

JANUARY AND FEBRUARY 2010

COMMISSION DECISIONS AND ORDERS

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JANUARY AND FEBRUARY 2010

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

Secretary of Labor, MSHA v. Ernest N. Matney, employed by Knox Creek Coal Corporation, Docket No. VA 2008-215. (Judge Feldman, December 3, 2009)

Secretary of Labor, MSHA v. R & K Coal Company, Docket No. PENN 2009-290. (Unpublished Default order issued by Chief Judge Lesnick on January 5, 2010)

Secretary of Labor, MSHA v. Black Castle Mining Company, Docket No. WEVA 2006-891-R, etc. (Judge Hodgdon, January 20, 2010)

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

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 12, 2010

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

v.

PINKY'S AGGREGATES, INC.

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Docket No. CENT 2009-848-M
A.C. No. 32-00793-188600

BEFORE: Jordan, Chairman; Duffy, 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 22, 2009, the Commission received from Pinky's Aggregates, Inc. ("PA") a letter seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The operator states that it received Proposed Assessment No. 000188600 on June 25, 2009. PA submits that it failed to contest the proposed assessment in a timely manner because the assessment was "misplaced." The operator contends that the proposed assessment involves serious citations and requests that this matter be reopened.

The Secretary of Labor does not oppose PA's request to reopen the proposed assessment. However, she urges the operator to take all steps necessary to ensure that, in the future, any penalty assessments are contested in a timely manner.

Having reviewed PA's request to reopen and the Secretary's response, we conclude that the operator has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. The operator's statement that it failed to timely contest the proposed penalties because the proposed assessment was "misplaced" does not provide the Commission with an adequate basis to reopen without further elaboration. Accordingly, we hereby deny the request for relief without prejudice. See *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007). The words "without prejudice" mean that PA may submit another request to reopen Assessment No. 000188600 so that it can contest the proposed penalties.¹


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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

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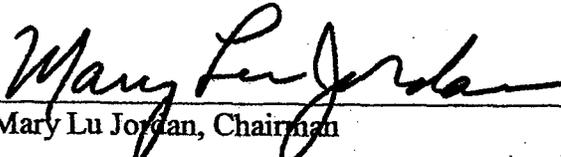
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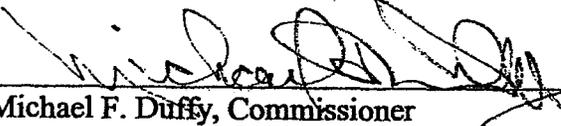
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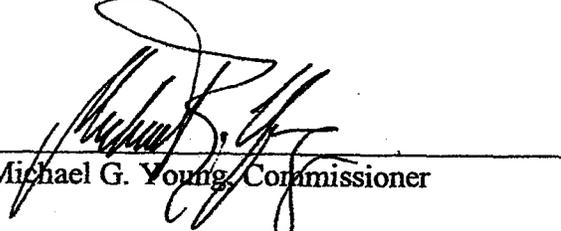
Chief Administrative Law Judge Robert J. Lesnick
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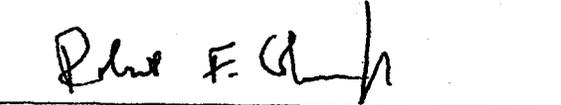
On May 6, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000184621 to Apex, proposing penalties for various citations. Apex's safety director states that on May 20, 2009, he indicated on the proposed assessment form that Apex intended to contest the penalties for seven citations. He further states that Apex mistakenly mailed the contest, together with payment for the uncontested penalties, to MSHA's office in St. Louis, Missouri, rather than to the Civil Penalty Compliance Office in Arlington, Virginia. The Secretary states that she does not oppose the reopening of the proposed penalty assessment. She notes that MSHA's St. Louis payment processing center received a payment from Apex for the uncontested penalties.

Having reviewed Apex'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.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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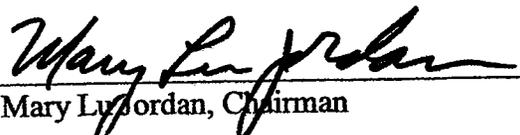
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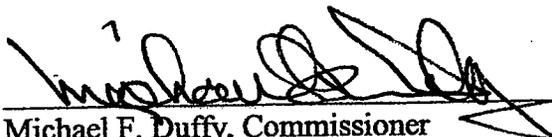
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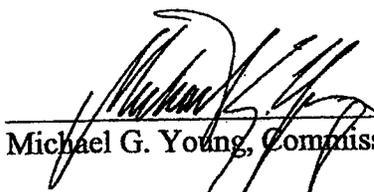
**Chief Administrative Law Judge Robert J. Lesnick
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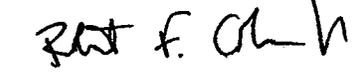
On July 8, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000190469 to Rogers, proposing penalties for eight citations and an order that had been issued to Rogers in May 2009. Rogers states that it did not realize that the citations from the same inspections "came in two dockets." The Secretary states that she does not oppose Roger's request to reopen the assessment.

Having reviewed Rogers' request to reopen and the Secretary's response, we conclude that the operator has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. The operator's statement that it failed to timely contest the proposed penalties because it did not realize that citations from the same inspection "came in two dockets" does not provide the Commission with an adequate basis to reopen without further elaboration. Accordingly, we hereby deny the request for relief without prejudice. *See Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007). The words "without prejudice" mean that Rogers may submit another request to reopen Assessment No. 000190469 so that it can contest the proposed penalties.¹


Mary L. Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 12, 2010

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

v.

SEYMOUR STONE

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Docket No. PENN 2010-51-M
A.C. No. 36-09754-189609

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

ORDER

BY THE COMMISSION:

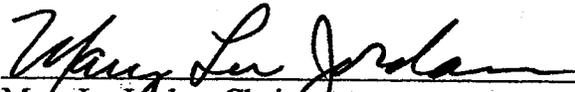
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 19, 2009, the Commission received from Seymour Stone ("Seymour") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 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).

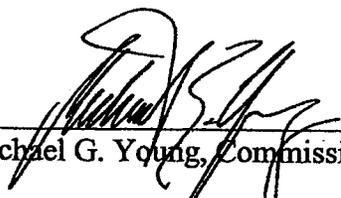
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a)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

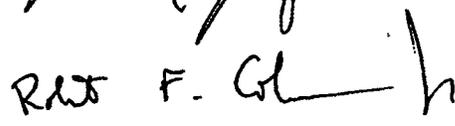
The Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000189609 to Seymour on June 30, 2009, proposing penalties for six citations and an order that had been issued to Seymour the previous month. Seymour appears to have sent its contest of all seven penalties to the local MSHA district office. The Secretary of Labor does not oppose reopening, but states that the proposed assessment form instructs that notices of contest are to be mailed to MSHA's Civil Penalty Compliance Office in Arlington, Virginia.

The Secretary correctly points out that the proposed assessment form specifies that contests of proposed penalties are to be sent to the Arlington office. Nevertheless, we note that Seymour appears to have sent its contest to the local MSHA district office within the 30-day period for contests, and there is no indication that Seymour has previously sent contests to the wrong address.¹ Having reviewed Seymour'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.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

¹ We caution Seymour that it must send any future notices of contest regarding proposed penalties to the address specified on the proposed assessment form.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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January 12, 2010

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

v.

J.S. REDPATH CORPORATION

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Docket No. WEST 2010-93-M
A.C. No. 26-02300-188847 R83

BEFORE: Jordan, Chairman; Duffy, 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 20, 2009, the Commission received a request from J.S. Redpath Corporation (“Redpath”) to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

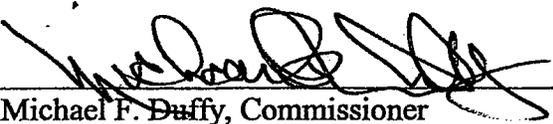
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a)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

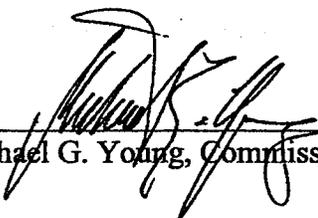
The Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000188847 to Redpath on June 23, 2009, proposing a penalty for a citation that had been issued to Redpath on May 12, 2009. By letter dated May 27, 2009, Redpath had already requested a conference on the citation with the local MSHA district office. Redpath subsequently contested the penalty for that citation by mailing the form to the same office, with a cover letter dated July 1, 2009. Because the contest form should have been mailed to MSHA's Civil Penalty Compliance Office in Arlington, Virginia, Redpath received a delinquency notice dated September 17, 2009, from MSHA.

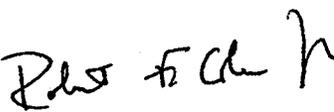
The Secretary of Labor opposes reopening in this instance. She points out that both the proposed assessment form and the letter Redpath received from the local MSHA office, dated June 16, 2009, acknowledging the conference request, specified that any contest of a proposed penalty is to be sent to MSHA's Arlington office. The Secretary also states that Redpath previously had properly contested penalties.

Having reviewed Redpath'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. While what the Secretary states is correct, there is nothing in the record to indicate that Redpath's previous contests involved citations or orders on which it had already requested a conference. Redpath did send its contest to the local MSHA district office within the 30-day period for contests. 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. § 2700.28.¹


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

¹ We caution Redpath that it must send any future notice of contest regarding proposed penalties to the address specified on the proposed assessment form, regardless of whether it has an outstanding conference request on any underlying citation or order.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 12, 2010

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

v.

LONG BRANCH ENERGY

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Docket No. WEVA 2009-1982

A.C. No. 46-08305-192713

BEFORE: Jordan, Chairman; Duffy, 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 29, 2009, the Commission received from Long Branch Energy (“Long Branch”) 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).

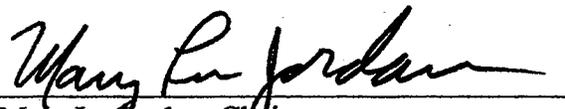
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

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

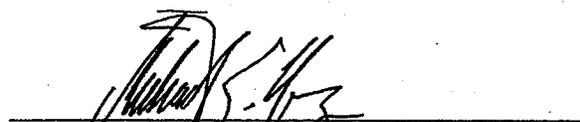
Long Branch states that it mailed its contest of Proposed Assessment No. 000192713 to the Department of Labor's Mine Safety and Health Administration ("MSHA") approximately five days after the 30-day deadline. In a detailed submission and affidavit, Long Branch's president, who was responsible for filing notices of contest to penalty assessments, submits that he received the proposed assessment on August 4, 2009. He explains that on September 3, he indicated on the form that Long Branch was contesting four proposed penalties. On September 8, after a long holiday weekend, the operator's president realized that he had mistakenly failed to mail the form on September 3, and immediately mailed the form. Long Branch states that after it received a letter from MSHA on September 21 stating that the four penalties had become final orders, it promptly filed the request to reopen.

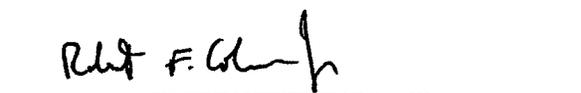
The Secretary does not oppose Long Branch's request to reopen the proposed assessment. However, she urges the operator to take all steps necessary to ensure that, in the future, any penalty assessments are contested in a timely manner.

Having reviewed Long Branch'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.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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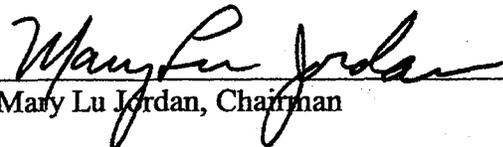
Myra James, Chief
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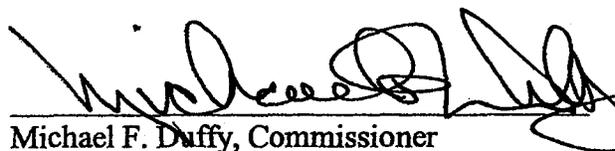
Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
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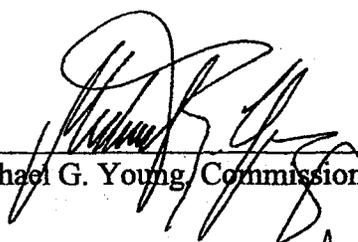
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

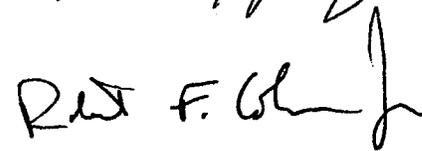
The Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000191940 to Allgeier on July 22, 2009, proposing penalties for a citation and an order that had previously been issued to Allgeier. The contest form received by MSHA indicated that the penalty for the citation was being contested, but not the penalty for the order. The request to reopen indicates that Allgeier intended to contest both penalties, but apparently failed to indicate this on the form that was submitted to MSHA by Carthage. The motion to reopen was filed immediately after an MSHA delinquency notice was received for the uncontested penalty. The Secretary of Labor does not oppose reopening.

Having reviewed the 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. § 2700.28.¹


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

¹ The request to reopen was filed by Jack Slates, who identifies himself as a Environmental Safety & Health Engineer with Carthage. Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall into one of the categories in Rule 3(b), which include parties, representatives of miners, an "owner, partner, officer or employee" of certain parties, or "[a]ny other person with the permission of the presiding judge or the Commission." 29 C.F.R. § 2700.3(b). Carthage is not a party in this proceeding, and it is unclear whether Mr. Slates satisfied the requirements of Rule 3 when he filed the request on behalf of Allgeier. We have determined that, despite this, we will consider the merits of the request in this instance. However, in any future proceeding before the Commission, including further proceedings in this case, Allgeier must be represented by its owner, partner, officer, or employee, or Mr. Slates must demonstrate to the Commission or presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seek permission to practice before the Commission or judge pursuant to Rule 3(b)(4).

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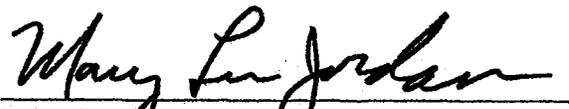
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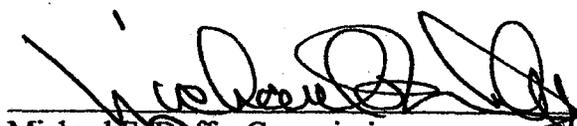
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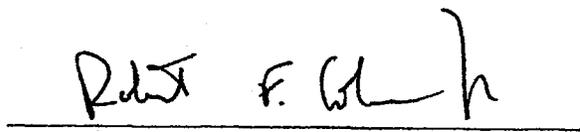
On May 11, 2009, the Commission denied without prejudice XMV's request on the basis that the operator had failed to provide a "sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment." *XMV, Inc.*, 31 FMSHRC 523, 525 (May 2009). On May 22, 2009, XMV filed a second motion to reopen the penalty assessment with affidavits and documentation that fully explain the reason for its delay in contesting the assessment. XMV described a miscommunication between it and its counsel as to whether the operator's Safety Director or counsel would file the notice of contest. This occurred at a time when the Safety Director was extremely busy addressing a problem involving a section 104(b) withdrawal order at the mine. Operator's counsel discovered the delinquency three weeks after it occurred, and promptly requested reopening. The Secretary has not opposed the requests to reopen.

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


Mary Lu Jordan, Chairman


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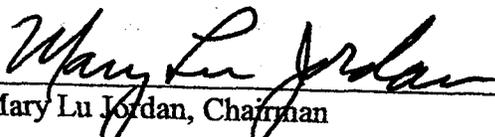
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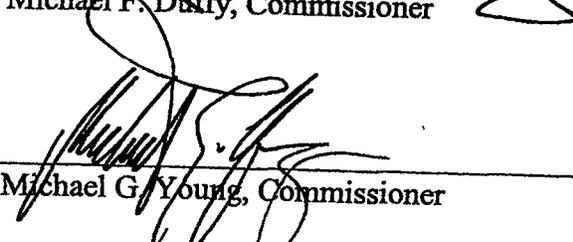
The Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000191480 to Paulson on July 16, 2009, proposing penalties for nine citations that had been issued to the operator in May 2009. Paulson states that upon receiving the assessment it called, and spoke with, an individual in the local MSHA district office. According to Paulson, it understood from the conversation that it needed to contest the penalties through that office, so it sent the local MSHA office a letter detailing the grounds on which it was contesting six of the penalties and underlying citations. The Secretary of Labor does not oppose reopening, but states that the proposed assessment form instructs that notices of contest are to be mailed to MSHA's Civil Penalty Compliance Office in Arlington, Virginia.

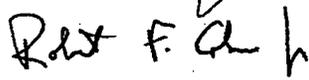
The Secretary correctly points out that the proposed assessment form specifies that contests of proposed penalties are to be sent to the Arlington office. Nevertheless, we note that Paulson sent its letter to the local MSHA district office within the 30-day period for contests, and there is no indication that Paulson has previously sent contests to the wrong address.¹

Having reviewed Paulson'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.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

¹ We caution Paulson that it must send any future notices of contest regarding proposed penalties to the address specified on the proposed assessment form.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 20, 2010

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

v.

HIGGINS STONE COMPANY, INC.

Docket No. CENT 2009-179-M
A.C. No. 14-01650-156893

BEFORE: Jordan, Chairman; Duffy, 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 December 29, 2008, the Commission received from Higgins Stone Company (“Higgins”) a letter seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

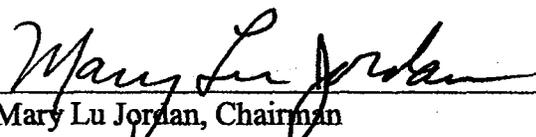
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a)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

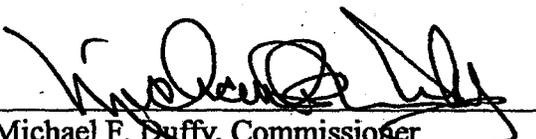
In its letter, Higgins asserts that the proposed assessment was lost when it moved its office to a new city. However, Higgins does not indicate when the move took place or provide any details regarding its handling of the proposed assessment. In addition, Higgins does not indicate which of the 16 violations contained in the assessment it seeks to contest.

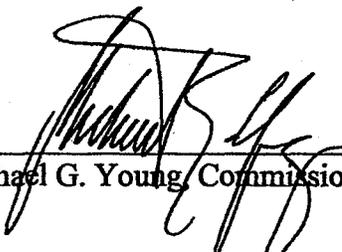
The Secretary states that although she does not oppose the reopening of the proposed penalty assessment, she urges that Higgins take all "steps necessary to ensure that future penalty assessments it wishes to contest are processed in a timely manner," including ensuring that "the operator's address of record is accurate for any future notification of proposed assessments."

Having reviewed Higgins' request and the Secretary's response, we conclude that Higgins has failed to provide an adequate basis for the Commission to reopen the proposed penalty assessment. Higgins has failed to substantiate its proffered justification for its delays in responding to the proposed assessment and does not specify which violations it wishes to contest. An operator seeking to reopen a proceeding after a final order is effective bears the burden of establishing an entitlement to extraordinary relief. At a minimum, the applicant for such relief must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure. The operator must also identify which specific citations or orders in the assessment it wishes to contest upon reopening. Affidavits from persons involved in and knowledgeable of the situation and pertinent documents should be included with the request to reopen.

Accordingly, we hereby deny without prejudice Higgin's request. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that Higgins may submit another request to reopen the assessment so that it can contest the penalty assessment.¹


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

¹ Higgins should include in another request a full description of the facts supporting its explanation, including (1) the date it moved its office; (2) how it initially handled the proposed assessment; and (3) how quickly it acted upon receiving the November 3, 2008 delinquency notice. Higgins should also confirm that it has notified MSHA of its new address.

Distribution:

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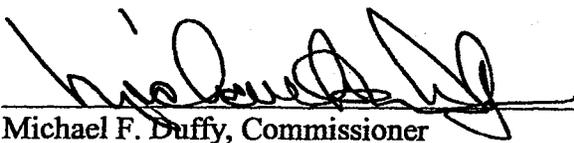
**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
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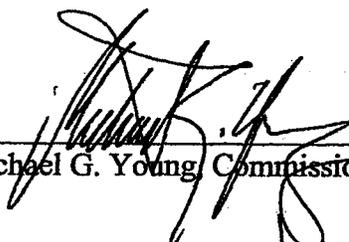
does not address any attempt on its part to file a contest of the proposed penalty assessment or to pay any of the penalties proposed by the assessment. Rather, Drum states why it wishes to contest various citations.

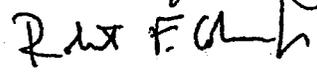
The Secretary responds that the request to reopen should be denied in that it includes no explanation for why the contest form was not timely filed. The Secretary notes that MSHA's records show that the proposed assessment was delivered on June 16, 2009, and became a final order of the Commission on July 16, 2009.

Because Drum's request for relief does not explain the company's failure to contest the proposed assessment on a timely basis, and is not based on any of the grounds for relief set forth in Rule 60(b), we hereby deny the request for relief without prejudice. *See FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007). The words "without prejudice" mean that Drum may submit another request to reopen the assessment.¹


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

¹ If Drum submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Drum should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. Drum should also submit copies of supporting documents with its request to reopen and specify which proposed penalties it is contesting.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 25, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2009-1289-M
v.	:	A.C. No. 15-17075-178181
	:	
	:	Docket No. KENT 2009-1290-M
	:	A.C. No. 15-17075-180774
SPECIALTY ROCK PRODUCTS, INC.	:	

BEFORE: Jordan, Chairman; Duffy, 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 July 6, 2009, the Commission received from Specialty Rock Products, Inc. (“Specialty Rock”) a motion by counsel seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

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

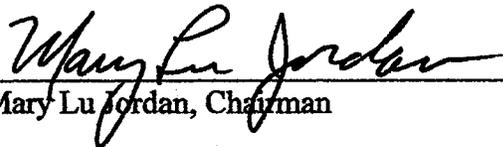
¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2009-1289-M and KENT 2009-1290-M, both captioned *Specialty Rock Products, Inc.*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

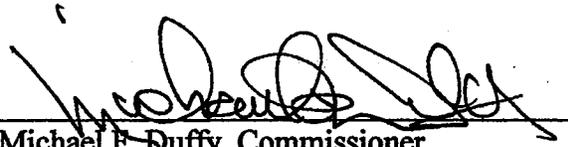
reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) (“the Commission 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).

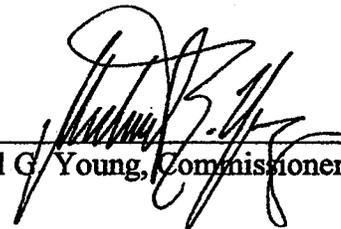
On March 3, 2009, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000178181 to Specialty Rock, and on April 1, 2009, it issued Proposed Assessment No. 000180774 to Specialty Rock. The operator alleges that it sent its contests of the two proposed assessments to MSHA’s Franklin, Tennessee, office rather than to the correct address of MSHA’s Civil Penalty Compliance Office in Arlington, Virginia, as indicated on the proposed assessment forms. The contests were apparently sent within the 30-day time period for contesting proposed assessments although they were sent to the wrong office.² The Secretary does not oppose the operator’s request to reopen.

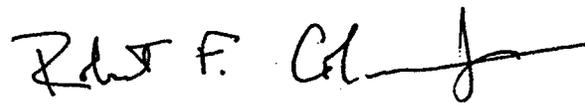
² The operator also alleges that it attempted to contest two citations (Citation Nos. 7771505 and 7771504) which were not assessed penalties in the proposed assessments that it seeks to reopen. It attached to its request to reopen a letter to MSHA requesting a conference on those citations, a response from MSHA instructing the operator that a conference would be scheduled once it contested the proposed assessment related to those citations, and its response contesting the citations. There is nothing in the record before us indicating if, or when, MSHA issued proposed assessments on these two citations, or the operator’s response to such proposed assessments, if issued. The operator does not appear to request any relief with regard to the two citations.

Having reviewed Specialty Rock's request and the Secretary's response, in the interests of justice, we hereby reopen Penalty Assessment Nos. 000178181 and 000180774 and remand the matter to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.³


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

³ As to Citation Nos. 7771505 and 7771504, based on the operator's submission, the status of these two violations is unclear from the record. Because the operator does not request relief with regard to the citations, we do not address the question of whether any relief should be granted.

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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 May 22, 2009, in Docket No. KENT 2009-624, the Commission denied without prejudice WKJ's first request to reopen on the basis that the operator failed to provide an explanation for why it failed to timely contest the proposed penalty assessment by returning the completed assessment form to the Civil Penalty Compliance Office of the Department of Labor's Mine Safety and Health Administration ("MSHA") in Arlington, Virginia, as instructed by the assessment form. *WKJ Contractor's Inc.*, 31 FMSHRC 551, 552 (May 2009). Instead, the operator explained that it attempted to contest the underlying citation by mailing a notice of contest to MSHA's office in Barbourville, Kentucky, rather than to the Commission.¹ The Commission instructed the operator that if it submitted another request to reopen, it must establish good cause for not contesting the proposed penalty assessment within 30 days from the date the proposed assessment was received from MSHA. *Id.* We stated in part that WKJ should include "a full description of the facts supporting its claim of 'good cause,' including how the mistake or other problem prevented WKJ from responding within the time limits," and that it should also submit copies of supporting documents with its request to reopen. *Id.* at 553 n.3.

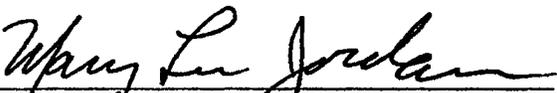
On October 9, 2009, WKJ filed a second motion to reopen. In the motion, counsel for WKJ states that after it filed its contest of the underlying citation with MSHA's office in Kentucky, it was informed by MSHA that "all correspondence should have been sent to the Washington, DC, address," and that, since that time, all correspondence has been sent to that address.

On November 13, the Secretary filed an opposition to WKJ's request to reopen. She states that the operator filed its second request more than one year after the penalty assessment became a final order on August 28, 2009, and that the request is untimely under Rule 60(b). The Secretary also notes in part that the operator makes no showing of the exceptional circumstances

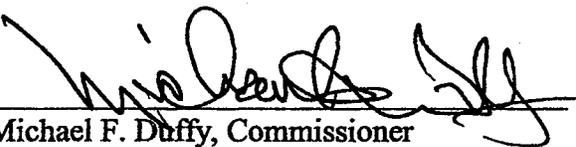
¹ The Mine Act sets forth a scheme of dual filing relating to contests of citations and orders (29 C.F.R. Part 2700, Subpart B), and contests of proposed penalties (29 C.F.R. Part 2700, Subpart C). *The filing of a contest of a citation does not constitute a challenge to a proposed penalty for that citation.* *See* 29 C.F.R. § 2700.21(a) ("The filing of a notice of contest of a citation or order issued under section 104 of the Act . . . does not constitute a challenge to a proposed penalty assessment that may subsequently be issued by the Secretary under section 105(a) of the Act . . . which is based on that citation or order."); 29 C.F.R. § 2700.26 ("A person who wishes to contest a proposed penalty assessment must provide such notification regardless of whether the person has previously contested the underlying citation . . ."). The operator explained that it had mailed its contest of a citation to a regional MSHA office, rather than to the Commission, which is an independent agency that is separate from MSHA. However, the operator offered no explanation for why it failed to send the proposed penalty assessment form to MSHA in its Arlington, Virginia, office.

that warrant reopening because the operator failed to explain why it failed to return the completed assessment form to MSHA's Civil Penalty Compliance Office in Arlington, Virginia.

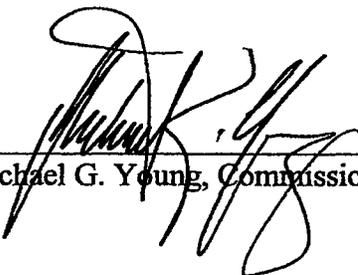
We conclude that WKJ's request for relief was not made within a reasonable time and fails to provide an adequate basis for reopening. WKJ waited almost five months before filing its second motion to reopen and has not offered any reason for that delay. WKJ, as the movant, carries the burden of establishing its entitlement to relief. Delay in seeking that relief, if unexplained, has been a relevant consideration in denial of motions to reopen. *Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009). Moreover, the operator again fails to offer any explanation for its failure to timely contest the proposed penalty assessment and merely reiterates the circumstances regarding the misfiling of its separate contest of the underlying citation. The operator has failed to provide the Commission with any basis to warrant reopening. Accordingly, we deny WKJ's request for relief.



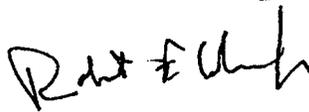
Mary Lu Jordan, Chairman



Michael F. Duffy, 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
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January 25, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. LAKE 2009-265-M
	:	A.C. No. 47-00792-173702
v.	:	
	:	Docket No. LAKE 2009-694-M
CEDAR LAKE SAND & GRAVEL CO.	:	A.C. No. 47-00792-175338

BEFORE: Jordan, Chairman; Duffy, 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 4, 2009, the Commission received from Cedar Lake Sand & Gravel Co. (“Cedar Lake”) 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).¹

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

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

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers LAKE 2009-265-M and LAKE 2009-694-M, both captioned *Cedar Lake Sand & Gravel Co.*, and both involving similar factual and procedural issues. 29 C.F.R. § 2700.12.

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 October 17, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Citation Nos. 7840542, 7840543, and 7840547 to Cedar Lake. On November 17, 2008, Cedar Lake’s counsel filed notices contesting the three citations pursuant to 29 C.F.R. § 2700.20. The notices of contest for Citation Nos. 7840542, 7840543, and 7840547 were docketed in LAKE 2009-101-RM, LAKE 2009-102-RM, and LAKE 2009-103-RM, respectively, and those contest proceedings were stayed.

On January 6, 2009, MSHA issued Proposed Assessment No. 000173702 to Cedar Lake, proposing civil penalties for Citation Nos. 7840542 and 7840543. The operator timely contested the proposed penalties pursuant to 29 C.F.R. § 2700.26. The Secretary moved for an extension of time to file a petition for assessment of penalty for the citations, and the motion was granted. On June 8, 2009, the Secretary filed a petition for assessment of penalty, pursuant to 29 C.F.R. § 2700.28, and the matter was docketed as a civil penalty proceeding in LAKE 2009-265-M. After Cedar Lake failed to file an answer to the petition for assessment of penalty, Chief Administrative Law Judge Robert J. Lesnick issued an order on November 9, 2009, directing Cedar Lake to file an answer within 30 days of the date of that order or to show good reason for its failure to do so. The Judge stated that, otherwise, Cedar Lake will be placed in default and ordered to pay the amount of the proposed penalties.

On January 27, 2009, MSHA issued Proposed Assessment No. 000175338 to Cedar Lake, proposing a civil penalty for Citation No. 7840547. Cedar Lake did not timely contest the proposed penalty, and the proposed assessment became a final order of the Commission pursuant to section 105(a) of the Mine Act. 30 U.S.C. § 815(a); *see also* 29 C.F.R. § 2700.27.

On September 4, 2009, the Commission received a letter from Cedar Lake’s counsel requesting that the Commission reopen all proposed penalty assessments related to Citation Nos. 7840542, 7840543, and 7840547. Counsel explains that he entered his appearance as counsel when he filed the contests of the citations in November 2008, but that counsel received no subsequent filings from MSHA. The operator’s counsel submits a contest of the proposed penalty assessments in the event the Commission grants Cedar Lake’s request to reopen. The Secretary does not oppose the operator’s motion.

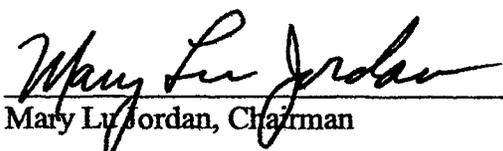
The Mine Act sets forth a scheme of dual filing relating to contests of citations and orders (29 C.F.R. Part 2700, Subpart B), and contests of proposed penalties (29 C.F.R. Part 2700, Subpart C). The filing of a contest of a citation does not constitute a challenge to a proposed penalty for that citation. See 29 C.F.R. § 2700.21(a) (“The filing of a notice of contest of a citation or order issued under section 104 of the Act . . . does not constitute a challenge to a

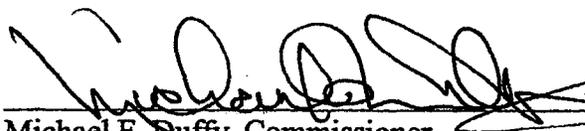
proposed penalty assessment that may subsequently be issued by the Secretary under section 105(a) of the Act . . . which is based on that citation or order.”); 29 C.F.R. § 2700.26 (“A person who wishes to contest a proposed penalty assessment must provide such notification regardless of whether the person has previously contested the underlying citation . . .”). Thus, after filing the notices of contest of Citation Nos. 7840542, 7840543, and 7840547 in November 2008, the operator was still required to file contests of the proposed penalties associated with those citations.² The operator timely contested the proposed penalties associated with Citation Nos. 7840542 and 7840543, but failed to do so with respect to the proposed penalty associated with Citation No. 7840547. In addition, to date the operator has not filed an answer to the petition for assessment of penalty filed by the Secretary in Docket No. LAKE 2009-265-M (A.C. No. 47-00792-173702) relating to Citation Nos. 7840542 and 7840543.³

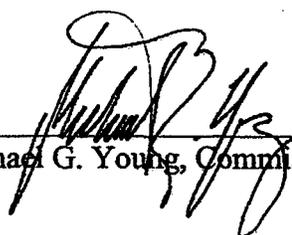
² We note that contests of citations and orders are filed with the Commission, and that MSHA, which is separate from the Commission, issues the proposed penalty assessments. Thus, even if an attorney enters an appearance with the Commission by filing a contest of a citation under 29 C.F.R. Part 2700, Subpart B, MSHA sends a proposed penalty assessment to the operator’s address of record listed with MSHA.

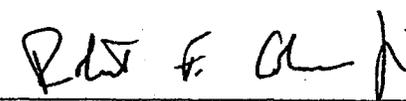
³ Pursuant to our rules, when an operator wishes to contest a penalty assessment, it must notify the Secretary. Commission Procedural Rule 26, 29 C.F.R. § 2700.26. However, after an operator successfully contests a penalty assessment by notifying the Secretary, the Secretary files a penalty petition with the Commission, and then the operator must file an answer to that petition. Commission Procedural Rule 29, 29 C.F.R. § 2700.29. The “answer” submitted by the operator in this case does not satisfy the requirement of Rule 29, as it does not respond to a penalty petition.

Having reviewed Cedar Lake's request and the Secretary's response, in the interests of justice, we hereby reopen Proposed Penalty Assessment No. 000175338 relating to Citation No. 7840547 (LAKE 2009-694-M). We remand this matter to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order relating to Proposed Penalty Assessment No. 000175338, and the operator shall file an answer to that petition within 30 days after service of the petition. See 29 C.F.R. §§ 2700.28, 2700.29. The operator must also file an answer to the petition for assessment of penalty filed relating to Proposed Assessment No. 000173702 for Citation Nos. 7840542 and 7840543 (LAKE 2009-265-M) within 30 days of the date of this order. See 29 C.F.R. § 2700.29.


Mary Lu Jordan, Chairman


Michael F. Duffy, 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
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January 25, 2010

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

v.

FRASURE CREEK MINING, LLC

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:
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Docket No. WEVA 2010-90
A.C. No. 46-09209-190396

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

ORDER

BY THE COMMISSION:

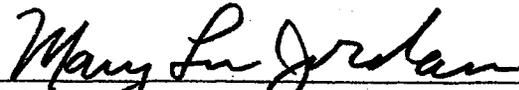
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On October 20, 2009, the Commission received from Frasure Creek Mining, LLC (“Frasure Creek”) a motion by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

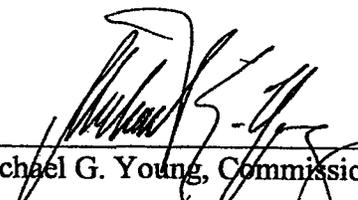
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the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

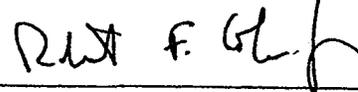
On July 7, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000190396 to Frasure Creek, proposing a penalty for a citation that had been issued to the operator approximately a month earlier. Frasure Creek states that it had previously indicated its intent to contest the citation by requesting a conference on it with the local MSHA office, but it did not realize that the assessment had been issued until it received a delinquency notice from MSHA. Frasure Creek explains that the employee who was responsible for forwarding assessments to the appropriate management official was terminated in August 2009, and that while the company soon thereafter searched her files for assessments and found some, the assessment at issue was never located. The Secretary states that she does not oppose Frasure Creek's request to reopen the assessment.

Having reviewed Frasure Creek'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.


Mary Lu Jordan, Chairman


Michael F. Duffy, 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 25, 2010

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

BEFORE: Jordan, Chairman; Duffy, 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 15, 2009, the Commission received a motion from the Secretary of Labor seeking to reopen dismissal orders issued by Chief Administrative Law Judge Robert Lesnick in these proceedings. The orders involve four proposed penalty assessments issued to Williams & Sons Slate & Tile, Inc. (“Williams”) 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).

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

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

The Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued the following proposed assessments to Williams on the dates noted: A.C. No. 36-07156-45867 (PENN 2006-78-M), issued on December 16, 2004; A.C. No. 36-07156-47898 (PENN 2006-75-M), issued on January 13, 2005; A.C. No. 36-07156-67440 A (PENN 2006-76-M), issued on September 15, 2005; and A.C. No. 36-07156-70601 (PENN 2006-77-M), issued on October 28, 2005. When Williams failed to timely contest the proposed penalty assessments, the proposed assessments became final orders of the Commission by operation of section 105(a) of the Mine Act.

