safety standard provides, in part, that “[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.”

Inspector Spruell testified that the breaker panel was south of the scale trailer. The door for the panel was closed but, when opened, there was no cover for the breakers. (Tr. 74). The circuits were energized.

Mr. Salts admits that there was a panel missing on the inside of the electrical box, but the outside cover was still present. (Tr. 121). Salts had an electrical contractor install this box and he was not aware that the inside cover was missing.

The evidence establishes that the outside cover for the electrical box was closed. The inner cover was apparently never installed by the electrician. The Secretary established a violation. A penalty of \$20.00 is appropriate.

18. Inspector Spruell issued Citation No. 7810818 alleging a violation of section 56.11012. The citation alleges that there were openings in the handrail around the platform on the sand conveyor. The platform was about 7 feet above the ground and 2 ½ feet wide. At the top of the ladder there was nothing in place to prevent anyone from falling down. At the right side of the platform there was an 18 inch area that was not protected by a handrail. There was also an opening in the floor of the platform that was 2 feet long and about 6 inches wide. Inspector Spruell determined that an injury was reasonably likely and that any injury would likely result in lost workdays or restricted duty. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides, in part, that “[o]penings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers.”

Inspector Spruell testified that the platform for the sand conveyor had areas that were not protected by handrails. (Tr. 78; Exs. G-6, G-7 & G-8). A person could fall from the platform or partially fall through the opening in the floor. The platform was 7 feet above the ground. There was no handrail where the ladder came up to the platform and to the left of the ladder. (Tr. 79). There was another opening at the end of the platform near the engine. This area would need to be accessed twice a day to start and stop the engine. There was also an opening in the floor of the platform near the engine.

Mr. Salts testified that at one end of the platform, the handrail was not tied back to the structure. He said that “[t]here was hardly enough room for anybody to get through there.” (Tr. 122). The citation should not have been marked as “reasonably likely” and the negligence should be low.

I credit the testimony of Inspector Spruell as to the hazards presented by the cited conditions. The citation is affirmed as written. The violation was S&S because it was reasonably likely that someone would be injured by the conditions, assuming continued mining operations. The operator’s negligence was moderate because the hazards were obvious. (Tr. 84). A penalty of \$50.00 is appropriate.

19. Inspector Spruell issued Citation No. 7810819 alleging a violation of section 56.14107(a). The citation alleges that there was no guard on the tail pulley of the finish gravel conveyor belt. The unguarded pulley was about 2 ½ feet above the ground. The inspector was advised that people are not in the area when the conveyor is operating. Inspector Spruell determined that an injury was unlikely but that any injury would likely be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides, in part, that “[m]oving machine parts shall be guarded to protect persons from

contacting . . . drive, head, tail, and takeup pulleys . . . and similar moving machine parts that can cause injury.”

The inspector testified that there was no guard to protect the cited tail pulley. (Tr. 88-89; Ex. G-9). He did not believe that an injury was likely because people do not normally travel through the area when the conveyor is operating.

Mr. Salts testified that nobody walks or travels near this pulley when it is operating. (Tr. 123). I find that the Secretary established a violation. The pulley was clearly not guarded. (Ex. G-9). I affirm the citation and find that the operator’s negligence was moderate. A penalty of \$30.00 is appropriate.

20. Inspector Spruell issued Citation No. 7810820 alleging a violation of section 56.14109. The citation alleges that there was no railing or stop cord for the three upper rollers and one lower roller on the sand conveyor belt. The upper rollers were between 3 ½ and 6 ½ feet above the ground while the bottom roller was about 4 feet above the ground. Someone travels by the belt after the conveyor is started. Inspector Spruell determined that an injury was reasonably likely and that any injury would likely result in lost workdays or restricted duty. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides, in part, that “[u]nguarded conveyors next to travelways shall be equipped with (a) emergency stop devices . . . or (b) railings . . . .”

Inspector Spruell testified that there was a conveyor belt without a railing or stop cord in an area where contact could be made with the belt or rollers. (Tr. 91). The rollers were from 3 feet to 6 ½ feet above the ground. He determined that the violation should be S&S because the employee walks by this area while the conveyor is operating. He based this determination on a conversation with the employee. The employee would be 3 to 4 feet from the conveyor when he walked by. This condition should have been known by the operator.

Mr. Salts testified that nobody would travel near the conveyor belt. (Tr. 123). He said that he was baffled that anyone would have told the inspector that he usually walked near the conveyor because it is not on the way to anything. He also testified that the condition was not serious because nobody could get into the belt or rollers.

I find that the Secretary established a violation. The area was not protected by a railing or a stop cord. Whether the violation was S&S is a close question because the testimony directly conflicts. I find that the violation was not S&S. The evidence does not establish that it was reasonably likely that anyone would come into contact with the belt or the rollers. The conveyor was out in the open and I am not convinced that anyone would walk immediately adjacent to the moving belt. The operator’s negligence was moderate. A penalty of \$30.00 is appropriate.

21. Inspector Spruell issued Citation No. 7810821 alleging a violation of section 56.14107(a). The citation alleges that a guard was not provided to prevent accidental contact

with the pulley or v-belt drive on the engine of the loader. The pulley and belt were about 2 to 3 inches from the cowling at the left rear of the loader. The loader operator was observed passing by this area during trips in and out of the cab of the loader. Inspector Spruell determined that an injury was reasonably likely and that any injury would likely result in lost workdays or restricted duty. He determined that the violation was S&S and that the negligence was moderate.

The inspector testified that there was no guard to protect the pulley and v-belt on the engine of the loader. (Tr. 94; Ex. G-10). He testified that the loader operator passes close by this area every time he gets in and out of the loader. (Tr. 95). The condition was obvious and presented a hazard of a serious injury.

Mr. Salts testified that the v-belt drive and pulley referenced in the citation are for the air conditioner for the loader. (Tr. 124-25). The loader was manufactured without any type of guard in this location.

I find that the Secretary established a violation. The fact that the manufacturer did not install a guard does not relieve the operator from its responsibility to comply with the safety standard. I affirm the citation as written, including the S&S determination, except that I find that the operator's negligence was low. The pulley and drive belt are partially recessed behind the frame of the loader and the operator did not believe that it created a hazard. A penalty of \$40.00 is appropriate.

22. Inspector Spruell issued Citation No. 7810822 alleging a violation of section 56.18002(a). The citation alleges that a competent person designated by the operator was not examining each working place at least once each shift for conditions which may adversely affect safety or health. Several safety hazards were discovered during the MSHA inspection. Inspector Spruell determined that an injury was reasonably likely and that any injury would likely result in lost workdays or restricted duty. He determined that the violation was S&S and that the negligence was low. The safety standard requires that a "competent person . . . examine each working place at least once each shift for conditions which may adversely affect safety or health." The operator is required to correct any safety hazards that are found.

Inspector Spruell testified that the operator was not keeping records of workplace examinations that are required to be performed each shift. (Tr. 99). He was not given any information that suggested that such examinations were being conducted. He determined that the violation was S&S based on the number of violations he found during his inspection. Negligence was low because the operator was not aware that it was subject to MSHA inspections.

Mr. Salts testified that he performed examinations at the quarry and he made any necessary repairs. He went to the quarry every evening to check everything. (Tr. 126).

I find that the Secretary established a violation. I also find that the violation was S&S because workplace examinations are crucial to ensure that the work environment is safe.

Although I do not dispute that Mr. Salts checked out and repaired equipment in the evenings, such activities are not as comprehensive as the examinations required under the safety standard. Recording safety problems in a record book also helps to ensure that any problems are promptly corrected. A penalty of \$30.00 is appropriate.

## II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. D & H Gravel had not been issued any citations prior to the present inspection. D & H Gravel was a small operator. All of the violations were abated in good faith. D & H Gravel did not establish that the penalties assessed in this decision will have an adverse effect on its ability to continue in business. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

## III. ORDER

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

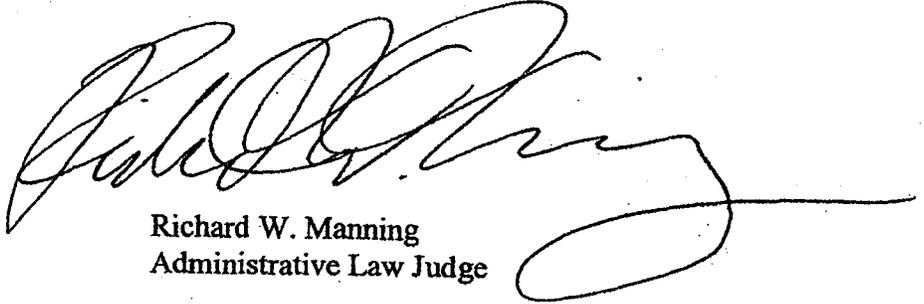
<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
LAKE 2008-219-M		
7810801	56.18013	\$20.00
7810802	46.3(a)	20.00
7810803	41.11(a)	10.00
7810804	56.15001	20.00
7810807	56.14132(a)	40.00
7810808	56.14103(b)	Vacated
7810809	56.14130(a)	Vacated
7810810	56.14101(a)(3)	40.00
7810811	50.30(a)	10.00
7810812	50.30(a)	10.00
7810813	56.13015(a)	Vacated
7810814	56.12028	20.00
7810815	56.12034	20.00
7810816	56.4201(a)(1)	20.00
7810817	56.12032	20.00
7810818	56.11012	50.00
7810819	56.14107(a)	30.00
7810820	56.14109	30.00
7810821	56.14107(a)	40.00
7810822	56.18002(a)	30.00

LAKE 2008-220-M

7810805	56.18010	20.00
7810806	46.5(a)	50.00

TOTAL PENALTY \$500.00

Accordingly, the citations contested in these cases are **AFFIRMED, MODIFIED, or VACATED** as set forth above and D & H Gravel is **ORDERED TO PAY** the Secretary of Labor the sum of \$500.00 within 40 days of the date of this decision.<sup>1</sup> Upon payment of the penalty, these proceedings are **DISMISSED**.



Richard W. Manning  
Administrative Law Judge

Distribution:

Wayne L. Lundquist, Conference & Litigation Representative, Mine Safety and Health Administration, 515 W. First Street, Room 333, Duluth, MN 55802-1302 (Certified Mail)

James R. Salts, D & H Gravel, 7794 S State Road 263, Williamsport, IN 47993-8271 (Certified Mail)

RWM

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<sup>1</sup> Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

February 26, 2009

WEST RIDGE RESOURCES, INC,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 2009-504-R
	:	Order No. 8454817-05; 02/13/2009
v.	:	
	:	
SECRETARY OF LABOR,	:	West Ridge Mine
MINE SAFETY AND HEALTH	:	Id. No. 42-02233
ADMINISTRATION (MSHA),	:	
Respondent	:	

**DECISION**

Appearances: Kevin N. Anderson, Esq., and Jason W. Hardin, Esq., Fabian & Clendenin, Salt Lake City, Utah, and Daniel W. Wolff, Esq, Crowell & Moring, Washington, DC, for West Ridge Resources, Inc.; Timothy S. Williams, Esq., John Rainwater, Esq., and Derek Baxter, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, and Arlington, Virginia, for the Secretary of Labor.

Before: Judge Manning

This case is before me on a notice of contest brought by West Ridge Resources, Inc. ("West Ridge") against the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et. seq.* (the "Mine Act"). An expedited hearing was held in Denver, Colorado, on February 20 and 21, 2009.

**I. BACKGROUND AND STIPULATIONS**

West Ridge operates the West Ridge Mine, a large underground coal mine in Carbon County, Utah. The mine extracts coal in panels using a longwall system. In each panel, two sets of entries are excavated using continuous mining equipment to the very back of the panel. The coal to be mined is between the two sets of entries. The longwall equipment is transported to the back of the panel where it is set up to begin the mining process. Large cutting blades with teeth (the "shearer") cut the coal along the face. The coal is transported out of the mine on a series of conveyor belts. As the shearer moves along the face cutting the coal, the shields that support the roof move closer to the longwall face along with the other longwall equipment, so that a new cut can be made. The longwall equipment moves toward the main entries of the mine until the panel

is completely mined out. This type of mining is often referred to as retreat mining because the longwall equipment is set up at the back of the panel and the coal is cut as the equipment "retreats" toward the main mine entries.

The West Ridge Mine is under deep cover. In a very real sense, the mine is under a mountain. As discussed below, the mine experienced a series of bounces in late January 2009. When a bounce occurs there is a sudden outburst of coal from the ribs (sides) of an entry. The outburst can also emanate from the working face. One miner was injured as a result of a bounce.

The parties entered into stipulations of fact. The key stipulations are set forth below. I have edited the stipulations slightly as shown in brackets.

4. Since May 2001, West Ridge has utilized a longwall mining system commonly referred to as a two-entry yield pillar system, where, generally, longwall panels are mined one after another, with two entries and 30-foot yield pillars left between them.

5. On August 15, 2008, Allyn Davis, District Manager, Coal Mine Safety & Health ("CMS&H") District 9, sent a letter to West Ridge discussing the proposed longwall retreat of Panel 13. (Joint Exhibit ("JX") 1).

7. On September 9, 2008, West Ridge submitted a large roof control plan amendment and accompanying reports. (JX-3).

9. On September 19, 2008, West Ridge submitted to MSHA a Site Specific Mining Plan for Longwall Panel 13, which enclosed the September 17, 2008 report [prepared by Agapito Associates, Inc. ("AAF")]. (JX-5).

10. On October 8, 2008, Michael Gauna, Mining Engineer, Roof Control Division of MSHA, authored his evaluation of [the site specific plan]. (JX-6).

11. On October 20, 2008, West Ridge sent a letter to [District Manager Davis], enclosing for his review and approval a submittal amending pages 39 and 40 of the current West Ridge Roof Control Plan. (JX-7).

12. On October 27, West Ridge sent a letter to [District Manager Davis] enclosing for his review and approval modifications/amendments to the currently approved West Ridge Roof Control Plan. (JX-8).

13. On October 31, 2008, MSHA sent a letter to West Ridge approving proposed roof control plan amendments. (JX-9).

14. Also, on October 31, 2008, MSHA sent a letter to West Ridge approving the proposed roof control plan to longwall mine Panel 13. (JX-10).

15. West Ridge began to longwall mine Panel 13 in November 2008.

16. On January 24, 2009, a coal burst occurred on the Panel 13 longwall in the tailgate [area of the face]. It damaged mining equipment and caused mining to cease for over an hour. No one was injured. West Ridge reported the incident to MSHA pursuant to 30 C.F.R. § 50.10. MSHA issued an order pursuant to section 103(k) of the Mine Act and terminated the order the next day. (JX-11).

17. On January 26, 2009, a coal burst occurred on the Panel 13 longwall in the tailgate [area of the face]. It damaged equipment and caused mining to cease for over an hour. No one was injured. West Ridge reported the incident to MSHA pursuant to [section 50.10]. MSHA issued an order pursuant to Section 103(k) of the Mine Act (Order No. 8454816) after the bounce occurred. (JX-12).

18. Order No. 8454816 was twice amended to allow West Ridge to move equipment. (JX-13 & 14).

19. On January 29, 2009, MSHA terminated Order No. 8454816 following approval of a roof control amendment (JX-15). Among other things in the amendment, West Ridge agreed to slow the rate of mining from forty-five (45) feet per minute to thirty-two (32) feet per minute on most portions of the longwall face and to twenty (20) feet per minute on the tailgate portion.

20. On January 31, 2009, a coal burst occurred on the Panel 13 longwall in the tailgate [area of the face]. It caused injury to the longwall shearer operator. West Ridge reported the incident to MSHA pursuant to [section 50.10].

21. Following the coal outburst on January 31, 2009, MSHA issued an Order pursuant to Section 103(k) of the Mine Act (Order No. 8454817). (JX-16).

22. Later on January 31, 2009, MSHA issued a modification to the order [No. 8454817-01] to allow West Ridge to bring the shearer to the headgate. (JX-17).

23. On February 1, 2009, MSHA issued a second modification to the order [No. 8454817-02] to allow maintenance on the longwall. (JX-18).

24. On February 2, 2009, MSHA issued a third modification to the order [No. 8454817-02 (sic)] to allow West Ridge to test the feasibility of remotely operating the longwall shearer. [JX-19].