Williams subsequently filed a motion requesting the Commission to reopen the penalty assessments. On February 27, 2006, the Commission issued an order remanding the matter to the Chief Judge for a determination of whether good cause existed for Williams’ failure to timely contest the penalty proposals and whether relief from the final orders should be granted. *Williams & Sons Slate & Tile, Inc.*, 28 FMSHRC 13, 15 (Feb. 2006).

On January 7, 2008, the Chief Judge issued an order reopening the penalty assessments and directing the Secretary to file petitions for assessment of penalty pursuant to 29 C.F.R. § 2700.28. The Judge reopened the orders based on an explanation provided by the operator by sworn statement dated December 26, 2006, that it failed to timely contest the proposed penalty assessments due to its owner’s medical conditions and treatments.

By letter dated January 22, 2008, the Secretary informed the Judge that Williams had paid all of the subject civil penalties in full. The Secretary further stated that the operator did not wish to pursue the cases further. Based upon these representations, the Judge issued orders dismissing these proceedings on January 26, 2009. Pursuant to section 113(d) of the Mine Act, the Judge’s dismissal orders became final orders of the Commission 40 days after their issuance, on March 9, 2009. 30 U.S.C. § 823(d)(1).

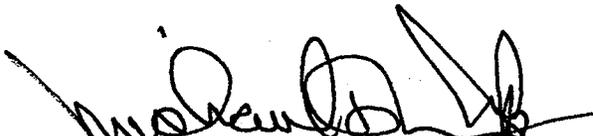
On September 15, 2009, the Commission received a request to reopen the dismissal orders from the Secretary. The Secretary explains that she recently ascertained that the penalties had not, in fact, been paid by the operator. Rather, MSHA had misapplied payments from another company with a similar name to Williams’ account. The operator has not responded to the Secretary’s motion.

Having reviewed the Secretary’s motion, we remand this matter to the Chief Judge for a determination of whether the dismissal orders should be reopened. If it is determined that relief

from the final orders is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



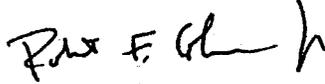
Mary Lu Jordan, Chairman



Michael F. Duffy, 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 26, 2010

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

v.

R & K COAL COMPANY, INC.

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Docket No. PENN 2008-290

A.C. No. 36-08341-143134

BEFORE: Jordan, Chairman; Duffy, 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 April 22, 2009, Chief Administrative Law Judge Robert Lesnick issued to R & K Coal Company, Inc. ("R & K") an Order to Show Cause for failure to answer the Secretary of Labor's petition for assessment of penalty. On January 5, 2010, Chief Judge Lesnick issued an Order of Default dismissing this civil penalty proceeding for failure to respond to the show cause order.

On January 11, 2010, the Commission received from R & K a request to set aside the default order. Attached to its request is a letter from Independent Miners and Associates ("IMA") addressed to the Chief Judge dated April 24, 2009, that appears to be R & K's answer to the Secretary's petition. In addition, a fax cover sheet from IMA to the Regional Solicitor's Office dated April 24, 2009, is attached to the request.

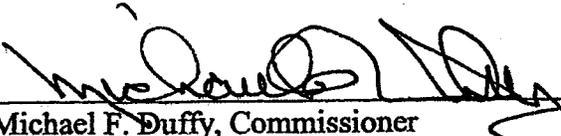
The judge's jurisdiction in this matter terminated when his decision was issued on January 5, 2010. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem R & K's request to constitute a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

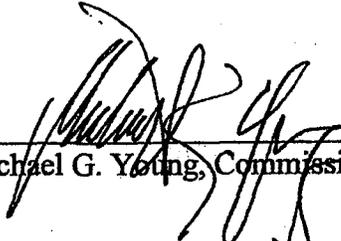
R & K allegedly submitted an answer in April 2009 to the Secretary's petition for assessment of penalty. However, the Commission apparently did not receive R & K's answer at that time. Accordingly, the judge entered a default judgment against R & K. Based on the

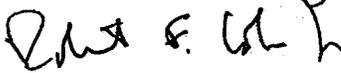
present record, we are unable to determine whether R & K timely submitted its answer, and if so, why it apparently was not received.

Having reviewed R & K's request, in the interest of justice, we remand this matter to the Chief Administrative Law Judge, who shall determine whether relief from default is warranted, and for further proceedings as appropriate pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.¹


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

¹ The request for relief and R & K's answer were filed by IMA. Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall into one of the categories in Rule 3(b), which include parties, representatives of miners, an owner, partner, officer or employee of certain parties, or "[a]ny other person with the permission of the presiding judge or the Commission." 29 C.F.R. § 2700.3(b). IMA is not a party in this proceeding, and it is unclear whether IMA satisfied the requirements of Rule 3 when it filed the request and answer on behalf of R & K. We have determined that, despite this, we will act on the petition in this instance. However, in any future proceeding before the Commission, including further proceedings in this case, R & K must be represented by its owner, partner, officer, or employee, or IMA must demonstrate to the Commission or presiding judge that it fits within one of the categories set forth in Rule 3(b)(1)-(3) or seek permission to practice before the Commission or judge pursuant to Rule 3(b)(4).

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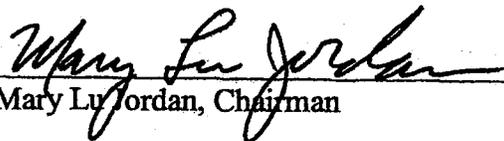
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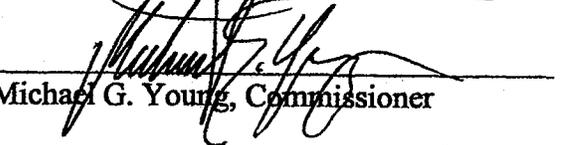
On July 31, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000158919 to Keokee, proposing penalties for three citations and Order No. 6636916. Keokee states that it received the proposed assessment soon after it was issued and forwarded it to its counsel to contest the penalty for the order. The operator states that its counsel failed to file the contest through "inadvertence and oversight." Keokee maintains that it became aware that the proposed assessment had not been contested on May 4, 2009, when it contacted its counsel about individual civil penalties that the Secretary assessed against one of Keokee's supervisors.

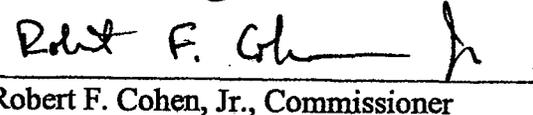
The Secretary opposes reopening on the ground that Keokee has failed to make a showing of the exceptional circumstances that warrant reopening. The Secretary argues that the operator's conclusory statement that its counsel failed to timely contest the proposed penalty through inadvertence and oversight is insufficient to establish a basis for reopening. In addition, the Secretary contends that the operator fails to explain why, after it was informed that it had not contested the penalty assessment, it took as long as it did to request reopening. The Secretary asserts that although MSHA sent Keokee a delinquency notice on November 4, 2008, and the operator paid the assessment by check dated December 4, 2008, the operator did not request reopening until May 2009, approximately seven months after receiving the delinquency notice and six months after payment.

Having reviewed Keokee's request to reopen and the Secretary's response thereto, we agree that Keokee has failed to provide an adequate basis for the Commission to reopen the penalty assessment. Keokee's conclusory statement that its counsel failed to timely contest the proposed assessment through "inadvertence and oversight" lacks sufficient detail and does not provide the Commission with an adequate basis to reopen.¹ Furthermore, Keokee has failed to explain its delay in responding to the delinquency notice.² Keokee has also failed to explain why it is seeking reopening after paying the assessment. Accordingly, we hereby deny without prejudice Keokee's request. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009).


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

¹ In requesting relief from a final order, a client may be held accountable for the acts and omissions of its attorney. *See Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 396-97 (1993) (holding that the neglect of both respondents and their counsel is relevant in determining whether respondents' failure to file their proofs of claim in a bankruptcy proceeding prior to the bar date was excusable); *Easley v. Kirmsee*, 382 F.3d 693, 698-700 (7th Cir. 2004) (although attorney carelessness may constitute "excusable neglect" under Rule 60(b)(1), attorney inattentiveness to litigation, such as failure to comply with pretrial scheduling orders and filing deadlines, is not excusable, and clients must be held accountable for the acts and omissions of their attorneys).

² In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009). Although the Secretary raised the issue that Keokee failed to explain why, after it was informed of the delinquency, it took as long as it did to request reopening, the operator did not file a reply providing an explanation. We encourage parties seeking reopening to provide further information in response to pertinent questions raised in the Secretary's response. *See, e.g., Climax Molybdenum Co.*, 30 FMSHRC 439, 440 n.1 (June 2008).

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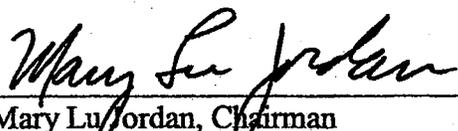
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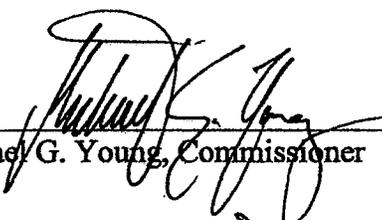
On April 14, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000182176 to Banner, which listed proposed penalties for 34 citations. In a detailed submission, the operator states that it intended to contest the proposed penalties for nine of those citations but that it failed to do so in a timely manner. The operator's safety director states in an affidavit that, on May 14, 2009, the proposed assessment form was completed and forwarded to the human resources department, and, on May 15, the form was forwarded to the accounts payable department along with four other matters. The safety director states that, at this time, the corporate headquarters was being moved, and that the subject proposed assessment "was lost in the shuffle." He submits that the mistake was discovered two months later and that the contest was mailed to MSHA on July 24, 2009. The operator states that MSHA notified Banner that its contest was untimely by letter dated August 13, 2009. After receiving the letter, Banner investigated the matter and filed its request to reopen.

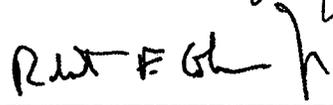
The Secretary responds that she does not oppose the operator's request to reopen. She notes, however, that a delinquency notice was mailed to the operator on July 9, 2009.

Having reviewed Banner's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.¹ 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.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

¹ The Commission has previously recognized that an operator's failure to respond to a delinquency notice may constitute grounds for dismissal with prejudice. *See, e.g., Newmont USA Ltd.*, 31 FMSHRC 862, 863 n.2 (Aug. 2009). It has explained that, accordingly, an operator who does not explain why, after it was informed of a delinquency, it took as long as it did to request reopening, does so at its peril. *Id.* We have encouraged parties seeking reopening to provide further information in response to pertinent issues raised in the Secretary's response. *Id.* Here, Banner did not file a reply to the Secretary's response explaining whether it received the delinquency notice. It appears, however, that Banner filed its contest of the proposed penalty close to the time that the delinquency notice was issued. In addition, it appears that Banner filed its request to reopen within a reasonable time after receiving MSHA's August 13 letter.

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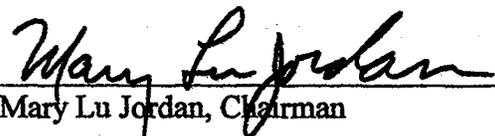
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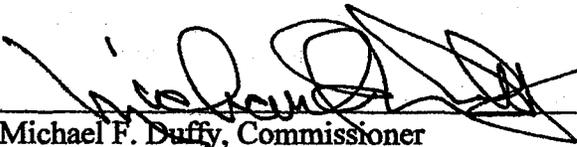
On July 15, 2008, the Department of Labor's Mine Safety and Health Administration issued a proposed penalty assessment for 19 violations totaling \$34,269 to Performance. Performance states that it received the proposed penalty assessment on July 25, 2008. It explains that it failed to timely process the proposed assessment because of a change in safety directors at the company around the time of its receipt of the proposed assessment. Specifically, Performance states that the transition occurred between June and August 2008. In June and July 2008, Performance states that its current safety director was frequently out of the office for up to two weeks at a time, while the new safety director, who did not assume responsibility until August, was being trained. It asserts that during this transition, the proposed assessment was misplaced when files and offices were moved and was not discovered until October 20, 2008.¹ Upon discovering the overdue assessment, the operator states that it promptly submitted the assessment to its counsel on October 21.

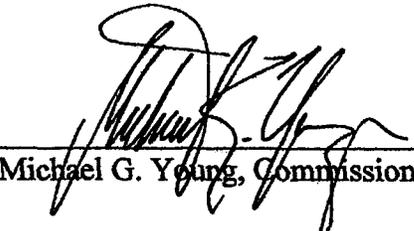
The Secretary opposes reopening the proposed penalty assessment, maintaining that Performance has failed to establish the existence of "exceptional circumstances." Specifically, the Secretary contends that for two months, the operator's system for handling penalty assessments was inadequate, which militates against reopening. She states that inadequate or unreliable internal procedures do not constitute an adequate excuse to reopen.

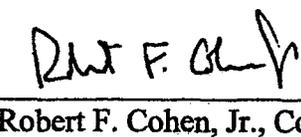
¹ We are concerned by the admission of the current safety director that "any forms received during this transition process between safety directors would not have been promptly received." Aff. of Gregory Raines at 2. During periods of personnel changes, back-up systems should be instituted to make sure that penalties are contested in a timely manner. Rather than assuming that late-filed penalty contests are "justifiable and unavoidable" during such transitions, Mot. at 4, a prudent operator would institute an alternate procedure to ensure that penalties are contested by the clear statutory deadline.

Having reviewed Performance's request and the Secretary's response, we conclude that Performance has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Performance's explanation that it failed to file a timely contest due to a "change in safety directors," without further elaboration, does not provide the Commission with an adequate basis to justify reopening of the assessment.² Accordingly, we deny without prejudice Performance's request. *See, e.g., Eastern Associated Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

² We note that in addition to the operator's initial two month delay in handling the final proposed penalty assessment, it appears that counsel for the operator delayed for approximately 40 more days in filing a request to reopen without any explanation for this delay. Thus, the law firm took 10 days longer to act than the Mine Act permits for contesting the penalty in the first instance. A party seeking to reopen a final proposed assessment must explain such delays, in addition to any delays in failing to timely contest.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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January 28, 2010

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

v.

F & G RESOURCES, LLC

: Docket No. KENT 2009-1076
: A.C. No. 15-18516-161572
:
: Docket No. KENT 2009-1077
: A.C. No. 15-18516-170126
:
: Docket No. KENT 2009-1078
: A.C. No. 15-18571-173098
:
: Docket No. KENT 2009-1079
: A.C. No. 15-18516-175641
:
: Docket No. KENT 2009-1080
: A.C. No. 15-18571-175642
:
: Docket No. KENT 2009-1081
: A.C. No. 15-18516-178191
:
: Docket No. KENT 2009-1082
: A.C. No. 15-18571-178192
:
: Docket No. KENT 2009-1083
: A.C. No. 15-18516-180784
:
: Docket No. KENT 2009-1084
: A.C. No. 15-18571-180786

BEFORE: Jordan, Chairman; Duffy, 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 May 20, 2009, the Commission received a request to reopen nine penalty assessments issued to F & G Resources, LLC (“F & G”) that may have

become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

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

Docket Nos. KENT 2009-1078; KENT 2009-1080; KENT 2009-1082;
and KENT 2009-1084

F & G states that it never received Proposed Assessment Nos. 000173098, 000175642, 000178192 and 000180786. The Secretary confirms that the four proposed assessments were returned to the Department of Labor’s Mine Safety and Health Administration (“MSHA”) as undelivered. The Secretary submits that in order to achieve proper service, she will mail the proposed assessments by U.S. Postal Service, Certified Mail, to the address provided in the operator’s reopening request.

Having reviewed F & G’s request and the Secretary’s response, we find F & G’s request to reopen Proposed Assessment Nos. 000173098, 000175642, 000178192 and 000180786 to be moot. The Secretary may proceed as she has outlined in her response, and, if any of the proposed penalties are contested by F & G, this case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. See *Lehigh Cement Co.*, 28 FMSHRC 440, 441 (July 2006).

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2009-1076 through KENT 2009-1084, all captioned *F & G Resources, LLC*, and involving similar factual and procedural issues. 29 C.F.R. § 2700.12.

Docket No. KENT 2009-1081

F & G states that it never received Proposed Assessment No. 000178191 and attaches an MSHA Civil Penalty Collection Report that indicates that the proposed assessment became a final order on April 9, 2009. The Secretary responds that Proposed Assessment No. 000178191 was timely contested and is the subject of Docket Nos. KENT 2009-919 and KENT 2009-920.

Accordingly, having reviewed F & G's request and the Secretary's response, we find F & G's request to reopen Proposed Assessment No. 000178191 to be moot. F & G may pursue its contest of the proposed assessment in Docket Nos. KENT 2009-919 and KENT 2009-920.²

Docket Nos. KENT 2009-1076; KENT 2009-1077; KENT 2009-1079;
and KENT 2009-1083

In its motion to reopen, F & G states that it never received Proposed Assessment Nos. 000161572, 000170126, 000175641, and 000180784. It asserts that its superintendent either did not know or understand the significance of the assessment sheets, and that the sheets were apparently misplaced or lost.

The Secretary opposes reopening these four proposed assessments because she contends that the operator failed to demonstrate the exceptional circumstances that warrant reopening. She asserts that the superintendent's ignorance of the rules and law is not a permissible ground for reopening under Rule 60(b)(1). The Secretary further states that the operator failed to explain why, after it was informed that it had not contested some of the penalty assessments, it took as long as it did to request reopening. The Secretary explains that MSHA's records indicate that the operator requested reopening six months, three months, and one month, respectively, after being notified of the delinquencies regarding Proposed Assessment Nos. 000161572, 000170126, and 000175641.

F & G subsequently filed an amended motion to reopen in which it states that after further investigation, it discovered that Proposed Assessment Nos. 000161572, 000170126, and 000175641 were never delivered to the person and address that were listed on the legal identification form. It explains that the proposed assessments were delivered to and signed for by the General Manager of the operator who owned the Gracie No. 1 Mine before F & G.

In its amended motion, F & G does not explain why it did not contest Proposed Assessment No. 000180784 (Docket No. KENT 2009-1083).

² As indicated on the Civil Penalty Collection Report attached to F & G's amended motion to reopen, 15 of the 25 violations contained in Proposed Assessment No. 000178191 remain unpaid. Our action here does not change the status of the 15 delinquent citations contained in Proposed Assessment No. 000178191.

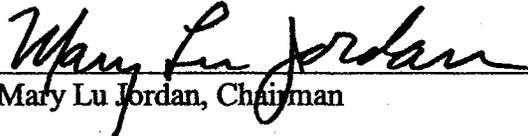
We note that the record shows that all four of these proposed assessments were delivered to the same address (F & G Resources, LLC; Attn: Robert Gregory Jr. – Owner; 1014 N. 12th St. Ste. 2A; Middlesboro, KY 40965). Likewise, Proposed Assessment No. 000178191, which F & G partially contested, was delivered to this same address. The fact that F & G received and dealt with another proposed assessment during the period when it was failing to contest the four proposed assessments at issue here is relevant to the issue of receipt or non-receipt of these four proposed assessments.

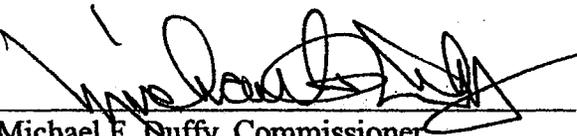
Having reviewed F & G's requests and the Secretary's response, in the interests of justice, we remand Proposed Assessment Nos. 000161572, 000170126, 000175641, and 000180784 to the Chief Administrative Law Judge for a determination of whether F & G's request should be granted in whole or in part.

The present record is insufficient to resolve certain issues. On remand, the Chief Judge should take additional evidence and determine whether F & G received the proposed assessments and delinquency notices, and whether the operator unreasonably delayed in filing its motion to reopen.³

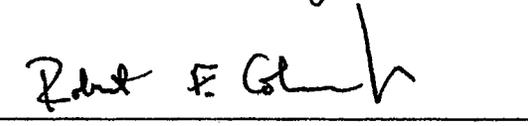
³ In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009). Although the Secretary raised the issue that F & G failed to explain why, after it was informed of the delinquency, it took as long as it did to request reopening, the operator did not file a reply providing an explanation. We encourage parties seeking reopening to provide further information in response to pertinent questions raised in the Secretary's response. *See, e.g., Climax Molybdenum Co.*, 30 FMSHRC 439, 440 n.1 (June 2008).

The Judge shall order further appropriate proceedings based upon those determinations in accordance with the principles described herein, the Mine Act, and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Mary Lu Jordan, Chairman


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Michael G. Young, Commissioner


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February 2, 2010

SECRETARY OF LABOR,	:		
MINE SAFETY AND HEALTH	:	Docket Nos.	WEVA 2006-125-R
ADMINISTRATION (MSHA)	:		WEVA 2006-126-R
v.	:		WEVA 2006-127-R
	:		WEVA 2006-128-R
COAL RIVER MINING, LLC	:		WEVA 2007-196

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

DECISION

BY THE COMMISSION:

These consolidated contest and civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”). Administrative Law Judge David Barbour upheld in whole or part both a citation charging Coal River Mining, LLC (“Coal River”) with a violation of 30 C.F.R. § 75.340(a)¹ and three orders, issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”). 31 FMSHRC 192 (Jan. 2009) (ALJ). The Commission subsequently granted the Secretary of Labor’s petition for discretionary review, which challenged (1) the judge’s determination that the section 75.340(a) violation was not attributable to Coal River’s unwarrantable failure to comply, and (2) the penalties the judge assessed for that citation and the three orders. For the reasons that

¹ Section 75.340(a) provides in pertinent part:

(a) Underground transformer stations, battery charging stations, substations, rectifiers, and water pumps shall be housed in noncombustible structures or areas or be equipped with a fire suppression system meeting the requirements of § 75.1107-3 through §75.1107-16.

30 C.F.R. § 75.340(a).

follow, we vacate and remand the judge's finding regarding the unwarrantability of the section 75.340(a) violation and the penalty he assessed for that violation, and affirm the penalties he assessed for the three orders.

I.

Factual and Procedural Background

This case arose out of MSHA's investigation of an incident at Coal River's Tiny Creek No. 2 Mine, an underground coal mine in Lincoln County, West Virginia. 31 FMSHRC at 193-94. During the evening shift on January 27, 2006, batteries being charged on the ground at a battery charging station overheated. *Id.* at 194; Gov't Ex. 9, at 1 (MSHA Accident Investigation Report).

The response to the batteries' overheating was influenced by the recent multi-fatality mine explosion at Sago and fire at Aracoma, which created a sense of urgency as the situation at the Tiny Creek Mine unfolded. Tr. 591, 771-773. First, the overheating triggered the mine's alarm system.² That in turn prompted Coal River to act quickly to evacuate all 30 or so miners underground, cut power to the section, and contact MSHA and rescue teams. 31 FMSHRC at 195; Tr. 313, 771-72, 775; Gov't Ex. 8 (MSHA Preliminary Accident Report). There were no injuries. 31 FMSHRC at 195. As noted by MSHA's lead accident investigator, Fred Willis, removing power from the charger, as soon as the CO monitor sounded, allowed the charger to cool and "prevent[ed] a major fire." Tr. 313-14; *see also* Tr. 250.

MSHA personnel traveled to the mine that night and issued a section 103(k) order. 31 FMSHRC at 195-96.³ While that order was in effect, MSHA interviewed miners and went

² The release of high levels of hydrogen from batteries while they are charging or when they overheat can trigger carbon monoxide ("CO") sensor systems. 31 FMSHRC at 196 n.7. The Sago and Aracoma accidents had prompted MSHA to order operators to adjust the settings on such systems to detect and alert operators to the presence of lower levels of gases. Tr. 28.

³ Section 103(k) of the Mine Act provides:

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

underground, where it inspected the battery charging station at Spad No. 1965. *Id.* at 198. The investigation led to the issuance of three citations and three orders. Gov't Ex. 1-6. Coal River contested one of the citations and the three orders. All four of the contested citations and orders were designated by MSHA as significant and substantial ("S&S") and attributable to Coal River's unwarrantable failure.⁴ 31 FMSHRC at 193.

A. Citation No. 7249165

At the time of the overheating incident, Coal River was using two scoops on the section, each with its own battery charging station: (1) a Fairchild 35 C model, that the operator primarily depended upon; and (2) a much older model, referred to as a 488. Tr. 690, 697, 810-11; Gov't Ex. 31, at 29. The scoops, which were used for such tasks as carrying supplies and cleaning the section, were powered by rechargeable batteries. Tr. 138, 697.

Both scoops had two sets of dedicated batteries, though the second set of batteries for the 488 was rarely used. Tr. 810-11.⁵ A scoop with only one set of batteries could only be charged at the battery charging station while its batteries remained on it, in which case the scoop would be idled. Tr. 641-42. With the availability of the second set of batteries, a scoop's batteries also could be removed using the scoop's hydraulic jack and placed on the ground for charging at the station. Tr. 174. In the latter instance, the scoop could then use the alternate set of batteries – which would have been previously charged on the ground while the scoop was being used elsewhere – and go back into service. Tr. 301, 633, 637, 757, 914.

of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k).

⁴ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." The unwarrantable failure terminology is taken from the same section, and establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

⁵ The Fairchild 35 C scoop would generally run on a fully charged set of batteries for six to eight hours, though the time period could be as little as four hours and as great as 12 hours, depending on how hard the scoop was being used and the condition of the batteries. Tr. 709. Fully charging the scoop's batteries at a battery charging station would generally take eight to 12 hours and then it would take another four to eight hours more for the batteries to cool before they could be safely used. Tr. 258-59, 534-35, 558, 580-81.

The two battery charging stations would be set up and generally moved as mining progressed, and as frequently as was called for by conditions in the mine. Tr. 708; Gov. Ex. 31, at 23. In January 2006, the two battery charging stations had been set up in a location where, within a few days, deteriorating roof conditions prompted Superintendent B.K. Smith to direct third shift foreman Mark Blackburn to move the stations to an area with better roof. 31 FMSHRC at 196-97; Tr. 681, 682-83, 784-86. In testifying at the hearing in this matter, Blackburn described in detail the steps that would usually be taken to complete the move to, and setup at, a new location for a battery charging station, some of which Smith echoed in his testimony. 31 FMSHRC at 197.

At the time of the events relevant to this proceeding, Coal River's battery charging stations were neither equipped with fire suppression systems nor housed in noncombustible structures. Coal River therefore would apply Pyro-Chem to the ribs and roof around a battery charging station as a fire retardant that would provide the fireproofing required by section 75.340(a) for charging batteries on the ground at such stations. *Id.* at 198; Tr. 708. Blackburn testified that the normal practice would be to spray a new battery charging station area with Pyro-Chem before transporting the charger, batteries, and ancillary items to the new location, so as to avoid getting the chemical on that equipment. Tr. 703-04, 718.

In moving the battery charging station to Spad No. 1965, however, Coal River did not spray the new area first, because the deteriorating roof made the removal of the battery charger, batteries, and other items to the new location a priority. Tr. 691, 703-04, 718-19. Blackburn moved the equipment and other items to Spad No. 1965 to start the process of setting up the new station, and assigned Section Foreman Ronnie Bias and his crew the task of completing the setup of the station. 31 FMSHRC at 197; Tr. 691, 710, 719-20.⁶ Blackburn stated that he specifically instructed Bias to spray the area at Spad No. 1965 with Pyro-Chem. Tr. 691, 719-20.

Coal River stored Pyro-Chem that it was not planning on immediately using on the surface, bringing it inside a couple of days prior to use so that it could thaw in the event it was frozen. Tr. 693. In this instance the chemical had frozen, so it could not be immediately applied by Bias' crew at the time. Tr. 691-93, 797. As a result, it was left near the battery station to thaw. Tr. 638.

The next morning, at the end of the shift, both Blackburn and Smith learned from Bias that it had been impossible to apply the Pyro-Chem. Tr. 707, 797. According to Blackburn, Smith responded "[O]kay we'll get someone to take care of it." 31 FMSHRC at 197; Tr. 707. Smith testified that he told a foreman that the Pyro-Chem had not been applied and expected that the foreman would pass the information along. 31 FMSHRC at 197; Tr. 831-32. In addition,

⁶ Because of an error in the transcript, the judge misstated Bias's name as "Byans." Additionally, the judge said that Bias was the section foreman on the incoming shift, 31 FMSHRC at 197, when the record indicates that Bias was section foreman on the third shift, the same shift as the shift when Blackburn moved the batter charger. Tr. 690-91, 719.

according to Blackburn, Bias informed incoming day shift Section Foreman Keith Pack that the Pyro-Chem had not been applied at the new battery charging station, and that, consequently, batteries should not be charged on the ground there, only on the scoop. Tr. 721-22.

It is undisputed that Coal River had not sprayed Pyro-Chem at Spad No. 1965 by the evening of January 27. 31 FMSHRC at 200. Batteries were being charged on the ground there that night, and they apparently released hydrogen gas which triggered the mine's CO sensors. *Id.* at 194-95. This led to the shut-off of power, mine evacuation, resulting MSHA investigation, and issuance of Citation No. 7249165. *Id.* at 195, 200; Gov't Ex. 1, 8, 9. Because of the lack of Pyro-Chem at the battery charging station at Spad No. 1965, Coal River was charged with an S&S and unwarrantable violation of section 75.340(a). 31 FMSHRC at 193, 200; Gov't Ex. 1. MSHA later proposed a civil penalty of \$10,300. 31 FMSHRC at 216; Gov't Ex. 7.

B. Order Nos. 7249166, 7249167, and 7249168

Order No. 7249166 alleged that Coal River's failure to detect the missing Pyro-Chem at Spad No. 1965 during preshift examinations violated 30 C.F.R. § 75.360(b)(9). Gov't Ex. 2. That standard requires a preshift examiner to "examine for hazardous conditions . . . at . . . [u]nderground electrical installations."

In Order No. 7249167, MSHA asserted that the lack of fireproofing and the condition of the batteries at Spad No. 1965 established a violation of 30 C.F.R. § 75.512. Gov't Ex. 3. That regulation requires that all electric equipment be "frequently examined, tested, and properly maintained . . . to assure safe operating conditions."

Order No. 7249168 alleged that the condition of the batteries that were being charged at the station violated 30 C.F.R. § 75.503. Gov't Ex. 4. Under that standard, an operator is obligated to keep electric face equipment in "permissible condition."

MSHA proposed civil penalties of \$10,300 each for Order Nos. 7249166 and 7249167. 31 FMSHRC at 193; Gov't Ex. 7. The agency also eventually requested an identical penalty for Order No. 7249168.⁷

⁷ MSHA initially proposed a penalty of only \$5,300 for Order No. 7249168, because the order indicated that only one miner was endangered by the violation alleged therein, in contrast to the indications in the other contested citation and orders that eight miners were endangered by those alleged violations. 31 FMSHRC at 193 & n.2; Gov't Ex. 7. At the hearing, the Secretary stated that this was a mistake, that eight miners were also endangered by the violation alleged in Order No. 7249168, and the judge granted the Secretary's motion to modify the order. 31 FMSHRC at 193 n.2; Tr. 282, 414. In her post-hearing brief, the Secretary requested that the judge also assess a penalty of \$10,300 for that order. S. Post-Hearing Br. at 44.

C. Judge's Decision

Because Pyro-Chem had not been applied at Spad No. 1965, the judge affirmed the citation charging a violation of section 75.340(a). 31 FMSHRC at 206-07. He also concluded that, given the condition of the battery cables, there was a likelihood of fire and that the danger from such a fire would be even greater because of the failure to provide fire suppression measures. Thus, he concluded that the violation was S&S. *Id.* The judge further determined that because Coal River intended to apply Pyro-Chem at Spad No. 1965 but was thwarted by the chemical being frozen, the operator's failure to apply it did not rise to the level of unwarrantable failure. *Id.* at 207-08. The judge credited the testimony of the mine's superintendent as to the company's commitment to safety, found that there had been no showing that the failure to provide required fire protection was a habitual practice at the mine, and concluded that the lack of Pyro-Chem was not obvious because of the presence of rock dust on the ribs at Spad No. 1965. *Id.*

With regard to the three orders, the judge similarly affirmed Order No. 7249166, agreeing that the violation of the preshift examination requirement was S&S, but holding that it was not attributable to Coal River's unwarrantable failure. 31 FMSHRC at 208-10, 217-18. The judge also affirmed Order No. 7249167, holding that Coal River's weekly electrical examination of the batteries at Spad No. 1965 violated section 75.512 and that the violation was both S&S and unwarrantable. *Id.* at 210-13, 218.⁸ As for Order No. 7249168, the permissibility violation, the judge affirmed that Coal River violated section 75.503 and agreed that the violation was S&S and unwarrantable. *Id.* at 213-15.⁹ For the two violations that the judge found to be unwarrantable, he assessed penalties of \$4,000 each. *Id.* at 217. For the two that he concluded were not unwarrantable, he assessed the penalties at \$2,000 each. *Id.* at 216.

⁸ The judge found the weekly examination of the electrical equipment to be in violation of the standard and S&S because he found that water levels in the battery cells were low or non-existent at the time of the last weekly examination, which caused the batteries to overheat on January 27, and because of the presence of hazardous spliced battery cables. The judge found unwarrantable failure because the weekly examiners did not have a practice of always checking the water in batteries of electrically powered equipment, and because Coal River did not know that the use of spliced cables was prohibited. 31 FMSHRC at 211-12.

⁹ The judge found that electrical equipment was not kept in permissible condition because two battery cables were spliced, because the cables used on the scoop's batteries were not approved by MSHA, and because of the lack of proper clamps securing the cables. The spliced cables and lack of proper clamps caused the violation to be S&S. The judge found the violation to be an unwarrantable failure because Coal River relied on its electrical equipment vendor to supply and service the batteries without checking on the compliance-readiness of the equipment it was provided, and thus abrogated its responsibilities. 31 FMSHRC at 213-15.

II.

Disposition

A. Unwarrantable Failure

The Secretary requests that the Commission reverse the judge's determination that the violation of section 75.340(a) was not due to Coal River's unwarrantable failure to comply. PDR at 21-22. The Secretary contends that the judge erred in his unwarrantable failure analysis because he focused on the conduct of the mine superintendent, when in fact three lower level supervisors were also involved in the violation, and that the judge failed to hold the four supervisors to the higher level of care the Commission requires of supervisory personnel. PDR at 12, 14. The Secretary further argues that the non-obvious nature of the violation is irrelevant, given that the supervisors knew that Pyro-Chem had not been applied and thus were aware that Coal River was in violation of section 75.340(a). *Id.* at 12-14. The Secretary also maintains that the judge erred in his analysis by failing to take the danger of the violation into account and that the violation existed from between several days to a couple of weeks. *Id.* at 14-16.

Coal River responds that the judge's conclusion that the violation was not attributable to unwarrantable failure is supported by substantial evidence. CR Br. at 1. The operator maintains that the supervisors were not aware of the violation, because, while they knew that the Pyro-Chem had not been applied, they did not know that batteries were being charged on the ground at the station. *Id.* at 4-5, 9-10. Coal River also points to the lack of a history of this type of violation by Coal River as supporting the judge's determination that the Secretary had failed to establish reckless conduct on the part of the operator in this instance. *Id.* at 6-7.

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); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a

high degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 43 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *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. The Commission has made clear that it is necessary for a judge to consider all relevant factors. *Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999); *San Juan Coal Co.*, 29 FMSHRC 125, 129-31 (Mar. 2007) (remanding unwarrantable determination for further analysis and findings when judge failed to analyze all factors). While an administrative law judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).¹⁰

In this case, there is record evidence to support the judge's findings on some of the unwarrantable failure factors, such as his finding that "there was no showing the failure to provide fire protection was a habitual practice at the mine." 31 FMSHRC at 207 (citing Tr. 696, 802). Other factors are irrelevant in this instance, such as the extent of the violative condition, and the operator's previous abatement efforts after having been placed on notice of the condition, as there is no evidence of such notice. However, with regard to four of the factors, the judge either failed to consider all of the evidence, so that his findings with respect to these factors lack

¹⁰ Commission Procedural Rule 69(a) requires that a Commission judge's decision "shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a). As the D.C. Circuit has emphasized, "[p]erhaps the most essential purpose served by the requirement of an articulated decision is the facilitation of judicial review." *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). Without findings of fact and some justification for the conclusions reached by a judge, the Commission cannot perform its review function effectively. *Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981). Thus, the Commission has held that a judge must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994).

the required support in the record,¹¹ or he neglected to take the factor into account at all in his analysis.

1. Knowledge of the Violation

Coal River was charged with violating section 75.340(a) because batteries were charged on the ground at a battery charging station where none of the required fireproofing measures had been taken.¹² The judge in his unwarrantable failure analysis did not address the extent of Coal River's knowledge of the violation.

As the Secretary points out, it is undisputed that supervisory personnel at Coal River were aware that the area lacked the required fireproofing. PDR at 12. As was discussed, four different supervisors at Coal River were aware that Pyro-Chem had not been applied at Spad No. 1965 at the point in time at which the operator intended to apply it: Blackburn, Bias, Smith, and Pack. Because supervisors are held to a higher standard of care, the Commission, in determining unwarrantability, takes into account the extent of involvement of supervisory personnel in a violation. See *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) (citing *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998)). Here, the judge should have considered the involvement of

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

¹² Citation No. 7249165 states:

The unattended 35 C scoop charger serial Number 0577MC2406 located at spad No. 1965 was not provided with a fire suppression system or enclosed in a noncombustible structure. *Batteries were being charged on the bottom off the scoop and were not provided with fire suppression systems required by 75.1107-3 through 75.1107-16. Management is aware of this requirement in that previous station area was fire proofed. Through interviews this charger station has existed for 2 to 3 weeks. This violation is an unwarrantable failure to comply with a mandatory standard.*

Gov't Ex. 1 (emphases added). Below, the Secretary suggested that Coal River could have avoided a violation by removing the batteries from the charging station area until the area had been fireproofed as required by section 75.340(a), or indicated with a sign that batteries were not to be charged on the ground at that location. S. Post-Hearing Br. at 16-18.

all four supervisors in the section 75.340(a) violation when determining whether the violation was unwarrantable.