25. On February 5, 2009, West Ridge sent a letter to [District Manager Davis], attaching for his review and approval a request for amendment to the roof control plan to allow for mining the remainder of Panel 13 using remote operation. (JX-20).

26. On February 6, 2009, MSHA sent a letter to West Ridge denying the February 5, 2009, requested amendments and noting several deficiencies. (JX-21).

27. On February 7, 2009, West Ridge sent a letter to [District Manager Davis], attaching for his review and approval a request for amendment to the roof control plan to allow for evaluation of the remote longwall mining system for Panel 13. (JX-22).

28. On February 7, 2009, MSHA issued a fourth modification to the order [No. 8454817-03 (sic)], which allowed for the implementation of the plan to retreat the longwall to a point 35 feet inby crosscut 32 using remote longwall operation and which also stated that, during this time, the performance of the plan would be evaluated to determine feasibility and exposure. (JX-23).

29. On February 7, 2009, MSHA also sent a letter to West Ridge approving the plan to allow for evaluation of the remote longwall mining system for Panel 13. (JX-24).

30. On February 13, 2009, MSHA issued a fifth modification to the order [No. 8454817-05] prohibiting further longwall retreat past crosscut number 32 and referencing a letter from Allyn Davis to Darrell Leonard of February 13, 2009. (JX-25).

31. On February 13, 2009, Allyn Davis also sent a letter to West Ridge indicating the results of MSHA's evaluation and stating that the 103(k) order was being modified to preclude additional mining beyond crosscut 32. (JX-26).

Because the language of Order No. 8454817 and some of the subsequent modifications are important to the disposition of this case, I have set them out below:

Order No. 8454817 (January 31, 2009) states:

A bounce/outburst of coal occurred at approximately 0700 hours on January 31, 2009, located at the tail gate area of the 7<sup>th</sup> West two-entry longwall section (MMU 003). This event involved the shearer between #134 and #144 shields.

This order is issued to assure the safety of all persons at this operation, until examination and/or investigation of the bounce/outburst area is made to determine that the area is safe. This order will also prohibit any mining of coal on the 7<sup>th</sup> West section, until this investigation is complete.

Modification No. 8454817-03<sup>1</sup> (February 2, 2009) states:

This modification is to allow the operator to test the feasibility of remotely running the shearer from outby the bounce prone area. The operator may do the following:

1. Install additional lighting
2. Paint the cowl with reflective or fluorescent paint while the shearer is at the headgate
3. Tram the shearer up and down the face
4. Perform any cleanup with the shearer that may be needed
5. Install permissible cameras on the shearer from a safe location and at the tailgate.

This order prohibits the mining of any coal on the 7<sup>th</sup> West section, except any necessary cleanup to facilitate tramping the shearer.

Modification No. 8454817-04 (February 7, 2009) states:

This order is modified to allow the implementation of the plan, dated February 7, 2009, to retreat the longwall to 35 feet inby crosscut 32. During this time, the performance of the plan will be evaluated to determine feasibility and exposure.

Modification No. 8454817-05 (February 13, 2009) states:

**THIS ORDER IS MODIFIED TO PROHIBIT FURTHER LONGWALL RETREAT PAST CROSSCUT NUMBER 32.** This modification of the (k) order is based on an evaluation of the feasibility and exposure associated with the February 7, 2009, plan modification. Please see the attached letter from District Manager Allyn Davis to Mr. Darrell Leonard dated February 13, 2009.

The letter from District Manager Davis dated February 13 states, in part, that MSHA had performed an evaluation of the February 7 plan and “the results make it clear that this method of mining presents unacceptable risks to miners.” The letter goes on to state:

Longwall panel 13 is mining under deep cover and in difficult geological conditions. Coal bursts continue to occur on the

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<sup>1</sup> This modification was incorrectly numbered -02 by the inspector. In addition, Modification No. 8454817-03, discussed below should have been numbered -04. I have used the correct numbers in this decision.

longwall face. Indeed, significant bounce activity occurred last night and early this morning which indicates that conditions appear to be worsening. A log kept by West Ridge shows numerous instances of miners traveling inby shield No. 125, exposing them to the hazards of coal bursts. The February 7 modification provides no protection for miners performing necessary maintenance at the face, and does not provide for necessary examinations through the tailgate. The need to have access to the entire face during normal mining cannot be overlooked. The February 7 modification did not adequately address safe access to the tailgate, the ability to frequently check the face and tailgate for hazards and methane, prevention of accumulations of combustible material, and routine maintenance. The continued exposure to miners of hazards under the February 7 modification is unacceptable. MSHA cannot allow the mine to continue operating under this modification. Therefore, the 103(k) order will be modified to preclude additional mining beyond crosscut 32.

It is this final modification of the order prohibiting further mining of Panel No. 13 that is the subject of this litigation.

The parties presented numerous witnesses and exhibits at the two day hearing. The Secretary called Peter Del Duca, a mining engineer in the roof control division of MSHA's Coal District 9; Michael Gauna, a mining engineer in the roof control division of MSHA's Technical Support Directorate; Ronald Paletta, a coal mine inspector from MSHA's Price, Utah, office; Kevin Stricklin, Administrator of Coal Mine Safety and Health for MSHA; and Allyn Davis, District Manager for Coal District 9. West Ridge called Bruce Hill, President of West Ridge; Darrell Leonard, Mine Superintendent; Hubert Wilson, Safety Director at the mine; Ernie Martinez, a longwall production foreman at the mine; Adam Mann, an assistant shift foreman; Mike Allred, a longwall production coordinator; and Dr. Syd Ping, a professor of mining engineering at West Virginia University.

Section 103(k) of the Mine Act gives the Secretary authority to issue what are known as control orders at the nation's mines. 30 U.S.C. § 813(k). That section provides:

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

## II. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

### A. West Ridge

West Ridge argues that the Secretary's decision to modify the section 103(k) order to prohibit the company from mining Panel 13 inby crosscut 32 was unreasonable and was an abuse of the Secretary's discretion. The evidence shows that mining Panel 13 by remote control was very successful because it greatly reduced the exposure of miners to hazards presented by bounces. The parties reached agreement on February 7 that West Ridge would try to mine Panel 13 by remote control under an amended roof control plan and that MSHA would evaluate the plan to determine feasibility and exposure. All of the credible evidence shows that the amended plan worked better than expected and that the exposure of miners to the hazards of bounces was greatly reduced. West Ridge employees were shocked when they learned that all mining in Panel 13 had to stop. MSHA never evaluated the amended roof control plan that authorized remote mining and arbitrarily decided that, because the amended plan could not assure that there would never be any more bounces on the tailgate end of the face, mining should cease in Panel 13.

On the morning of February 13, without any warning, MSHA initiated a conference call to advise West Ridge that it would not be permitted to mine past crosscut 32 in Panel 13. This call included high level MSHA officials such as Ed Clair and Kevin Stricklin. Three local MSHA inspectors had been closely monitoring the longwall section, yet MSHA initiated this conference call after the District Manager had a conversation that morning with only one of these three inspectors. He made no effort to contact the other inspectors or to evaluate the effectiveness of the remote mining system in an objective manner.

The Secretary exceeded her authority when MSHA issued Modification No. 8454817-05. It was an unreasonable use of her power under section 103(k). The initial withdrawal order was issued on January 31 because an outburst had occurred between shields 134 and 144. The order was issued to assure the safety of all persons until an "examination and/or investigation of the bounce/outburst area is made to determine that the area is safe." The company instituted significant technological changes to prevent future injuries. About 95 percent of face bounces occur when the shearer is cutting coal in the tailgate area. The changes instituted by West Ridge, with the approval of MSHA, kept all miners out of the tailgate area as the shearer was cutting coal in that area. The area where the January 31 outburst occurred was 240 feet away in the gob by the time the fifth modification to the order was issued. As a consequence, the area cited in the order was safe. There was no legal justification to modify the order to prohibit further mining. If MSHA had a problem with the amended roof control plan, it should have sought further negotiations or issued a section 104(a) citation, rather than modify the 103(k) order in an illegal manner.

### B. Secretary of Labor

The Secretary argues that she has plenary power to issue and modify section 103(k) orders. The Commission cannot and should not disturb her authority unless she has abused her discretion. It is not improper for MSHA to use her authority under section 103(k) to require a mine operator to implement a new roof control plan to ensure the safety of miners. There are no time limitations on the Secretary's use of modifications to section 103(k) orders. MSHA performed an evaluation of the amended plan and determined that it did not adequately protect miner safety. On that basis, MSHA concluded that the subject modification to the order of withdrawal was necessary. MSHA is not required to interview everyone who was involved in the evaluation or to explain why it gave weight to some facts and not others. If some evidence supports MSHA's decision to issue a section 103(k) order or to modify an existing order, it acted reasonably and her decision cannot be overturned by the Commission. The inspector that the district manager interviewed on the morning of February 13 told him that the "energy level" along the face was increasing and that there were numerous bumps and bounces along the face during the graveyard shift of February 12-13. It was reasonable for MSHA to rely on this information, along with other information it received, when it decided to shut down the longwall. In short, MSHA exercised its professional judgment that the amended roof control plan could not safely be used in Panel 13.

### **III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW**

#### **A. Discussion of the Evidence.**

At the hearing, everyone agreed that, because the mine operates under deep cover, it is a bounce-prone mine. A mine operator must report a bounce to MSHA under section 50.10 if there is a "coal or rock outburst that causes withdrawal of miners or which disrupts regular mining activity for more than an hour." (30 C.F.R. § 50.2(h)(9)). Including the bounce on January 31, 2009, West Ridge has experienced 15 reportable bounces since January 1, 2003. (GX-1 & GX-2). All but two of these bounces have been on the tailgate side of the longwall. In addition to these reportable bounces, the mine experiences smaller events that need not be reported. These events may make noise and may include outbursts of coal, but they do not need to be reported if nobody is injured or if mining is not disrupted for at least an hour. If there is a violent outburst of coal or rock, mine personnel consider the event to be a bounce. If there is no outburst of coal or rock, or if coal merely sluffs off the face into the panline after a noise, it is not considered to be a bounce.<sup>2</sup> Because the mine is under deep cover, the longwall face frequently makes noises and coal falls from the face on a regular basis. Indeed, miners get worried if the face is too quiet because it may mean that the pressure is not being released from the coal which could portend a larger bounce in the future.

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<sup>2</sup> The panline carries the freshly cut coal to the stage loader at the headgate where the coal is transferred onto a belt for transportation out of the mine. The panline is adjacent to the coal face.

In general, MSHA had not taken any enforcement action following bounces at the mine because such events are to be expected. MSHA became quite concerned in late January 2009, however, because the mine experienced three reportable bounces within a seven-day period. Peter Del Duca of the District 9 office visited the mine following this bounce. He took photographs which showed that a large amount of coal was expelled from the face near Shield 143.<sup>3</sup> (GX-3). Because bounces are more common on the tailgate end of the longwall, West Ridge had built protective guards so that the face, shearer, and the panline are behind these guards. These guards consist of metal framing, called the pig pen, and three-quarter inch belting. (CX-16). The walkway used by miners working in the longwall are on the other side of these guards. The idea of the guarding is to protect miners from coal bursts. As Mr. Del Duca noted, however, employees can be injured by the concussion from the noise or movement of coal. In addition, if the ground shakes, a miner can be knocked off his feet. The photographs taken by Del Duca show that the belting prevented the coal that was expelled from the face from entering the walkway. The belting was severely deformed, however, and protruded into the walkway. (GX- 3b & 3c).

Following the second bounce, Michael Gauna of MSHA Technical Support visited the mine. He took photographs of what he observed. (GX-11). He noted that the bounce damaged the cable tray. (GX-11d). The pig pens and belting material kept coal from entering the walkway.

A miner suffered a fractured rib and a partially deflated lung when another bounce occurred on January 31. He was not hit by any coal. Rather, either the floor vibrated or the concussion from the burst knocked him down and he fell into a shield. After the third bounce, District Manager Davis quickly became convinced that the West Ridge Mine should not be permitted to continue mining Panel 13 and should move on to Panel 14. Kevin Stricklin agreed with Davis on this issue. A meeting was held among mine officials and District 9 personnel to discuss the situation. At this meeting, company management asked if the company could try to develop a system where the shearer could be operated by remote control when it was cutting coal at the tailgate end. The idea behind this proposal is that, because most of the bounces occur as the shearer is cutting coal at the tailgate, the company would try to develop a system in which the miners would not need to be in the tailgate area as coal is being cut. (Ordinarily, two miners walk along the entire length of the walkway as they operate the shearer.) West Ridge asked to test this remote system because it wanted to see if coal could be safely mined with the aim of using the system to mine all of Panel 13. As stated below, MSHA eventually granted the company's request, but it made no commitment that it would be allowed to mine beyond crosscut 32. MSHA preferred that the company remove the longwall equipment and proceed to Panel 14 as soon as possible. In preparation for this experiment, MSHA issued Modification No. 8454817-03. (JX-19).

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<sup>3</sup> The shields provide roof support along the walkway in the longwall. The shields are numbered 1 through 148. The shields that are considered to be in the tailgate area are between 126 and 148.

The company's attempt to develop a system to mine the tailgate end of the face by remote control was a major undertaking that had never been attempted at any mine in the country. For example, it required changes be made by Joy Manufacturing Company in the program software. The shields normally move up a few at a time but a large number of shields had to move if it was operated remotely. The speed of the shearer had to be changed in the computer program to automatically slow it down in the tailgate area. In addition, more lighting was installed, the cowl for the shearer was painted with a reflective paint, and cameras were installed. Bruce Hill testified that these modifications were made at great cost.

In order for West Ridge to use the remote mining method, an amendment to the roof control plan had to be approved. The company submitted a plan to provide for remote mining on February 5. (JX-20). The plan included the elements that had been discussed at the meeting on February 2. When cutting the tailgate zone from shields 126 through 148, no miners would not be permitted to travel past shield 125. The shearer would travel at a speed of 20 feet a minute while in the tailgate zone and 32 feet a minute along other areas of the face. The shearer would be operated from shield 125 by radio remote control when coal was cut in the tailgate zone. Pig pens and belting guards would be installed all along the tailgate zone up to shield 145. A record book ("log book") would be kept at shield 125 to record such information as the name of any miner who traveled into the tailgate zone and the purpose for each trip. Any bounces were also to be recorded. No miners would be permitted in the tailgate zone for 30 minutes after the coal was cut.

In a letter from District Manager Davis, dated February 6, 2009, MSHA rejected the proposed amendment to the roof control plan. One reason that the plan was not approved was that the 30-minute waiting period was too short. The rejection letter also stated that the "plan should state that the purpose of this plan is to evaluate the use of remote systems with the intent of reaching the next available crosscut to extract the longwall face." (JX-21).

On February 7, the parties held a five-hour meeting at the district office to discuss the plan amendment. West Ridge repeatedly asked to be permitted to mine the remainder of Panel 13, if the remote system performed well. Although MSHA personnel did not make any promises, it also indicated that, if the system worked, it might permit mining to continue beyond crosscut 32. West Ridge submitted a new amended plan and it was approved on February 7.<sup>4</sup> (JX-22). The amended plan did not specifically state that the intent was to reach the next available crosscut so that the longwall equipment could be removed. The modification to the 103(k) order allowed the implementation of the February 7 plan to retreat the longwall to crosscut 32. It went on to state that, during this time, the performance of the plan would be evaluated to determine feasibility and exposure. (JX-23).

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<sup>4</sup> Kevin Stricklin did not become aware of this amended plan until February 9 and he was surprised because he thought that the company had agreed to remove the longwall equipment from the face as soon as possible.

West Ridge started mining with the remote system on February 8. All of the West Ridge witnesses testified that the remote system operated better than they expected. They had been worried that operating the shearer would be difficult or impossible when it reached the very end of the tailgate near Shield 148. They also noted that miners were no longer exposed to the hazards associated with bounces because miners were prohibited from entering the tailgate area while the shearer was cutting coal there. MSHA sent three inspectors to the mine to monitor the longwall starting on February 10. Each inspector was on the longwall for his assigned shift for three days. The inspectors were Randy Gunderson, Jim Martin, and Ronald Paletta. Inspector Paletta worked the graveyard shift which started at 11:00 p.m. Only Inspector Paletta testified at the hearing.