In addition, the evidence is that the frozen bags of Pyro-Chem were left nearby the charging station to thaw. Tr. 638. Those bags were a visible reminder to those who knew that the Pyro-Chem had not been applied that the battery charging station had been set up without the required fireproofing.

While conceding that the supervisors were aware that Pyro-Chem had not been applied as intended at the battery charging station, Coal River argues that there is no evidence that those supervisors were informed or otherwise knew that batteries were being charged on the ground at the charging station. CR Br. at 4-6. Coal River is correct as far as the evidence goes. There is no evidence that witnesses observed batteries being charged on the ground there following the move of the charging station. Tr. 346-47, 741, 744. Blackburn testified that it was company practice not to charge batteries on the ground at a station until the station had been sprayed with Pyro-Chem. Tr. 701.¹³

Even if it is true that supervisors did not have direct knowledge of batteries being charged on the ground, and regardless of Coal River's overall commitment to safety, in this instance it is clear that miners used the station at Spad No. 1965 to charge batteries on the ground, at least on January 27. Moreover, there is much in the record to establish that Coal River relied on the Fairchild 35 C scoop to such an extent that it would have been difficult for the operator *not* to charge scoop batteries on the ground for any extended length of time.

At the hearing, Blackburn testified that there always should be a set of Fairchild 35 C scoop batteries on charge, which would tend to indicate continual or near-continual use of the station. Tr. 709. This is consistent with the earlier deposition testimony of Pack, who stated that it was not unusual for a scoop operator to tell him that he needed to switch out dying batteries for charged ones, and in such instances the dying batteries would be left at the station to recharge while the operator returned with the scoop to continue working. Gov't Ex. 30, at 29-31. In addition, evening shift section foreman Mickey Webb testified at his deposition that, while the only batteries he saw being charged at Spad No. 1965 were on a scoop, it would have been

¹³ However, fireboss Jerry Vance, Jr., who performed two pre-shift examinations each day in the area of the violation in January, 2006, did not specifically recall seeing batteries being charged either on the scoop or on the ground, or whether there were batteries there which were not actually connected to the charger. Tr. 743-44. Vance also said that at the time of the violation, he was not aware that the law required a fire suppressant such as Pyro-Chem in addition to rock dust. Tr. 754. In other words, the evidence of record does not directly establish either instances of charging batteries on the ground at Spad No. 1965 between the time of the battery charger move and the January 27 incident, or its absence.

unusual for Coal River, in light of its extensive use of the Fairchild 35 C scoop, to operate for even a couple of days without charging scoop batteries on the ground. Gov't Ex. 32, at 21-23.¹⁴

In determining whether the section 75.340(a) violation was unwarrantable, the judge should have taken the foregoing into account, particularly since the Secretary pointed out below that the operator's practice was to charge batteries on the ground to keep the Fairchild 35 C scoop in service.¹⁵ S. Post-Hearing Br. at 16. The factor of an operator's knowledge may be established, and a finding of unwarrantable failure supported, where an operator reasonably should have known of a violative condition. *See Emery*, 9 FMSHRC at 2002-04; *Drummond Co., Inc.*, 13 FMSHRC 1362, 1367-68 (Sept. 1991) (quoting *Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991) ("*Emery* makes clear that unwarrantable failure may stem from what an operator 'had reason to know' or 'should have known'")). On remand, the judge must consider whether, under the circumstances, the Coal River supervisors reasonably should have known that batteries would be charged on the ground at Spad No. 1965 once the battery charging station was set up there.

2. Duration

The Commission has emphasized that duration of the violative condition is a necessary element of the unwarrantable failure analysis. *See Windsor Coal*, 21 FMSHRC at 1001-04 (remanding for consideration of duration evidence of cited conditions). Here, the issue of duration of the violation is a particularly critical one, because the longer the battery station lacked the required fireproofing, the more likely it would be that miners would charge batteries on the ground there, given that the second set of batteries was there and there were no signs warning miners not to charge batteries on the ground.

In deciding the section 75.340(a) issues, the judge did not directly address the amount of time that elapsed between the setup of the battery charging station at Spad No. 1965 and when the batteries overheated. *See* 31 FMSHRC at 207-08. He did, however, address the duration issue elsewhere in his decision, in the context of affirming in part the order charging that Coal River violated the pre-shift examination requirements of section 75.360(b)(9). *See id.* at 208-09. Similar to the citation for the section 75.340(a) violation, this order stated that, according to interviews with miners and Coal River management, the battery charging station had been at

¹⁴ Four deposition transcripts, including those of Pack and Webb, were made part of the hearing record. Tr. 407-12.

¹⁵ It is not unreasonable to expect that if Coal River was refraining from charging batteries on the ground, there would be evidence of the operator having to idle the Fairchild 35 C scoop, which would eventually lead to a halt in production. There is no record evidence of such a stoppage. On remand, the judge may consider the inference that the lack of evidence of the idling of the scoop indicates that its batteries were being charged on the ground in violation of section 75.340(a), prior to the incident on January 27.

Spad No. 1965 for two to three weeks. Gov't Ex. 2, at 1. The judge concluded that it was impossible to establish with certainty when the station was moved to Spad No. 1965. 31 FMSHRC at 209. He did rule, however, that the Secretary had failed to establish that the move had occurred as early as two to three weeks prior to the overheating incident. *Id.* at 208.

On review, the Secretary argues that there is undisputed evidence that the lack of fire suppression existed for at least several days, that such a duration supports a finding of unwarrantable failure, and that the judge erred in not considering the duration of the violation in his analysis. *Id.* at 15-16.¹⁶ Coal River responds that the judge simply found that the Secretary did not carry her burden on the issue of the duration of the violation. CR Br. at 10.

We appreciate that the state of the record in this case does not permit the judge to make a conclusive finding regarding exactly how much time elapsed between the setup of the battery charging station and the overheating incident. Nevertheless, the duration of the violation remains a relevant consideration for purposes of determining whether the violation was unwarrantable. Even imperfect evidence of duration in the record should be taken into account by the judge.

The judge rejected MSHA's position that two or more weeks had elapsed, and the Secretary on review does not challenge that rejection, but there is other evidence in the record regarding a shorter duration that nevertheless may still be considered significant under the circumstances. For instance, Blackburn testified that the overheating incident occurred a couple of days after the setup of the battery charging station. Tr. 708. Smith was less certain, stating it could have been from a few days to a week. Tr. 794. Vance said the charging station could have been at Spad No. 1965 for a week to two weeks. Tr. 738-39. On remand, the judge, after weighing the varying accounts regarding the length of time Spad No. 1965 remained without fireproofing, should consider the duration factor in determining whether Coal River's failure to fireproof the area was unwarrantable under the circumstances. Depending on the judge's findings on the other factors, the violation of section 75.340(a) can be found to have been unwarrantable even if a relatively short period of time passed between the setup of the battery station and the overheating incident. *Cf. Midwest Material Co.*, 19 FMSHRC at 34-36 (finding violation to be attributable to operator's unwarrantable failure where the duration was only a period of a few minutes, because it posed a high degree of danger, involved a foreman, and the violative condition may have continued but for occurrence of accident); *Lafarge Constr. Materials*, 20 FMSHRC 1140, 1145-48 (Oct. 1998) (same).

¹⁶ Below, MSHA Inspector Willis testified that the agency would have designated the violation as high negligence even if the condition had existed for only two to three days. Tr. 315-16.

3. Obviousness

There is little dispute that the lack of fireproofing at Spad No. 1965 was not obvious. Given that Coal River routinely sprayed rock dust on top of Pyro-Chem, and the relative difficulty of distinguishing color between the two substances in the underground environment, it would have been difficult for anyone to detect that Pyro-Chem had not been applied at Spad No. 1965. *See* 31 FMSHRC at 209-10. The record is replete with evidence to support the judge's finding to that effect. Tr. 603-04, 633-34, 695, 742, 802.

It appears from his analysis that the judge viewed this lack of obviousness to be a mitigating factor in this instance. However, because the operator knew that the absence of Pyro-Chem would be obscured by the presence of rock dust, we do not necessarily agree that the operator's degree of fault is mitigated in this instance by the lack of obviousness of that absence. The likelihood of batteries being eventually charged on the ground at the station was actually *increased* because of the coating of rock dust. The evidence is that if any miner who did not know that Pyro-Chem had not been applied there looked at the Spad No. 1965 battery station, he could not tell that the required fireproofing was lacking because of the rock dust on the roof and ribs. Tr. 817. Consequently, a scoop operator would have had no way of knowing from the appearance of the area that batteries should not have been charged on the ground there.

On remand, the judge should consider in his unwarrantable failure analysis that the lack of obviousness could have tended to *increase* the likelihood of a violation in this instance, i.e., batteries being charged on the ground in an area that lacked required fireproofing. *See San Juan*, 29 FMSHRC at 129 (facts and circumstances of case determine whether an unwarrantable failure factor aggravates or mitigates an operator's negligence).

4. The Degree of Danger

The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See BethEnergy*, 14 FMSHRC at 1243-44 (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering the area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation to be aggravated and unwarrantable based upon "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals*, 10 FMSHRC at 709 (finding unwarrantable failure where roof conditions were "highly dangerous").

In concluding that the violation was not attributable to Coal River's unwarrantable failure, the judge did not consider the factor of the danger posed in this instance. 31 FMSHRC at 207-08. The judge failed to do so even though he concluded that the violation of section 75.340(a) was S&S. *Id.* at 206-07. In reaching that conclusion (which Coal River did not appeal), the judge found Inspector Maynard's testimony on how the process of charging batteries can result in fires, hydrogen buildup, and explosions to be "persuasive." *Id.* at 206 (citing

Tr. 181). The judge also acknowledged that the requirements of section 75.340(a) are designed to greatly minimize such hazards, and that the lack of fireproofing at Spad No. 1965 increased the hazard of the ribs catching fire and the fire spreading, which would be extremely dangerous in the underground mine environment. *Id.* at 206-07.

While these findings are not necessarily dispositive of the unwarrantability of the violation of section 75.340(a), they are highly relevant to the degree of danger posed by the violation in this instance. On remand, in determining unwarrantability, the judge must consider the dangers posed by Coal River's failure to fireproof the battery station at Spad No. 1965.

In summary, we remand this case to the judge for a determination of whether, considering all of the facts and circumstances, the violation of section 75.340(a) that occurred when batteries were charged on the ground at Spad No. 1965 was attributable to Coal River's conduct that rose to the level of unwarrantable failure, i.e. conduct that constituted "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." This means that the judge must consider Coal River's conduct throughout the period at issue, beginning with the failure to apply the Pyro-Chem and ending with the charging of batteries on the ground at Spad No. 1965 that resulted in the overheating incident. In addition, should the judge on remand reach a different conclusion as to whether the violation was unwarrantable, he should reassess the associated penalty in light of his revised findings.¹⁷

B. The Judge's Penalty Assessments as to the Orders

The Secretary requests that the Commission vacate the penalties that the judge assessed for the orders and remand the case to the judge with instructions for assessing appropriate penalties for the violations. PDR at 21-22. The Secretary contends that the judge did not adequately explain in assessing the penalties why he diverged to the extent that he did from the Secretary's proposed penalties. *Id.* at 19-20. The Secretary also argues that the judge's finding that Coal River demonstrated "more than good faith" in abating the violations is neither supported by substantial evidence nor permissible under the six statutory factors he was limited to considering in assessing the penalties. *Id.* at 20-21. Coal River responds that it was well within the judge's discretion to assess the penalty amounts he did, given that his findings on the operator's good faith and low history of violations are supported by record evidence. CR Br. at 10-14.

Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). In determining the amount of the penalty, neither the judge nor the Commission shall be bound by a penalty recommended by the Secretary. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). However, such discretion is not unbounded and must reflect proper consideration of

¹⁷ For the reasons below, we otherwise reject the Secretary's challenge to the penalty that the judge assessed with respect to the section 75.340(a) citation.

the penalty criteria set forth in section 110(i) and the deterrent purposes of the Act.¹⁸ *Cantera Green*, 22 FMSHRC at 620. In reviewing a judge's penalty assessment, the Commission must determine whether the judge's findings with regard to the penalty criteria are supported by substantial evidence. Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). Additionally, the Commission in *Sellersburg*, 5 FMSHRC at 293, explained that "when . . . it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission." In *Cantera Green*, the Commission clarified that "[w]hile the findings and explanations relating to a penalty assessment do not have to be exhaustive, they must at least provide the Commission with a basis for determining whether the judge complied with the requirement to consider and make findings concerning the section 110(i) penalty criteria." 22 FMSHRC at 621.

Here, the judge, in assessing the penalties, provided an adequate explanation for why he diverged to the extent that he did from the Secretary's proposed penalties. First of all, it is clear that the judge reduced two of the penalties by \$2,000 each because he did not affirm the findings of high negligence sought by the Secretary, but instead found moderate negligence with respect to the two orders associated with those penalties. This was, roughly, a 20 percent reduction from the Secretary's proposed penalty amounts for those two violations.¹⁹ Ascribing such weight to the degree of negligence factor is well within a judge's broad discretion in assessing penalties de novo under the Mine Act. *See, e.g., Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (upholding 800 percent increase of proposed penalty based on gravity and negligence factors).

¹⁸ Section 110(i) provides in part:

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

¹⁹ For the two orders that the judge affirmed and agreed with the Secretary on the degree of negligence, he reduced the penalties from the requested \$10,300 to \$4,000. For the citation and order that the judge affirmed but reduced the degree of negligence, he reduced the Secretary's proposed penalties even further, from \$10,300 to \$2,000. 31 FMSHRC at 216-17.

As for the judge's additional \$6,300 reduction to each of the penalties from the Secretary's proposal, the Secretary argues that such reductions were based solely on the judge's findings regarding Coal River's abatement efforts. PDR at 20-21. That is not accurate, however, because for each of the penalties, the judge directly justified his large reduction from the Secretary's proposed penalties based on *two* of the section 110(i) factors. In addition to taking into account Coal River's actions in responding to the violations, the judge relied upon the operator's "low history of prior violations." 31 FMSHRC at 216-17.

Substantial evidence supports the judge with regard to this factor. Coal River states in its brief that the total amount of penalties it was assessed and paid in 2006 was only \$5,662. CR Br. at 11. Even more importantly, the Secretary in her brief below recited statistics establishing the operator's ratio of violations per inspection day, and concluded that "[t]his low history of previous violations reflects Coal River's 'excellent' reputation for mine safety." S. Post-Hearing Br. at 44 (citing Tr. 206 (testimony of MSHA Inspector James Maynard)).

As for the Secretary's argument that the judge's focus on the operator's abatement efforts went beyond the terms of section 110(i), here we do not agree that the judge strayed beyond the confines of the Mine Act when he put as much emphasis as he did on the operator's abatement efforts. Section 110(i) states that the judge must consider "the *demonstrated* good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 820(i) (emphasis added). The term "demonstrated" makes the question of the operator's "good faith" one that can be answered in degree, just as other section 110(i) factors, such as negligence, can be answered.

In this instance, the judge found that the degree of good faith demonstrated by the operator was "much more than ordinary good faith." 31 FMSHRC at 215. In so doing, the judge was not using an additional factor in his assessment; rather, he was indicating the weight he was giving that factor. In fact, the judge stated as much. *See* 31 FMSHRC at 216 ("I will give much more weight than normal to the good faith criteria when I assess penalties in this case."). In assessing penalties de novo, it is within the discretion of the Commission, and thus of its judges acting in the first instance, to accord different weights to the six penalty factors. *See Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997) ("there is no requirement that equal weight must be assigned to each of the penalty assessment criteria").

The Secretary maintains that because Coal River did no more than what the law requires, the judge's finding that "much more than ordinary good faith" was demonstrated by Coal River is not supported by substantial evidence. PDR at 20-21. While we might agree that the judge, in characterizing the operator's response to be "much" more than good faith, was perhaps overly effusive in his praise, the record supports the conclusion that Coal River did act quickly to do more than necessary to abate the violations in question. In addition to purchasing new and more

reliable fire suppression systems that would be used at battery charging stations,²⁰ the company changed its practices throughout its mines in response to the incident on January 27. 31 FMSHRC at 216. Although we might not have come to the same conclusion as the judge, we believe that substantial evidence supports the judge's finding that Coal River demonstrated "much more than ordinary good faith." Thus, we affirm the penalties that the judge assessed as to the three orders.

²⁰ After being charged with violating section 75.340(a), Coal River stopped using Pyro-Chem to fireproof battery charging station areas. It purchased and began using a dry chemical solution fire suppression system that would attach to the station itself. 31 FMSHRC at 215-16; Tr. 659-660, 710, 762-63.

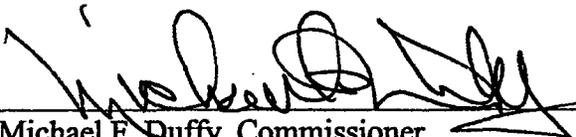
III.

Conclusion

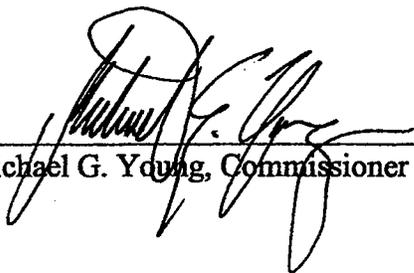
For the foregoing reasons, we vacate and remand the judge's finding as to whether the section 75.340(a) violation was attributable to Coal River's unwarrantable failure, the operator's degree of negligence in connection with the violation, and the penalty the judge assessed for that violation. As to the three orders, we affirm the penalties that the judge assessed.



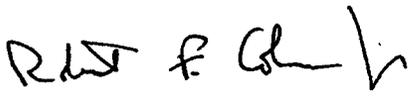
Mary Lu Jordan, Chairman



Michael F. Duffy, 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

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February 18, 2010

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

v.

ROCKHOUSE CREEK
DEVELOPMENT LLC.

Docket No. WEVA 2009-516
A.C. No. 46-08778-160570

BEFORE: Jordan, Chairman; Duffy, 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 December 22, 2008, the Commission received from Rockhouse Creek Development LLC. ("Rockhouse") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

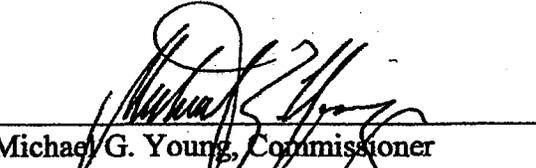
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a)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

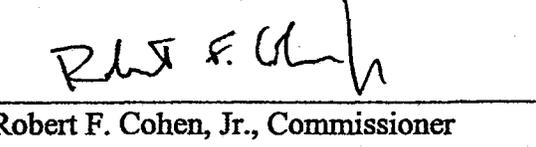
The operator states that it intended to contest the proposed penalty assessment and e-mailed it to counsel on a timely basis. However, the record indicates that, due to counsel's error, the case was not properly calendared by counsel's firm, and no contest was submitted. When the operator realized the mistake, it promptly sought re-opening. Although the Secretary does not oppose the reopening of the proposed penalty, she strongly urges both counsel and the operator to revise their present contest system so that it is more reliable.

Having reviewed Rockhouse'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.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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February 18, 2010

SECRETARY OF LABOR,	:	Docket No. WEVA 2009-527
MINE SAFETY AND HEALTH	:	A.C. No. 46-08522-150745
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2009-528
	:	A.C. No. 46-08522-162132
	:	
	:	Docket No. WEVA 2009-529
v.	:	A.C. No. 46-08909-150748
	:	
	:	Docket No. WEVA 2009-530
	:	A.C. No. 46-08909-159267
	:	
WEST VIRGINIA MINE POWER, INC.	:	Docket No. WEVA 2009-531
	:	A.C. No. 46-08909-162134

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

ORDER

BY: Jordan, Chairman; Young and Cohen, Commissioners

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 24, 2008, the Commission received from West Virginia Mine Power, Inc. (“WVMP”) a motion by counsel seeking to reopen five penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

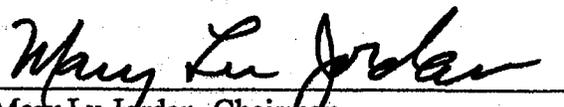
¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2009-527, WEVA 2009-528, WEVA 2009-529, WEVA 2009-530, and WEVA 2009-531, all captioned *West Virginia Mine Power, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

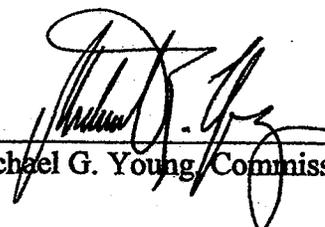
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a)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

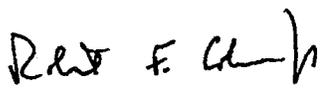
WVMP explains that at the time the proposed penalty assessments were issued the mines were under new management and did not have an effective means of receiving and processing the assessment forms in a timely manner. It further claims that due to excusable neglect, inadvertence or mistake related to the new management and safety teams running the mines, it did not timely contest the proposed assessments it seeks to reopen. It contends that in November 2008, the Safety Director for the mines conferred with counsel to review the delinquent cases and decided to pay some of the delinquent cases and to reopen the five identified in its motion. In the affidavit attached to the motion, the Safety Director states that he has instituted a new system to better handle the assessment forms at the mines to prevent future delinquencies.

The Secretary opposes reopening the proposed penalty assessment, maintaining that WVMP has failed to establish the existence of “exceptional circumstances.” Specifically, the Secretary contends that WVMP’s “inadequate or unreliable internal procedures” do not justify reopening. She also notes that as of the time she filed her response, the operator had ignored the assessments it had received for the past 8.5 months and had a total of 88 outstanding assessments totaling \$97,670 for the two mines at issue.

Having reviewed WVMP's request and the Secretary's response, we deny the motion with prejudice. We have held that an inadequate or unreliable system for receiving and processing proposed assessments does not constitute inadvertence, mistake or excusable neglect so as to justify the reopening of an assessment which has become final under section 105(c) of the Mine Act. *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1061 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1066 (Dec. 2008). The Secretary correctly points out that WVMP has conceded that it "did not have an effective means of receiving . . . and processing" assessments in a timely manner. Mot. at 1. Furthermore, the lack of such an effective system appears to have been a chronic and longstanding problem. WVMP did not respond to the Secretary's allegation that it has ignored 88 outstanding assessments for over 8 months, and we therefore accept the Secretary's representation as true and conclude that WVMP has failed to establish good cause for reopening the proposed penalty assessments.


Mary Lu Jordan, Chairman

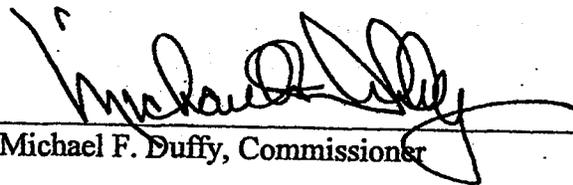

Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

Commissioner Duffy, dissenting:

WVMP's explanation that it failed to file timely contests due to "new mine management," without any further elaboration, does not provide the Commission with an adequate basis to justify reopening of the assessment. However, in such cases, our denials have usually been without prejudice. *See, e.g., Eastern Associated Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

My colleagues are rightly concerned that in this case a number of assessments, covering a large number of proposed penalties, were not properly processed. However, unlike they, I would not go so far as to deny the requests to reopen with prejudice, based on our treatment of other operators who have admitted to a "chronic and longstanding problem" in responding to penalty assessments. *See slip op.* at 3 (citing cases). In those cases, there was no claim that the operator had new management. Moreover, here the operator has already demonstrated an improvement in responding to assessments in 2009. *See West Virginia Mine Power, Inc.* 31 FMSHRC 600, 601 (June 2009) (granting motion to reopen where contest was filed one day late). Consequently, I cannot agree that the admission of inadequate procedures in the earlier motion to reopen justifies denial of that motion with prejudice.



Michael F. Duffy, Commissioner

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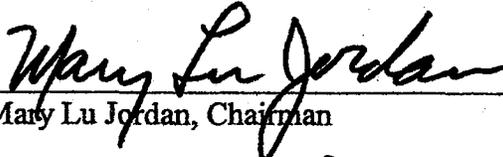
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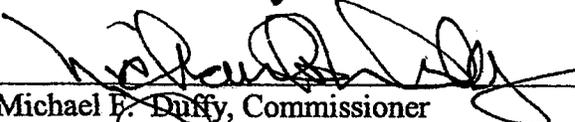
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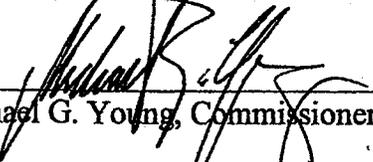
On December 3, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000170281 to Mingo Logan, proposing penalties for 30 citations that had been issued to the operator for alleged violations at its Mountaineer II Mine. According to the affidavit from that mine's safety manager, on December 11, 2008, he had sent MSHA a contest form indicating Mingo Logan's desire to contest 16 of the proposed penalties. Attached to the affidavit is a copy of the contest form with certain boxes checked and a handwritten note allegedly indicating when the form was mailed. The affidavit further states that on the same day Mingo Logan sent MSHA a check for the uncontested penalties. Nevertheless, Mingo Logan received a delinquency notice from MSHA dated February 26, 2009, regarding the penalties on the assessment form that Mingo Logan claimed it had contested. Upon receipt of the delinquency notice, Mingo Logan immediately contacted MSHA, and then filed this motion to reopen the penalty assessment.

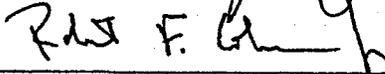
The Secretary states that she does not oppose the reopening of the assessment, but notes that there is no record of MSHA having received the contest form. She also notes that this is the second time in the last year that the operator has brought a motion to reopen claiming that it mailed the contest form to MSHA but there is no record of MSHA receiving the contest. *Mingo Logan Coal Co.*, 31 FMSHRC 575 (June 2009). The Secretary urges that the operator ensure that in the future it submits the contest form to MSHA's Civil Penalty Compliance Office in Arlington, Virginia.

Having reviewed Mingo Logan's motion 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.


Mary Lu Jordan, Chairman


Michael E. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

February 18, 2010

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

v.

WHITE BUCK COAL COMPANY

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:
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Docket No. WEVA-2009-1314

A.C. No. 46-08365-148880

BEFORE: Jordan, Chairman; Duffy, 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 April 28, 2009, the Commission received from White Buck Coal Company (“White Buck”) a request to reopen a penalty assessment that has become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

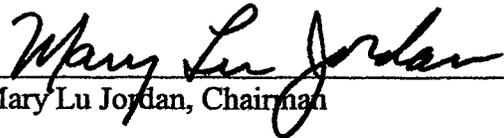
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

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

On April 29, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 00148880, which covered 65 citations. White Buck asserts that due to a turnover in its safety directors it did not become aware of the delinquent penalty assessment until nearly eleven months after the assessment became a final order. The Secretary states that she does not oppose the reopening of the proposed penalty assessment but urges the operator to take all steps necessary to ensure that future penalty assessments are contested in a timely manner.¹

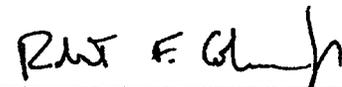
¹ We consider the Secretary's position in this case in light of the provisions of the "Informal Agreement between Dinsmore & Shohl Attorneys and Department of Labor – MSHA – Attorneys Regarding Matters Involving Massey Energy Company Subsidiaries" dated September 13, 2006. Therein, the Secretary agreed not to object to any motion to reopen a matter in which any Massey Energy subsidiary failed to timely return MSHA Form 1000-179 or inadvertently paid a penalty it intended to contest so long as the motion to reopen is filed within a reasonable time. Thus, we assume that the Secretary is not considering the substantive merits of a motion to reopen from any Massey Energy subsidiary so long as the motion is filed within a reasonable time. Such agreements obviously are not binding on the Commission, and the Secretary's position in conformance with the agreement in this case has no bearing on our determination on the merits of the operator's proffered excuse. The Commission has been informed that, since the time the Secretary filed her response, she has rescinded the agreement.

Having reviewed White Buck'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 White Buck's failure to timely contest the penalty proposal, whether the delay in seeking reopening was reasonable,² 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.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

² Among other things, the Administrative Law Judge handling the case should determine whether the operator received delinquency letters from MSHA or collection notices from the Department of the Treasury that would have provided notice to the operator that the proposed assessment had been issued and was delinquent.

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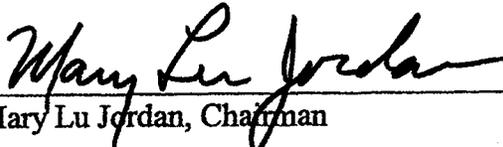
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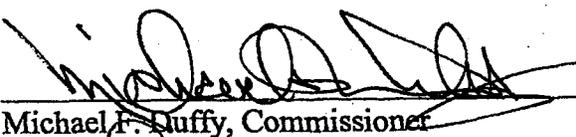
Chief Administrative Law Judge Robert J. Lesnick
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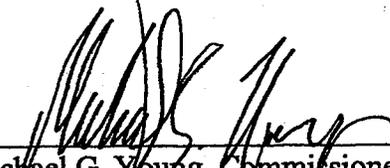
merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

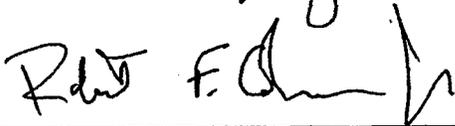
The record indicates that the operator's contest form was received by the Postal Service but subsequently lost in the mail. The operator's safety representative did not learn that the contest form had not been submitted until he received a delinquency notice from the Secretary. The motion to reopen was filed promptly. The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

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


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


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Robert F. Cohen, Jr., Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 5, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2006-148-M
Petitioner	:	A.C. No. 40-03268-80642
	:	
v.	:	Docket No. SE 2006-163-M
	:	A.C. No. 40-03268-82949
SCP INVESTMENTS, LLC,	:	
Respondent	:	Old County Quarry

DECISION ON REMAND

Before: Judge Feldman

These consolidated civil penalty matters have been remanded by the Commission for further consideration. 31 FMSHRC 821 (Aug. 2009). These matters concern two statutory provisions of section 103(f) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 813(f) ("Mine Act" or "Act"), concerning walkaround rights and jurisdiction. More specifically, these cases concern the impact, if any, on the viability of citations issued as a consequence of an inspection that was conducted after the impermissible denial of the statutory section 103(f) right of Pat Stone, as a representative and owner-operator of the Old County Quarry, to accompany the inspector during his inspection.

At issue are eleven citations alleging several violations of the Secretary's mandatory safety standards, and a 104(g)(1) order issued because of a failure to provide personnel with new miner training. The Secretary seeks to assess a total civil penalty of \$1,087.00 for the alleged violations. The cited violative conditions have been corrected and the subject citations and order have been terminated. Consequently, there are no unresolved continuing safety issues.

The initial decision vacated the eleven citations and the one order in issue. The citations and order issued during the inspection were vacated based on an abuse of the mine inspector's discretion in denying walkaround rights. 30 FMSHRC 544 (June 2008) (ALJ). The initial decision stated:

Section 103(f) does not mandate that an inspector must be accompanied by a mine operator during an inspection. Thus, I am cognizant that the failure of a mine operator to accompany an inspector is not a jurisdictional bar to the issuance of citations for violations of the Secretary's mandatory safety standards observed during the inspection. *See Emery Mining*, 10 FMSHRC at 289. However,

section 103(f) provides the “opportunity” for the mine operator to exercise its right to be present during an inspection. This right cannot arbitrarily be denied. In other words, the jurisdiction to enforce does not provide a license to abuse.

30 FMSHRC at 548, fn. 3.

Although the Commission reinstated the citations and order vacated in the initial decision and remanded these matters for further action, it did so on jurisdictional grounds. 31 FMSHRC 821. It did not reach a majority consensus concerning the action I now should take. *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff’d on other grounds*, 969 F.2d 1501 (3rd Cir. 1992) (“*Penelec*”) (disposition by the Commission requires a majority vote). Two Commissioners suggested that I conduct an exclusionary hearing to determine what prejudice, if any, resulted from the denial of walkaround rights. 31 FMSHRC at 822. One Commissioner suggested that I exercise my discretion to determine the appropriate civil penalty given the mine operator’s lack of an opportunity to present probative evidence during the inspection. *Id.* The remaining Commissioner concluded the refusal of walkaround rights has no effect in this case. *Id.*

Although the Commission’s remand lacked a majority consensus, a majority of the Commissioners agreed with respect to two issues that now are the law of the case. The Commissioners unanimously concluded there was jurisdiction to conduct the inspection. A majority of the Commissioners also concluded that Stone’s statutory 103(f) walkaround rights were violated. *See, eg.*, 31 FMSHRC at 827, 838.

I. Statutory Framework

These matters concern two statutory provisions of section 103(f) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 813(f) (“Mine Act” or “Act”). The first provision of section 103(f) provides that: “[s]ubject to regulations issued by the Secretary, a representative of the operator . . . shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to subsection (a), for the purpose of aiding such inspection” 30 U.S.C. § 813(f). The second provision of section 103(f) specifies that compliance with this subsection is not “a jurisdictional prerequisite” to enforcement. *Id.*

With respect to the first provision, the right of a mine operator, or, a miner’s representative, to accompany an inspector is a fundamental right that is recognized in Commission case law as well as the legislative history. In this regard, it has been noted that “[t]he right to accompany an inspector on all 103 inspections has been consistently recognized by the Commission and the courts.” *Consolidation Coal Co.*, 16 FMSHRC 713, 719 (Apr. 1994).

The failure to comply with MSHA filing requirements, that occurred by virtue of Stone's failure to register as a mine operator, is not a basis for denying section 103(f) "walkaround rights." *Emery Mining Corporation*, 10 FMSHRC 276, 277 (Mar. 1988) (failure of a non-employee miners' representative to file identifying information required by 30 C.F.R. Part 40 does not permit an operator to refuse the representative entry to its mine for purposes of exercising section 103(f) walkaround rights). Nor does an assertion that an area to be inspected is too dangerous provide an adequate justification for denying walkaround rights. *Consol. Coal*, 16 FMSHRC at 718-19.

As noted by the Commission, the legislative history of the 1977 Mine Act mandates that MSHA *is required to permit* representatives of miners and operators to accompany inspectors. The legislative history states that the Mine Act:

contains a provision based on that in the [Federal Coal Mine Health and Safety] Act [of 1969 ("Coal Act")] *requiring that representatives of the operator and miners be permitted to accompany inspectors* in order to assist in conducting a full inspection. It is not intended, however, that *the absence of such participation* vitiate any citations and penalties issued as a result of an inspection.

31 FMSHRC at 831-32 (citing S. Rep. No. 95-181, at 28 (1977), *reprinted in* Senate Subcomm. On Labor, Comm. On Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 616 (1978)) (emphasis added).

There is a crucial substantive difference between the legislative history's reference to "*the absence of such [walkaround] participation*" that "is not intended [to vitiate] any citations and penalties," and, *the unauthorized denial of such walkaround rights* that a majority of the Commission has determined occurred in this case. The Commission also recognized the substantive distinction between an operator's unavailability, or its decision not to participate in an inspection, and MSHA's refusal to allow its participation. While an operator's absence generally is benign, the Commission concluded that the arbitrary and unreasonable refusal in this case constituted an "impermissible" violation of the mine operator's section 103(f) statutory walkaround right. 31 FMSHRC at 827, 829, 830-31, 838. In fact, two Commissioners concluded Stone's treatment lacked "common decency."¹ 31 FMSHRC at 829.

¹ Specifically, two Commissioners concluded "common decency compels the conclusion that Mr. Stone be given something in writing providing him the legal basis for his exclusion from the inspection" 31 FMSHRC at 829.

The important substantive distinction between “absence” and “denial” brings us to the second operative provision of section 103(f) that “[c]ompliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this act.” 30 U.S.C. § 813(f). Obviously, the only party that can object to jurisdiction under section 103(f) is the mine operator. The only reasonable meaning of this provision is that a mine operator cannot successfully attack citations on jurisdictional grounds simply because it was not available during an inspection or refused to participate.² Surely, it does not give the Secretary the authority to arbitrarily deny a fundamental statutory walkaround right that the legislative authors noted the Secretary was ‘required’ to respect.

The disposition of this matter is not affected because the subject citations were issued pursuant to the authority to conduct mine inspections delegated to the Secretary in section 103(f). The Commission was created by Congress as an “independent adjudicative body authorized to hear disputes arising under the Mine Act.” *Emery West Mining Corp. v. FMSHRC*, 40 F3d 457, 459 (D.C. Cir. 1994) citing 30 U.S.C. §§ 815(d), 823. The Commission is authorized by Congress to review, upon a mine operator’s contest, enforcement actions of the Secretary to determine if citations should be affirmed, modified, or vacated. 30 U.S.C. §§ 813(a), 814(a), 815(d). The rights of miners’ representatives and representatives of mine operators to accompany inspectors are equally important, and, their participation in inspections enhances safety. In exercising its responsibilities, the Commission routinely considers whether citations should be set aside based on abuse of discretion, prejudice, or due process considerations. The Secretary’s view that these fundamental fairness issues are immaterial in this case must be rejected.