On February 13, 2009, after he left the mine, Inspector Paletta called District Manager Davis. He told Davis that the longwall face was experiencing coal bursts, bounces, and bumps all along the face. He noted that there was a significant increase in the amount of energy being released along the face when compared to previous shifts. He prepared a memo on the subject. (GX-19). He was concerned that this increased activity would affect the ability of miners to exit the panel down the tailgate entry.

Davis testified that he had previously received a copy of part of the log book that had been kept at shield 125. He testified that he was surprised by the number of times people had traveled into the tailgate zone after February 8. (GX -18; CX-18). He believed that this exposed miners to the hazards that remote mining was designed to prevent. Men went into the tailgate zone to perform such work as cleaning rubble, making repairs, and performing examinations. Davis called Kevin Stricklin to discuss the matter and a conference call was initiated. The call involved a number of people including Stricklin, Davis, Ed Clair, Paletta, and Michael Gauna. The other two inspectors who monitored the performance of the remote mining system were not consulted by Davis or anyone else from MSHA. Paletta related that the number of bounces appeared to be increasing and that they were also occurring in areas that were not in the tailgate zone. Stricklin had also reviewed the log book and he was concerned about the number of times miners went into the tailgate zone. He was also concerned about the number of bounces that had been occurring. At this point, it was agreed that the remote mining system was not adequately protecting miners and that no mining was to occur past crosscut 32 in Panel 13.

Company witnesses testified that MSHA failed to properly evaluate the feasibility of the remote mining system and the exposure of miners to bounces. Several witnesses who worked the graveyard shift with Paletta directly contradicted his testimony. Ernie Martinez, a longwall production foreman, worked the same graveyard shifts as Paletta. He testified that there were no bounces during his shifts. There were some hits and noises but those always occur along the face. No coal was expelled from the face and there were no outbursts of coal. Coal would sluff off after a hit and fall into a panline, but that is a regular occurrence. During the graveyard shift in the early morning of February 13, the shearer had stopped near shield 125. Paletta was sitting on the shield and Martinez was leaning on a piece of equipment. There was a loud noise which startled the group of men. The shearer was not operating so the area was otherwise quiet. Paletta

testified that he said to Martinez, "that was a good bounce," to which Martinez replied, "Yea, it was a good bounce." (GX-19). Martinez denied this conversation and testified that when he asked the inspector to rate the little bump from 1 to 10 the inspector said it was a 2.

Adam Mann, an assistant shift foreman, testified that nothing that happened on that same graveyard shift of February 13 was abnormal. He said that the conditions were not at all like the situation on January 24 when there was a major outburst. Mann could not recall any bounces at the headgate. On several occasions, Paletta would ask the person keeping the log book (the log book "umpire") if he had recorded a particular bump or bounce. Mann testified that Paletta would frequently tell the umpire to record events that were not even close to being bounces. Unless there is an outburst of coal, the event should not be considered a bounce. The log book shows that many more events were recorded as bounces when Paletta was the MSHA representative than when the other two inspectors were present. Mann believed that Paletta was very uncomfortable being on the longwall face and that he was jittery while he was there. Mike Allred, a longwall production coordinator, testified he heard thumping on the graveyard shift, but no bounces. He admitted that there was a bounce on the day shift on February 13, after Paletta had left the mine. That bounce did not need to be reported to MSHA under section 50.10.

West Ridge witnesses also testified that, as the longwall approached crosscut 32, it was traveling under a ridge in the mountain. (GX-1). The longwall was in an area where the stresses would be the highest. Once the longwall retreated beyond crosscut 32, the cover would not be as deep and the stress would be reduced. Dr. Ping testified that he believes that there were several reportable bounces in late January because there was a roof overhang near the tailgate corner at the time.<sup>5</sup> In other words, the area in the gob near this corner was not caving completely. He attributed this overhang to the fact that, due to geologic conditions, Panel 11 was only partially mined.<sup>6</sup> *Id.* He testified that better caving is achieved if the gob covers a large area that is not interrupted by intrusions of unmined coal. He also testified that the area under a ridge is a transition zone that puts stress on the tailgate side of the panel being mined and that, as mining progresses past this transition zone, the number of bounces or bumps should decrease.

Bruce Hill and other witnesses testified about the ongoing negotiations between MSHA and the company concerning the method of mining once Panel 14 has been mined. As stated above, each panel bring mined is adjacent to the previous one with yield pillars in between. This is known as panel-panel mining. It is apparent that MSHA wants the company to place a barrier of coal between each panel, in a system known as panel-barrier-panel mining. Although that is

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<sup>5</sup> Dr. Ping is a well-recognized expert in ground control in coal mines. He has authored textbooks on coal mine ground control and longwall mining that are used in mining engineering courses. (CX-2).

<sup>6</sup> The coal seam at West Ridge has geologic faults and other structures that can interfere with mining. There is also sandstone present, which can adversely affect ground control.

not an issue in this case, Hill suggested that MSHA's actions can only be understood by taking this dispute into consideration.<sup>7</sup>

Mr. Hill and other West Ridge witnesses testified that, during the negotiations over the amended roof control plan for Panel 13 to allow remote mining, the company made clear its objective to mine the remainder of Panel 13. The company would have only mined about half the panel if it could not retreat past crosscut 32. Although MSHA did not make any promises, District Manager Davis gave the impression that, if remote mining worked, West Ridge would be able to mine beyond crosscut 32. It was on this basis that Mr. Hill agreed to try the remote mining system. He testified that if MSHA had told him on February 7 that the company would not be permitted to mine beyond crosscut 32, it is likely that he would have taken steps to have the longwall equipment removed so that the company could begin mining Panel 14. (The company would have been required to have the roof control plan amended to allow the extraction of the longwall equipment). Hill testified that, because the roof in a coal mine deteriorates when mining stops, the company may not be able to safely remove the longwall equipment at the present time. At best, he believes that it will be able to remove some of the equipment near the headgate.<sup>8</sup>

Mine Superintendent Leonard testified that West Ridge has taken extraordinary steps to protect the safety of miners working in the longwall section. Indeed, Mr. Del Duca told him that no other coal mine in the country is doing more. In addition to the actions discussed above, such as the installation of pig pens and belting in the tailgate zone, the company requires all of its miners working in the longwall to wear what it colloquially calls "riot gear." (CX-16). This gear includes a full face mask, chest protector, and knee, shin, and metatarsal protection. The company prohibits anyone from entering the tailgate zone during production, it slows down the rate of production, and it does not allow anyone in the tailgate zone until 45 minutes after coal has been cut to allow the roof to settle. These provisions are in the amended roof control plan.

West Ridge witnesses testified that Davis and Stricklin should not have been alarmed by the fact that miners traveled into the tailgate zone. The men entered the tailgate in accordance with the roof control plan to perform required tasks and conduct required MSHA examinations and tests. Company witnesses testified that 90 to 95 percent of all bounces occur when coal is being cut in the tailgate zone. As a consequence, with all of the protective measures taken by the

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<sup>7</sup> West Ridge left a barrier of coal between Panels 13 and 14. Its witnesses stated that this barrier was placed there to better control water in the mine and ventilation of the panels.

<sup>8</sup> Because both parties to this proceeding asked that my decision be issued as quickly as possible, I wrote this decision before the expedited transcript had been prepared. As a consequence, I could not include page references to the transcript.

company, miners who work in the tailgate zone 45 minutes or more after the coal is cut are not in serious danger.<sup>9</sup>

Several West Ridge witnesses, including Leonard, Wilson, Mann, and Allred, testified that they discussed the remote mining system with Inspectors Gunderson and Martin. These discussions occurred between February 10 and February 13. The witnesses testified that these inspectors had a more positive attitude toward the safety of the remote mining process than Inspector Paletta. They also said that these inspectors were surprised and upset that they were not consulted before MSHA decided that remote mining was not safe. Hill and Leonard also testified that the objective of the test of remote mining was to see if miners could be protected from bumps, bounces, and outbursts by limiting their exposure and instituting the administrative controls discussed above. Measured by this standard, the test was a complete success. They strongly believe that MSHA wrongly rejected the idea of remote mining, as described in Hill's letter to Davis dated February 15, 2009. (CX-19).

### **B. Analysis of the Issues.**

The parties do not dispute that MSHA had the authority to issue the 103(k) order on January 31, 2009. There had been a reportable accident at the mine. The dispute concerns MSHA's authority to issue Modification No. 8454817-05. (JX-25). West Ridge argues that the original order was issued because of conditions that existed on January 31 in the tailgate area. As stated above, the longwall has mined well beyond the area of concern and the company has instituted significant changes that will prevent future injuries. As a consequence, MSHA was required to terminate the 103(k) order and it did not have the authority to extend it to cover a new situation.

Although it is true that the longwall had retreated past the area where the January 31 bounce occurred, I find that it was within MSHA authority to keep the section 103(k) order in force until it was satisfied that the hazards presented by bounces in the tailgate were fully addressed. The fact that mining had progressed beyond the area of the original accident does not end MSHA's responsibility to "insure the safety" of miners from the same conditions along the tailgate further inby. (Section 103(k)). Section 103(k) allows MSHA to issue such orders as it deems appropriate following an accident until it is convinced that it can safely return the area to normal. This authority includes the power to issue modifications to the original order. The hazard presented in this case was not stationary, but retreated inby with the longwall along the tailgate side. As a consequence, I do not agree with company's argument on this issue.

West Ridge also argues that the dispute in this case is really about the mine's amended roof control plan. If MSHA believed that the plan was not being followed or that it should be modified, it should have negotiated with West Ridge and, if such negotiations were not

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<sup>9</sup> If miners must leave the travelway in the tailgate zone to work behind the pig pens and belt guards, special measures are taken that the company believes protects the miners.

successful, it should have issued a citation under section 104(a). By unlawfully using a section 103(k) order in this instance, the Secretary is denying the company the opportunity to litigate the issue on the merits. The Secretary's burden of proof is significantly reduced when litigating a section 103(k) order.

As I stated at the hearing, I am troubled by the Secretary's use of a section 103(k) order to demand compliance with a roof control plan. MSHA, in essence, rejected the continued use of the amended roof control plan when it issued Modification No. 8454817-05. It is important to note that MSHA did not consider the situation in Panel 13 to constitute an imminent danger because a section 107(a) order was not issued and MSHA allowed West Ridge to continue mining. MSHA used what it considers to be its plenary power under section 103(k) to force West Ridge to abandon Panel 13 without affording the company the opportunity to negotiate the issue or obtain meaningful review before the Commission. I recognize that the previous modification of the 103(k) order stated that it was only issued to allow remote retreat mining to 35 feet inby crosscut 32.<sup>10</sup> That provision was included, however, with the caveat that the plan would be evaluated to determine feasibility and exposure.

Congress granted the Secretary wide discretion under section 103(k). The Commission has the authority to review section 103(k) orders but this authority is limited to determining whether MSHA acted reasonably under the circumstances. *See e.g. Buck Mountain Coal Co.*, 15 FMSHRC 539 (March 1993) (ALJ). I have no doubt that the MSHA officials who participated in the decision to halt mining in Panel 13 did so because they believed that the safety of the miners could not be adequately protected under the amended roof control plan. The issue is whether it was reasonable for MSHA to modify the section 103(k) order rather than issue a section 104(a) citation and, if necessary, a 104(b) order in this case. MSHA believed that the hazard that caused the accident had not been mitigated. Davis and Stricklin were told by Inspector Paletta that bounces were continuing, miners had to enter the tailgate zone more often than originally believed, and miners might not be able to exit the tailgate entry in the event of an emergency.<sup>11</sup> In addition, the log book contained information that convinced Davis and Paletta that the conditions at the tailgate were too hazardous for miners. Thus, although I am troubled by MSHA's use of its authority under section 103(k), I hold that it was reasonable for it to issue the subject modification to the order given the unpredictable nature of bounces and the fact that the previous modification only authorized mining up to crosscut 32. The legislative history of section 103(k) is instructive. The Senate report states:

The unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary or his authorized representative be permitted to exercise broad discretion

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<sup>10</sup> The "35 feet inby" language was included because mesh would have to be bolted to the roof along the face at crosscut 32 if the company were to attempt to remove the longwall equipment.

<sup>11</sup> Both designated escapeways were in the headgate entries.

in order to protect the life or to insure the safety of any person. The grant of authority under section [103(k)] to take appropriate actions and . . . to issue orders is intended to provide the Secretary with flexibility in responding to accident situations, including the issuance of withdrawal orders.

(S. Rep. No. 95-181, at 29 (1977), *reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977*, at 617 (1978). Based on the above, I reject West Ridge's argument that the Secretary was required to address this issue through a section 104(a) citation.

I am also troubled by the fact that MSHA did not carefully evaluate the feasibility of the amended roof control plan to see whether it protected miners from being exposed to the hazards of bumps and bounces. A reasonably prudent person would interpret the term "evaluate" to include more than what occurred in this instance. Based on the input from one inspector, MSHA determined, in a conference call, that mining should not progress beyond crosscut 32. MSHA did not seek the input of the other two inspectors or evaluate the log book in an analytical manner. More importantly, MSHA did not seek any input from the company to obtain information that might address the concerns that MSHA had. As a consequence, West Ridge managers were honestly surprised when they were told that Panel 13 could not be mined beyond crosscut 32. (CX-19). February 13 was a Friday and the longwall reached that crosscut over the weekend. With the exception of some development mining using a continuous mining machine, the mine has been idle since that weekend and most miners have been furloughed.

As stated above, West Ridge devoted a considerable amount of energy, time, and money to try to develop a remote longwall system that would protect miners. MSHA knew about these undertakings and District Manager Davis seemed interested in seeing whether the system would work. It is rather surprising that MSHA would shut down the longwall in Panel 13 without a more thorough evaluation of the system. For example, both Davis and Stricklin reviewed the raw data in the log book and drew some important conclusions from the information provided without discussing this information with company officials. At the hearing, West Ridge employees testified that some of the conclusions drawn from this review of the raw data were erroneous and that other more logical conclusions could also be drawn from the data.<sup>12</sup> West Ridge was never given the opportunity to discuss the information in the log book with MSHA before it made the decision to issue the contested modification. MSHA did not discuss the issues with Inspectors Gunderson and Martin to see if they agreed with Paletta. West Ridge argues that the decision to disallow remote control mining really came from MSHA headquarters in Arlington and that the decision was more politically based than the agency is willing to admit. It

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<sup>12</sup> For example, an extraordinary number of the reported bounces occurred when Inspector Paletta was at the mine. In addition, miners were only in the tailgate zone when the shearer was not operating. The company was never able to discuss with MSHA how these facts affect the safety of miners working on the longwall.

is clear from Administrator Stricklin's testimony that he was not really in favor of the remote mining test and believed that the longwall equipment should have been removed from the panel at the earliest possible opportunity.

I find that, although MSHA did not thoroughly evaluate the effectiveness of the remote longwall system or whether the system adequately protected miners, MSHA's decision to issue the subject modification was reasonable. The process that MSHA used in evaluating the effectiveness of the remote mining system was flawed, but MSHA's concerns were genuine. MSHA could have initially determined on February 7 that it would not consider testing a remote mining system in an amended roof control plan. For example, one reason that it ultimately determined that it would not permit West Ridge to continue operating in Panel 13 under the amended roof control plan was because, under section 75.362(d), frequent tests for methane are required at the working face. This standard would require a miner to enter the tailgate zone on a regular basis. Davis testified that MSHA failed to take this safety standard into consideration when the February 7 amended roof control plan was approved.

In addition, although the evaluation was flawed, as described above, MSHA could have and likely would have issued the same modification had Davis first discussed the matter with the other two inspectors and reviewed the log book with company management. MSHA officials relied heavily on the opinions of its own employees including Del Duca and Gauna, who have extensive roof control experience. They had both been to the mine and had observed firsthand what can happen if there is a coal outburst. Throughout the hearing, witnesses for both MSHA and the company testified that bumps, outbursts, and bounces are unpredictable. Stricklin, Davis, and other MSHA officials were concerned that a bounce could occur when a miner was in the tailgate area and he could be injured despite all of the administrative controls that West Ridge had in place. It is quite clear from the record that discussions with company officials would not have eased these concerns. West Ridge did not, during the period between February 8 and 13, ask the district manager how the amended plan would be evaluated but it simply assumed that the plan would be approved if the company could get the remote mining system to operate.