II. September 1, 2009, Show Cause Order

In view of the determination by a Commission majority that the Stone’s section 103(f) walkaround right was impermissibly violated, on September 1, 2009, the Secretary was ordered to show cause why the citations issued as a consequence of the December 2005 inspection should not be vacated on abuse of discretion, prejudice, and/or due process grounds. 31 FMSHRC 1273. The Order to Show Cause noted that the denial of Stone’s walkaround right does not effect the propriety of the Part 46 training violations in 104(g)(1) Order No. 6122908 and Citation No. 6122916 as these violations were not cited as a consequence of the physical inspection of the mine. *Id.* at 1275. An analysis of the Secretary’s responses to questions posed in the Order to Show Cause follows.

² I previously have denied a mine operator’s attempt to prevent an inspection because it refused to provide a representative to accompany the inspector. *F.R. Carroll, Inc.*, 26 FMSHRC 97 (Feb. 2004) (ALJ).

a. Abuse of Discretion

The show cause order requested the Secretary to state whether she believed the inspector's denial of Stone's walkaround right constituted an abuse of discretion in light of the Commission's determination that Stone's 103(f) right was violated, Commission case law, and the Secretary's history of prosecution of cases involving a denial of a miners representative's 103(f) walkaround rights. 31 FMSHRC at 827, 829, 830-31, 838. Specifically, the Secretary was requested to address *Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991), quoting *Bothyo v. Moyer*, 772 F.2d 353, 355 (7th Cir. 1985) (an "abuse of discretion" has occurred when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law."). 31 FMSHRC at 1275. (Emphasis added).

The Secretary responded that the inspector does not have the discretion to violate the statute assuming, for the sake of argument, that Stone's right was impermissibly violated. *Sec'y Resp.*, at 1-2.

The Secretary's reticence to concede the occurrence of the abuse of discretion in this case is disconcerting. Section 103(f), as well as its legislative history, *requires* the Secretary to afford representatives of the operator and miners an opportunity to accompany an inspector subject to the Secretary's regulations. Initially, the Secretary alleged Stone was disqualified from observing the inspection due to a lack of Part 46 new miner training. 30 C.F.R. Part 46. The Secretary now admits, albeit hesitantly, that Part 46 new miner training is not required to accompany an inspector.³ The Secretary has not proffered any regulation that justifies the denial of Stone's right to participate in the inspection. The Secretary's stance in this proceeding with regard to her own denial of Stone's section 103(f) rights is ironic in view of her history of prosecution of alleged 103(f) violations against mine operators. *See, eg., Consol. Coal*, 16 FMSHRC at 714 (issuance of 104(a) citation for failure of an operator to allow an authorized representative of miners to accompany an authorized representative of the Secretary). In the final analysis, the Commission has concluded that the denial of Stone's walkaround right was an impermissible violation of section 103(f). Since the inspector's action was contrary to the applicable statutory provisions, the denial of Stone's rights was based on an "improper understanding of the law" that constitutes an abuse of discretion. *Utah Power & Light*, 13 FMSHRC at 1623 n.6.

Assuming the inspector abused his discretion, the Secretary was requested to address whether longstanding case law supports the proposition that a citation can be vacated based on a mine inspector's relevant and material abuse of discretion. Specifically, the Secretary was asked to address the decisions in *Energy West Mining Company*, 18 FMSHRC 565, 569 (Apr. 1996) and its progeny (abuse of discretion as a basis for vacating a 104(b) order otherwise validly issued); and *Rochester & Pittsburgh Coal Company*, 11 FMSHRC 2159, 2163-64 (Nov. 1989)

³ As noted by the Commission, although initially asserting the contrary, the Secretary now concedes that the denial of Stone's walkaround right cannot be based on his lack of 30 C.F.R. § 46.5 new miner training. 31 FMSHRC 828-29.

quoting *Old Ben Coal Corp. v. Interior Bd. of Mine Op. App.*, 523 F.2d at 31 (7th Cir. 1975) and its progeny (findings and decisions of an inspector are supportable unless there is evidence that he abused his discretion or authority). 31 FMSHRC at 1275.

The Secretary's response seeks to distinguish the abuse of discretion in this case from abuses of discretion in *Energy West* and *Rochester & Pittsburgh Coal* concerning the reasonableness of 104(b) orders and imminent danger orders, respectively. In this case, the Secretary asserts that the abuse of discretion was the decision to exclude the operator from the inspection rather than an error in judgement related to the merits of the subject citations. *Sec'y Resp.*, at 3.

The Secretary misses the point. The abuse of discretion with respect to 104(b) orders, imminent danger orders, and the subject citations, that were issued without the operator's presence and participation, all involve issues of fundamental fairness. A 104(b) order can be vacated if the MSHA inspector requires an unreasonably short abatement period. A 107(a) imminent danger order can be set aside if an inspector unreasonably concluded that the hazard created by the violation could cause death or serious injury before the condition can be abated. In each instance, subjecting the mine operator to withdrawal orders was unjustified by the circumstances.

Here too, Stone's withdrawal from his mine property was unjustified. Significantly, the subject citations posed no significant danger to Stone. For example, the health and safety hazards created by no on-site toilet facilities, inadequate guarding, an absence of traffic signs, a lack of "no smoking" signs, and fire extinguishers that were not periodically tested, clearly did not present any walkaround dangers. In the absence of any extraordinarily hazardous conditions, the Secretary has not presented a rational basis for the denial of Stone's walkaround right.

Moreover, the Secretary's contention that a denial of walkaround rights is warranted because an inspector cannot predict what hazardous conditions exist before entering a mine is unavailing. As a threshold matter, such an approach would justify the denial of all walkaround rights. Moreover, a representative of a mine operator can alert an inspector to potential dangers based his familiarity with the mine. Consequently, as in the cases vacating 104(b) and 107(a) withdrawal orders, imposing liability on the mine operator, given the unwarranted forced withdrawal of Stone from the mine site, is not justified by the circumstances. Accordingly, the inspector's abuse of discretion provides an adequate basis for vacating the subject citations.

b. Due Process

In its remand, two of the Commissioners suggested "[t]he only possible basis to overcome the [jurisdictional] statutory language would have to be constitutional in nature, such as the Due Process Clause." 31 FMSHRC at 834, fn. 14. Although the inspector's jurisdiction to conduct the December 2005 inspection in issue is beyond dispute, Commission case law reflects that violations of due process are grounds for vacating citations otherwise jurisdictionally and substantively valid. *American Coal Company*, 29 FMSHRC 941, 952-53 (Dec. 2007) citing

Gates & Fox Co. V. OSHRC, 790 F.2d 1189, 1193 (9th Cir. 1982). (considerations of due process prevents imposition of a civil penalty and validation of a citation otherwise properly issued). Consequently, the Order to Show Cause, requested the Secretary to address whether the MSHA inspector's unreasonable denial of the mine operator's statutory section 103(f) walkaround right constitutes a due process violation. 31 FMSHRC at 1275.

The Secretary responded that:

Assuming that the inspector's determination was contrary to § 103(f), there is no evidence that the determination was based on anything other than the inspector's misunderstanding of the law. Even assuming the inspector's misunderstanding of the law constituted negligence, negligence does not support a substantive due process claim.

Sec'y Resp., at 7, citing County of Sacramento v. Lewis, 523 U.S. 833, 845-50 (1998); Davidson v. Cannon, 474 U.S. 344, 347-48 (1986); Daniels v. Williams, 474 U.S.327, 330-32 (1986).

The Secretary's reliance on the aforementioned cases involving negligence is misplaced. They involve the death or injury of victims of alleged negligence by government officials as a consequence of a vehicular police chase and unsafe prison conditions. In each of these cases, the court concluded that the negligence of government officials does not give rise to Fifth Amendment "right to life" claims. These cases do not concern the arbitrary denial of a statutory right.

Moreover, the Secretary's assertion that a negligent misunderstanding of the law is not a material consideration when due process issues arise is surprising. The inadmissible confession obtained in violation of the right to counsel, the illegally obtained evidence acquired without a search warrant, and the instant arbitrary denial of a fundamental statutory right, cannot be overlooked based on a claim of carelessness. It is clear that the denial of Stone's right to accompany the inspector deprived the mine operator of its statutory right to provide exculpatory information during the course of the inspection. Nor are, as the Secretary suggests, subsequent post-inspection close-out conferences with MSHA officials to discuss the merits of citations substitutes for 103(f) statutory rights. *Sec'y Resp.*, at 5-6.

In addition to relying on "excusable negligence", the Secretary, citing *Valot v. Southeast Local Sch. Dist. Bd. Of Educ.*, 107 F.3d 1220, 1228 (6th Cir. 1997), notes that there are two categories of substantive due process claims. Within the first category are deprivations of a particular constitutional guarantee. *Id.* The second category consists of actions that "shock the conscience." *Id.* The Secretary asserts that neither category is applicable to the facts in this case. *Sec'y Resp.*, at 4-5.

The Fifth Amendment provides, in pertinent part, that “no person shall be . . . deprived of life, liberty, or property, without due process of law” Stone was removed from his property against his will as a result of an abuse of governmental authority. Even though it was of short duration, Stone’s removal must not be viewed as a trivial matter. Consequently, the inspector’s action could reasonably be viewed as a violation of Stone’s Fifth Amendment Constitutional property right.

However, even if the section 103(f) walkaround right violation does not constitute a due process deprivation of a right to property under the Fifth Amendment, it nevertheless constitutes a denial of due process because of the erroneous denial of Stone’s right to participate in the inspection. The Supreme Court has identified the elements of government conduct that can result in violations of due process. The Court has stated:

. . . the truism [is] that “due process,” unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). “(D)ue process is flexible and calls for such procedural protections as the particular situation demands.” Morrissey v. Brewer, 408 U.S. 471, 581, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. Arnett v. Kennedy, supra, 416 U.S., at 167-168, 94 S.Ct., at 1650-1651 (Powell, J., concurring in part); Goldberg v. Kelly, supra, 397 U.S. at 263-266, 90 S.Ct., at 1018-1020; Cafeteria Workers v. McElroy, supra, 367 U.S., at 895, 81 S.Ct., at 1748-1749. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors. First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value if, any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. See, e.g., Goldberg v. Kelly, supra, 397 U.S., at 263-271, 90 S.Ct., at 1018-1022.

Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (emphasis added).

Thus, the Court has identified three factors for determining whether a violation of due process has occurred. With respect to the first “private interest” factor, a major objective of the Mine Act is to encourage the efforts of mine operators and miners “. . . to prevent the existence of . . . [hazardous] conditions and practices in . . . mines.” 30 U.S.C. § 801(e). That is why section 103(f) of the Act confers the right of representatives of mine operators and miners to accompany inspectors during inspections “for the purpose of aiding such inspection.” 30 U.S.C. § 813(f). In fact, the Commission recently noted that it examines decisions of

administrative law judges for abuses of discretion to “. . . ensure that [each decision] effectuates the purposes of the Mine Act.” *Sec’y of Labor o/b/o Gatlin v. KenAmerican Resources, Inc.*, 31 FMSHRC 1050, 1053-54 (Oct. 2009) citing *Sec’y of Labor o/b/o Rieke v. Akzo Nobel Salt, Inc.*, 19 FMSHRC 1254, 1258 (July 1997). An MSHA inspector must not be held to a lesser standard. Consequently, the deprivation of Stone’s private interest to accompany the inspector for the purpose of providing material information and “for the purpose of aiding [in the] inspection” is readily apparent. 30 U.S.C. § 813(f).

Second, the Commission has already concluded that the inspector erroneously deprived Stone of his right to participate in the inspection. 31 FMSHRC at 827, 838. The Secretary’s assertion, in essence, that a close-out conference is an acceptable substitute for walkaround rights that provides a procedural safeguard to protect Stone’s rights is unavailing. The legislative history makes clear that Congress did not intend to empower the Secretary to arbitrarily deny Section 103(f) walkaround rights in favor of a substitute procedure.

Finally, and most importantly, there is no Government interest that justifies the denial of Stone’s right. In this regard, notwithstanding that new miner training is not a prerequisite to mine inspection participation, the Secretary has, in effect, conceded that Stone was a qualified miner. Significantly, MSHA allowed Stone to provide Part 46 new miner and hazard training to his personnel despite the fact that Stone had never received formal Part 46 training. 30 C.F.R. §§ 46.5, 46.11; *see also* 31 FMSHRC at 830. In fact, Stone’s participation furthers, rather than burdens, the Government’s interest in encouraging a safer mining environment. As previously noted, a mine operator is familiar with the particular conditions that are unique to each mine. Consequently, the mine operator is an asset to a successful mine inspection that seeks to identify hazardous conditions and to address the necessary remedial actions required to alleviate the dangers. *Id.* Allowing walkaround rights does not result in any administrative burden. Finally, vacating the subject citations as a consequence of this due process violation does not adversely affect safety as these citations have been terminated because the necessary abatement actions have been taken to correct the alleged violative conditions.

Consequently, even if the inspector’s action did not specifically violate the Fifth Amendment, Stone was the victim of an abuse of government authority that constitutes a due process violation. Longstanding Commission case law dictates that violations of due process are grounds for vacating citations otherwise substantively valid. *American Coal Company*, 29 FMSHRC at 952-53 (lack of due process notice of MSHA’s interpretation of a regulation). Accordingly, the subject violations can be vacated on due process grounds.

(1) Exclusion of Evidence

The Commission did not reach a majority consensus on how to proceed in light of the potential due process violation in this case. Two Commissioners suggested an exclusionary hearing to determine what information, if any, Stone would have provided during the inspection in defense of each citation. 31 FMSHRC at 836-37. Having been deprived of the opportunity,

we will never know what information Stone would have provided during the December 2005 inspection. Any testimony he now may give concerning what he might have said is entitled to little weight because it is remote in time and self-serving. In other words, the Secretary's denial of Stone's due process has undermined the value of Stone's testimony. Certainly, the Government should not benefit from its own misconduct. Rather, two Commissioners suggested that I determine, in view of the denial of Stone's 103(f) walkaround right, whether "none, some, or all of the evidence resulting from the inspection" should be excluded. 31 FMSHRC at 836-37.

Once due process issues arise, all direct and indirect evidence obtained as a result of a government official's abuse is excluded. *See, eg., Weeks v. United States*, 232 U.S. 383 (1914); *Nardone v. United States*, 308 U.S. 338, 341 (1939) (suppression of "fruit of poison tree"); *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). The material facts are not in dispute and the mine operator is appearing *pro se*. Consequently, the exclusionary hearing suggested by the Commissioners to determine whether a due process violation has occurred has been accomplished, in effect, as a result of the Secretary's opportunity to provide answers to the September 1, 2009, Order to Show Cause. 31 FMSHRC 1273. Having given the Secretary the opportunity to address the due process issue, and, having determined that Stone's right to due process was violated, all evidence obtained as a result of the inspector's observations of the mine conditions during the inspection must be excluded. *Weeks, supra*.

c. Prejudice

The Order to Show Cause requested the Secretary to address whether an unreasonable denial of a mine operator's walkaround right is prejudicial *per se*, and whether prejudice provides a basis for vacating the citations in issue. 31 FMSHRC at 1276. The Secretary responded that the arbitrary denial of walkaround rights is not prejudice *per se* in view of the Commission's remand. Although one Commissioner concluded the mine operator was prejudiced, the remaining Commissioners did not specifically address this issue. With respect to whether prejudice provides a basis for vacating the subject citations, the Secretary responded that the operator has not been prejudiced because it has not shown an inability to defend itself in these proceedings.

The exercise of a section 103(f) right is not contingent on an operator's showing of a need to accompany the inspector for the purposes of litigation. Although walkaround rights are qualified rather than absolute, they can only be denied pursuant to the Secretary's regulations, or in instances where there is a legitimate government need to preclude the mine operator's participation. Government officials must not be permitted to arbitrarily decide when statutory rights will be granted. Consequently, the unreasonable denial of a section 103(f) walkaround right is prejudicial *per se* regardless of whether it interferes with an operator's ability to defend itself. Moreover, the operator's ability to defend itself has been adversely affected by the absence of its opportunity to provide material contemporaneous information at the time of the inspection.

Finally, the Commission may deny MSHA's issuance of a modified citation if it results in legally recognizable prejudice to the operator. The Secretary may be precluded from modifying a citation to allege a different standard upon a showing of prejudice even if the facts support a violation of the modified standard. *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990). In other words, prejudice provides a basis for precluding enforcement regardless of whether a cited safety standard was in fact violated.

Thus, the Secretary's section 103(f) violation is both prejudicial *per se*, and, prejudicial based on its adverse impact on the operator's ability to defend. Consequently, consistent with Commission case law, the resultant prejudice provides an additional basis for vacating the subject citations.

III. Part 46 Training Violations

As stated above, the September 1, 2009, Order to Show Cause noted that the denial of Stone's walkaround right does not effect the propriety of the Part 46 training violations in 104(g)(1) Order No. 6122908 and Citation No. 6122916 as these violations were not cited as a consequence of the physical inspection of the mine. 31 FMSHRC at 1275. Consequently, during an October 23, 2009, telephone conference with Stone and the Secretary's counsel, I explained that there is no basis for disturbing the operator's liability for these two violations if it is not contended that Part 46 training had occurred. As a result, Stone reluctantly agreed to withdraw the operator's contest of 104(g)(1) Order No. 6122908 and Citation No. 6122916, and to pay the total \$281.00 civil penalty for these two training violations. Letter from Pat Stone to Judge Feldman (Oct. 24, 2009).

IV. Ultimate Findings and Conclusions

In the final analysis, the Commission is a quasi-judicial independent agency created by Congress to adjudicate Mine Act disputes. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994). Although an executive branch agency, Commission decisions are reviewable by the Court of Appeals. *Id.* at 208 citing 30 U.S.C. § 816(a)(1). Due process, abuse of discretion and prejudice are related concepts that are applied by the judiciary to remedy abuses of governmental authority. As recognized throughout these proceedings, while the decision to allow walkaround rights is committed to the broad discretion of the inspector, the right to accompany an inspector is an important right that must not arbitrarily be denied. 30 FMSHRC at 550.

As noted in the Commission's remand in this matter:

... the Commission has recognized the critical role that section 103(f) plays in the overall enforcement scheme of the Act, and has cautioned that "[w]e are not prepared to restrict the rights afforded by that section absent a clear indication in the statutory language or legislative history of an intent to do so, or absent an appropriate limitation imposed by Secretarial regulation.

31 FMSHRC at 827 citing *Consolidation Coal Co.*, 3 FMSHRC 617, 618 (Mar. 1981). The Secretary has failed to provide any rational justification for the denial of Stone's right to accompany the inspector. Accordingly, the subject citations shall be vacated as a consequence of the denial of Stone's section 103(f) right to be present during the inspection. The alternative is to ignore the denial of this important statutory right.

As a final note, due process violations and abuses of discretion generally occur as a result of errors in judgement or misunderstandings of the law rather than because of intentional wrongdoing, bad faith or misconduct. *United States v. Nolen*, 472 F.3d 362, 376 (5th Cir. 2006) (citations omitted). I am certain the inspector had a good faith belief that Stone was not entitled to exercise his walkaround right because the mine operator had not filed a mine identity report, and/or, because Stone had not received Part 46 new miner training. The inspector was wrong.

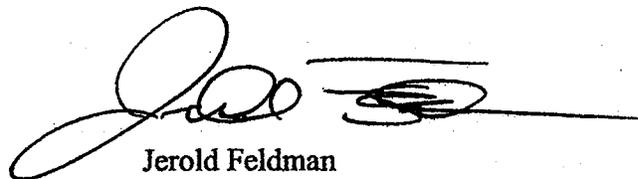
ORDER

In view of the above, **IT IS ORDERED** that Citation Nos. 6122909, 6122910 and 6122911 (alleged guarding violations), 6122912 (alleged warning sign violation), 6122913 (alleged traffic control violation), 6122914 (alleged lack of a work place examination program), 6122915 (alleged failure of periodic fire extinguisher examinations), 6122917 (alleged failure to implement a hazardous chemical identification and training program), 6122918 (alleged lack of first aid materials), and 6122919 (alleged lack of toilet facilities) **ARE VACATED** on due process, abuse of discretion and/or prejudice grounds.

IT IS FURTHER ORDERED that the contests of SCP Investments, LLC, of the Part 46 training violations in 104(g)(1) Order No. 6122908 (lack of new miner training) and Citation No. 6122916 (lack of approved training plan) **ARE DISMISSED**.

IT IS FURTHER ORDERED that SCP Investments, LLC, shall pay, within 45 days of the date of this decision, a total civil penalty of \$281.00 in satisfaction of 104(g)(1) Order No. 6122908 and Citation No. 6122916.

IT IS FURTHER ORDERED that upon timely payment of the \$281.00 civil penalty, the civil penalty proceedings in Docket Nos. SE 2006-148-M and SE 2006-163-M **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

Distribution: (Certified Mail)

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/rps

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9950 / FAX: 202-434-9949

January 20, 2009

BLACK CASTLE MINING CO., Contestant	:	CONTEST PROCEEDING
	:	
v.	:	Docket No. WEVA 2006-891-R Citation No. 7247101; 07/12/2006
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Black Castle Mining Co. Mine ID: 46-07938
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
v.	:	Docket No. WEVA 2007-288 A.C. No. 46-07938-109302
	:	
BLACK CASTLE MINING CO., Respondent	:	Mine: Black Castle Mining Co.
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	CIVIL PENALTY PROCEEDING
	:	
v.	:	Docket No. WEVA 2007-421 A.C. No. 46-07938-115566A
	:	
MICHAEL VIRA, employed by BLACK CASTLE MINING CO., Respondent	:	Mine: Black Castle Mining Co.

DECISION

Appearances: Robert S. Wilson, Esq., and Lucy C. Chiu, Esq., Office of the Solicitor, Arlington, Virginia, for Petitioner;
Carol Ann Marunich, Esq., and Robert M. Stonestreet, Esq., Dinsmore & Shohl, LLP, Morgantown and Charleston, West Virginia, for Respondent Black Castle Mining Company;
David J. Hardy, Esq., and Christopher D. Pence, Esq., Allen, Guthrie, McHugh & Thomas, PLLC, Charleston, West Virginia, for Respondent Michael Vira.

Before: Judge Hodgdon

These consolidated cases are before me on a Notice of Contest, brought by Black Castle Mining Co., and two Petitions for Assessment of Civil Penalty, brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Black Castle Mining Co., and Michael Vira, an employee of Black Castle Mining, pursuant to sections 105 and 110(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §§ 815 and 820(c). The cases involve an alleged violation of the Secretary's mandatory health and safety standards and seek penalties of \$60,000.00 from Black Castle Mining and \$9,000.00 from Michael Vira. A trial was held in Charleston, West Virginia. For the reasons set forth below, I vacate the citation, grant the contest and dismiss the proceedings.

Background

Black Castle Mining Company operates a large surface coal mine in Boone County, West Virginia. Black Castle is a subsidiary of Massey Coal Services, Inc., and Massey Energy Company. On Wednesday, February 1, 2006, Paul Moss was fatally injured when the bulldozer he was operating, in the East of Stollings Amendment area of the mine, contacted and ruptured a 16-inch low-pressure, high-volume natural gas line which burst into flames. The parties have stipulated to the basic facts surrounding the accident, which are set out below in narrative form. (Tr. 48-58.)

On the morning of Monday, January 30, 2006, a planning meeting was held at which the start of benching operations in the East of Stollings Amendment site was discussed. The meeting was attended by William Marcum, Production Manager for Black Castle, and Michael Boothe, Drill and Blast Foreman. They decided to assign bulldozer operator Paul Moss to clear an area known as the Judy Low Gap area for an access road to lead to where Moss would clear a drill bench for mining the Clarion coal seam. The fact that a gas line, owned and operated by Equitable Gas, was buried in the area of East of Stollings Amendment site was discussed at the meeting.

On Tuesday morning, Moss began constructing an access road uphill from the Judy Low Gap area to locate the Clarion coal seam outcrop. Once he reached the seam, he was to construct a drill bench to allow drilling equipment to be brought to the site to start a new highwall. By 3:30 p.m. that afternoon, Moss had roughed in an access road in close proximity to the Stockton coal seam, which was located below the Clarion coal seam. He had not reached the Clarion seam when he stopped for the day.

On Wednesday morning, Moss returned to the area to continue construction of the access road and drill bench. Boothe observed Moss' arrival at the site and asked him over the CB radio if he was "okay." Moss replied that he was fine. Shortly after 8:30 a.m., Michael Vira, Mine Superintendent, spoke to Moss over the CB and told him to stay 100 feet away from the gas line. Later that morning, Mike Black, General Mine Foreman, called Moss on the CB as he drove

through the East of Stollings Amendment and asked Moss if he was alright. Moss responded that he was doing fine. At approximately 11:30 a.m., Boothe spoke to Moss on the CB and then went to see him where he was working. Boothe and Moss talked about how far off of the coal seam Moss was currently working and Moss told Boothe that his progress would be a little slow. The accident occurred sometime after 2:00 p.m. that afternoon.

The accident was investigated by MSHA Inspector James R. Humphrey. At the conclusion of his investigation, some five months after the accident, he issued a citation to Black Castle which is the subject of this proceeding. Sometime later, a section 110(c) special investigation, 30 U.S.C. § 820(c), resulted in Vira being charged personally with the same violation.¹

Findings of Fact and Conclusions of Law

Inspector Humphrey issued Citation No. 7247101 to Black Castle on July 12, 2006. It alleges a violation of section 77.1713(a), 30 C.F.R. § 77.1713(a), of the Secretary's regulations because:

An adequate daily examination for hazardous conditions was not made of the active working area in the East of Stollings area of the mine. A bulldozer operator was working in this area, developing a drill bench at the Clarion coal seam level. The area was not adequately examined by a certified person for hazardous conditions and an existing hazardous condition, which was neither reported nor corrected, contributed to a fatal accident.

An active 16-inch diameter gas line was buried and was not adequately marked in the area where the bulldozer was being operated. The area was not adequately examined to determine the location and extent of the gas line. Mine management knew that the gas line was located in the general area where the bulldozer was being operated and knew that the gas line was not marked. The presence of the unmarked gas line constituted a hazardous condition which should have been reported and corrected during the required daily inspection. Although management conducted an onshift examination of the general area, this hazardous condition was neither reported nor corrected. Management instructed the bulldozer operator to locate the Clarion coal seam crop and to

¹ Section 110(c) provides that: "Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer or agent of such corporation who knowingly authorized, ordered or carried out such violation . . . shall be subject to the same civil penalties . . . that may be imposed upon a person under subsection[] (a)"

develop a drill bench at that level. While carrying out this task, the bulldozer contacted the gas line causing it to rupture. The natural gas ignited, flames engulfed the bulldozer and the operator received fatal injuries.

This violation is an unwarrantable failure to comply with the cited mandatory standard.

(Govt. Ex. 1.)

Section 77.1713(a) requires that:

At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

The Secretary argues that the company and Vira did not conduct an adequate on-shift examination of the access road and drill bench area because they did not mark the gas line more specifically than it was marked. It is the Secretary's position that they failed to do this despite the fact that Moss had expressed concern about the location of the gas line which should have put them on notice that additional action was necessary. It is the Respondents' view that the access road and drill bench were not active working areas within the meaning of the regulation and, even if they were, the gas line was adequately marked and the on-shift examination was satisfactory. As discussed below, I conclude that Vira's on-shift examination of the area on behalf of the company was adequate and that no violation occurred.

Active Working Area

The main thrust of the Respondents' defense in this matter is that section 77.1713(a) is not applicable because the accident did not occur in an "active working area" of the mine. The argument is based on the findings and decision in *Central Ohio Coal Co.*, 12 FMSHRC 1014 (May 1990) (ALJ). Acknowledging that section 77.2(a), 30 C.F.R. § 77.2(a), states that "active workings means any place in a coal mine where miners are normally required to work or travel," the judge held that that was not the definition of "active working area" in section 77.1713(a). *Id.* at 1017-18. He concluded that "'active working area' in § 77.1713(a) means the 'pit' or 'mining area' of a surface coal mine and not simply any location where miners are normally required to work or travel." *Id.* at 1019. Consequently, he found that a 16-mile-long railroad that generally ran through a remote area of the mine was not an "active working area" of the mine requiring

daily examination. *Id.* at 1021. Relying on this decision, the Respondents' contend that the pipeline right-of-way is analogous to the railroad track. (Black Castle Br. at 12., Vira Br. at 24.)

This argument is not persuasive. As the Secretary correctly notes, the Commission's rules state that: "A decision of a Judge is not a precedent binding on upon the Commission." 29 C.F.R. § 2700.29(d). Furthermore, even if *Central Ohio* were binding, it would not be applicable in this case since the bulldozer operator was working on a bench for drilling so that mining could be performed and thus the area was clearly a "mining area." The pipeline right-of-way was obviously close enough to the access road in the low gap area to be included in the "active working area." Whether it was close enough to the area where Moss was cropping the bench when the accident occurred is a closer question. Nevertheless, for the purposes of this decision, I will assume that it was part of the "active working area."

The preshift and on-shift examinations

Michael Vira conducted both preshift and on-shift examinations of the area on January 31, 2006, and February 1, 2006, the day of the accident.² (Stip. 47, Tr. 57.) He did not note any hazardous conditions on any of the examination reports for any of the examinations. (Govt. Ex. 6.) According to the Secretary, his examinations were inadequate because he neither mentioned nor additionally marked the gas line.

Brian Miller, Superintendent of pipelines for Equitable Resources, testified that the 32 mile pipeline had been on the north section of the Black Castle mine, going east to west, since at least the 1940's. (Tr. 80-81.) He said that the pipeline was marked with "paint, ribbons, flags or sometimes carsonite markers that stay permanent." (Tr. 83.) He stated that the pipeline was also marked by mowing the vegetation along it and for a distance on either side of it. (Tr. 99, 107.) In addition, Rejean Boulet, the owner/foreman for East Cumberland, the contractor hired by Black Castle to cut trees on the property, testified they left a row of trees on each side of the gas line right-of-way to further mark it. (Tr. 286.) Marcum testified that the gas line was marked with a clear right-of-way, cleared path down to the natural ground, as well as by yellow stakes. (Tr. 624.) He also said that this particular right-of-way was used by members of the public on all-terrain vehicles (ATV), so that the center four feet of the right-of-way was usually muddy. (Tr. 625-27.)

According to Vira, who had been at the mine since 1989, Black Castle had been mining near the gas line throughout the last ten to twelve years before the accident. (Tr. 772-73.) Marcum, who had only been at the mine since August or September 2005, testified that: "We were always mining in the vicinity of the gas line." (Tr. 610.) Never had it occurred to anyone to note the gas line as a hazardous condition in the preshift or on-shift book. (Tr. 772-73.)

² The Secretary's regulations only require an on-shift examination. However, the state regulations require a preshift examination, so Vira conducted both.

Marcum testified that in performing a preshift or on-shift examination, he would be “looking for anything that substantially could cause imminent harm or serious injury, a bad highwall, insufficient berm roadways, grade elevation, those types of major issues.” (Tr. 604.) Specifically, with regard to bench areas he would be examining for hazards “against potential bodily harm, an example may be a low berm or a break or a wash out, something we trim over or fall into that would get you in trouble, a weak berm. Something of that nature.” (Tr. 604.) He said he would also make sure that the ground control plan was being followed. (Tr. 605.) Vira agreed that he “would look over for any kind of abnormalities or anything that would be a hazardous situation.” (Tr. 781.) In other words, the examiner would be looking for changes in conditions from the previous examination of the area which could be hazardous.

In fact, not only was the gas line not a new condition or presence, but all of the miners were aware of it. Vira acknowledged that the presence of the gas line was a well-known fact and talked about on the job. (Tr. 147-48.) Kenneth Smith, an excavator and bulldozer operator at Black Castle, related that the gas line had been brought up in safety meetings for the five and one-half years he had worked for the company prior to the time of the accident. (Tr. 206.) Boulet stated that he knew there was a gas line on the property and where it was. (Tr. 285.) Marcum agreed that the presence of the gas line on the East of Stollings Amendment was common knowledge at the mine. (Tr. 327.) Boothe testified that “everybody at Black Castle knew the gas line was there” (Tr. 380.)

Inasmuch as the gas line had been present on the mine, in the vicinity of mining operations, for at least the last ten years, was marked, at a minimum, by a mowed or muddy right-of-way edged by trees, and everyone at the mine was aware of it, it is not surprising that prior to the accident it was not perceived as an hazardous condition necessary to report on daily examinations. Accordingly, I find that the preshift and on-shift examinations conducted by Vira were adequate and did not violate section 77.1713(a).

More Often if Necessary for Safety

This does not end the inquiry, however. The regulation requires examinations be conducted more often than once a shift, “if necessary for safety.” Therefore, the evidence must be examined to determine whether Vira and/or Black Castle were subsequently put on notice that the pipeline could be an hazardous condition.

Marcum met Moss in the Judy Low Gap area on Monday, January 30, prior to his commencing work on Tuesday. (Tr. 328, 330.) He testified that:

We walked over to this area near this vicinity [the area between the access road and the gas line right-of-way in Govt. Ex. 4-28] and we looked at it. I said, Paul, here’s your [gas]line, this is your line, this is your right-of-way. I said, I need you to take your tractor travel through right here. Don’t even drop your blade. Just

travel through here, get up here on top where the line will veer up the mountain away from us, start your cut, come around through here [the access road at the top of the hill in Govt. Ex. 4-28] and go down the mountain.

(Tr. 330.) The road on the left in Govt. Ex. 4-28 is the road Marcum was telling Moss to create. (Tr. 331.) Marcum said that Moss never asked any questions about the gas line. (Tr. 633.) He insisted that: "Mr. Moss never showed any concern at all about the gas line." (Tr. 634.)

Boothe, Moss' immediate supervisor, also met with Moss at the Judy Low Gap site. (Tr. 666.) The purpose of the meeting was to show him where the gas line was. (Tr. 667.) He testified that:

I showed him where he was entering. I actually took my arms and I said, the right-of-way, Paul. I said, the right-of-way for the gas line is on the ridge. And we were sitting in my truck and he looked out of the windshield, and I told him — I said we'll be entering here, varying levels. I said once you get through the low gap, I said you'll be fine. And I said the right-of-way is the top of the ridge, so the gas line is in the right-of way.

(Tr. 669.) According to Boothe, Moss did not ask any questions about what he was to do or about the gas line. (Tr. 669-70.)

Moss began working on the access road on January 31. He had not completed it when he had problems with his bulldozer and shut down for the day. (Tr. 674.)

On the morning of the accident, Moss and Kenneth Smith rode to work together as they did everyday. (Tr. 198.) They left Smith's house around 4:15 a.m. (Tr. 198.) Smith testified that, as they were getting close to work, Moss said that "he [was] going to be working in a new area and he believed there was a gas line over there and he wasn't sure where it was."³ (Tr. 199-200.) Smith said, "I told him if he didn't know where it was to get a hold of someone to show him where it was at." (Tr. 200.)

Later that morning, around 9:00 a.m., Smith said that he heard Moss calling on the CB radio for Boothe. (Tr. 207.) He related that the call was answered not by Boothe, but by Vira. (Tr. 209.) With regard to their conversation, he testified that: "I heard part of it and the part that I heard was that Paul was concerned he might be getting too close to the gas line." (Tr. 209.) He said that Vira "told him to stay 100 feet from it." (Tr. 209.)

³ The phrasing of this statement is curious, if it took place on the day of the accident, since Moss had already worked on the day before right next to the gas line.

On that same morning, Jackson Woodard, a Black Castle bulldozer operator, was working on a hill opposite from Moss, but from where he could see him. (Tr. 233.) He testified that:

When Paul got up on the bench he called me on the CB and asked me about the level that he needed to start benching on. I told him that I wouldn't — haven't been up that high on the hill[,] I mean where he was at I could see him, but there was no way I could tell him exactly the coal seam level that he should be benching on, but I told him that I can call one of the foreman and have them get with him and I had a coal operator to call Mike Boothe which was Paul's immediate foreman at the time. That was at 7:00, 7:30 or it was even earlier. I'm not exactly sure, but it was in that time frame. Paul went ahead and worked until a little while later and Mike Boothe had gone down to talk to Paul at the time. Mike Vira came by to take my preshift on my dozer and I told Mike to call Paul. They talked a minute. Mike told Paul to make sure that he stayed at least 100 feet away from that gas line and that was basically all of the conversation that they had.

(Tr. 234.)

Elmer Bishop, an East Cumberland employee, testified that he was running an excavator on the day of the accident. (Tr. 294.) He testified that at around 8:00 a.m. he heard Moss call Vira. (Tr. 296.) He stated that Moss "hollered at Bubba [Vira] and told him he didn't know where the gas line was at, or he didn't have no idea where it was at." (Tr. 296.) He said Vira responded, "just take your time and be careful, I'll send a surveyor there. As far as I recall that's what was said." (Tr. 297.)

Lonnie L. Wood testified that he was a survey lineman for Black Castle on February 1 and was assigned with another man to mark 400 or 500 feet of the gas line in the low gap area. (Tr. 563-64.) He said when they first showed up in the area, they encountered Moss who asked them to call Boothe. (Tr. 571.) He related that Moss asked if they were marking the gas line and they responded that they were. (Tr. 565.) He testified that:

We told him we was setting — we was standing right in the way of the gas line when we had our conversation. We told him it was about 10 or 15 feet behind us, and it was going in each direction, going left and right, just follow the ridge line. It just went on across the property. We didn't say how far it went. It just went across the ridge line.

(Tr. 565.)

Wood said that they had a second conversation with Moss about an hour later when they finished their work at the "top of the mountain." (Tr. 573.) He claimed that he did not remember making a statement to the accident investigator that he told Moss in the second conversation that he was not sure in which direction the gas line was going, but agreed that it was his voice on a recording, made by the investigator, making such a statement. (Tr. 566-71.)

Vira testified, with regard to his conversation with Moss, that: "Paul asked me how far he needed to stay away from the gas line. I told him a hundred feet." (Tr. 177, 768.) He also testified that Moss asked to see Boothe that morning and he told Boothe that Moss wanted to see him. (Tr. 179-80, 770, 775.) Moss did not say why he wanted to see Boothe. (769-70.) Vira denied that he had a conversation with Moss as described by Bishop. (Tr. 769.)

Boothe testified that Vira told him at the foremen's meeting that Moss wanted to talk to him. (Tr. 392.) He said that Vira did not tell him why Moss wanted to talk to him. (Tr. 392-93.) He said that he met Moss on the Clarion level, where he was cropping the Clarion seam, while Moss had stopped for lunch. (Tr. 393.) He stated that Moss did not say anything to him about the gas line at the meeting. (Tr. 394.) He testified that the conversation occurred as follows:

When I got there he was talking to the surveyors, the surveyors were going back to their vehicle. I got out. He climbed down off his dozer, come out on the ground and came back to me and we just talked about general stuff for a moment and I asked him what was going on, and we walked to the front of the dozer. He was on the clearing crop. I was always joking with him, telling him good job and all that. I told him, I says, this is great. I said, you know, what do you need? And he said, well, we're getting, you know — as I progressed, he says, rocks getting a little harder. I want you to know it's going to be slow. I said, no problem. He said, you know, just want you to know with the high wall, you know, it's going to be a slow process. And I told him, I said, again, don't worry about it. I said stay on the clearing and no problem. I'm not going to get on you for going slow.

(Tr. 396-97.)

In analyzing these statements, the first one is Moss remarking to Smith on the way to work that he was not sure where the gas line was in the area he was working. This is properly characterized as a remark rather than an expression of serious concern because of the following exchange:

Q. I just want to ask you a little bit more about your conversation that morning. You said you talked about his concern of the gas line. Did that stand most of the time you were driving to work?

A. No. In fact we were probably getting pretty close to work when he brought that up.

Moreover, however the statement is characterized, it did not put Vira or anyone else in management at Black Castle on notice of any concerns Moss might have had.

Next is the CB conversation with Vira. Vira said that Moss asked how far he should stay from the gas line. Smith overheard the conversation on the radio and, without stating exactly what Moss said, recounted that Moss was concerned he might be getting too close to the gas line. Bishop also overheard a conversation between Moss and Vira and claimed that Moss said that he did not know where the gas line was. Vira testified that Moss asked him how far he should stay from the gas line and he told him to stay 100 feet away from it. Smith heard Vira tell Moss to stay 100 feet from the gas line. Woodard, who did not hear what Moss said, heard Vira tell Moss to stay at least 100 feet from it. Bishop contended that Vira told Moss to be careful and he would send a surveyor there.

With the exception of Bishop's, it is easy to reconcile the statements. It does not strain credulity to conclude that when Smith heard Moss ask how far he should stay from the gas line, he inferred that Moss was concerned that he was getting too close to the gas line. It is also plausible that Bishop interpreted the statement as Moss saying he did not know where the gas line was. What is not reconcilable is Bishop's declaration that Vira said that he would send a surveyor over. There is no doubt that Vira told Moss to stay 100 feet from the gas line. Two witnesses who have no apparent interest in the outcome of this case, Smith and Woodard, verified that that was what was said. No one has made the claim that there was more than one conversation between Moss and Vira concerning the gas line and, other than Bishop's curious statement, there is no evidence of more than one. Accordingly, I find that Moss asked Vira how far he should stay from the gas line and Vira told him to stay at least 100 feet away. To the extent that Bishop's statements cannot be reconciled with the other witnesses, I find that he is not credible.

Wood testified that the surveyors pointed out the gas line to Moss. He did not describe any particular concerns or uncertainty about the gas line on the part of Moss.

Finally, Boothe testified that at their last meeting, he and Moss did not discuss the gas line at all.

Considering all of this, I find that Moss did not give Vira or Black Castle management any reason to believe that the gas line needed to be marked better than it was. Moss' remark to Smith on the way to work was apparently just that. If it was an expression of serious concern, he certainly did not take Smith's advice to ask someone to show him where the gas line was. Instead, he asked Vira how far from the gas line he should stay. When Vira told him 100 feet, he apparently was satisfied. There certainly is no evidence that he said anything to the affect of – "I don't know where the gas line is, how can I stay 100 feet from it?" or, "Have someone mark it

for me,” or anything like that. Later, when Black asked him if he was all right, Moss said he was doing fine and did not mention the gas line. Still later, when he talked with the surveyors, while he expressed some curiosity about where the gas line went, he did not state any concerns or ask them to proceed to where he was working and show him where the gas line was.

The Secretary’s case depends on finding that Moss expressed considerable concern about the location of the gas line and that the company did not adequately address his concern. However, as noted above, he really did not express concern or ask many questions. The Secretary’s case also relies heavily on the assumption that Boothe did not tell the truth when he testified that he had no discussion of the gas line with Moss at their last meeting. That assumption further depends on the previous contention that Moss was very concerned about the location of the gas line, so he *must* have asked Boothe about it.

The Secretary is viewing the case through the emotions of the accident. Prior to the accident, there was no reason, other than being aware of the gas line, for Black Castle or its employees to be particularly concerned about the gas line. They had worked around it for years. Everyone knew where it was. Everyone knew it was marked by the right of way, even if they did not know the exact location of the gas line within the right of way. Based on the evidence in this case, there was no reason for Boothe to suspect that Moss was concerned about the gas line. Furthermore, it was not unusual for Moss to talk to Boothe during the day. The fact that he wanted to tell Boothe the job was going to be slow, rather than ask him about the gas line, is perfectly reasonable under the circumstances. There is nothing in this case which leads to the conclusion that Boothe was not credible.

Moreover, if Moss had followed Vira’s guidance and stayed 100 feet from the right-of-way, this unfortunate accident would not have happened. (Tr. 498.) The closest Moss’ job called for him to work to the gas line was in the low gap area. Both Marcum and Boothe made clear to him where the gas line was located in that area and he obviously had no problems. Phillip Marsh, who was president of Black Castle at the time the accident, testifying based on a scale map of the area, noted that Moss was approximately 75 feet from the gas line when he began cropping the Clarion seam. (Tr. 735, Resp. Ex. 3.) The map indicates that as Moss cropped the seam he was moving away from the gas line. (Resp. Ex. 3.) Based on the map and Marsh’s testimony, Moss was 265 vertical feet from the seam when he struck the gas line. (Tr. 711, Resp. Ex. 3.) However, because he apparently could not go straight uphill, Moss had actually trammed 500 feet from the Clarion seam when he struck the gas line. (Tr. 711, Resp. Ex. 3.)

No one knows why Moss took the bulldozer where he did. (Tr. 495.) The Secretary speculates that he may have been removing loose material from the bench, removing cut trees or creating an access road to the next higher coal seam. (Sec. Br. 30-32.) There is no evidence to support these theories. The pictures of the scene, while they show material in the blade of the bulldozer, do not show loose material or trees being moved, or the necessity for such activity. (Govt. Exs. 4-3, 4-14.) As Marcum testified:

Q. During your investigation of the accident site after this accident, did you have a chance to see whether there was any loose material that needed to be taken down for safety purposes?

A. I've been all over that area, and again, I saw no reason that he was there for any productive issue.

Q. After this accident, did you know whether there were any trees lying on the ground near this area?

A. There were trees all over the area.

Q. And in performing the benching area on the Clarion Seam, would Mr. Moss have had to remove any of those trees for safety purposes?

A. Not in this area, no.

Q. And why not?

A. Much higher than the bench and completely out of the way.

(Tr. 645-46.)

Black Castle had no reason to anticipate that Moss would go above the Clarion seam because it had nothing to do with his work assignment. (Tr. 641.) In fact, the supervisors were not the only ones who were surprised by the location of the bulldozer at the time of the accident. Woodard testified that:

I'm not exactly sure what time the accident was, but it was in the neighborhood of 2:30, in that ballpark. I looked over there and Paul was coming down towards that gas line at that time and distance wise he would have probably been, I'm just guessing, maybe 75 feet before he hit that line. I called Paul on the CB because it struck me funny that he would have been as far away from the place that he was benching and I wasn't sure what was going on[.] I was just going to ask him. Paul did not answer me

....

(Tr. 235-36.) Bishop also testified that he was surprised to see Moss up on the ridge because he knew the gas line was up there. (Tr. 300-01.)

I find that up until the time of the accident, neither Moss nor anyone else had given Vira or any other Black Castle person in authority an indication that marking of the actual gas line was necessary. Accordingly, I conclude that conducting an additional on-shift examination or further marking the gas line was not necessary for safety.

Conclusion

No one knows why this tragic accident occurred. But the Secretary has not proven that it occurred because of an inadequate on-shift examination or a failure to mark the gas line better than it was. The evidence is clear that the Black Castle miners and the employees of the company's contractors were aware that the gas line was on the property and that it was marked by the right-of-way. Had Moss followed Vira's instructions to stay 100 feet from the gas line by staying 100 feet from the right-of-way, the accident would not have happened. Had he remained on the Clarion seam, the accident would not have happened. Black Castle's belief that the right-of-way sufficiently marked the gas line, based on the facts available at the time, was certainly reasonable. Accordingly, I conclude that neither the company nor Vira violated section 77.1713(a).

Order

In view of the above, Citation No. 7247101 is **VACATED**, the contest in Docket No. WEVA 2006-891-R is **GRANTED**, and the proceedings in Docket Nos. WEVA 2007-288 and WEVA 2007-421 are **DISMISSED**.



T. Todd Hodgdon
Senior Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001
January 26, 2010

UNITED TACONITE, LLC,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. LAKE 2008-93-RM
	:	Citation No. 6154850; 11/20/2007
	:	
SECRETARY OF LABOR,	:	Docket No. LAKE 2008-94-RM
MINE SAFETY AND HEALTH	:	Citation No. 6154851; 11/20/2007
ADMINISTRATION (MSHA),	:	
Respondent	:	United Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2008-501-M
Petitioner	:	A.C. No. 21-03403-154315
v.	:	
	:	
UNITED TACONITE, LLC,	:	United Mine
Respondent	:	

DECISION APPROVING SETTLEMENT
AND
ORDER DENYING INTERVENTION

Before: Judge Feldman

These contest and civil penalty proceedings are before me based upon a petition for assessment of civil penalty filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(d). These proceedings concern the April 18, 2007, fatality of a United Taconite LLC (“UTAC”) drill operator. The accident occurred when the drill operator attempted to level a large Pit Viper 351 drill that was positioned on a steep grade. The leveling jacks on the drill failed to maintain adequate contact with the ground causing the drill to tip on its side fatally injuring the operator. The drill was manufactured by Atlas Copco.

After conducting an accident investigation, the Mine Safety and Health Administration (“MSHA”) issued two citations for alleged violations of mandatory safety standards. Citation No. 6154850 alleges a violation of the mandatory safety standard in 30 C.F.R. § 56.14205 that prohibits machinery and equipment from being used beyond the design capacity intended by the manufacturer where such use creates a hazard to persons. There is pending civil litigation involving UTAC and Atlas Copco concerning the proper use of the Pit Viper 351 drill at the time of the accident.

Citation No. 6154851 alleges a violation of 30 C.F.R. § 48.27(a)(3) of the Secretary's regulations that requires equipment operators to be instructed in safe operating procedures applicable to the installation or use of new equipment, particularly when such installation or use involves new or different operating procedures. The Secretary initially proposed a total civil penalty of \$32,500.00 for each citation totaling \$65,000.00 in civil penalties.

These matters were scheduled for hearing on October 20, 2009. Shortly prior to the scheduled hearing, the Secretary and UTAC advised that they had settled all matters in issue. Before me is the parties' Motion for the Approval of Settlement. The Secretary now proposes to reduce the civil penalty from \$65,000.00 to \$1,000.00. The substantial reduction in proposed penalty is based on the Secretary vacating Citation No. 6154850 because of the apparent uncertainty of litigation. The Secretary's discretion to withdraw a citation is not subject to review. *RBK Construction, Inc.*, 15 FMSHRC 2099, 2101.

In addition, the Secretary moves to modify Citation No. 6154851 to reflect the cited violation is 30 C.F.R. § 48.29(a) rather than 30 C.F.R. § 48.27(a)(3). Section 48.29(a) provides, in pertinent part, that upon a miner's completion of each MSHA approved training program, the operator shall record and certify on MSHA form 5000-23 that the miner has received the specified training. The standard was modified after information learned in discovery suggested that miners were trained, but that such training was not recorded. Consequently, the Secretary moves to delete the significant and substantial (S&S) designation in Citation No. 6154851, and she proposes a significant reduction in civil penalty from \$32,500.00 to \$1,000.00. The Secretary's motion to amend Citation No. 6154851 to reflect 30 C.F.R. § 48.29(a) as the alleged violated mandatory safety standard shall be granted.

Also before me is a Motion to Intervene filed on behalf of William W. Walker and Steven W. Beck. The motion asserts that Walker and Beck are "affected miners" as contemplated by Commission Rule 4(b)(1), 29 C.F.R. § 2700.4(b)(1). Although Walker and Beck were not present at the time of the accident, as employees of a contractor, they participated, over a period of time, in the setup of the PV 351 drill involved the accident, as well as in the training of UTAC mine personnel in the use of the drill. Commission Rule 4(b)(1) provides, in pertinent part, that affected miners may intervene and participate in hearing proceedings. However, intervention is not a matter of right. Rather, the right to intervene is committed to the sound discretion of the Judge. 29 C.F.R. § 2700.4(b)(2)(C)(ii). UTAC opposes the intervention motion based on its assertion that Walker and Beck are not "miners."

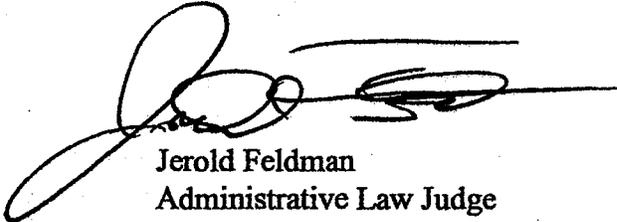
Without addressing the issue of whether Walker and Beck are "affected miners," the Motion to Intervene shall be denied because these contest and civil penalty matters between the Secretary and UTAC have settled obviating the need for a hearing. However, the settlement terms must be strictly construed for the purpose of settlement only. The approval of this settlement is not a finding on liability with regard to any civil litigation arising out of the April 18, 2007, drill accident with respect to United Taconite LLC, Atlas Copco, William W. Walker, Steven W. Beck, and/or any other person or entity that may be a party in relevant civil litigation.

I have considered the representations and documentation submitted in these matters and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the motion for approval of settlement **IS GRANTED**, and **IT IS ORDERED** Citation No. 6154850 **IS VACATED**.

IT IS FURTHER ORDERED that, consistent with the parties' settlement agreement, the Secretary's motion to amend Citation No. 6154851 **IS GRANTED**.

IT IS FURTHER ORDERED that the respondent pay a civil penalty of \$1,000.00 within 30 days of this order in satisfaction of the two citations in issue. Upon receipt of timely payment, the captioned contest and civil penalty cases **ARE DISMISSED**.

IT IS FURTHER ORDERED that the Motion to Intervene filed on behalf of William W. Walker and Steven W. Beck **IS DENIED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 28, 2010

MACH MINING, LLC,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. LAKE 2010-1-R
	:	Citation No. 6680550; 9/29/09
v.	:	
	:	Docket No. LAKE 2010-2-R
	:	Citation No. 6680551; 9/29/09
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mach #1 Mine
ADMINISTRATION (MSHA),	:	Mind ID 11-03141
Respondent	:	

DECISION

Appearances: Thomas Paige, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia and Peter Nessen, Office of the Solicitor, Chicago, Illinois, for Petitioner: Daniel Wolff, Crowell & Moring, LLP, Washington, D.C. and David Hardy, Allen Guthrie & Thomas, PLLC., Charleston, West Virginia for Respondent

Before: Judge Miller

These cases are before me upon Contestant's request for an expedited hearing to challenge Citation Nos. 6680550 and 6680551 issued pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act" or "Mine Act"). The citations allege that Mach Mining was operating its #1 Mine with an unapproved ventilation plan (both a site specific and a base ventilation plan) in violation of 30 C.F.R § 75.370(d). The cited standard requires, in essence, that the mine operator develop and follow a ventilation plan approved by the Secretary.

On June 4, 2009, Mach Mining ("Mach" or "Contestant") submitted a ventilation plan, which included a base plan and site specific plan, to the Mine Safety and Health Administration ("MSHA"). The parties entered into negotiations and discussed various plan provisions. In September, 2009, Mach communicated its intent to implement the unapproved plan in order to bring these contests. By agreement between MSHA and the Contestant the mine began operation without an approved plan in place and, subsequently, on September 29, 2009, was issued two citations by MSHA Inspector Keith Roberts. In addition, MSHA sent a deficiency letter to Mach that addressed the points remaining at issue. The letter and the citations list the specific items that are in dispute in the site specific plan for the #3 longwall panel and the base, or general, plan at the mine. At hearing, the parties stipulated to specific items listed in the

citations that remain in dispute for review by this Court. Specifically, the parties stipulated that the basis for the Secretary's disapproval of the ventilation plans involved the following issues:

- 1) Issue #1 in Citation No. 6680550 (panel #3) and Issue #6 in Citation No. 6680551 (general plan): Means of evaluating the effectiveness of the bleeders, bleeder evaluation points.
- 2) Issue #2 in Citation No. 6680550 and Issue # 15 in Citation No. 6680551: Use of regulators as ventilation controls in the worked-out areas.
- 3) Issue #3 in Citation No. 6680550 and Issue #14 in Citation No. 6680551: Use of stoppings as ventilation controls in the active tailgate entry.
- 4) Issue #4 in Citation No. 6680550 and Issue # 9 in Citation No. 6680551: Use of belt air to ventilate the working longwall face.
- 5) Issue #1 in Citation No. 6680551: Requirement to specify means of compliance with 30 C.F.R. § 75.332, continuous mining machines and split air.
- 6) Issue #3 in Citation No. 6680551: Requirement to show means of ventilating idle places and places where the roof bolter is operating.
- 7) Issue #4 in Citation No. 6680551: Inclusion of a depth-of-water action level to avoid issues regarding safe travelways.
- 8) Issue #8 in Citation No. 6680551: Requirement to change the manner of shuttle car operation.
- 9) Issue #11 in Citation No. 6680551: Requirement to use something other than check curtains in the headgate entry to direct air across the face.

MSHA argues that the above items, except issue #4 in Citation No. 6680551, should be included in the plan in a manner that meets MSHA's goals of providing a safe and effective ventilation plan. Mach argues that the plan it has used for panels #1 and #2 in the mine has worked successfully and, therefore, will work successfully for panel #3 without any change. Further, Mach alleges that its ventilation system is superior to other systems due to the high capacity fans that allow it to ventilate without "artificial" controls.

The Secretary maintains that the MSHA district manager was not arbitrary and capricious in finding that Mach's current ventilation plan is not suitable for the mining conditions at the #1 Mine while, on the other hand, the plan proposed by MSHA is suitable. The Secretary argues that the district manager, with the assistance of others at MSHA, reviewed all factors and reached a reasonable conclusion regarding the plans.

The contested citations allege violations of 30 C.F.R. § 75.370(d), which states that "[n]o proposed ventilation plan shall be implemented before it is approved by the district manager." In deciding whether to approve a proposed ventilation plan MSHA looks to § 75.370(a), which provides in pertinent part that "[t]he operator shall develop and follow a ventilation plan approved by the district manager [and] [t]he plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine." 30 C.F.R. § 75.370(a).

As a general matter, the Commission has held that plan formulation under the Mine Act requires MSHA and the operator to negotiate in good faith for a reasonable period of time concerning disputed plan provisions. *Carbon County Coal Co.*, 7 FMSHRC 1367, 1371 (Sept. 1985). “Two key elements of good faith consultation are giving notice of a party’s position and adequate discussion of disputed provisions.” *C.W. Mining Co.*, 18 FMSHRC 1740, 1747 (Oct. 1996). In this proceeding there is some question as to whether Mach negotiated in good faith. Mach requested that negotiations end a number of times in order to take the matter to hearing. It is no secret that Mach was up against a deadline to set up the #3 panel so that the longwall could be moved on time. In addition, there is testimony from one of Mach’s witnesses regarding the use of the hearing process to resolve ventilation plan disputes in other districts, which could imply that Mach failed to negotiate in good faith. (Tr. 480). Further, Mach hired two experts, Hartsog and Blandford, in July and August 2009 to advise the mine and create courtroom exhibits for the anticipated hearing. (Tr. 505, 572-573, 587-589). However, in spite of such evidence, the record supports the premise that the Secretary and Mach had extensive back and forth discussions over a period of eight months. *See Emerald Coal Res., LP*, 29 FMSRHC 956, 967 (Dec. 2007). The discussions between the district manager and Mach included telephone calls, emails, letters and meetings, at both the district and national level. During the negotiations both parties made adjustments in their positions regarding the issues. The discussions were ongoing and, based upon those talks, several of the issues were removed from consideration. While I believe the Secretary’s argument that Mach failed to negotiate in good faith has some merit, the evidence presented indicates that what negotiations did occur adequately met the requirement of good faith consultation.

For reasons that follow below, I affirm Citation No. 6680550 and Citation No. 6680551 and dismiss Mach’s contest proceeding.

Findings of Fact

Mach employs a longwall mining system at the #1 Mine. (Tr. 143-144). The dispute in this case centers on whether Mach’s proposed system of ventilating panel #3 is suitable, as well as whether the base, or general, plan is suitable to the conditions at the mine. Mach’s ventilation system is a “push-pull” fan system, designed to flood the entire mine with air. The “push” of this system is provided by a large capacity intake fan that sends air into the mine, while the “pull” is provided by a large capacity exhaust fan at the back of the bleeder shafts that pulls air out of the mine. Some stoppings and curtains are utilized in the system, but fewer than in a traditional system. Mach’s position is that, because the fans put such velocities and volumes of air into the mine by utilizing pressure differentials, the air flows across the face, adequately ventilates the gob area and exits by way of the bleeders. In Mach’s view, the system works well and should not be changed or adjusted. The ventilation system design is a relatively new one that has provided ample air to ventilate the #1 and #2 panels during mining. However, the system is not flexible or easily altered, making it difficult to meet changing needs as mining progresses.

Mach's system utilizes the development sections to create the main entries and the gate road entries for the longwall. (Tr. 143). The development system makes use of three mine entries with connected cross-cuts. (Tr. 148). At the time the citations were issued the mine had developed and mined the #1 panel and was in the process of mining the #2 panel. Part of the dispute in this case arose when Mach began to develop panel #3. While mining the #2 panel the mine encountered adverse roof conditions, primarily in the bleeder entries of the mine. In an effort to avoid further adverse roof conditions, the mine developed panel #3 1000 feet beyond the bleeders of panels #1 and #2. This extended development was done without consultation or approval of MSHA.

Inspector Keith Roberts, who has more than 30 years of mining experience, testified that he reviewed the two plans at issue for the #1 Mine. After consultation with the district manager, and armed with information from MSHA and a survey team, Roberts drafted the list of deficiencies contained in the citations. He did so with the input of technical support, including that of Dennis Beiter, a ventilation specialist. After discussing his findings with the district manager, he, along with MSHA personnel, discussed the two ventilation plans with Mach. On several occasions, all parties traveled to Arlington to speak with higher ranking authorities regarding the plans. Roberts visited the mine on several occasions and consulted with inspectors, supervisors, and the operator about the various issues that continued to be disputed.

Robert Phillips, the MSHA district manager in Vincennes, Indiana at the time of this dispute, has been in the mining industry in various positions since 1960 and has been employed by MSHA for 27 years. At the time Phillips started working in this position he was notified that roof control problems existed at the Mach #1 Mine, and that the mine was operating with a "conditional" ventilation plan. In response, Phillips spoke with his roof control specialist about reviewing that plan and arranged to have the ventilation plan reviewed so that an unconditional plan could be put into place. About the same time, the Contestant asked for a review of the ventilation plan for the #3 panel, which had been developed 1000 feet beyond the bleeders of panel #1 and #2. MSHA issued a citation for failing to follow a ventilation plan and, after a contest, Judge Manning agreed that Mach had made a substantial change to the ventilation that required plan approval. *Mach Mining*, 31 FMSHRC 709, 714-715 (May 2009) (ALJ). Mach and MSHA were engaged in two plan discussions: one for the overall mine, and one specifically for the #3 panel area that was being developed with an eye toward mining after the #2 panel was complete. Mach was eager to develop the #3 panel so that it was ready to mine once the #2 panel was complete. Consequently, it pushed MSHA to make findings with regard to the ventilation in that area so that it could have a plan in place to meet the mine's timeline for development. While Mach pushed ahead its plans for the #3 panel, it was also negotiating on a base, or overall, plan for the mine.

District Manager Phillips explained that each district has its own procedure for processing and approving ventilation plans. First, Phillips reviews the plans in a cursory manner and then forwards the plan for review to his technical assistant. From there, the plan is forwarded to the proper supervisor for ventilation. The plan is then faxed to the field office responsible for the mine where the inspector assigned to the mine reviews and provides remarks

on the plan. The plan then goes back and forth between the inspector and his supervisor before the remarks are sent to the ventilation supervisor in the district. Phillips, in order to keep track of the progress of the plan, requires comments from his staff and from the mine to be put in writing rather than exchanged verbally. If there are issues, he asks for assistance, as he did here, from the technical support division of MSHA. Mach's proposed plan, Gov. Ex. 1, dated June 4, 2009 and the proposed plan for the #3 panel, Gov. Ex. 2, dated September 3, 2009, went through such a process. After much discussion and review, both plans were rejected on September 29, 2009. (Tr. 299-302).

I find District Manager Phillips to be thoughtful in his deliberation regarding the plan, and cautious in reviewing every comment and document provided to the district. He sought the assistance of not only the technical support division, but also the headquarters office in Arlington, Virginia. Phillips credibly testified that he considered all input when making his decision regarding the two plans and signing the letters regarding the deficiencies in the plans submitted by Mach.

- a. *Use of Belt Air to Ventilate the Working Longwall Areas. Issue #4 in Citation No. 6680550 (Panel #3) and Issue #9 in Citation No. 6680551 (General Mine Ventilation Plan).*

The Secretary's position is that Mach did not justify the use of belt air as required by the Secretary's new regulation found at 30 C.F.R. § 75.350(b) that requires the operator to provide substantial justification for the use of belt air. The new regulation, according to its preamble, requires a mine operator to have a compelling "need" to use belt air. *Flame-Resistant Conveyor Belt, Fire Prevention and Detection, and Use of Air from the Belt Entry*, 73 Fed. Reg. 80580-01, 80591-92 (Dec. 31, 2008) Mach, on the other hand, stresses that its system is designed to use belt air, which it has used successfully on the first two panels. In Mach's view, the system delivers twice the required air to the face and, as a result, there have been no respirable dust citations or methane ignitions. Mach argues that the use of belt air is necessary to keep the longwall face ventilated and, further, it is "safer" to use belt air than not.

Phillips and Roberts credibly addressed the issue of belt air in their testimony. Phillips explained that a new belt air rule was implemented in March, 2009. The Mach "conditional" plan had been approved prior to the new rule and the mine was using belt air to ventilate the working areas in the #2 panel. In an effort to give Mach more time to address the issue, MSHA agreed that Mach could continue to use belt air in the #2 panel while discussing the new plan. However, MSHA did not approve the use of belt air for the #3 panel. In reviewing the Mach plan, Phillips relied on a memo outlining the new belt air rule that was prepared by MSHA and circulated to all district managers. Gov. Ex. 3. The memo explains the new belt air regulation and instructs the district managers to look to four specific items in evaluating the use of belt air. First, the operator must evaluate the hazardous condition it believes will be addressed by using air from the belt entry. In most cases, the hazard will be either methane or dust at the working area. Second, the operator must evaluate how the belt air will mitigate the hazard and explore other possible solutions. Third, the operator must review technology and safety measures that it

will implement to use belt air. Fourth, and finally, the district manager must determine whether the use of belt air would afford at least the same measure of protection as not using belt air. The guidance given to the district managers tracks the standard and explains the regulation and its intent. *Id.*

Phillips explained the long history of belt air, including the belt air committee and its recommendations regarding the use of belt air. He discussed the general hazards associated with using belt air in working areas, including smoke and fire carried to the working face from the belt. According to Phillips, Mach failed to address the four criteria necessary for him to make a reasoned decision, and therefore did not justify the use of belt air in its plan. Phillips requires more of an explanation and Mach has not provided it. (Tr. 314-317).

Roberts agreed with Phillips regarding the use of belt air. In his testimony, Roberts described how Mach's proposed plan depicts the use of belt air to ventilate the working sections. However, he stated that Mach failed to identify a hazardous condition that would justify the use of belt air and, in addition, did not discuss providing at least the same measure of protection as entries that were not using belt air. Further, Roberts reviewed the new regulation and administrative documents and understands that a mine operator must meet all of the requirements in the regulation in order to justify the use of belt air. (Tr.78-80).

Mach's position is that it would be "less safe" if it were not permitted to use belt air to ventilate the longwall face. Mach used belt air to ventilate the longwall face in panel #1 and #2 and, therefore, according to Mach, its safety is justified. Mach has had no dust violations in the belt entry on the active longwall section or longwall face. (Tr. 110, 397). Mach argues that hazards would be present without the use of belt air, and believes it has justified the use to the district manager. Mach argues that it submitted some additional information to the district manager at a meeting in Arlington, Virginia, but was under the impression that belt air would not be allowed and did not pursue it further. (Tr. 346-349). Gary Hartsog, Mach's expert witness, testified that eliminating the use of belt air would cause problems with the overall ventilation system. He explained that in order to direct the belt air outby, the mine must turn down the bleeder fan to such a low setting that there would not be enough air going through the gob to keep it adequately ventilated. (Tr. 520). While Hartsog acknowledged the inherent dangers recognized by the belt air technical study panel, he nevertheless believed that it was safe to use belt air at the #1 Mine. (Tr. 578-581).

Phillips agreed that Mach had expressed concerns about discontinuing the use of belt air. However, there is no evidence in the record that Mach provided sufficient information during its meetings with MSHA to explain its position. Mach, in turn, agrees that MSHA believes Mach had not submitted enough information. The citations and the letters explain to Mach that they have not provided sufficient information to the District to make an appropriate evaluation of the use of belt air. At the present time, given that Mach has not provided sufficient information to justify the use of belt air, the plan proposed by MSHA is suitable.

- b. *Bleeder Evaluation Points. Issue #1 in Citation No. 6680550 (Panel #3) and Issue #6 in Citation No. 6680551 (General Ventilation Plan): Means of Evaluating the Effectiveness of the Bleeders and Specifically Evaluation Points in the Bleeder System.*

MSHA requires Mach to evaluate the effectiveness of the bleeders, and, as part of that obligation, requires bleeder evaluation points at specific locations. MSHA argues, among other things, that 30 C.F.R. § 75.364(a)(2)(iii) requires that at least one bleeder be walked every seven days. The purpose of the regulation is to ensure that the bleeders are free from obstructions and that proper air quantity, quality, and direction continue throughout the system. Mach counters that, because of unstable roof, it is not safe to walk the bleeders and it is not necessary because the air is tested at the point it exits the mine. Mach believes that, given the velocity and pressure differential of the air, there is no need to risk evaluating the bleeder areas when a reading is taken “around the perimeter” and at the end of the system. According to Mach, the risk associated with walking the bleeders far outweighs the information obtained. Mach points out that it has evaluated its bleeders for the first two panels and will continue to do so for panel #3, but without using the evaluation points sought by MSHA.

Dennis Beiter is employed by MSHA in the Pittsburgh Safety and Health Technology Center as the supervisor of the Ventilation Division. (Tr.136). He spends half of his time supervising and the other half participating in mine investigations, face ventilation investigations, and investigations into explosions, accidents, fires and ignitions. Beiter has worked in underground coal mines in Pennsylvania and Illinois, and has worked for MSHA as a mining engineer in ventilation since 1991. He holds a Bachelor of Science in mining engineering from Pennsylvania State University and served on a committee that explored issues associated with bleeders and gob in the aftermath of a fatal explosion at South Mountain. As a member of that committee, he drafted a report on the bleeder and gob issues and made recommendations for education regarding bleeder ventilation systems in underground coal mines. (Tr. 138-139). He is well qualified as an expert in underground coal mine ventilation and ventilation surveys.

Beiter and his team conducted two ventilation surveys at the Mach Mine. The first survey was conducted from March 31 through April 2, 2009, and the second in June. (Tr. 145). At the time of the first survey, the mine had completed mining panel #1 and had advanced about 1000 feet in panel #2. (Tr. 150). Beiter conducted an air pressure and air quantity investigation. He also conducted a tracer gas study, collected bottle samples, took underground readings at identified locations, measured pressure differentials, and used chemical smoke and hand-held gas detectors to determine the direction of airflow and the levels of methane and oxygen. A map attached to his report provides an overview of the bleeder system, the pressure differentials, and the key locations of the ventilation system. Gov. Ex. 4 Figure 1. It also indicates all places where readings and measurements were taken during the survey. (Tr. 147- 148). Beiter relied on this map, as well as others, during his testimony. Gov. Ex. 4 Figure 1, 4.

Beiter and his team, along with representatives from the mine, traveled every bleeder entry and stood in every cross-cut, except those that were not safe due to the deteriorating roof

condition in the bleeder entries. They used chemical smoke to determine air movement in all of the cross-cuts between the bleeder entries and the south mains for headgate number one. (Tr. 157, 163). Beiter, or persons in his party, traveled both tailgate entries, the number three entry, and the tailgate travelway in their entirety. They encountered deep water with bridges spanning the water in many locations. (Tr. 162). They traveled the bleeder entries from headgate number two to the bleeder shafts and outby tailgate number one for four cross-cuts, collecting information regarding the adequacy of the airflow distribution and the adequacy of the dilution of gases. (Tr. 180). Traveling the bleeders was necessary to determine if the ventilation system was effective, as well as to determine what effect the roof falls had on the system. (Tr. 181-181).

The #1 Mine uses an intake shaft with a blower fan located at the surface to bring air into the mine. As the air enters the mine, it is forced into the mine with the blowing fan at the top of the intake shaft. (Tr. 149). At the other end of the mine are two bleeder shafts, one cross-cut apart, that join one another before reaching the bleeder shaft fan. (Tr. 150). The air reaches the bleeder shaft through the bleeder entries, which are perpendicular to the longwall panels and the gate entries. (Tr. 152).

When Beiter's team began the first survey, panel #1 had been mined and was now the gob area. Panel #2 was in the process of being mined and the bleeder entries were connected with the bleeders for panel #1. The bleeders in panel #2 were changed from panel #1 when the mine encountered extremely bad roof. Five bleeder entries were mined from headgate number two to headgate one, and two entries continued on but were never fully developed to reach the bleeder shafts. (Tr. 154). As the mine began to develop panel #3 in preparation for a move of the longwall from panel #2, the bleeder entries were again changed. Without MSHA's knowledge, Mach developed the bleeder entries of panel #3 an additional 1000 feet beyond the bleeders for panels #1 and #2. According to Beiter, the change in the bleeder entries has an effect on the ventilation and, in turn, on the ventilation plan. Beiter testified that the fact that one panel is mined, which in turn creates a gob area, affects the ventilation plan as each panel moves forward.

Based upon the studies completed by the technical support team, Beiter explained that when the air movement was examined between the number two entry and the number three entry of the tailgate, it sometimes traveled from two to three, and at other times from three to two. (Tr. 166). Beiter was able to determine that the air flow from headgate number one to tailgate number one passed over the gob, or worked-out area. He stated that "[e]ven though there is a significant volume of airflow . . . from headgate one towards tailgate one in the big sense, in the little sense at each cross-cut, there's not a significant volume you can measure." (Tr. 186). He explained that when panel #1 is mined out and panel #2 is being mined, the existence of panel #2 has an effect on how the air from the gob gets to the bleeder system. (Tr. 187). Further, he stated:

In the three entry longwall development system, as the two panels are mined out, one subsequent to the other, the only opening left between the panels is the

middle entry. The number one entry falls for the mining of panel one. Panel two caves entry number three. Now you have some open area along the perimeter of the walk that . . . has some open area to it. The primary place for air to flow and gas to accumulate in volume are in those open entries inby [the] face and along the cave material itself. (Tr. 187).

Beiter confirmed that Mach must have evaluation points to determine the air quality and quantity before the air reaches the bleeder entries and at points within the bleeder system. He suggested that evaluation points be placed at the areas proposed by MSHA because the evaluation points are necessary for panel number #3 and for the base ventilation plan. He confirmed that the mining of panel #3 changed in design from the previous panels. When the panel #3 entries were driven, they were driven beyond those of panel #2, creating a "stair-step" in the bleeder entries inby panel #3. (Tr. 194-195). In order to determine if the system is functioning effectively, Beiter would require a number of measuring points and evaluation points. (Tr. 198-199).