I also note that, if I were to determine that the Secretary exceeded her authority under section 103(k) and I vacate Modification No. 8454817-05 on that basis, Modification No. 8454817-04 would remain in place. That modification only authorized West Ridge to mine up to crosscut 32, a point the longwall has now reached. I could only order MSHA to again evaluate the mine's experience under the February 7 roof control plan amendments to determine feasibility and exposure. I reject the argument of West Ridge that, if I were to vacate the fifth modification, the mine would be authorized to resume mining Panel 13. I do not have the authority to review or approve roof control plans or to order MSHA to approve such plans.

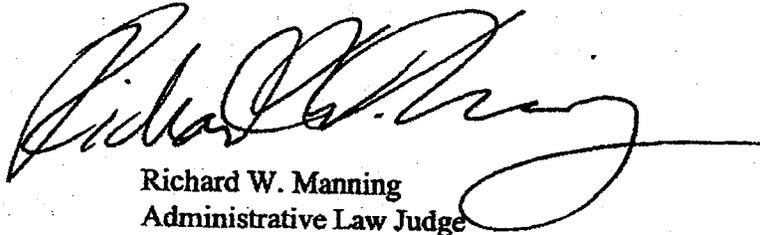
Commission administrative law judges have vacated orders when an official from the MSHA district office dictated that an order be issued when such official was not at the mine. *See Jim Walter Resources, Inc.*, 29 FMSHRC 1043, 1047-48 (Nov. 2007) (ALJ) (citing *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 555-56 (Aug. 2006) (imminent danger order). Although

Modification No. 8454817-05 was issued by Inspector Martin, it is clear that he did so at the direction of the district office.<sup>13</sup> In this instance, the matter at issue was directly related to ground control, an area in which district offices are intimately involved during the plan approval process. Thus, I find that the Secretary did not abuse her discretion when Davis, after consulting with Del Duca, Gauna, and Paletta, determined that the subject modification should be issued. Although Davis had not been to the mine in 2009, he relied on information provided by officials who were very familiar with ground control at the mine.

In conclusion, I find that the Secretary acted reasonably when she issued Modification No. 8454817-05, given the broad discretionary authority granted the Secretary under section 103(k) and the unpredictable nature of bounces, bumps, and outbursts at this mine. Despite the problems in the manner in which MSHA evaluated the amended roof control plan, noted above, the explanation provided by District Manager Davis for the subject modification in his letter of February 13 was reasonable. (GX-17). I recognize that reasonable people could disagree whether the amended roof control plan was adequately protecting miners from bounces. The company strongly believes that the plan worked better than expected. I only have jurisdiction to determine whether the Secretary acted reasonably when she issued the subject modification to the section 103(k) order. I cannot substitute my judgment for hers. On this basis, I find that the Secretary did not abuse her discretion and I affirm the modification of the order.

#### IV. ORDER

For the reasons set forth above, the Notice of Contest is **DENIED**, Modification No. 8454817-05 is **AFFIRMED**, and this proceeding is **DISMISSED**.



Richard W. Manning  
Administrative Law Judge

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<sup>13</sup> Although Inspector Martin was apparently unhappy that he was not consulted before the decision was made to halt mining in Panel 13, there is no evidence that he ultimately disagreed with this decision.

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RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

February 26, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2008-804
Petitioner	:	A.C. No. 46-04168-142950
v.	:	
	:	
WOLF RUN MINING COMPANY,	:	Sentinel Mine
Respondent	:	

**ORDER GRANTING JOINT MOTION FOR FINAL  
DECISION REGARDING CITATION NO. 6606199  
AND  
DECISION APPROVING SETTLEMENT FOR  
CITATION NOS. 6606187 AND 6605283**

Before: Judge Feldman

**I. Background**

Safeguards, issued by Mine Safety and Health Administration (MSHA) inspectors pursuant to section 314(b) of the Federal Mine Health and Safety Act of 1977, as amended (“the Act”), address conditions in a particular mine that pose hazards associated with the transportation of miners and materials. 30 U.S.C. § 874(b). Section 75.1403 of the Secretary’s mandatory safety standards repeats verbatim section 314(b) of the Act. 30 C.F.R. § 75.1403. Section 75.1403-1 of the Secretary’s regulations sets forth procedures for the issuance of safeguards. 30 C.F.R. § 75.1403-1. Sections 75.1403-2 through 75.1403-11 of the regulations describe the criteria by which MSHA inspectors are to be guided in issuing and enforcing safeguards on a mine-by-mine basis. 30 C.F.R. §§ 75.1403-2 through 75.1403-11.

On June 27, 2000, the Secretary issued Notice of Safeguard No. 7095089 at the Sentinel Mine operated by Wolf Run Mining Company (“Wolf Run”). Safeguard No. 7095089 cited the criteria in section 75.1403-5(j) that requires suitable crossing facilities where persons cross over or under moving conveyor belts.

Citation No. 6606199, a subject in this proceeding, was issued at Wolf Run’s Sentinel facility on January 23, 2008. The citation alleged a violation of Safeguard No. 7095089 because a suitable crossing facility was not provided to enable miners to safely cross over a moving conveyor belt. The safeguard violation in Citation No. 6606199 affected one person, and it was designated as significant and substantial (“S&S”) based on the Secretary’s assertion that the cited

condition was “reasonably likely” to contribute to an accident that would result in a serious injury.<sup>1</sup> The safeguard violation was attributable to a moderate degree of negligence. The Secretary has proposed a civil penalty of \$1,304.00 for Citation No. 6606199.

## II. Wolf Run’s Motion

Section 104(d) of the Act specifies that only mandatory safety standards can be designated as S&S. 30 U.S.C. § 814(d)(1). Wolf Run asserts that safeguard violations citing safeguard criteria provisions cannot be designated as S&S because the safeguard criteria in sections 75.1403-2 through 75.1403-11 are not mandatory safety standards. Consequently, on November 25, 2008, Wolf Run filed a Motion for Partial Summary Decision concerning the S&S designation in Citation No. 6606199 based on its contention that neither the underlying Safeguard No. 7095089 allegedly violated, nor section 75.1403-5(j), are mandatory safety standards as contemplated by section 104(d)(1) of the Act. The Secretary filed her opposition to Wolf Run’s motion on December 15, 2008.

## III. Order Denying Wolf Run’s Motion

On December 18, 2008, I issued an Order Denying Wolf Run’s Motion for Partial Summary Decision. 30 FMSHRC 1198. As a general proposition, safeguards are “interim mandatory safety standards” under Title III of the Act. Wolf Run relies on the statutory language in section 104(d) that only mandatory safety standards can be designated as S&S. However, Wolf Run’s reliance is misplaced because it fails to recognize the relevant dispositive term “mandatory safety standard” has different contextual meanings. Title I of the Act authorizes the Secretary to promulgate mandatory safety standards by means of notice and comment rulemaking proceedings. However, the statutory definition of “mandatory safety standards” in section 3(l) of the Act *includes* the “interim mandatory safety standards” in Title III. 30 U.S.C. § 802(l). Thus, safeguards may be enforced as mandatory safety standards even though they were not promulgated through a Title I rulemaking.

Specifically, the Order determined that safeguard violations, issued **after** an initial notice of safeguard has been issued, are “mandatory safety standards,” as defined by the Act, that can be properly designated as significant and substantial violations. *Id.* at 1205. The Order noted that the safeguard violation in Citation No. 6606199 was issued pursuant to section 75.1403 of the regulations that repeats section 314(b) of the interim safety standards in Title III. *Id.* at 1200. Thus, Wolf Run’s motion was denied based on the statutory definition of “mandatory health and safety standards” in section 3(l) that includes “interim mandatory safety standards.” *Id.* at 1205.

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<sup>1</sup> Generally speaking, a violation is S&S if it is reasonably likely that the hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981).

#### IV. The Parties' Stipulations

The parties now have filed a February 19, 2009, Joint Motion for Final Decision with respect to Citation No. 6606199. The parties note that Wolf Run intends to seek review of my December 18, 2008, interlocutory Order regarding the propriety of designating safeguard violations as S&S because of conflicting decisions issued by Judge Zielinski. *See Big Ridge, Inc.*, 30 FMSHRC 1172 (Nov. 24, 2008); *Cumberland Resources LP*, 30 FMSHRC 1180 (Dec. 4, 2008). In an effort to expedite the appellate process, the parties have entered into stipulations resolving the issues of the fact of the violation, the gravity of the violation, the applicability of the civil penalty criteria, and the appropriate civil penalty to be assessed for Citation No. 6606199.