Mach places much emphasis on the fact that both of Beiter's surveys contain the same conclusion, i.e., the bleeder system was working effectively on the date of each survey. However, the reports generated as a result of the surveys go on to reach a number of other conclusions. The conclusion of Beiter's team was that the "adequacy of the airflow distribution in the bleeder system and the dilution of methane elsewhere in the bleeder system in addition to the 30 C.F.R. Part 75.323(e) location(s), could not be determined from information collected [by the mine] at the required weekly examination locations for the bleeder system." Gov. Ex. 5 at 7. Beiter and his team were able to make their recommendation and conclude that, based upon measurements at evaluation points that are not contained in the proposed plan of Mach, the system was working effectively on the day of the survey. For this reason, Beiter believes that in order to adequately evaluate the system, readings at the evaluation points recommended by MSHA are important. Mach's proposal lacks "consideration of a very significant piece of information, and that's the adequacy of the airflow to dilute the contaminants that are being liberated in that worked-out area to safe levels." (Tr. 209). That is why Beiter suggested the location of evaluation points at the back end of panel #3 and the bleeder entries. (Tr. 209). Evaluation at those areas would provide representative information regarding airflow and the dilution of contaminants. (Tr. 209).

Beiter explained that Mach had requested a change to the mine ventilation plan for its #1 Mine to allow the use of a step bleeder system as it developed the #3 panel. He explained that MSHA could not approve the plan primarily because of the location of the evaluation points for the ventilation system. Mach asserts that it is sufficient if it tests and finds little, if any, methane at the point the air exits the mine. However, the exit point does not explain to Mach or MSHA where the air is going or what the readings are at the working areas or idle areas in the mine. It is critical, as Beiter explained, that the system be evaluated and tested at various points in the mine.

Anthony Webb, the general mine manager for the Mach #1 Mine, explained the mine's current method of evaluating the bleeder system and confirmed that it is the method used in panels #1 and #2. (Tr. 378-380). Webb testified, as he did with each issue, from notes that were handed to him by his attorney, thereby making his testimony less believable. He testified primarily about the quantity of air that moved in the system. He believes that the evaluation points suggested by MSHA cannot be representative of what is going on in the flow path of the system. (Tr. 389). Webb maintains that during the prospective mining of panel #3, ventilation will not be any less effective given that the mine fan still has 30% unused capacity left and, therefore, further evaluation points sought by MSHA are unnecessary. (Tr. 388). In Webb's view the value of the data must be weighed against the risk of obtaining it. (Tr. 390).

Mach argues that it has developed an "alternative method of evaluation" of its bleeder system through the evaluation and monitoring of points located around the perimeter of the bleeder system. Mach claims it is able to obtain all relevant information, including the air quantity, quality, and direction, without endangering the lives of miners by requiring them to walk the bleeder entries. According to Mach, the evaluation points around the perimeter tell the examiner that the air is moving in the right direction, while the evaluation point on the surface reads the quantity and quality of air that exits the bleeder system. Mach's expert, Gary Hartsog, agrees that the evaluation points proposed by Mach are effective to evaluate the "ventilation system." (Tr. 548-49). Hartsog, who has an engineering degree from West Virginia University, conducted his own ventilation survey after reviewing the two conducted by MSHA. (Tr. 513). He reached the same conclusion as Beiter, i.e., that the system was effective at the time of his survey. However, he did not make any recommendations or address the recommendations made by MSHA as a result of their own ventilation surveys.

Mach admits that wide variations in air quality, as portrayed in Beiter's survey, are coming through the bleeder system. Mach Brief at 10; (Tr. 236-237). Hartsog says that traveling the bleeder system would provide "minimal relevant information." (Tr. 556). In his opinion, the evaluation around the perimeter would provide sufficient information to evaluate the effectiveness of the bleeders. (Tr. 549). Hartsog admits, however, that taking air measurements at the exhaust fan will not indicate where, and in what quality, the air has traveled in the bleeders

There is no question that there are adverse roof conditions existing in bleeders which may deteriorate further as mining progresses. However, those adverse roof conditions may have an effect on the ventilation system. (Tr. 552). The district manager's reliance on the information gathered by Beiter and the conclusions reached by Beiter's team are all well-founded and suitable for this mine. I conclude that, unlike Hartsog's proposals, the evaluation points recommended by Beiter give a complete view of the effectiveness of the ventilation system.

- c. *Stoppings in Active Tailgate Entries. Issue #3 in Citation No. 6680550 (Panel #3) and Issue #14 in Citation No. 6680551 (General Ventilation Plan): Use of Stoppings as Ventilation Controls in the Active Tailgate Entry.*

The Secretary argues that Beiter's survey established that air was moving toward the active tailgate entry, rather than away from the active tailgate entry, and that stoppings should have been in place to assure the correct movement of air. (Tr. 210-11). The stopping line required by MSHA would protect the active tailgate entry from methane and move air away from that entry. Mach argues, again, that its system is effective without imposing new ventilation controls. Mach alleges that MSHA failed to prove that the use of controls in the #1 Mine is safer and therefore more suitable to the mine.

It is Beiter's opinion that there should be ventilation controls in the bleeder entries of panel #3 that are sufficient to control and distribute the airflow. (Tr. 206). The lack of ventilation controls makes it difficult to control airflow distribution in the system. He explained that during his survey it was clear that the controls in headgate number two were critical to controlling the airflow of the system. Those controls worked in conjunction with the curtains near the face to build pressure across the worked-out area and provide airflow across the longwall face and into the bleeder entries. The controls, not part of the Mach proposal, are important to establish pressure differential and direction of airflow into the worked-out area, in the headgate, and on the longwall face. (Tr. 206).

Stoppings are necessary, based upon the MSHA survey, to "prevent the vast majority of any airflow that was in the number two entry and its contaminants from entering into the tailgate entry." (Tr. 211). Beiter's opinion is based not only on the two surveys conducted at the mine, but also on his observation of notable changes in the air movement when stoppings were put in place during the course of the second survey. The second survey was conducted in the same manner as the first and, like the first survey, was conducted with Mach personnel. (Tr. 212-213). The longwall face had progressed at the time of the second survey from about 800 feet to approximately 4800 feet in the second panel. (Tr. 215). Ventilation controls, i.e., stoppings, that were in place for the first survey had been removed by the time of the second survey. Gov. Ex. 5 Figure 5. The second survey began on June 9. When the survey team returned on June 11, the stoppings had been reconstructed in the same manner as they had been for the first ventilation survey. According to Beiter and his team, the stoppings made a significant difference in airflow patterns and pressure differential. (Tr. 217). The pressure differential changed when the ventilation controls were reconstructed prior to the team's arrival on June 11. (Tr. 221). The result was that the direction of air movement carried the liberated gases into the caved areas. (Tr. 222). Mach argues that the change in the stoppings is insignificant, that the ventilation controls will compromise the overall Mach system, and that they are difficult to construct. Mach, however, presented no real evidence that the tailgates would be adequately ventilated without the stoppings in place. Beiter's view of the need for stoppings, however, has a legitimate basis in fact and is a sound basis for the inclusion in the ventilation plan.

- d. *Bleeder Entry Ventilation Controls. Issue #2 in Citation No. 6680550 and Issue #15 in Citation No. 6680551: Use of Regulators as Ventilation Controls in the Worked-out Areas.*

The Secretary argues that because Mach chose to drive the #3 panel 1000 feet out by the bleeder entries of panel #1 and #2, it created a stair-step effect that requires controls to ensure proper ventilation in the bleeder entries. MSHA proposes a permanent stopping line and other controls across the bleeders behind panel #3. The ventilation controls are needed to ensure that air does not short circuit and travel through caved areas or around the corner of the stair-step. (Tr. 198-199, 203, 205-207).

At the time of Beiter's second survey, Mach removed ventilation control stoppings behind panel #2, which resulted in a redistribution of air in the bleeder system. (Tr. 216-217, 220-222). Mach's expert, Hartsog, believes that the controls suggested by Beiter would only add resistance in the system and slow down the air movement. (Tr. 564). Hartsog failed to explain how the air would avoid a short circuit without some control in place. Hartsog also opined that it would be difficult to get to the area to build stoppings. He testified that it would take enormous time and effort to get the materials into the bleeders for construction, and that it might prove to be dangerous to undertake construction given the roof conditions. (Tr. 552-554). Consequently, Mach argues that no stoppings should be built in the bleeder system because it would be labor intensive and the roof is bad. In addition, Mach believes that its ventilation design works effectively because there are few, if any, ventilation controls to block or redirect air flow. (Tr. 419-20, 550-56).

The Secretary has demonstrated the need for ventilation controls in the bleeder entries and the importance of those controls to be included in the ventilation plan of the mine.

- e. *Ventilation of Idle Places and Places where Roof Bolter is Operating. Issue #3 in Citation No. 6680551: Requirement to Show Means of Ventilating Idle Places and Places Where the Roof Bolter is Operating.*

The Secretary argues that a methane buildup hazard is created when a curtain is not present to direct air into idle areas that have been cut but not yet bolted.

Mach argues that MSHA failed to demonstrate a basis for requiring Mach to ventilate its idle areas or areas where roof bolting operations were occurring. Mach has not been asked in the past to use a line curtain to direct air from the main ventilation into idle places or into areas where roof bolting is occurring. (Tr. 90, 355). It is Mach's opinion that, by not using the line curtain the mine avoids directing dust from the continuous miner, that may be working in the area, onto its roof bolters. MSHA, on the other hand, is concerned with methane accumulations in those areas. Mach counters that the mine has not experienced a methane buildup in idle areas, or areas where roof bolts are being installed. In addition, Mach avers that roof bolting machines are equipped with methane monitors and that the bolters use a probe to sweep the area in front of them as they progress. (Tr. 408).

Roberts explained the potential methane hazard that exists if the area where roof bolters are working is not adequately ventilated. The line curtain, in most cases, is used when the continuous miner is cutting, and therefore is already in place and may be adjusted to

accommodate the roof bolters. (Tr. 18-25). Phillips agreed, and added that an additional factor that must be considered is the nature of roof bolting in causing a spark and, in turn, an ignition if methane has been allowed to build while an area is idle. (Tr. 69). The Secretary points out that adjustments can be made and that it is far safer to avoid a methane buildup in those idle areas, or areas that are being roof-bolted, than it is to completely disregard having a curtain for fear that more dust will reach the roof bolter operator. The Secretary demonstrates a legitimate concern for the possibility of a methane buildup in those areas that are currently idle but will eventually require the roof bolter to enter and bolt the roof.

f. Continuous Miners on the Same Air Split. Issue #1 in Citation No. 6680551: Requirement to Specify Means of Compliance with 30 C.F.R. § 75.332.

As a result of a complaint at the mine, Inspector Roberts issued a citation alleging a violation of 30 C.F.R. § 75.332(a). Roberts found that, contrary to the regulation, two continuous mining machines were operating on the same split of air. (Tr. 57). Roberts, in advising the district manager to include a provision regarding the use of split air in the mine ventilation plan, explained that MSHA wants to assure that the mine has a plan in place to deal with two continuous miners working on the same split of air. (Tr. 70-71, 66,-67). However, both Hartsog and Webb testified that Mach is using an appropriate system to meet the requirements of the standards and it is not necessary to have the provision in the plan. (Tr. 405-407, 568).

The Secretary avers that, in order to assure compliance, it is appropriate to include a provision regarding the use of air splits when two continuous miners are operating. MSHA relies, rightly, on the premise that additional provisions, including the subject air split provision, may be required to be included in the plan as “required by the district manager.” Gov. Brief at 18; 30 C.F.R. § 75.371.

g. Issue #4 in Citation No. 6680551: Inclusion of a Depth-of-Water Action Level.

Mach asks the Secretary to include a provision in the plan allowing the accumulation of up to 12 inches of water before any action is taken. Mach seeks a means to ascertain when a citation may be issued for accumulation of water in the bleeder entries in violation of 30 C.F.R. § 75.371(a). Webb testified on behalf of Mach that 12 inches of water is not a hazard and therefore the proposal is sound. MSHA refused the provision as an attempt on the part of Mach to circumvent the regulation, something that the district manager will not allow. I conclude that the district manager was well within his discretion to deny a proposed plan that places limits on a mandatory standard.

h. Issue #8 in Citation No. 6680551: Requirement to Change the Manner of Shuttle Car Operation, and Issue #11 in Citation No. 6680551: Requirement to Use Something Other than Check Curtains in the Headgate Entry to Direct Air Across the Face.

The Secretary did not present evidence at hearing or brief the issue of the requirement to change the manner of shuttle car operation, or the requirement to use something other than check curtains in the headgate entry to direct air across the face. As a result, I refrain from addressing these issues.

Conclusions of Law

While plan contests are based on consultations between the Secretary and the operator, the Commission has recognized that “the Secretary is [not] in the same position as a private party conducting arm’s length negotiations in a free market.” *C.W. Mining Co.*, 18 FMSHRC 1740, 1746 (Oct. 1996). As one court has noted, “the Secretary must independently exercise [her] judgment with respect to the content of . . . plans in connection with final approval of the plan.” *UMWA v. Dole*, 870 F.2d 662, 669 n. 10 (D.C. Cir. 1989), quoting S. Rep. No. 95-181, at 25 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 613 (1978).

The framework for resolution of a plan dispute has been established by the Commission in a number of cases, including *Twentymile Coal Co.*, 30 FMSHRC 736, 748 (Aug. 2008). The Commission has held that, “absent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan’s approval.” *C.W. Mining Co.*, 18 FMSHRC at 1746. At issue is whether the Secretary properly exercised her discretion and judgment in the plan approval process. The standard of review incorporates an element of reasonableness. See *Monterey Coal*, 5 FMSHRC 1010 at 1019 (June 1983). I must therefore look at the issue of suitability in terms of the discretion of the district manager.

a. *Unsuitability of the Current Mach Plan.*

There are two plans at issue in this case: (1) a general plan for the entire mine and (2) a specific plan for the mining of panel #3. MSHA issued a citation for each plan. Because the issues are fundamentally the same in each citation they may be addressed together. The general plan was in effect when Phillips came to District 8. At that time there was no plan for the development and mining of panel #3. Rather, the plans in place were conditional plans. After his arrival, Phillips instructed his ventilation supervisor to contact Mach and start working on a plan that was not “conditional.”

The ventilation plan that was in place at the Mach #1 Mine was found to be unsuitable in a number of ways. First, it did not address the #3 longwall panel that had already been developed an extended distance beyond the bleeders of panels #1 and #2. In developing the panel #3 bleeders 1000 feet beyond those in panels #1 and #2, the mine created a stair-step in the bleeder system and had no means of evaluating the area. This was a substantial change in the ventilation plan and it needed to be addressed. In addition, the longer Mach continued to mine under that plan, the more gob it created, which in turn necessitated ventilation changes to meet

the changing circumstances in the mine. Further, as mining progresses and Mach moves forward with panel #3, the air has a longer route to travel. The plan in place contained no provision for these contingencies and therefore was not suitable. Finally, the mine had been conditionally granted the use of belt air, but, following the implementation of the new belt air regulation, the district manager was directed to review the matter. As a result, it is clear that the plan in place was no longer suitable for the mine.

The ventilation surveys conducted by Beiter and technical support at the mine demonstrate that the ventilation was good at the time of the survey. Mach takes this to mean that the plan in place was working, i.e., suitable, and need not be changed. In fact, the experts who testified on behalf of Mach assert that the ventilation system is so good, that it will last throughout the mining of six panels or more. MSHA counters that the system no longer functions properly as new panels are developed and specifically as the # 3 panel begins.

Mach's argument fails to take into account the changing conditions at the mine, i.e., the stair-step bleeder that has been created, the fact that the air course is longer, and the fact that there is a much larger mined-out area, or gob, to ventilate. I agree with the district manager that the plan in place was not suitable to the Mach mine and therefore was subject to review by MSHA.

b. Suitability of the MSHA Plan.

Next, the Secretary must show that the district manager did not abuse his discretion in determining that the MSHA plan is suitable to the conditions at the Mach #1 Mine. Specifically, the Secretary must show that the actions of the district manager were not arbitrary and capricious in his review and decision-making regarding the plan and its suitability. The Commission has defined "suitable" as " 'matching or correspondent,' 'adapted to a use or purpose: fit,' 'appropriate from the view point of . . . convenience, or fitness: proper, right,' 'having the necessary qualifications: meeting requirements.' " *See Secretary v. Peabody Coal Company* 18 FMSHRC 686, 690 (May 1996)(omission in original), *quoting Webster's Third New International Dictionary* 2286 (1986), *aff'd* 111 F.3d 963 (D.C. Cir. 1997). The evaluation points proposed by MSHA, the ventilation controls, and the belt air all must be suitable to this mine.

The evidence presented by the Secretary clearly demonstrates that the MSHA proposal is suitable as it relates to the evaluation points for the bleeder system. First, Bieter's testimony is well founded that measuring the quality and quantity of air traveling through the system at various points is a crucial part of the ventilation plan, and that the perimeter checks or the exhaust check proposed by Mach is not adequate. The bleeder system was changed by Mach and created an even greater need for reliable evaluations of the system. Mach argues that the plan in place is good enough and that the extended bleeders have not changed that. MSHA refutes this argument based upon the surveys conducted by Beiter. Beiter testified that, if the mine uses the evaluation points it proposes, the information will not be sufficient to evaluate the effectiveness of the system.

Beiter explained that ventilation controls are necessary in the bleeders and the tailgate area, and that the proposal by MSHA is suitable. He was able to witness the changes in the air quantities and qualities when he conducted his second survey. Midway into that second survey, the mine made changes by installing stoppings in certain areas. Given these changes, Beiter opined that the ventilation controls are important and essential to an effective system.

The ventilation surveys conducted by MSHA's technical support people indicate that, while the ventilation system works well, it is important nevertheless to evaluate it at different locations in the mine to be sure that there is no methane or dust in those areas. An evaluation at the exhaust fan where all air exits the mine is not a credible indication of air quality and quantity as air travels through the mine. The evaluation points proposed by MSHA are critical in providing the information necessary to determine the effectiveness of the ventilation system. If the areas cave as the mine says they will, given the roof stresses Mach observed, then those areas will affect the air, which in turn requires an even greater need to regularly and reliably confirm the effectiveness of the bleeders and the ventilation as a whole. MSHA has demonstrated that its plan, which requires the mine to evaluate the air at the recommended evaluation points, is suitable to the mine. The Secretary has demonstrated that, as successive panels are mined, additional airflow paths through the larger worked-out area are created. These additional airflow paths, coupled with the creation of open areas where gases can accumulate, result in a more complex system, which, if not properly addressed, poses a hazard to miners. (Tr. 224).

While Mach's #1 Mine currently uses belt air, MSHA has determined that it may not be suitable. MSHA considers belt air and its associated hazards so important that it commissioned a panel to look into the issue and author a report. As a result of that report a new regulation was promulgated and district managers were given guidelines to follow when making a determination as to whether the use of belt air is appropriate in each circumstance. The regulation, which became effective in March 2009, imposes a higher standard upon mine operators to show that the use of belt air to ventilate the face is a safe option. The panel and the MSHA directive both indicate that belt air should not be used at the face unless there is no safe alternative. Based upon the testimony, the use of belt air has not been eliminated from consideration by the Secretary. However, Mach has a duty to provide further information and justification in order to continue the use of belt air. Mach's argument focuses on how detrimental reversing the belt air would be to the overall ventilation plan. However, Mach did not attempt to address the possibility of directing the air in some other manner or offer an alternative to belt air that is workable. Instead Mach relies upon its argument that it is safer to use belt air because, if the mine is required to turn the belt air around, it will take away air meant to ventilate the face and gob.

I credit Beiter's testimony far more than the generalization made by Mach's expert, Hartsog. Beiter spent significant time in the mine and conducted two very thorough studies of the ventilation system in its entirety. Beiter examined all of the changes made by the mine and the effect those changes had on ventilation. The district manager relied on the information provided by Beiter and his team, and rightfully determined that the plan proposed by MSHA is suitable for this mine.

The parties agree, and I concur, that the current ventilation system at the Mach #1 Mine is a new system that utilizes a high volume of air with the intention of keeping all areas free of methane and dust. The #1 Mine is well built and incorporates a good ventilation system as well as wide entries and up-to-date technology. Although the mine has received dust citations, it has not received a citation for dust at the working face in the two years it has been in operation. The measurements taken at the exhaust fan after the air has left the mine have never shown a methane concentration greater than .4. However, all of this is not enough to convince me that, as Mach asserts, the ventilation plan does not now need, nor ever will need, any changes.

c. *Decision of the District Manager.*

The Commission in *Twentymile Coal* applied the following guidance in determining if the actions of the district manager are arbitrary and capricious:

The scope of review under the “arbitrary and capricious” standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.” In reviewing the explanation, we must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. 30 FMSHRC at 754-755, quoting *Motor Vehicle Mfr’s Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

I find that the district manager in this case went beyond the requirements of examining relevant data by seeking out data, information, and opinions from a number of highly qualified people. He articulated a satisfactory explanation both for his finding that the Mach plan was not suitable to the mine and for his determination that the provisions sought by MSHA are suitable. The record clearly demonstrates that the district manager had a solid basis to determine that Mach’s plan was not suitable. He understood that the mine was operating on a “conditional” plan, and that the plan contained the use of belt air to ventilate working areas. He was aware that the mine had started to develop the #3 panel, had created a stair-step in the bleeder area, and that the mine had suffered a number of roof falls that may have affected the ventilation.

Further, I find that District Manager Phillips did not abuse his discretion in determining that the plan changes requested by MSHA are suitable to this mine. Based upon the information provided to him from multiple sources, i.e., input from the agency and from the mine, he determined that the use of belt air needed further examination, that there must be relevant

evaluation points in the bleeder system, that ventilation controls must be put in place, particularly in the bleeders and the tailgate area, and that the area where the roof bolters are operating must be ventilated. The changes proposed by MSHA are within reason and are suitable to the conditions as they currently exist at the mine. There is a clear connection between the facts found by Phillips and the decisions that he made. His reasoning and explanation fit squarely with the information and evidence that was before him.

I find the approach of the district manager to be reasonable given all of the circumstances. In other words, the district manager's refusal to approve the Mach plan without the provisions listed in the citations was not arbitrary and capricious. The district manager was reasonable in determining that the plan in place at Mach was not suitable, both in general terms and in terms of the mining about to begin in the #3 longwall panel. Phillips did not approach the plans in a vacuum, but instead sought and received input from inspectors, their supervisors, roof and ventilation control specialists, MSHA's technical support division, and finally from the MSHA headquarters office in Arlington. Phillips spent months discussing the issues with Mach, requesting further information, meeting with them, and reviewing material. He has been in the mining industry for more than forty years and has extensive experience with ventilation and ventilation plans. He was familiar with the Mach #1 Mine, its ventilation system, and its arguments regarding the plan. He reviewed all of the information presented to him, followed the instructions of the agency and Congress in assessing the use of belt air, understood the risks of the plan, and, in the end, made a reasonable decision regarding the suitability of the plan provisions proposed by MSHA.

Mach argues that the district manager is seeking to make material changes to the mine's ventilation plan and that the changes make the mine unsafe, and the ventilation ineffective. This argument focuses primarily on the issues of ventilation controls, belt air, and evaluation points. Mach argues that it makes the system less effective to use ventilation controls and eliminate the use of belt air, that by using the evaluation points proposed by MSHA the mine is less safe as the roof deteriorates, and that building stoppings is not safe and requires an unusual amount of labor.

I reject Mach's proposal that the Secretary be required to prove that the hazard addressed by a new plan provision either exists or is reasonably likely to occur, i.e., that the mine is less safe if the MSHA plan is put in place. "Section 303(o) of the Act, in setting forth the requirement that a ventilation plan be suitable to mining conditions, does not require that plan provisions be based on the existence of specific hazards or the likelihood that specific hazards may occur." *Peabody Coal*, 18 FMSHRC at 690. I conclude that the Secretary carried her burden of proving the suitability of the new MSHA plan provisions, once she identified a specific mine condition not addressed in the previously approved ventilation plan and addressed by the new provision. *Id.*

While MSHA agrees with Mach that the "push/pull" ventilation system is generally a good one, the nuances of the system need work. Mach's view is that the system is good and needs no changes now or in the future. Mach wants little, if any, MSHA involvement in the mine ventilation plan. It appears that while the system is a good one, it has little flexibility to

meet the changing conditions in the mine. I find that the Mach experts diminished their credibility by insisting that the ventilation system works in all conditions ad infinitum. Such insistence ignores a realistic assessment of the potential for change as mining progresses. On the other hand, MSHA has reviewed and recognized that changes in the mine are inevitable and the plan must be flexible and meet such change. I find that the district manager was not arbitrary and capricious, that he made well thought-out decisions, and that the plan MSHA proposed is suitable to this mine.

d. Other Matters.

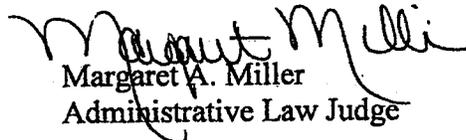
I find no value in Mach's argument that MSHA approved its ventilation plan when it terminated a citation on September 9, 2009. The regulation is clear that a ventilation plan must be approved, in writing, by the district manager. 30 C.F.R § 75.370. There can be no dispute that this did not occur here.

I find no merit to Mach's argument that they should not be subject to both a general plan and a site specific plan for the #3 panel. The Secretary explained why the two discussions were ongoing. It appears that separating the discussions of the #3 panel from the general plan provided Mach an opportunity to focus on that which was most important to it, i.e., having a plan in place to move forward on their mining schedule.

During the course of the hearing, Mach attempted to introduce evidence concerning the ventilation plans at other mines, ventilation or dust surveys at other mines, and information that had not been provided to the district manager during the course of the negotiations regarding the ventilation plans. I refused to allow that evidence for several reasons, but most importantly because it is not relevant to the decision regarding the circumstances and suitability of the plan to this mine. While I understand that many plans are based upon the experience at other mines, it is extremely unlikely that two underground coal mines would present exactly the same factual situation and the same needs in their ventilation plan.

Since I must examine whether the actions of the district manager are arbitrary and capricious, I must look at how he made his decision, what he had before him at the time, and what information he used. Any document generated after that time is not relevant and will not assist me in making an informed decision in this matter. The same can be said about the testimony of a former district manager, who does not have the same information in front of him; it has no probative value. District managers are individuals and may make different determinations even if it were possible to exactly re-formulate what went into one decision.

I conclude that the Secretary has met her burden of proving that the district manager did not abuse his discretion in determining that the prior Mach ventilation plan is no longer suitable to the mine and that the plan provisions proposed by MSHA are suitable. Accordingly, Citation No. 6680550 and Citation No. 6680551 are affirmed and Contest Proceedings, Docket Nos. LAKE 2010-1-R and LAKE 2010-2-R are hereby dismissed.


Margaret A. Miller
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 12, 2010

OAK GROVE RESOURCES, LLC,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. SE 2010-350-R
	:	Order No. 6698830; 01/06/2010
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Oak Grove Mine
ADMINISTRATION, (MSHA),	:	Mine ID 01-00851
Respondent	:	

DECISION

Appearances: Jennifer D. Booth, Esq., Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor; Laura E. Beverage, Esq., Arthur M. Wolfson, Esq., Jackson Kelly, PLLC, Denver, Colorado, on behalf of Oak Grove Resources, LLC.

Before: Judge Zielinski

This case is before me on a Notice of Contest filed by Oak Grove Resources, LLC, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. Oak Grove contests the Secretary's issuance and refusal to terminate Order No. 6698830, issued pursuant to section 104(d)(2) of the Act, which curtailed mining on its 11-East longwall panel. Oak Grove's motion for an expedited hearing was granted, and a hearing was held in Birmingham, Alabama on January 26, 27 and 28, 2010. At the conclusion of the hearing, the parties made oral arguments, and a decision was rendered from the bench. This decision memorializes the bench decision issued on January 28, 2010. For the reasons stated in the bench decision, as further explained below, Order No. 6698830 is affirmed and the Secretary's refusal to abate the violation and terminate the order is found not to be arbitrary and capricious. Consequently, the Notice of Contest is dismissed.

Findings of Fact - Conclusions of Law

Oak Grove Resources operates the Oak Grove Mine, an underground coal mine, in Jefferson County, Alabama. A substantial amount of its coal production is obtained through operation of longwall mining equipment, and it has mined a number of longwall panels on the East section of the mine, served by the Main East Bleeder system. The panel currently being mined is designated "11 East LW38" ("11-East"), which is the north-most of a series of panels mined in that section. The panel runs in an east-west direction. Mining commenced at the east

end on March 2, 2009, and had proceeded west approximately 6,000 feet. The mined-out area of the 11-East panel, the “gob,” is ventilated by the Main East Bleeder system, the primary component of which is the No. 6 Fan, located off the northeast corner of the panel. That centrifugal exhaust fan also provides ventilation for fourteen or more other mined-out longwall panels through lengthy bleeder entries that run from the end of the track entry, to the east and north behind (east) of the old panels. The bleeder system is depicted in a number of exhibits, notably, Government Exhibit No. 35. The bleeder entry is accessed from the track entry. Because of its low height, it must be traversed largely by “duckwalking.” It takes almost a whole shift to traverse the south side of the bleeder entry from the end of the track to Measuring Point Location (“MPL”) No. 781, a bleeder examination point near the southeast corner of the 11-East panel. Prior to January 6, 2010, persons traveling in the bleeder entry had no ability to communicate with the surface or miners in other locations of the mine.

Mined-out areas, like the 11-East gob, continue to generate methane, and must be ventilated “so that methane-air mixtures and other gases, dusts, and fumes from throughout the worked-out areas are continuously diluted and routed into a return air course or to the surface of the mine.” 30 C.F.R. § 75.334(a)(1). The ventilation system for mined-out areas must be examined at least every seven days. 30 C.F.R. § 75.364(a). Part of the weekly examination must include:

At least one entry of each set of bleeder entries used as part of a bleeder system under § 75.334 shall be traveled in its entirety. Measurements of methane and oxygen concentrations and air quantities and a test to determine if air is moving in the proper direction shall be made at the measurement point locations specified in the mine ventilation plan to determine the effectiveness of the bleeder system.

30 C.F.R. § 75.364(a)(2)(iii).

If the bleeder system used does not continuously dilute and move methane-air mixtures and other gases, dusts, and fumes away from worked-out areas into a return air course or to the surface of the mine, or it cannot be determined by examinations under § 75.364 that the bleeder system is working effectively, the worked-out area shall be sealed.

30 C.F.R. § 75.334(d).

Oak Grove had positioned air-powered pumps in the bleeder entries to control water accumulations. It began to experience problems with the pumps around mid-December, 2009. By the end of the month, the problems had grown, and there were significant accumulations of water in low spots of the bleeder entries.¹ On or about January 1, it initiated efforts to drill bore

¹ Oak Grove’s efforts to repair and replace pumps were stymied for three to four days by an order issued by MSHA barring access to the area. The order related to dangerous

holes down to the bleeder entries near the rear of the 11-East panel to provide electrical power for more powerful electric pumps, communication lines, and additional compressed air capacity.

On January 5, Edward Boylen, an MSHA inspector with considerable mining experience involving design, set-up and operation of longwall mining systems, commenced a regular inspection of the Oak Grove mine. He met with mine officials, reviewed records, and became aware that there had been roof falls in the bleeder entries on the headgate side of the 11-East panel and water accumulations in the bleeder system. He decided to travel to the longwall and conduct a spot inspection, but did not complete it.² When he exited the mine, he examined charts of pressure measurements at the No. 6 exhaust fan, and found that the pressure differential had almost doubled since December 15, 2009, indicating that there were significant restrictions in the bleeder system flow. That same day, members of the United Mine Workers of America, the union representing miners at Oak Grove, met with MSHA officials and expressed concerns about the safety of miners who were involved in efforts to pump water from the bleeder system.³

MSHA determined to inspect the mine the following day.⁴ On the morning of January 6, 2010, Boylen and Jacky Shubert, an MSHA field office supervisor, arrived at the mine to conduct an inspection of the bleeder system. They met with Oak Grove officials and examined records of weekly bleeder examinations and noted that a complete inspection had last been accomplished on December 14, 2009. Ex. G-9. The record reflected that the mine had been idle on December 21, that on December 29 and January 4 two MPLs on the headgate side of the 11-East panel could not be examined because the entries were impassible due to a roof fall, and that no measurements had been taken at nine other MPLs established in Oak Grove's approved ventilation plan. Oak Grove managers readily acknowledged that 11 MPLs were not being visited during the weekly

atmospheres behind some seals located several miles from the 11-East panel.

² The Oak Grove mine liberated in excess of one million cubic feet of methane in a 24-hour period, and was subject to spot inspections by MSHA pursuant to section 103(i) of the Act. 30 USC § 813(i).

³ Oak Grove officials also met with MSHA on January 5, on a variety of topics. The meeting was not related to the UMWA's meeting, and Oak Grove officials were unaware of the other meeting.

⁴ MSHA was very concerned about information related by the Union members about conditions in the bleeder entries. MSHA phoned Oak Grove and advised, in essence, that the longwall should not be in production. Oak Grove called back later, questioning MSHA's authority to impose such a condition in the absence of any official enforcement action. Joseph O'Donnell, Jr., assistant district manager for MSHA's District 11, then advised Oak Grove to "forget" the earlier call, and that MSHA would see them in the morning.

examinations.⁵

Shubert and Boylen traveled to the South end of the Main East Bleeder system, and began to walk up the bleeder entry. They encountered accumulations of water in five locations that they determined presented unsafe travel conditions, including water at MPL 476 that was waist to chest deep for a distance as far as a cap light would shine, and water had accumulated to the roof of the entry in by MPL 483. They decided not to attempt to proceed further. They exited the bleeder entries some 12 hours after they had entered, and Boylen issued two orders pursuant to section 104(d)(2) of the Act.⁶

Order No. 6698829 alleged a violation of 30 C.F.R. § 75.370(a)(1), which requires that operators develop and follow a ventilation plan approved by the MSHA district manager. Ex. G-1. Oak Grove's approved ventilation plan required that bleeder entries be maintained with additional roof support and that water be pumped to maintain free air flow and safe travel. Ex. G-7. Oak Grove had clearly failed to comply with its ventilation plan. Water accumulated in the bleeder entries had rendered them unsafe for travel, and impassible. Moreover, the conditions had existed at least since December 29, when the MPLs could not be examined. The order barred entry beyond the first-identified hazardous water accumulation until the entry had been pumped and was safe for travel. Ex. G-1. The order was modified on January 8 to allow

⁵ Boylen also determined that Oak Grove was not conducting proper preshift examinations of the area where miners were working on pumps in the bleeder system. Because it took about six hours to reach the work area and men in the bleeder entries had no means of communication, miners were simply following examiners into the bleeder entries. Normal preshift examinations, required to be conducted within three hours of a scheduled shift were not conducted for the bleeder work.

⁶ Section 104(d)(2) of the Act provides:

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

The underlying section 104(d)(1) withdrawal order had been issued on October 21, 2003, and Oak Grove had not experienced a "clean" inspection since that date. Consequently, it remained on the section 104(d)(2) "chain." Ex. G-5, G-6.

certified persons, accompanied by a limited number of miners, to travel further inby, to an electric pump station to move and maintain pumps that were beginning to run “dry,” possibly creating a further hazard.⁷

The second order, Order No. 6698830, alleged a violation of 30 C.F.R. § 75.334(d), which requires that a worked-out area be sealed if its bleeder system does not continuously dilute and move methane-air mixtures and other noxious gases out of the mine, or if it cannot be determined from the required weekly examinations that the bleeder system is working effectively.

The violation was described in the “Condition and Practice” section of the Order as follows:⁸

The mine operator is not maintaining the Main East Bleeder system. There are eleven MPL evaluation stations that are not being examined by certified officials. Water was allowed to roof inby MPL 483. Thus the bleeder system was not inspected to determine its effectiveness in diluting and removing methane-air mixtures and other gases. This bleeder area has existed for at least 10 shifts and the longwall had continued operating under normal production. Located on the headgate side of the operating longwall there are roof falls in the No. 1 and No. 2 entries preventing passage for bleeder inspection to the No. 6 Exhaust Fan. The air returning off the tailgate of the operating longwall was not being monitored, due to the fact that the 11 MPLs were not being checked. Upon inspection of the mine fan charts for the No. 6 exhaust fan, it was revealed that the water gauge, in a two-week period, went from a reading of 15 to a reading of 31. A 75.364(a)(2)(iii) citation was written on 12/30/2009 because the bleeder could not be made in its entirety. The mine operator has engaged in more than ordinary negligence by allowing the bleeder to remain unexamined, while the longwall was in normal production mode. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-2.

The orders required idling of the longwall. On January 8, 2010, Oak Grove filed notices of contest of the orders with the Commission, along with a motion for an expedited hearing.

⁷ Order No. 6698829 was terminated on January 15, because the water in the cited areas had been pumped down. Because that order had been terminated, Oak Grove’s contest action involving it was not made a subject of the expedited hearing.

⁸ Grammar and spelling errors have been corrected in quotations from documents prepared in the field.

The weekly examination regulation, section 75.364, provides that: "In lieu of the requirements of section 364(a)(2)(i) and (iii) of this section, an alternative method of evaluation may be specified in the ventilation plan provided the alternative method results in proper evaluation of the effectiveness of the bleeder system." 30 C.F.R. § 75.364(a)(2)(iv). Oak Grove officials met with MSHA on January 8, following which, Paul Hafera, the General Manager, faxed a letter requesting additional access to the bleeder entries to maintain conditions and pump water. Ex. G-22. MSHA erroneously construed the letter as a request to amend the ventilation plan to address bleeder evaluation, denied the request and specified information that would be required for review of such a plan. Ex. G-23. The following day, Saturday, Oak Grove faxed a letter in response to MSHA's reply. Ex. G-24. It proposed establishment of temporary bleeder evaluation points, to be examined daily, as substitutes for the MPLs that could not be accessed, and suggested an alternative bleeder evaluation plan. Two temporary evaluation points, BE 1 (T) and BE 2 (T) would be established in the No. 1 and No. 2 headgate entries, outby the roof fall. They would approximate the conditions at the two inaccessible headgate MPLs, Nos. 550 and 551, as depicted on a map submitted with the letter. Ex. G-24A. Because MPL 483 and those further inby were not accessible, it was proposed that MPLs 439, 440 and 441, be designated temporary evaluation points, which would show conditions in the south side of the bleeder up to that location, i.e., behind the old 9-East panel. Another temporary evaluation point, BE 6 (T), would be established at the No. 6 Fan. Oak Grove represented that "the air quantity difference between that temporary BE points and the fan measuring point will be significant and will be the sum of the air that is passing through old 9 East, Old 10 East, New 10 East and the longwall gobs of 10 East and the active 11 East." Ex. G-24.

Oak Grove stated that the plan was "being submitted in order to terminate order # 66988[30] which alleges Oak Grove has violated 30CFR75.334(d)." Ex. G-24. This approach later became known as the "subtraction" method for evaluating the effectiveness of the bleeder system. The quantity and quality of air entering the bleeder system at known points, would be subtracted from the amount leaving the system through the No. 6 Fan, and it was assumed that the remainder was exiting the 11-East tailgate entries.

MSHA responded on January 11, the following Monday, denying approval of the plan, and specifying nine "issues and/or items of concern" that Oak Grove had to address, including "the means by which the air quality in the untravelable areas will be determined." Ex. G-25. It also noted that MSHA's understanding was that the plan supplement had been submitted to allow temporary evaluations until the bleeder entries could be traveled in their entirety, not to allow resumption of longwall mining.

Oak Grove responded by letter dated January 13, with an attached map depicting temporary bleeder evaluation points, MPLs and other information, and clarifying that it was intended to secure termination of the section 334(d) Order so that mining could be resumed. Ex. G-26. Also clarified was Oak Grove's proposed "subtraction" method to evaluate the effectiveness of the bleeder system. It proposed to determine the quantity of air passing through the three MPLs at the back of the tailgate entries of the 11-East panel, MPLs 556, 557 and 569,

by subtracting from the quantity measured at the No. 6 Fan, the quantities measured in the No. 1 and No. 2 headgate entries, BE 1 (T) and BE 2 (T) (approximating readings at MPLs 550 and 551), and the quantity measured at the then-accessible MPL 483 (approximating the reading at MPL 581).

The MSHA district office obtained input from MSHA's technical support and certification center prior to preparing a response. Thomas Morley, an MSHA engineer and ventilation expert, reviewed the Oak Grove proposal and advised the district office by e-mail. Morley also testified at the hearing. Morley expressed concern about the assumptions underlying the "subtraction" alternative and the reliability of the results. His e-mail read, in part:

The proposed method of substitution reading where the 11 East Headgate and Bleeder 483 quantities are subtracted from the total at the fan does not account for air flow in the headgate of the 10 East panel.

The proposed method of substitution reading does not account for air that may be traveling the setup entries of previous panels.

The quantity of air shown 4 crosscuts in by the face in the tailgate is 5,593 cfm [cubic feet per minute]. The total quantity at the fan and in the bleeder is so much larger than the amount of air in the tailgate that a determination of quantity or quality can not be reliably made for air exiting the active tailgate by substitution.

Ex. G-38.

MSHA responded to Oak Grove's January 13 submittal by letter dated January 15, denying approval of the plan amendments. Ex. G-27. It viewed Oak Grove's proposal as an alternative method of evaluating the effectiveness of the bleeder system under section 75.364(a)(2)(iv), and determined that it did not adequately provide for proper evaluation of the bleeder system. The letter made clear that MSHA's position was that:

Any plan submitted for approval of an alternative method for evaluating the effectiveness of the bleeder system must provide no less than the same information as would be gathered during normal weekly examinations. This information includes measurements of methane and oxygen concentrations and tests to determine that air is moving in the proper direction. Of prime concern is the air quantity and quality, particularly methane concentrations, on the tailgate end of the 11-East longwall panel at the back end. An alternative plan for evaluating the effectiveness of the East Bleeder System must specify how air quality will be determined in the areas that cannot be traveled, particularly where air would normally be exiting the gob on the tailgate end. In addition, the adequacy of the plan submitted January 14, 20[10], cannot be evaluated because air entering and/or exiting the "Old" 10-East entries outby the "Old" 10-East

Longwall face, including the establishment of evaluation points in this area, is not specified in the submitted plan. The air entering/exiting this area directly impacts the East Bleeder System and the ability to make a proper evaluation of its effectiveness.

Ex. G-27.

Specific concerns were identified at page 2 of the letter, including the following points:

Air quantities across the old longwall start-lines, particularly the 10-East and 11-East panels, are not accounted for in the proposed calculation. In order for an adequate review of any such plan to be conducted, the plan must include all air quantities entering and leaving the East Bleeder System so that it may be possible to calculate such air quantities. Such air quantities must be shown on the map and, if calculated, must include the method of calculation.

The total air quantity at the fan and in the bleeder entries is so much greater than the quantity shown in by the longwall face on the tailgate end (5,593 cfm) that a calculated determination of air quantity and quality exiting the worked-out area on the tailgate end at the back may not be reliable.

The low air quantity just in by the longwall face on the tailgate end (5,593 cfm) is very low and does not ensure adequate ventilation of the worked-out area. This is particularly significant since the air quality cannot be measured directly.

Ex. G-27.

Further correspondence was exchanged. Oak Grove forwarded a letter dated January 18, 2010, to which MSHA responded on January 20, advising that, in its opinion, the supplement provided no additional information. Ex. G-28, G-29. Oak Grove sought to move the longwall shearer back to the headgate, a request that was also denied. Ex. G-30, G-32. Oak Grove further clarified its proposal by letter dated January 21, 2010, which MSHA denied on January 22, partially on the understanding that a new proposal would be forthcoming following a meeting that day. Ex. G-31, G-33. Oak Grove's final proposal, prior to the hearing, was a January 23, letter, with attached mine map, showing air readings and calculations. Ex. G-34, G-34A. Pumping had progressed to the point that MPL 581 was accessible, and Oak Grove proposed to use readings from that evaluation point to calculate, or approximate, the quantity of air exiting the tailgate entries at the back end of the 11-East panel. Notably, approximate locations where water remained roofed were highlighted in blue, and it was represented that, "Airflow is passing by and through these areas and being accounted for." Ex. G-34 at 2.

MSHA did not respond to the January 23 letter. That letter, and the attached map, were the subjects of considerable testimony at the hearing, which commenced on January 26, 2010. At

that time Order No. 6698830 remained in effect, barring production on the active longwall panel.

The Issues

There are two primary issues, resolution of either of which in Oak Grove's favor, would remove the bar to production. The first is the validity of the Order. If the Order is found to be valid, the second issue is the reasonableness of the conditions set for abatement of the violation, specifically, the validity of MSHA's disapprovals of Oak Grove's proposed amendments to its ventilation plan, that would have established an alternative method for evaluation of the bleeder system.

The Order

The order was clearly valid. Section 75.364(a)(2)(iii) requires that bleeder system entries be examined weekly, and that air quality and quantity be measured at evaluation points specified in the operator's approved ventilation plan. Section 75.334(d) provides that, if the effectiveness of the bleeder system cannot be ascertained by the weekly examinations, the worked-out area must be sealed. Oak Grove was well aware that it had not conducted a proper weekly examination of the bleeder system since December 14, over three weeks prior to January 6, 2010. During the weekly examinations on December 29 and January 4, eleven MPLs specified in the ventilation plan for evaluation of the bleeder system serving the 11-East panel had not been examined, and no measurements had been taken.

Records of pressures at the No. 6 Fan indicated that significant changes were occurring in the bleeder system. The pressure differential at the fan increased by 50% from December 15 to January 2, indicating that there was significant additional resistance to air flow in the system.⁹ Nevertheless, Oak Grove operated the longwall on January 4, 5 and 6, and it made no apparent effort to propose an alternative method of evaluating the bleeder system until after the order had been issued. Ex. G-19.

The cited regulation was violated. The violation was extensive, open, obvious, and was known to the operator.¹⁰ High level officials of Oak Grove, including the General Mine

⁹ The pressure differential at the fan, essentially the vacuum created by the exhaust fan, was recorded in inches of water, referred to as the "water gauge," or "W.G." Prior to December 15 the W.G. was averaging about 20 inches. It rose steadily, to a level above 30, by January 2. Ex. G-19.

¹⁰ The Order was issued pursuant to section 104(d)(2) of the Act, and alleged that the operator's negligence was high, and that the violation was a result of the Oak Grove's unwarrantable failure to comply with the standard. 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

Foreman, had signed off on reports of incomplete examinations recorded in the weekly examination book. Oak Grove management officials candidly told Shubert and Boylen, on January 6, that the MPLs were not being examined due to roof falls and water accumulations. Tr. I-100.¹¹ The violation was of high gravity. Operation of the longwall with an ineffective bleeder system, or a bleeder system whose effectiveness could not be determined, posed a serious risk of a serious injuries to miners.¹² Resistance to air flow through the bleeder system had increased by 50% over the past three weeks, indicating significant changes in the bleeder system. The mine liberates substantial amounts of methane. Methane could have been accumulating in the gob, backing up along the tailgate entry. Roof falls in the gob could push explosive concentrations of methane onto the longwall face, where there were numerous ignition sources. The significant possibility of an ignition was not obviated by safety devices on the face equipment.

(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). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts 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. 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). *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001).

¹¹ The hearing transcript consists of three separately numbered volumes. The volume associated with the first day of the hearing is identified as "Tr. I-x," day two "Tr. II-x" and day three "TR.-III-x."

¹² The Order alleges that the violation was significant and substantial ("S&S"). An 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). *See also Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985).

Oak Grove points to the fact that another MSHA inspector issued a less serious section 104(a) citation on December 30, 2009, because the bleeder entries were not travelable. Ex. C-1. The original time allowed for abatement of that citation, December 31, was extended on January 14 to January 29, 2010. This was somewhat of a mixed signal from MSHA. However, the longwall was not operating on December 30 or after January 6, which could explain the abatement period determinations. The issuance of the citation, and the abatement period, do not excuse Oak Grove's conduct. It knew that no weekly examination of the bleeder entries had been done since December 14, and that conditions had deteriorated since that time, such that a considerable portion of the south bleeder entries, as well as critical portions of the 11-East headgate entries, were inaccessible. Yet it resumed production on the longwall. The longwall was operated on January 4 (2 shifts), January 5 (2 shifts), and January 6 (1 shift). Ex. G-10.

I find that Order No. 6698830, which was issued as an S&S violation pursuant to section 104(d)(2) of the Act based upon Oak Grove's unwarrantable failure to comply with a mandatory standard, was valid in all respects, and reject Oak Grove's contest of the Order.

Abatement

MSHA's refusal to abate the order, by approving Oak Grove's proposed amendments to its ventilation plan presented, in essence, a plan dispute. The law applicable to plan disputes is well-settled. Both MSHA and the operator must negotiate in good faith, stating their positions on the issues and explaining them. If the parties have fulfilled their obligations to negotiate, then it must be determined whether MSHA's rejection of plan provisions proposed by the operator was arbitrary and capricious.¹³

¹³ The law applicable to plan disputes was recently explained by the Commission in

One of the cornerstone principles with regard to plan formulation under the Mine Act is that MSHA and the affected operator must negotiate in good faith for a reasonable period concerning a disputed plan provision. *Carbon County Coal Co.*, 7 FMSHRC 1367, 1371 (Sept. 1985). The Commission has noted, "Two key elements of good faith consultation are giving notice of a party's position and adequate discussion of disputed provisions." *C.W. Mining Co.*, 18 FMSHRC 1740, 1747 (Oct. 1996).

While the contents of a plan are based on consultations between the Secretary and the operators, the Commission has recognized that "the Secretary is [not] in the same position as a private party conducting arm's length negotiations in a free market." *Id.* at 1746. As one court has noted, "the Secretary must independently exercise [her] judgment with respect to the content of ... plans in connection with [her] final approval of the plan." *UMWA v. Dole*, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989), quoting S. Rep. No. 181, 95th Cong., 25 (1977), reprinted in Senate Subcom. on Labor, Com. on Human Res., 95th Cong.,

Here, both parties engaged in rapid-fire exchanges of correspondence, and fulfilled their obligations to negotiate in good faith over the disputed plan provisions. Consequently, the issue to be decided is whether MSHA's disapproval of the proposed amendments was arbitrary and capricious. I conclude that it was not.

While it presented Oak Grove with a series of "concerns" that it wanted addressed to evaluate plan submittals, MSHA had made clear that its primary focus was assuring reliable measurement, or calculation, of the air exiting the tailgate side of the 11-East panel at the back of the gob. Ex. G-27. The MPLs that were intended to provide that information were Nos. 556, 557 and 569, at which were measured the quality and quantity of air exiting the No. 1, 2 and 3 tailgate entries. They are highlighted in yellow on Government exhibit 34A. MSHA had also made clear that it did not believe that Oak Grove's subtraction method accounted for all air entering and exiting the bleeder system, particularly air entering from the 10-East headgate and set up entries. Ex. G-27.

MSHA's point was well-taken. As is evident on Government exhibit 34A, there are two passages from the No. 1 headgate entry of the 10-East panel to the bleeder entries behind the 11-East panel. They are circled in orange on the exhibit, and labeled "cut thru." The east cut-through has an air lock that prevents passage of air from the 10-East panel. However, the west cut-through is open and, in fact, is the passage for air from the south bleeder, which has passed through MPL 581, into the bleeder entry behind the 11-East panel. Air traveling in by in the 10-East headgate entries and entering the bleeder entries through the cut-through would not have passed through MPL 581, and would not have been accounted for in Oak Grove's subtraction method.

MSHA's concern was that such air was entering the system, and it had serious reservations about the proposed subtraction method. As depicted on Government exhibit 34A, Oak Grove's example of readings on January 22, showed that 230,000 cfm of air was exiting the system at the No. 6 fan. The quantity of air entering the system from the 11-East headgate entries (BE 1 (T) and BE 2 (T), approximating the flow in MPLs 550 and 551), was 29,472 cfm. The quantity of air entering the bleeder from the south, as measured at MPL 581, was 178,320 cfm.

Legislative History of the Federal Mine Safety and Health Act of 1977, at 613 (1978). Ultimately, the plan approval process involves an element of judgment on the Secretary's part. *Peabody Coal Co.*, 18 FMSHRC 686, 692 (May 1996) ("Peabody II"). "[A]bsent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval." *C.W. Mining*, 18 FMSHRC at 1746; see also *Monterey Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983) (withdrawal of approval of water impoundment plan was not arbitrary or capricious where MSHA's conduct throughout the process was reasonable).

Emerald Coal Res. LP, 29 FMSHRC 956, 966 (Dec. 2007)

That left a balance of 22,253 cfm that Oak Grove attributed to flow from the tailgate side of the 11-East panel.

However, as the exhibit shows, there was also a total of 24,000 cfm flowing inby in the No. 1 and No. 2 heagate entries of the 10-East panel. It appears that that air could flow inby and enter the bleeder system through the cut-through.¹⁴ If the 24,000 cfm entering the 10-East headgate entries was entering the bleeder through the cut-through, without passing through MPL 581, then it also needed to be subtracted from the total exiting the system to approximate the flow from the 11-East tailgate area. The result, a negative 1,747 cfm, would indicate that air was flowing outby in the 11-East tailgate, i.e., backing up methane in the gob toward the face.

Oak Grove's Safety Manager, Timothy Thompson, and General Manager testified at the hearing that, in their opinion, the air from the 10-East headgate was not able to flow through the cut-through, but, rather, was flowing into the bleeder entries upstream, i.e., south, of MPL 581. As such, it would have formed a portion of the flow at MPL 581, and would have been accounted for in the proposed subtraction evaluation method. While Oak Grove maintained in its letter that air from the 10-East panel was accounted for, it did not explain its theory of flow in its correspondence with MSHA. Thompson did not believe that the theory had been advanced to MSHA. Tr. III-158. Morley, MSHA's ventilation expert, did not believe that it was likely that the 10-East headgate air was flowing into the bleeder upstream of MPL 581, because stoppings along the entries would have required that it flow down through the gob into the tailgate entries. Tr. II-194-96.

Possible errors in flow measurements were also a concern to MSHA, as expressed in its January 15 letter. Flow volume at the No. 6 Fan, the air exiting the system, was determined by one of two methods. Oak Grove's January 23 submission proposed measurement of the No. 6 Fan volume by reference to performance specifications published by the fan manufacturer. A chart entitled "typical performance curve" ("fan curve") for the centrifugal exhaust No. 6 Fan displays volume of flow through the fan as functions of the pressure differential across the fan, measured in inches of water, i.e., "water gauge" or "W.G.," and the angle setting of the fan louvers. Ex. G-20. With the fan louvers at 90 degrees, i.e., fully open, and a water gauge reading of 30 inches, the chart yields a flow volume of 220,000 cfm.

A second method involves use of a Pitot tube, a device that measures the pressures generated by flowing air, and consists of two concentric tubes bent in an "L" shape. The open end of the inner tube, which is pointed into the air flow, measures the total pressure within the stream, including that generated by the air velocity. Holes in the sides of the outer tube,

¹⁴ Oak Grove believed that the No. 1 headgate entry had been roofed with water, as shown on the map. The No. 2 entry, which was not completely separated from the No. 1 entry, extended to the area of the cut-through, and there were several areas where falls had occurred in that vicinity. Oak Grove had represented in its January 23 letter that air was flowing by and through the areas that were roofed with water.

transverse to the air flow, measure the “static” pressure, i.e., the pressure without the velocity component. The volume of flow can then be calculated based upon the two readings and other available information, such as the density of the air and the area of the discharge ducts. The Pitot tube method is regarded as a more accurate means of determining flow velocity and volume. Tr. II-207.

Flow volume in the bleeder entries was determined by measuring the velocity of air flow at various points in the entry, and multiplying the velocity by the area of the entry opening. Air velocity was measured with an anemometer, a small fan that is rotated by the air current. It is held in the mine airway for a specified time, while being moved steadily over the entire area of the entry. The velocity of air flow is then displayed as a function of the number of fan revolutions and the specified time. The error rate for anemometer readings ranges from five to ten percent. Tr. II-267. However, Larry Bennett, Oak Grove’s chief engineer, explained that at higher velocities, like those experienced near MPL 581, it was well known in the industry that such readings could be 10-20% high. Tr. III-35-36. Morley generally agreed that anemometer readings would likely be high at higher velocities. Tr. II-257.

Morley had expressed concern in his January 15 e-mail about the reliability of the calculation of volumes in the range of 20,000 cfm from much larger volumes in the range of 200,000 cfm, because the measurements might have significant error rates. Oak Grove’s final supplemental plan relied on measurements of flow volume at the No. 6 Fan determined by relating the water gauge reading to the fan curve. The map included with the submission, shows 230,000 cfm exiting the No. 6 Fan, based upon a water gauge reading of 29.0 inches. Ex. G-34A, G-20. After subtracting the measurements at MPL 581 (178,320 cfm) and B1 (T) and B2 (T) (29, 427 cfm), Oak Grove’s subtraction method yielded a volume of 22,253 cfm, which it assumed was entering the bleeder system from the 11-East tailgate.

However, in Morley’s experience, fans seldom performed exactly as predicted by manufacturer’s performance curves. Tr. II-229. The potential error rate was illustrated by Bennett’s testimony. He and an MSHA inspector, Steve Harrison, measured the flow volume at the fan with a Pitot tube, and determined it to be 197,197 cfm. Tr. III-18-23. To check the reasonableness of that measurement, they consulted the fan curve at the then water gauge reading of 30.438 inches, which yielded a figure of 212,000 cfm. Assuming the accuracy of the Pitot tube measurement, the fan curve reading was high by 15,000 cfm, or 7.6%.

Seven and six-tenths percent of the 230,000 cfm exit volume reflected on the January 22 map, is 17,480 cfm. Consequently, the exit volume was more likely in the range of 212,500 cfm. If the south bleeder and headgate volumes are assumed to be accurate, that would leave 4,753 cfm, rather than 22,253 cfm, that could have been entering the bleeders from the 11-East tailgate, or other potential sources. Of course, if the anemometer measurement at MPL 581 was high by 10% or more, as Bennett believed, the fan volume error would have been more than offset.

MSHA's disapprovals of the ventilation plan amendments submitted by Oak Grove were primarily based on, 1) disagreement with the underlying assumption of the subtraction method, i.e., that the entire remainder of the subtraction of the 11-East headgate and MPL 581 volumes from the No. 6 fan volume was attributable to flow from the 11-East tailgate; and, 2) that errors in measurements of relatively high flow volumes produced an unreliable result.

Oak Grove advanced explanations for concerns raised by MSHA. It believed that flows from other sources, such as the 10-East headgate and set-up entries of the old panels, were accounted for because they were being drawn into the bleeder entries in the area of the 10-East tailgate, and were included in the flow through MPL 581. However, MSHA's belief, as expressed by Morley, was that at least some of the 24,000 cfm flowing into the 10-East headgate, as well as air that might be coursing through the old set-up entries, was entering the bleeder through the cut-through, inby MPL 581, and was erroneously being characterized as flow from the 11-East tailgate. Morley explained that it was possible that the 10-East headgate air could be flowing either way, the trouble was that "we don't know." Tr. III-196. MSHA was also concerned that errors in measurements of volumes in the range of 200,000 cfm rendered unreliable calculations resulting in much smaller volumes, another unknown quantity..

Oak Grove argues that MSHA's rejection of several proposals and requests for additional information evidence a mindset that it would accept only evaluations made at the inaccessible MPLs at the back of the 11-East tailgate entries, and that that insistence was arbitrary and capricious. There is little question that MSHA's primary concern was that any bleeder evaluation method include reliable data demonstrating that there was an acceptable quantity and quality of air exiting the back of the 11-East tailgate entries. That was the most important indicator that the bleeder system was working properly in the active longwall panel. It did not rule out alternative methods, including the subtraction proposal. However, for the reasons explained above, MSHA did not believe that the proposals advanced by Oak Grove would reliably confirm that the bleeder system was working effectively. MSHA's reservations were reasonable.

As noted in the decision announced from the bench, Oak Grove's assumptions about air flow through the bleeder system may have been correct. It could have been that none of the 10-East headgate flow traveled through the cut-through, and that all of it is accounted for in the MPL 581 measurement. It could have been that errors in anemometer readings at MPL 581 offset errors in fan curve volumes. It could have been that the significant pressure differential across the regulators in the headgate and inby MPL 581 meant that there was sufficient low pressure at the back of the 11-East tailgate entries to continuously dilute methane and other noxious gases and move them out of the mined-out area of the 11-East panel. The problem is that there are reasons to doubt the accuracy of Oak Grove's theories and assumptions, and, most importantly, there is no way to verify their accuracy.

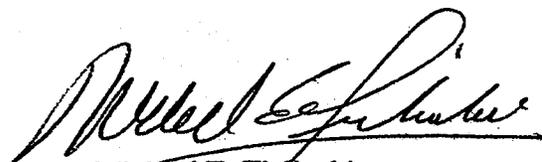
Under section 334(d), the effectiveness of the bleeder system must be determined by examinations. Here, the critical information that was no longer available was measurement of air quantity and quality exiting the tailgate entries of the 11-East panel. Predictions of quantity and

quality of critical air flow based upon assumptions are simply not adequate, unless it can be demonstrated that such assumptions are so reliable as to be the equivalent of actual measurements. The potential consequences of an erroneous assumption that the bleeder system is working effectively, demand a high level of reliability. MSHA's position that 10-East headgate and set-up entry flows were not accounted for in the subtraction method was equally as plausible as Oak Grove's contention. Its concerns about the reliability of results based upon measurement errors were also plausible. Absent verifiable explanations satisfying its concerns, the denials of the proposed alternative evaluation methods were reasonable.

MSHA's denial of proposed amendments to Oak Grove's ventilation plan that were designed to abate Order No. 6698830 were not arbitrary or capricious.

ORDER

Oak Grove's contest of Order No. 6698830, both as to the violation itself and the rejection of the proposed abatement measures, is **DISMISSED**.



Michael E. Zielinski
Senior Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 18, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2008-201-M
Petitioner	:	A.C. No. 42-02159-130699
	:	
v.	:	
	:	
GILBERT DEVELOPMENT CORP.,	:	Mine: SR9/ Harrisburg Pit
Respondent	:	

DECISION

Appearances: Jennifer A. Casey, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, and Hillary A. Smith, Conference and Litigation Representative, Mine Safety and Health Administration, Denver, Colorado, for Petitioner; Michael F. Leavitt, Esq., and Bryan J. Pattison, Esq., Durham, Jones & Pinegar, St. George, Utah, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”) against Gilbert Development Corporation (“Gilbert Development”) 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”). An evidentiary hearing was held in St. George, Utah and the parties introduced testimony and documentary evidence. For the reasons set forth below, I find that the Secretary established a violation of the safety standard, but that the violation was not the result of the company’s unwarrantable failure to comply with the safety standard.

Gilbert Development is made up of several divisions that engage in different types of enterprises. The division at issue here is engaged in mining aggregate. (Tr. 211). It has mined gravel since the early 1970s and it has operations in several states. The company produces materials for asphalt and concrete products and for roadway and embankment projects. The quarry and crusher operation involved in this case is located in Washington County, Utah.

I. BACKGROUND

A. The Citation.

On June 19, 2007, Inspector Michael Okuniewicz issued Citation No. 6319158 under section 104(d)(1) of the Mine Act, alleging a violation of 30 C.F.R. § 56.12016, in part, as follows:

A non-fatal accident occurred at this mine on 06/14/2007 when an employee tried to energize a defective 480 volt Square D electrical circuit breaker causing a short and arc flash. The employee received burns to the face and right arm.

The main line 480 breaker that supplied power to the defective breaker was deenergized and locked out prior to the employee coming on shift due to an electrical problem in the defective box found on the previous shift. There was no sign nor warning notices posted at the power switch to indicate the hazard. All employees that were working on the switch did not add their locks to the gang lock to prevent the removal. The key for the lock was inadvertently left where an employee was able to find it and energize the electrical system causing the short.

The mine superintendent and foreman who were working on the defective circuit breaker engaged in aggravated conduct in that they failed to properly lock out the 480 volt power to the plant and the defective main circuit breaker they were working on.

The inspector determined that an injury was reasonably likely and that a fatal accident could occur. He determined that the violation was of a significant and substantial nature ("S&S") and that the company's negligence was high. (Ex. G-1). Section 56.12016, entitled "Work on electrically-powered equipment" provides:

Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventative devices shall be removed only by the persons who installed them or by authorized personnel.

The Secretary proposes a penalty of \$60,000.00 for this citation.¹

II. SUMMARY OF THE EVIDENCE

The evidence introduced by the parties presented significantly different accounts of what happened at the plant on June 13-14, 2007. The basic configuration of the quarry is not disputed. Rock was extracted from the earth and transported to the plant, where it was crushed, screened, and sorted. Material was conveyed through the plant on belts and piles of product were created through the use of stacker conveyors. At the time of the accident, power for the electrical equipment was purchased from the local utility. The power entered through the main breaker. From there, the power was wired to various power boxes in the nearby electrical trailer. (Ex. J-1). These power boxes were very large cabinets, about the size of refrigerators, but not as deep. The power boxes contained circuit breakers for various pieces of electrical equipment. There was a pegboard in the electrical trailer that was used to store the locks used to lock out the power at the main breaker. The keys to these locks and danger tags were also kept on the pegboard.

The power box at issue in this case was the second box in the electrical trailer and it contained the breaker for an impact crusher. The power boxes were kept closed at all times, unless repairs were being made on equipment in that box. The handle on the second power box, used to close the circuit breaker that supplied power to the crusher, was on the right-hand side of the box at the front. This handle could not be pushed down to close the circuit breaker and energize the circuit if the door to the power box were not completely closed.

A. Katherine Gonzales.

Katherine Gonzales, who worked for Gilbert Development for about three years, testified for the Secretary. She was employed as the tower operator at the crusher and she testified that she was responsible for, among other things, conducting a general morning walkthrough of the plant, turning on the main power breaker and four power boxes, warming up the plant, shutting down and restarting the plant during lunch, and shutting down the plant at the end of the day. (Tr. 107, 109-110).

Gonzales testified that on April 23, 2007, the plant switched from being powered by a portable generator to receiving power from the local electric utility company. (Tr. 110-111). She said that once the plant started receiving power from the utility, she did not initially start up the plant in the morning. (Tr. 130). She testified, however, that about two weeks after this switch, she resumed her morning startup responsibilities. (Tr. 112).

Gonzales testified that at the end of her shift on June 13, 2007, she shut off the main power to the plant, placed a lock with the letter "K" written on the lock at the main breaker (the

¹ The proposed penalty was specially assessed under 30 C.F.R. § 100.5. Under the regular assessment formula, the penalty would have been \$3,689.00. (Ex. G-7).

"K" lock) along with a blank tag, and left the plant sometime between 3:00 p.m. and 3:30 p.m. (Tr. 114, 117, 123-124). There was no rock on the conveyor belts at the time she left and she was unaware of any problems at the plant when she left that day. She also testified that she was not aware of a meeting planned for the morning of June 14 at the shop. (Tr. 117-18, 135). Gonzales said that, although there had been power problems at the plant the previous week, she was not aware of any problems the week of June 14. (Tr. 133).

Gonzales testified that she arrived at the plant on June 14 at about 6:00 a.m. She did not notice anything unusual, except that a water truck had tipped over. (Tr. 119). She believed that she should start up the plant so that everything would be ready to go once the water truck was up and running. (Tr. 107, 120, 136).

Gonzales testified that, if problems develop at the plant when she is not there, someone calls her or leaves a note on the pegboard in the electrical trailer. (Tr. 123). She was not notified of any problems on June 14. She conducted a walkthrough of the plant and began the process of starting it up. She testified that she took the key from the pegboard in the electrical trailer, unlocked and removed the "K" lock and tag from the main breaker, and turned on the main power. (Tr. 116, 120, 123). If the tag for the lock had been filled out or signed, she said that she would not have removed the lock from the main power breaker. (Tr. 126). She then hung up the "K" lock and key on the pegboard and began throwing the switches on the power boxes in the trailer. The door to the first power box was open about 1/4 of an inch but, because there was no indication that anything was wrong, she shut the door and threw the switch. (Tr. 120). The door of the second electrical box was closed. She testified that there was nothing posted on the box, there were no wires lying on the floor or hanging out of the box, and there were no tools lying in the area. (Tr. 125-126). Gonzales testified that when she attempted to turn the power on at the second box, her hand became stuck to the switch, her arm started shaking, and she felt something surge through her. (Tr. 120-121, 137). There was an explosive blast that blew open the door of the box and threw her across the trailer. (Tr. 120-121). Gonzales shut off the power at the main switch and was taken to the hospital where she was treated for burns. (Tr. 121-122, 138).

Gonzales testified that she remembers everything that happened that morning. She said that, if there had been a tag or lock on the second power box, she would not have attempted to turn it on. (Tr. 126). She also said that, if the key to the lock at the main breaker had been secured, she would not have been able to turn on the main power breaker.

Gonzales testified that her procedure at the end of each working day was to lock out and tag out the plant by turning off the power at the main breaker, placing the "K" lock and "danger do not operate" tag on the breaker, and returning the key for the lock to the pegboard in the trailer. (Tr. 113-114, 123-124). This trailer is never locked. She sometimes left notes on the pegboard for the mechanics so that repair work could be completed after hours.

Gonzales initially testified that she was never issued her own lock and she assumed that the "K" on the lock could be used by employees whose name started with "K" including herself

("Katy"). (Tr. 114). She later testified that everyone had their own lock, except for her. (Tr. 115, 132). She was presented with a number of locks during cross-examination at the hearing and she testified that she had seen one of the locks but that she had never seen the lock labeled "GDC." (Tr. 131).

B. Inspector Michael Okuniewicz.

Inspector Okuniewicz is the field office supervisor for Utah. He testified that his office received a call from the local Utah OSHA office that someone had reported that an injured employee had not been provided with prompt medical attention. On June 18, 2007, Okuniewicz went to the pit to investigate. Based on his investigation, Okuniewicz said that a "K" lock was present on the main breaker on the morning of June 14. This lock belonged to Keith Gilbert, vice-president of Gilbert Development, but it was considered to be a common lock available to all employees to lock out the plant at the end of the day. (Tr. 25, 51, 60). It was the lock Gonzales had used every day to lock out the plant at night. Gonzales also placed a blank danger tag on the lock every evening to prevent potential vandalism.

Okuniewicz determined that there had been a discussion at the pit on June 13, 2007, about problems with the electrical system. (Tr. 17, 19). Keith Gilbert and Frank Taylor, a mechanic, had been working on the second power box, which controlled power to the crusher. (Tr. 27-28). When they were unable to complete the repairs, Taylor removed his lock from the main breaker but Keith Gilbert kept his lock in place. *Id.* On the morning of June 14, as part of her daily routine, Gonzales attempted to start the plant by opening the "K" lock at the main breaker and proceeding to switch on each of the power boxes in the electrical trailer. (Tr. 19-0, 33, 49, 53). Okuniewicz testified that the power box for the crusher was not locked or tagged out and there was no indication of any problem with the box. (Tr. 26, 55). A short occurred when she turned on the power for this box, which resulted in an arc flash. (Tr. 20). Okuniewicz testified that an arc flash occurs when there is a major ground fault, resulting in a large flash with explosive force that can cause electrocution, burns, and other injuries. (Tr. 33-34). Gonzales suffered severe burns as a result of this flash. Okuniewicz did not notice any damage to the handle of the power box or to the locking mechanism for the power box. (Tr. 97). He said that burn marks and soot were the only physical evidence that the door to the box was blown open by the electrical flash. Okuniewicz determined that there was no rock on the conveyor belts at this time. (Tr. 55).

Okuniewicz relied on the statements of Ms. Gonzales when he investigated this accident. She told him about her daily routine and what happened on June 13 and 14. (Tr. 49-52). He admitted that he relied exclusively on her rendition of her responsibilities and the events that led up to the accident. (Tr. 75-76).

Okuniewicz testified that he issued the citation because: (1) there was no signature or description of the hazard on the tag that was attached to the lock at the main breaker box or at the defective power box for the crusher, and (2) the key to the lock that was used at the main breaker

box was not secured, thereby allowing anyone to use it to unlock the lock. (Tr. 21-22, 35, 54, 70, 77, 80). Even though the safety standard does not specifically discuss securing the key, materials available to industry show that the key should be secured. (Tr. 82; Ex. G-11). The accident would not have occurred if these procedures had been followed.

Okuniewicz said that he issued the citation under section 56.12016 because the work being done was mechanical as opposed to electrical work, which would have been cited under section 56.12017. (Tr. 36-37, 85-86).

C. Inspector Thomas Barrington.

Inspector Barrington is an MSHA electrical inspector based in Utah. He testified that the fault, which caused an arc flash, occurred inside the subject power box. (Tr. 156, 165). Barrington determined that, at the time of the accident, work had been started on the subject power box but that it had not been completed. The burn pattern at the bottom of the box was typical of an arc flash. (Tr. 157; Ex. G-4). Barrington believes that the power box's locking mechanism made contact with part of the dismantled breaker inside the box and caused the arc flash. (Tr. 157-158). He admitted that, if the door of a power box were blown open, there would be damage to the parts on the box that keep the door closed. (Tr. 205-206). The breakers in the box could not be energized if the door is not closed. *Id.* In addition, these breakers could not be energized if the main breaker is locked out.

Barrington testified that the accident would not have occurred if the company were using a proper lockout/tagout procedure. (Tr. 159-159). Specifically, he testified that a signed, dated tag must be placed on the lock and the tag must identify the hazard. The key to the lock must also be secured. (Tr. 159, 161, 190, 197). If someone else's lock is on a piece of equipment and there is a danger tag attached, then the lock should not be opened by anyone but the person who installed it. (Tr. 201-202). Following some of the steps necessary for a lockout/tagout procedure is not sufficient; all of the steps must be followed. (Tr. 163). Barrington admitted that, prior to the accident, he had reviewed and approved Gilbert Development's lockout/tagout procedure, including the use of the pegboard in the trailer. (Tr. 207).

D. Dale Gilbert

Dale Gilbert is a Vice-President of Gilbert Development and he oversees all of its operations. He is an MSHA-approved training instructor. Dale Gilbert testified that, when Ms. Gonzales was transferred to the pit, she was responsible for starting the plant. (Tr. 220). She did not have any mechanical experience or capabilities, so other people would conduct the pre-shift inspection of the plant. If the plant required maintenance during the day, Gonzales would shut down the plant, put her lock on the main breaker, and call for a mechanic. (Tr. 220, 265). Dale Gilbert testified that Gonzales was relieved of the duty to start up the plant in the morning when the plant started getting its power from the local electric utility in April 2007. (Tr. 221-224, 263-264). After the switch to commercial power, only mechanics were allowed to start up the plant

in the morning. (Tr. 223-224). Keith Gilbert and Samuel Paoletti, who is a project manager, could also start the plant. Subsequently, Gonzales was trained to restart the plant when it had been shut down during the day, but she still had to get a mechanic to certify that the plant was ready for startup. (Tr. 224, 251). Gonzales was fully trained on the company's lockout/tagout procedures and she was aware that she was never permitted to remove someone else's lock. (Tr. 243, 247).