Specifically, the parties stipulate that while inspecting along the No. 5 coal conveyor belt on January 23, 2008, MSHA Inspector Jeffrey Maxwell issued Citation No. 660619 after he determined that someone had crossed under the return belt that was suspended 24 inches above the mine floor. There was no belt crossover provided at this location. To terminate the citation, the Wolf Run installed an aluminum crossover at the cited location.

The parties further stipulate that the cited safeguard violation was serious in gravity, and that it was reasonably likely to contribute to a "lost work days or restricted duty" injury for one miner. The parties agree that the cited violation was attributable to a moderate degree of negligence.

With respect to the appropriate civil penalty, the parties stipulate, that Wolf Run is a large mine operator, and that the proposed penalty will not affect its ability to continue in business. It has neither been contended nor shown that the cited violation was not abated in a timely manner, or that Wolf Run's history of previous violations is an aggravating factor warranting an increase in the proposed penalty. Finally, the parties agree that the \$1,304.00 civil penalty proposed by the Secretary for Citation No. 6606199 is appropriate.

#### V. S&S Issue

Consequently, the only outstanding issue is whether Citation No. 6606199 is properly designated as significant and substantial. The case law concerning what constitutes an S&S violation is well settled. As a general proposition, a violation is properly designated as S&S if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC at 825. In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

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

hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4; *see also Austin Power Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC at 1129, the Commission explained its *Mathies* criteria as follows:

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

The Commission subsequently reasserted its prior determinations that as part of any S&S finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

Resolution of whether a particular violation of a mandatory standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC at 1130. Thus, consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986).

Having previously determined that it is appropriate to designate safeguard violations as significant and substantial, the S&S analysis focuses on whether it is reasonably likely that the hazard posed by crawling under, or climbing over, a moving beltline will result in an accident causing serious injury. Obviously, being drawn into a moving belt and its rollers is reasonably likely to result in serious or fatal injuries. Thus, the circumstances surrounding the violation, as well as the parties' stipulation that it is reasonably likely that the hazard caused by the cited failure to provide a travelway over the beltline will result in a “lost work days or restricted duty” injury, provide a substantial basis for concluding the subject safeguard violation was properly designated as S&S. With respect to the penalty, I conclude that the parties' agreement to impose a \$1,304.00 civil penalty is consistent with the criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i).

VI. Settlement Approval for  
Citation Nos. 6606187 and 6605283

The Secretary has filed a motion to approve settlement with respect to Citation Nos. 6606187 and 6605283. A reduction in civil penalty from \$17,328.00 to \$10,000.00 is proposed for these citations. The reduction in penalty apparently is based on the vagaries of litigation. I have considered the representations and documentation submitted in this matter and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Accordingly, the parties' motion to approve their settlement terms for Citation Nos. 6606187 and 6605283 shall be granted.

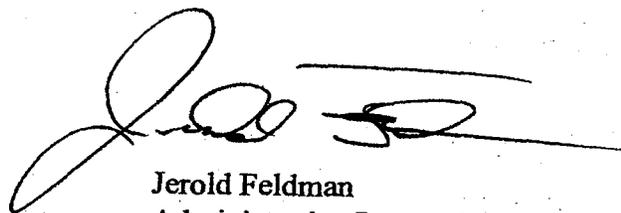
**ORDER**

In view of the above, **IT IS ORDERED** that the safeguard violation in Citation No. 6606199 **IS AFFIRMED** as a significant and substantial violation.

**IT IS FURTHER ORDERED** that Wolf Run Mining Company shall pay a civil penalty of \$1,304.00 in satisfaction of Citation No. 6606199.

Consistent with the parties' settlement terms, **IT IS FURTHER ORDERED** that Wolf Run Mining Company shall pay a civil penalty of \$10,000.00 for Citation Nos. 6606187 and 6605283.

Consistent with this decision and the parties' settlement terms, **IT IS ORDERED** that Wolf Run Mining Company shall, within 40 days of the date of this decision, pay a total civil penalty of \$11,304.00 in satisfaction of the three subject citations. Upon receipt of timely payment, the civil penalty proceeding in WEVA 2008-804 **IS DISMISSED**.



Jerold Feldman  
Administrative Law Judge

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/rps



**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, DC 20001

February 17, 2009

UNITED TACONITE, LLC,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. LAKE 2008-93-RM
	:	Citation No. 6154850; 11/20/2007
v.	:	
	:	Docket No. LAKE 2008-94-RM
SECRETARY OF LABOR,	:	Citation No. 6154851; 11/20/2007
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	United Mine
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2008-501-M
Petitioner	:	A.C. No. 21-003403-154315
v.	:	
	:	
UNITED TACONITE, LLC,	:	United Mine
Respondent	:	

**DISCOVERY ORDER**

These consolidated contest and civil penalty matters concern citations related to an April 18, 2007, fatal drilling accident at the United Mine operated by United Taconite, LLC (“United Taconite”). The accident occurred when the drill, that was positioned on a slope, tipped on its side killing the operator. Atlas Copco Drilling Solutions, LLC (“Atlas Copco”), and its related companies, manufactured and provided to United Taconite, by lease and sale, the drill that is the subject of these proceedings. Atlas Copco is not a party in these proceedings.

As a result of the accident, United Taconite was cited for an alleged violation of section 56.14205, 30 C.F.R. §56.14205, of the Secretary’s mandatory safety standards. This mandatory standard provides that:

Machinery, equipment, and tools shall not be used beyond the design capacity intended by the manufacturer where such use may create a hazard to persons.

United Taconite was also cited for an alleged violation of the Secretary’s training regulations in section 48.27(a)(3), 30 C.F.R. § 48.27(a)(3). United Taconite has reported that Atlas Copco provided certain training to United Taconite employees.

Commission Rule 56 governs the scope of discovery. 29 C.F.R. § 2700.56. This rule states:

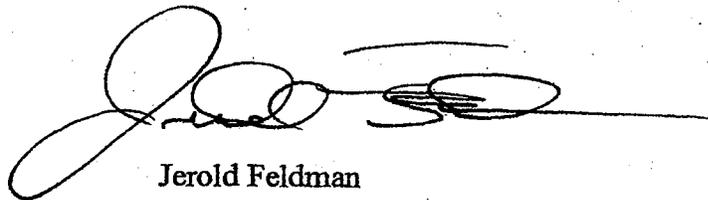
Parties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence.

There is a personal injury action pending in the District Court, Sixth Judicial District, County of St. Louis, State of Minnesota, No. 69 VI-CV-08-145, which involves Atlas Copco, United Taconite and others. United Taconite's counsel in the personal injury action is separate from counsel in these proceedings.

United Taconite and Atlas Copco have entered into a confidentiality agreement in the personal injury civil action concerning, *inter alia*, Atlas Copco's financial statements and other non-public or proprietary information including but not limited to, trade secrets, design specifications, product testing information and manufacturing processes and techniques. On December 17, 2008, United Taconite filed a motion requesting that I issue a confidentiality order incorporating the terms of its confidentiality agreement with Atlas Copco. As Atlas Copco is not a party in this matter, United Taconite's motion **IS DENIED**.

With respect to the scope of discovery, **IT IS ORDERED** that United Taconite, during the course of deposition and written discovery, provide to the Secretary all relevant evidence that may be admitted in this proceeding, or that is likely to lead to the discovery of admissible evidence. In this regard, all relevant deposition testimony and evidence concerning the issues of training, and the design capacity and intended use of the drill in issue, whether or not considered subject to the confidentiality agreement in the civil proceeding, shall be provided to the Secretary. The Secretary should utilize the information obtained through discovery for trial preparation only, and this information should not be routinely disseminated. Only evidence that is admitted in the evidentiary hearing may be publically disclosed.

**IT IS FURTHER ORDERED** that all deposition and written discovery shall be completed on or before April 17, 2008. The parties should initiate a telephone conference, on or before March 13, 2009, to select a mutually satisfactory hearing date and location.



Jerold Feldman  
Administrative Law Judge

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