Dale Gilbert testified that at about 2:00 p.m. on June 13, 2007, he was notified that there had been a power bump at the crusher. (Tr. 227). When he arrived at the plant, Gonzales and another employee were shoveling material from the tail pulleys and Keith Gilbert and Taylor were attempting to diagnose the problem. There were several locks on the main breaker. Keith Gilbert and Taylor determined that the breaker in the power box for the crusher had melted and that new breaker parts were required to fix it. (Tr. 229, 262). Dale Gilbert testified that as he was leaving, he noticed that Gonzales was in the electrical trailer with Keith Gilbert and Taylor. (Tr. 230). At a meeting at the end of the shift, it was decided that the plant would be down on June 14 and, until the problem was fixed, the crusher crew would do other work for Gilbert Development. (Tr. 232-233). A meeting was scheduled for 7:00 a.m. on June 14 to discuss this work. Dale Gilbert noticed that, at the end of the day, the door for the power box for the crusher was open and the breaker face plate was tied off and hanging outside of the box. (Tr. 243).

Dale Gilbert was at the pit when the accident occurred. When he was summoned up to the crusher, the electrical trailer was on fire and Gonzales had burns on her face and arms. (Tr. 235). He instructed an employee to take Gonzales to the hospital. Gonzales was treated and then discharged from the hospital that afternoon. She returned to the Gilbert Development office sometime after 2:00 p.m. on June 14. (Tr. 237). Dale Gilbert testified that she was very apologetic and asked if she was going to be fired. (Tr. 238-239).

Dale Gilbert testified that the company conducted an internal investigation of the accident. The company determined that Gonzales had removed Keith Gilbert's lock from the main breaker, turned on the main power and dislodged the plate and mechanical cable that was outside the power box for the crusher. When she dislodged the plate and cable, the plate swung between the right side of the box and the power legs which caused the plate to hit the hot bar. (Tr. 241, 243, 257). An arc flash occurred as a result. He said that the door to the power box must have been open when these events occurred because there was no damage to the door or door latch. (Tr. 244).

Dale Gilbert testified that a tag is not placed on the lock at the main breaker when the plant is shut down at night. (Tr. 250, 255). Rather, the "GDC lock" was used as a lockout device. (Ex. R-6). If, on the other hand, maintenance was to be performed or the plant was not to be started the next morning, then an individual mechanic would place a lock with his name on it along with a danger tag at the main breaker. (Tr. 250-252; Ex. R-5). Each employee, including Gonzales, had his or her own lock and key. (Tr. 264-265). All of the locks were kept on a pegboard at the trailer. If the mechanic fixed the problem during the night, he would

remove his lock at the main breaker and replace it with the "GDC" lock to indicate that the plant could be started. (Tr. 255).

E. Samuel Paoletti

Paoletti is a project manager for Gilbert Development. He normally works in the office, but he also helps as a supervisor some of the time. He testified that the company has had the same lockout/tagout policy since the plant opened. (Tr. 285). Each employee had his own personalized lock and key which, when not in use, was hung on the pegboard in the trailer. (Tr. 280-282, 293). When that employee needed to perform maintenance or otherwise shut down the plant, he placed his own lock on the main breaker to lock out the power. (Tr. 281, 283, 317). If more than one person were working on the plant, multiple locks would be used. The reason the keys were kept on the pegboard was to prevent employees from accidentally losing them or taking them home. Employees were trained to only remove their own lock from the main breaker and to leave other locks alone. (Tr. 318-319, 294). He admitted that the company had not put this policy in writing. (Tr. 316-317). Paoletti testified that, prior to this accident, MSHA inspectors had approved the company's lockout/tagout procedure after reviewing the procedure and asking employees to perform an actual lockout/tagout. (Tr. 294, 296).

Paoletti was an MSHA-approved trainer. He testified that employees, including Gonzales, were trained on the proper lockout/tagout procedure. (Tr. 277, 279-280, 286-287, 290). He also testified that a meeting was held to discuss the transition from generator power to commercial line power. Employees were instructed that, once the switch to line power was made, only management employees were authorized to start up the plant in the morning. (Tr. 291-292).

The "GDC" lock was a general company lock that was to be used at night to keep the plant from being energized by outsiders. (Tr. 281, 283-284). The company started using this lock after it switched from generator power to commercial line power. (Tr. 284). This lock was never used with a tag and it was never used where maintenance or repairs were being performed. The presence of the "GDC" lock at the main breaker indicated that the plant was not under repair, but if another lock were present, it was a signal that the plant was locked out and should not be started until that lock was removed. (Tr. 285).

Paoletti testified that he was working at the office on June 13 and 14, 2007. (Tr. 300-301). He said that the plant had not been operating since the afternoon of June 13 and that material was on the conveyor belts. (Tr. 302-303). This material remained on the belts until the plant was operated again about a week after the accident. (Tr. 306-307).

F. Frank Taylor

Taylor is a former Gilbert Development employee. When he worked for the company he was the head mechanic. (Tr. 323-324). He worked directly under Keith Gilbert. He testified

that training sessions were held when the switch was made to commercial line power and Gonzales was present for these meetings. (Tr. 330-331; Ex. R-2). It was explained that whenever someone is performing maintenance, he must install his own lock at the main breaker and that only he is permitted to remove this lock. (Tr. 330-331, 327-328, 358). Because company policy prohibited anyone from touching another person's lock, Taylor believes that it did not matter that all of the keys were kept on the pegboard. (Tr. 358). The "GDC" lock was not part of this lockout program and was used to lock the main breaker at night to keep vandals from starting the plant. (Tr. 332, 363).

Taylor testified that he normally started the plant each morning. (Tr. 328). Keith Gilbert or Paoletti would start it when he was not there. Taylor said that he usually arrived at work about an hour before everyone else and he would conduct the pre-shift examination. (Tr. 333). Taylor testified that Gonzales was never responsible for these walkthrough inspections. *Id.* He could not recall anytime when Gonzales arrived at work before he did or when she started the plant before he inspected it to make sure that it was safe to operate. *Id.* Gonzales would sometimes start the plant in the middle of the day if it had been shut down, but she never started it by herself in the morning. (Tr. 334). If everything was fine during his inspection, he would remove the "GDC" lock at the main breaker and start the plant. (Tr. 328-329). He would then turn on the power boxes in the trailer. If, however, he saw an employee's lock at the main breaker, he would not remove it or attempt to turn on the power. (Tr. 335). A personal lock and danger tag at the main breaker indicated that there was a problem with the plant. (Tr. 332, 334). He would then go and find that person or contact Keith Gilbert to see what the problem was. (Tr. 335). Even if there was a tag with the "GDC" lock, he would find out what was going on before he attempted to start the plant. (Tr. 336).

Taylor testified that on June 13, the plant experienced a problem with its electrical system that prevented the breaker in the second power box from resetting. (Tr. 338-339). Taylor then put his lock on the main breaker and Keith Gilbert put his lock on as well. They both then attempted to troubleshoot the problem. The plant, belts, and screens were all loaded with material. (Tr. 348). He said that Gonzales and another employee also put their locks on the main breaker and began shoveling the tail pulleys. (Tr. 340). Taylor then began to troubleshoot the problem in the second power box by removing the breaker plate and detaching the mechanism that turns on the breaker via a mechanical cable attached to the handle outside the box. Once detached, the cable with the attached switching mechanism hung down into the power wires that entered the box from the bottom. (Tr. 340). As a consequence, Taylor said that he pulled the breaker plate, cable, and switch mechanism out of the power box and wedged them into a ledge outside the box so that they were secure and would not curl back into the box. (Tr. 340, 348, 358-359). Taylor testified that about 3:00 p.m., Keith Gilbert told Gonzales and another employee to remove their locks and he advised them that he did not think that the plant would be running the next day so they should report to an area near the shop the following morning. (Tr. 341-342). Keith Gilbert told Taylor that he was going to get a certified electrician to come to the mine the next day to repair the power box. (Tr. 343). Taylor testified that he took his tools and placed them in the bottom of the power box and he left the door to the box open so it was

obvious that the box was being worked on. (Tr. 347). Taylor then removed his lock from the main breaker when he left for the day, but Keith Gilbert's lock and tag remained. (Tr. 343-344, 349).

Taylor testified that he arrived at the pit at about 6:00 a.m. on June 14 and began starting the mobile equipment before heading to the meeting place near the shop. (Tr. 349, 356). Gonzales was not present when he arrived at the pit and she was not at the meeting near the shop. (Tr. 350). About 15 to 20 minutes after the meeting ended, a water truck drove off an incline. (Tr. 351-352). Shortly after he helped right the truck, Dale Gilbert informed them that there was a fire at the crusher plant. (Tr. 352-353).

G. Keith Gilbert

Keith Gilbert is a Vice-President of Gilbert Development and is in charge of day-to-day operations at the pit. He testified that the company uses two types of locks to lock out the main breaker: (1) the "GDC" lock and (2) personalized locks for each employee. The "GDC" lock is used to lock out the main breaker at the end of the day when there are no problems at the plant. (Tr. 376). He said that Gonzales was never instructed to use a tag when attaching the "GDC" lock at the end of the day. (Tr. 377). Keith Gilbert's testimony on the use of the different types of locks is the same as the company's other witnesses. (Tr. 372-378). He said that if an employee saw a danger tag on the lock for the main breaker in the morning, he would know that the plant was not operational and would call the person whose lock was present to determine what to do. (Tr. 377, 428-429). Gonzales had her own lock to use. (Tr. 373).

Keith Gilbert also testified that only he, Taylor, and Paoletti were authorized to conduct the morning walkthrough and examination of the plant. (Tr. 380). Gonzales was never given this responsibility even when power was obtained from a generator. (Tr. 382). She would sometimes start the plant after accompanying Keith Gilbert, Taylor, or Paoletti during the walkthrough, but at no time did she start the plant when none of them were around. (Tr. 381-382). The main breaker was not locked out at night when the plant was powered by a portable generator. (Tr. 378-379). When the change to commercial power occurred, everyone attended a meeting about the change, the lockout/tagout procedures, and the procedure for starting the plant each morning. (Tr. 379, 431; Ex. R-2). Gonzales was never trained to independently start the plant in the morning. (Tr. 383).

Keith Gilbert testified that he was at another work site on June 13 when he heard that there had been a power bump at the crusher and the plant had shut down. Taylor's lock was on the main breaker when he arrived at the plant and he added his lock and tag. (Tr. 388-389). When the problem could not be immediately fixed, he ordered Gonzales and another employee to put their locks on the main breaker. (Tr. 388-389). He and Taylor began to troubleshoot the problem. Keith Gilbert's description of the removal of the breaker plate and mechanical cable conforms to Taylor's. (Tr. 390). They determined that the breaker would need to be replaced. (Tr. 391). Keith Gilbert testified that he told Gonzales to remove her lock and meet at the shop

the next morning. (Tr. 391-392). He said that Gonzales appeared to be attentive. Gonzales then left for the day. (Tr. 393). Keith Gilbert left his lock and warning tag on the main breaker and hung his key on the pegboard in the trailer. (Tr. 395, 397). Keith Gilbert testified that when he left for the day, there were tools lying in the bottom of the second power box, the breaker was torn apart, and the door to the power box was wide open. (Tr. 395-397).

Keith Gilbert testified that he arrived at work at 5:00 a.m. on June 14. He met with his managers and discussed the day's work. The mobile equipment used in the pit was started at about 6:00 a.m. and crew began to arrive at 6:30 a.m. (Tr. 400).² The managers met with the crew before 7:00 a.m. to discuss the day's work, but Gonzales was not present. (Tr. 401). While attempting to right a water truck, he received a call that there had been an accident at the crusher and that Gonzales was injured. (Tr. 403-405). Keith Gilbert wondered what had happened because he had locked out the main breakers with his own lock. (Tr. 405). Dale Gilbert proceeded to the crusher to find out what had happened.

Keith Gilbert also testified that the company conducted an internal investigation into the accident. The investigation revealed that on the morning of June 14, Gonzales removed Keith Gilbert's lock and tag from the main breakers and hung them on the pegboard. (Tr. 415). She switched on the main breaker and then began turning on the power boxes inside the trailer. When she arrived at the second power box, she took the cable and plate that were outside the box and threw them into the box. (Tr. 415). The cable touched the two power legs at the bottom of the box. A flash occurred, which resulted in an explosion and subsequent fire. (Tr. 415). One of the reasons that the company reached the conclusion that the door was open when the flash occurred was because neither the door nor the doors's latch or hinges were charred or damaged by the flash. (Tr. 415-416).

Keith Gilbert said that, during the month prior to the accident, Gonzales had been arriving late to work and leaving unexpectedly. (Tr. 401). Gilbert Construction's managers verbally warned her several times about her attendance problems. (Tr. 401, 432-433).

After the citation was issued, the only change that was made to the company's lockout/tagout procedures was that keys for the individual locks were kept in that person's pocket rather than on the pegboard when the main breaker was locked out. (Tr. 412).

H. Tina Shumway

The Secretary called Tina Shumway as a rebuttal witness. Shumway began working for Gilbert Development in August 2006, but started working for Rinker Material Corporation in December of that year. Rinker operated the scale house at the same location. (Tr. 442-443). Shumway worked at this scale house, which was about 200 yards from where Gonzales worked at the tower for the crusher. Shumway testified that she normally arrived at the scale house at

² Even though the plant was down for repairs, work could still be performed in the pit.

about 6:45 a.m. She testified that Gonzales was usually already at work when she arrived, but that she never noticed any management people at the facility at that time. (Tr. 447-448, 460). Shumway testified that she could not see the crushing plant but she could hear the radio communications. She admitted that her knowledge of Gonzales' duties is based solely on her conversations with Gonzales and what she heard over the radio. (Tr. 461).

Shumway testified that she arrived at work on June 13, 2007, at about 6:45 a.m. Everything seemed to be normal that day and she did not see any maintenance or repair work being performed. (Tr. 449). Shumway also arrived at work at 6:45 a.m. on June 14. Nothing seemed to be unusual and the crusher did not appear to be loaded with material. (Tr. 450). At some point after she arrived, she heard over the radio that there was a fire at Gilbert Development. *Id.* She noticed Gonzales walking with her arms out in front of her. Shumway testified that she grabbed a bucket of water and went to help Gonzales, who was hysterical. (Tr. 451). Gonzales had burns on her arms and face and burn marks on the bottoms of her shoes. Shumway testified that Gonzales told her that the second power box blew up when she tried to turn it on. (Tr. 451-452).³

III. SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary of Labor

The Secretary argues that Gilbert Development violated section 56.12016, or in the alternative section 56.12017, when it failed to properly lock out and tag out the plant while mechanical work was being conducted on an electrical power box. Specifically, the Secretary cites Gilbert Development's failure to secure the key to the lock that was used at the main breaker as well as the failure to sign and date the tag that was with the lock. (Tr. 473-475).

The Secretary argues that Gonzales, a longstanding employee with no disciplinary record, was acting as she had been trained when she removed the lock and tag from the main breaker and started the plant the morning of the accident. (Tr. 469-470, 472). Gonzales was not aware, and there was nothing to indicate, that there was anything wrong with the plant that morning. (Tr. 469-470). A "GDC lock" did not exist as evidenced by the fact that it was not on the pegboard on the day of the accident. (Tr. 470-471). Gilbert Development did not offer any evidence to dispute this fact and Gonzales testified that the only key on the pegboard that morning was the key to the "K" lock. *Id.* Had Gilbert Development adhered to a proper lockout/tagout practice, the accident would never have occurred. (Tr. 473).

The Secretary also argues that the violation should be upheld as S&S given that electrical accidents are one of the leading causes of serious injuries and fatalities. If the violative condition

³ Counsel for Gilbert Development moved to have Ms. Shumway's testimony stricken from the record because she was not listed as a potential witness in the Secretary's list of witnesses. (Tr. 482-483). The motion is denied because she was called as a rebuttal witness.

had not been abated, there was a reasonable likelihood that it would have contributed to an injury of a reasonably serious nature. (Tr. 478). Further, the Secretary argues that the violation was a result of high negligence on the part of Gilbert Development given that a high level manager, who was involved in the training of the lockout procedures, was the individual who failed to follow the required procedure. (Tr. 478-479). The violation was properly characterized as an unwarrantable failure because management demonstrated a serious lack of reasonable care by not securing the key to the lock that had been placed on the main breaker. (Tr. 479-480).

B. Gilbert Development Corporation

Gilbert Development argues that the citation should be vacated because the power at the main breaker was properly locked out and tagged out with Keith Gilbert's lock and a danger tag. Gonzales had been advised that the No. 2 power box was not in working order and that the plant would not be in operation on the morning of June 14. (Tr. 484-485, 487-488). Further, the citation was improperly issued under section 56.12016 and should have been issued under section 56.12017, which does not require a signature on a tag. (Tr. 483-484). In either case, the name written on the lock that was used to lock out the main power breaker served the same purpose that a signature on a tag would have served. Gonzales' statement that a tag is always present on the lock, even when there is no problem, is simply not true. (Tr. 485). The fact that the key was not secured does not make any difference because company policy dictates that no employee is permitted to touch another person's lock and, further, MSHA testified that the use of a common pegboard was not a problem. (Tr. 489-490). Gilbert Development also argues that the testimony of the Secretary's rebuttal witness, should be stricken because the witness was not disclosed prior to the hearing and her testimony was neither relevant nor credible. (Tr. 482-483).

Gilbert Development argues that, should a violation be established, it should not be considered to be S&S because the Secretary did not establish that it is reasonably likely that (1) an employee would ignore their training, (2) that an employee would remove someone else's lock with a tag attached to it, and (3) that an employee would, as a consequence, be seriously injured. (Tr. 493-496). In addition, the alleged violation was not the result of high negligence because there were a number of mitigating factors involved, including the fact that Gonzales had been properly trained by the company, she was aware of the problem at the plant, and she failed to attend the scheduled meeting on the morning of the accident. (Tr. 497-499). Further, the alleged violation was not the result of an unwarrantable failure because Gilbert Development immediately eliminated the violative condition by removing the pegboard that MSHA had previously approved and requiring all employees to secure keys in their pocket. (Tr. 503-504). Additionally, the gravity should be adjusted from fatal to lost workdays to reflect what actually occurred. Finally, the proposed penalty should be reduced. (Tr. 506-507).

IV. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The Accident.

It is important to understand that my responsibility in this case is to determine whether Gilbert Development violated the Secretary's safety standard as alleged by the inspector. It is not my primary obligation to determine the cause of the accident. The accident has a bearing on the merits of this case, however, especially when considering the gravity of any violation and the negligence of Gilbert Development.

I have carefully reviewed the testimony, the exhibits, and the parties' arguments. Based on my careful examination of the record and weighing of the evidence, I conclude that the accident did not occur as described by Ms. Gonzales. The physical evidence does not corroborate her testimony. She testified that the door to the second power box was closed and that when she pulled down the handle to close the circuit breaker in the box, her hand became stuck to the handle, her arm started shaking, and she felt something surge through her. Gonzales testified that there was an explosive blast that blew open the door of the box and threw her across the trailer. This rendition of the events is inconsistent with the physical evidence. There was no damage to the door for the power box or to the hinges or the latching mechanism for the door. Two holes were blasted out of the bottom right side of the box and the adjacent area on the inside of the box was charred black. Yet, the inside of the door showed little or no evidence of an electrical blast. This fact is evidenced by the photographs presented by the Secretary as well as the testimony of company witnesses. (Tr. 414-415; Ex. G-4). Gilbert Development brought the power box to the parking lot of the courthouse. Upon examining the box, I determined that the frame, body, and door for the box had not been cleaned or altered since the accident. The markings on the inside of the door were the same as shown on the photographs and were entirely consistent with the company's position that the electrical short and blast occurred while the door to the box was open.

I also credit the key testimony of the company's witnesses, as summarized above, with respect to the events that occurred on June 13 and 14, 2007. I find that the reliable evidence establishes that, after the plant started receiving its power from the local utility, it was not the responsibility of Gonzales to start the plant each morning. Although there may have been days when a member of management told her to start the plant after the walkthrough examination had been completed, she had been instructed to no longer independently start the plant in the morning after the generator was no longer the power source. I also find that the preponderance of the reliable evidence establishes that the door to the power box at issue was open when Gonzales entered the electrical trailer on June 14. Something that she did that morning caused live electrical components to short out, which caused the accident. I find that she had been told to report to the shop that morning, rather than to the plant, and that she had been advised that the plant was down for repairs when she left on June 13. Since the plant began receiving power from the local utility on April 23, 2007, the plant was locked out at the main breaker at night to

prevent intruders from energizing the circuits. I find that the lock that was normally used was marked "GDC" rather than with "K." In addition, I find that a danger tag was not normally attached to the lock when the plant was shut down for the evening. If the plant was under repair at the end of the shift, a lock other than the "GDC" lock was used and a danger tag was attached.

The Secretary based her entire case on the account of Ms. Gonzales as to the lockout procedures used and the events that occurred on June 13-14. For example, the Secretary contends that there never was a "GDC" lock provided at the plant. Ms. Gonzales testified that she had never seen a lock labeled "GDC" at the plant. (Tr. 131-132). Based on her statements, the Secretary argued that there was nothing out of the ordinary when Gonzales tried to start the plant on the morning of June 14 because the "K" lock was often used to lock out the plant at night. (Tr. 470-471).

Gonzales also testified that she arrived at the plant at about 6:00 a.m. on June 14. (Tr. 119-120, 134). She said that after she walked around the plant for a short time to make sure that no employees were doing any work, she put her purse in the tower and then attempted to start the plant. She saw that men were working on getting the water truck upright when she was in the tower. *Id.* The evidence establishes, however, that men did not start working on the water truck until some time after the close of the crew meeting at 7:00 a.m. that day. (Tr. 233, 350-352, 356, 403-404). Gonzales was injured sometime after that at about 7:15 a.m. on June 14. Under this chronology, it is clear that she could not have arrived at the plant as early as 6:00 a.m. Company witnesses testified that, starting about a month before the accident, Gonzales had often arrived late for work and she had been warned about her tardiness. (Tr. 300, 401-402, 406-407). I credit the testimony presented by the company where there is a disparity between its evidence and the testimony of Gonzales.

B. Applicable Safety Standard.

The issue remains whether Gilbert Development violated the safety standard cited by the inspector. At the hearing, the Secretary sought to allege, in the alternative, a violation of 56.12017.⁴ (Tr. 476-477). Inspector Okuniewicz testified that he cited section 56.12016 because "mechanical work" was being performed. (Tr. 34-35, 36-37). "They were troubleshooting inside

⁴ Section 56.12017, entitled "Work on power circuits," provides:

Power circuits shall be deenergized before work is done on such circuits unless hot-line tools are used. Suitable warning signs shall be posted by the individuals who are to do the work. Switches shall be locked out or other measures taken which shall prevent the power circuit from being energized without the knowledge of the individuals working on them. Such locks, signs, or preventive devices shall be removed only by the person who installed them or by authorized personnel.

the box to possibly replace either a circuit breaker or a main switch.” *Id.* He said that section 56.12017, on the other hand, is for “work on electrical power systems.” (Tr. 37). Inspector Barrington testified that the company was not “so much at the time troubleshooting the circuitry [because] the power was removed and they were actually working on mechanical applications for a power circuit.” (Tr. 191). He envisions section 56.12017 as applying to “troubleshooting high voltage circuitry or extending high voltage circuitry off a . . . power pole, but also troubleshooting low voltage circuitry.” (Tr. 191-192). He also testified that 56.12017 applies to “working on energized components until you find the problem and then you use lockout/tagout that gives you that option more than anything else.” (Tr. 192). Barrington admitted that he would have issued the citation under section 56.12017 because he is an electrician. (Tr. 193).

There are two significant differences between these safety standards. First, section 56.12016 requires that warning notices be posted and *signed* by the individuals who are to do the work while section 56.12017 provides that warning signs shall be posted by the individuals who are to do the work. Section 56.12016 applies to work on “electrically powered equipment” while section 56.12017 applies to work on “power circuits.” Based on the plain meaning of the language, I hold that section 56.12017 applies to this situation. A circuit breaker is not “electrically powered equipment.” A circuit breaker is simply a “switch that automatically interrupts an electric circuit under an infrequent abnormal condition.” (*Webster’s New Collegiate Dictionary* 200 (1979)). Indeed, the circuit breaker at issue was a switch in the electrical circuit providing power to the crusher. If the crusher were being repaired, section 56.12016 would apply, but here the power circuit for the crusher was under repair. While it is true that replacing a circuit breaker requires some mechanical work, the replacement of the circuit breaker repairs the power circuit rather than electrically-powered equipment. As a consequence, the fact that the warning tag attached to the lock at the main breaker was not signed is irrelevant because it is not required under section 56.12017.

I grant the Secretary’s motion to charge Gilbert Development with a violation of section 56.12017, in the alternative. The two safety standards are virtually identical except as noted above. The evidence presented by Gilbert Development was equally applicable to either standard. Although Gilbert Development objected to the motion to amend, it recognized that the court had the authority to grant the motion. (Tr. 483-484). Such amendments are permitted under the Federal Rules of Civil Procedure. Fed. R. Civ. P. 8(d)(2), 15(b). I have granted similar motions to amend in the past. *CDK Contracting Company*, 23 FMSHRC 783 (July 2001) (ALJ). In that case, the motion was filed by the Secretary prior to the hearing so I determined that the respondent was not prejudiced by the amendment to the Secretary’s pleading. In this case, although the motion was made during the hearing, Gilbert Development was not prejudiced because it had been able “to discern what conditions required abatement” and the evidence it presented at the hearing was equally relevant to both safety standards. *Empire Iron Mining Partnership*, 29 FMSHRC 999, 1003-04 (Dec. 2007) (quoting *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 379 (Mar. 1993)).

C. Fact of Violation.

It is clear that the power circuit had been deenergized before the work was performed on the power box for the crusher. In addition, several locks were placed on the main breaker during the afternoon of June 13. When it was determined that the condition could not be corrected before the end of the shift, all of the locks were removed except the "K" lock and a danger tag was placed on that lock. As a consequence, the subject power circuit could not be energized without removing the lock.

Nevertheless, I find that Gilbert Development violated section 56.12017. Because the key to the "K" lock was hung on the pegboard in the electrical trailer, the company's lockout procedure did not "prevent the power circuit from being energized without the knowledge of the individuals working" on that circuit. Although the work had been performed by Taylor and Keith Gilbert, Gonzales was able to easily remove the single lock and energize the circuit without their knowledge. The company had a procedure in place, that it communicated orally to its employees, that only the person doing the work was to remove a lock on a power circuit. That procedure was easily circumvented, however. Whether the person who installs the lock must keep the key on his person at all times is not directly at issue under the facts in this case. What is clear in this case is that, under Gilbert Development's lockout/tagout procedures, the keys to the locks were easily accessible to any and all employees. Such procedures are not effective to "prevent the power circuit from being energized without the knowledge of the individuals working on them."

Gilbert Development argues that in many industrial applications, plastic tabs or locks can be used in lieu of metal locks. (Tr. 434, 506). It contends that anyone could remove such devices by twisting them off. It is not clear that MSHA would approve such devices and, in any event, it takes more of an affirmative act to remove them. In this case, the lock that was used was marked in an ambiguous manner. Ms. Gonzales testified that she thought that the "K" on the lock stood for Keith or Katy. (Tr. 114, 130-131). I believe that when she arrived at the plant that day, she did not see anyone else around and was a little confused. There was testimony that she was experiencing personal problems at that time. Her attendance at work had started to slide. She knew she was late for work that day and believed that it would be a good idea to energize the plant. She had forgotten that everyone was to meet at the shop that morning. When she saw the "K" lock on the main breaker, she opened it believing that she had the authority to do so. The lockout/tagout requirement is designed to protect miners from these kinds of careless mistakes. If the key for the "K" lock had not been placed on the pegboard, Gonzales would not have been able to energize the power boxes in the electrical trailer. In addition, if the tag had been marked with Keith Gilbert's name or it had listed the work to be performed, it is doubtful that Gonzales would have removed the lock. To abate the citation, Gilbert Development stopped keeping the keys on the pegboard.

D. Significant and Substantial.

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

The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 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*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

As stated above, the Secretary argues that the violation was S&S because, if the violative condition had not been abated, there was a reasonable likelihood that the cited condition would have contributed to an injury of a reasonably serious nature assuming continued mining operations. Gilbert Development maintains that the violation was not S&S because the Secretary did not establish that it was reasonably likely that an employee would ignore the training, remove someone else's lock with a danger tag attached, and that an employee would be seriously injured as a result.

I find that the Secretary established an S&S violation. The safety standard is designed to prevent someone, as a result of ordinary human carelessness, from energizing a circuit when it is under repair. Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or distractions, despite a comprehensive training program. I find that it was reasonably likely that, assuming continued mining operations, someone other than the person doing repair work would remove a lock from the main breaker and energize the circuits. I reach this conclusion taking into consideration the fact that (1) the key to the lock in question was kept on the nearby pegboard making it available to any employee, and (2) the lock was ambiguously marked with the letter "K" as the only identifier. Although there was a danger tag attached to the lock, it was not marked to indicate the work to be performed or who placed it there. Since the main breaker is only locked out during working hours if repair work is being performed, it was reasonably likely that someone would be seriously injured if the lock were removed and the main breaker energized by someone other than the miners doing the work.

E. Unwarrantable Failure and Negligence.

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

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

Whether conduct is "aggravated" in the context of an unwarrantable failure analysis 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).

I find that the Secretary did not establish that the violation was the result of Gilbert Development's unwarrantable failure to comply with the safety standard. Its conduct was not aggravated. It had been using the same lockout/tagout system for some time. Inspector Barrington, an electrical specialist with MSHA, testified that, during a recent inspection of the plant, he examined and approved the company's lockout/tagout policies, including the use of the pegboard. (Tr. 207- 208). The company had never been issued a citation for violating the Secretary's lockout/tagout standards. Gilbert Development had good reason to believe that its lockout/tagout system complied with the Secretary's safety standards and that it was a safe, foolproof system. It had an extensive training program and genuinely believed that its employees understood these policies. But for the unusual chain of events that occurred on June 13 and 14, 2007, it is highly likely that Gilbert Development would have continued to use the same lockout/tagout system without being cited by MSHA. The company was not on notice that greater efforts were necessary to comply with the safety standard, the violation was not obvious, and the company did not realize that it was violating any safety standard. The company's conduct did not amount to "reckless disregard," "intentional misconduct," "indifference," or even a "serious lack of reasonable care."

For the same reasons stated above, I also find that the company's negligence was low to moderate. As stated above, Gilbert Development had been using its lockout/tagout system for some time without incident. It reasonably relied on the fact that Inspector Barrington did not find any problems with its lockout/tagout system during his inspection of the plant prior to the

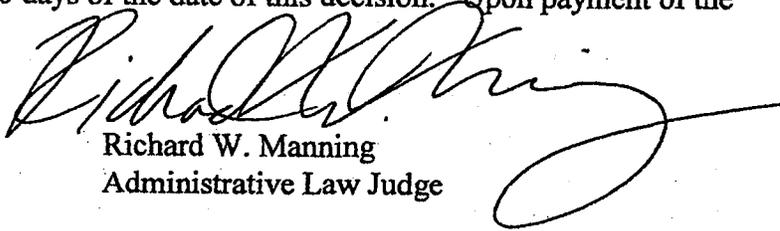
accident involved in this case. Inspector Barrington is an electrical specialist with MSHA and is certified to do electrical work by the State of Utah. (Tr. 153). Gilbert Development and its managers genuinely believed that it was in compliance with MSHA's lockout/tagout standards. Potential deficiencies in its lockout procedures were not revealed until the accident.

V. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The record shows that Gilbert Development had seven paid violations at this facility during the two years preceding June 19, 2007. (Ex. G-8). None of these violations were S&S. The mine is now permanently closed but it worked about 19,000 employee-hours in 2007 and 2,500 employee-hours in 2008 making it a relatively small operation. The violation was abated in good faith. No evidence was presented to show that the penalty assessed in this decision will have an adverse effect on Gilbert Development's ability to continue in business. The violation was serious and Gilbert Development's negligence was low. Based on the penalty criteria, I find that a penalty of \$5,000.00 is appropriate.

VI. ORDER

For the reasons set forth above, the unwarrantable failure designation in Citation No. 6319158 is deleted and the citation is **MODIFIED** to a section 104(a) citation with low negligence and Gilbert Development Corporation is **ORDERED TO PAY** the Secretary of Labor the sum of \$5,000.00 within 40 days of the date of this decision.⁵ Upon payment of the penalty, this case is **DISMISSED**.


Richard W. Manning
Administrative Law Judge

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⁵ 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.

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February 22, 2010

SECRETARY OF LABOR, MSHA, on : TEMPORARY REINSTATEMENT
behalf of JOSE A. CHAPARRO : PROCEEDING
Complainant, :
 : Docket No. SE 2010-295-DM
v. :
 :
 :
COMUNIDAD AGRICOLA BIANCHI, INC., : Mine ID 54-00350
Respondent, : CAB Aggregate

DECISION AND ORDER REINSTATING JOSE A. CHAPARRO

Appearances: Allison L. Bowles, Esq., Marc G. Sheris, Esq., U.S. Department of Labor, New York, New York, on behalf of the Complainant
Rafael Sanchez-Hernandez, Esq., San Juan, Puerto, Rico, on behalf of the Respondent

Before: Judge Barbour

This matter is before me on an Application for Temporary Reinstatement filed by the Secretary on behalf of Jose A. Chaparro pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). Chaparro filed a complaint with the Secretary's Mine Safety and Health Administration (MSHA) alleging that his August 15, 2009, layoff was motivated by his protected activity. The Secretary contends that Chaparro's complaint was not frivolous, and she seeks an order requiring Comunidad Agricola Bianchi ("CAB") to reinstate Chaparro to his former position pending the completion of an investigation and final decision on the merits of Chaparro's discrimination complaint. A hearing on the application was held in San Juan, Puerto Rico, on February 2, 2010.¹ For the reasons that follow, I grant the application and

¹The hearing was not conducted within the time specified by the Commission's Rules, 29 C.F.R. § 2700.45(c), because counsels were unavailable for trial in January. It was held on the first day all the lawyers could be present, with the understanding that should I order Chaparro's reinstatement, his employment would be regarded as beginning on the date the order would have been issued had the case been conducted as required. See Notice of Hearing (January 6, 2010.) In like manner, because of weather considerations and the undersigned's travel schedule, this decision and order was not issued within the time required by the Commission's rules, and I intend the retroactive nature of the order also to cure this defect.

order Chaparro's temporary reinstatement.²

THE EVIDENCE

CAB Aggregate is a sand processing facility located in the Commonwealth of Puerto Rico. Among other things, the facility includes a drag line, sand screening equipment and conveyor belts. It also includes a shop area where equipment is maintained and repaired. Jose Chaparro was first hired by CAB in 2008 to work as an equipment operator at the facility. When he was hired, Chaparro signed a contract that specified the company could suspend him without cause during the first 90 days of his employment.³ After Chaparro worked for approximately five weeks, the company's administrator, Reynat Jimenez, concluded that Chaparro's job performance was unsatisfactory. As a result, the company invoked the probationary contract and suspended Chaparro. Jimenez testified, and Chaparro did not deny, that following his suspension, Chaparro repeatedly called CAB management personnel and requested that he be given another chance. Chaparro told company officials that he wanted to come back and that he would work in any capacity.

In 2009, Jimenez decided to give Chaparro another chance. As a result, CAB rehired Chaparro on June 1, 2009, this time as a maintenance worker. Chaparro's duties included servicing equipment both on-site and at the shop. He cleaned the shop floors and collected oil. When he was rehired, Chaparro again signed a probationary contract. The contract was dated June 1, 2009. As before, the company retained the right to fire Chaparro for any reason during the first 90 days of his employment.

Jimenez, who was one of Chaparro's supervisors during his second employment, maintained that there were again problems with Chaparro's job performance. Jimenez described Chaparro's work as poor in all respects. Jimenez testified that in carrying out his maintenance

²Prior to the hearing, the Secretary filed a motion in limine seeking to bar the company from presenting evidence to establish a testimonial conflict or an affirmative or rebuttal defense. I denied the motion, not because I disagreed with the Secretary's legal position which stressed the limited scope of the hearing, but because I believed a better, more inclusive record would result from hearing the case in the usual manner, that is, from the company's witnesses being subjected to objections to individual questions and without the company being bound by prior restraints in presenting its evidence.

³The contract was referred to by the parties as a "probationary contract." In addition, throughout the course of the hearing, witnesses and lawyers used the word "suspend" and "suspension" as synonyms for being terminated, fired, or laid off.

duties, Chaparro was a danger to himself and to others.⁴ In fact, Jimenez went so far as to describe Chaparro's work performance as "extremely dangerous."

Because of Chaparro's alleged poor performance, Jimenez raised the issue of whether the company should again fire Chaparro. Jimenez and CAB's president spoke early in August, and they decided Chaparro should again be suspended pursuant to the provisional contract. However, Chaparro had injured his hand and was receiving workmen's compensation. Puerto Rican law forbade firing a worker while he or she was in that status. In addition, according to Jimenez, if the company waited until August 14 to act, Chaparro not only would be off workmen's compensation, he would receive pay for a full work period because the pay period ended on August 14.

On Friday, August 14, Chaparro reported for work at the sand processing facility. However, he had to leave work early to see a doctor about his hand. Jimenez wanted to speak with Chaparro in person, but because he had left the facility, Jimenez called Chaparro to tell him he was being suspended. Chaparro did not answer the telephone. On Sunday, August 16, Jimenez called again and left a message for Chaparro that he was suspended as of August 14.

For his part, Chaparro agreed that he was hired in 2008 as an equipment operator and that he was suspended before he worked 90 days. He also agreed that he was rehired on June 1, 2009, and was suspended a second time on August 14.⁵ However, he maintained he was not fired because of his unsatisfactory and unsafe job performance; rather, he was let go because he cooperated, and was continuing to cooperate, with MSHA in its investigation of an earlier accident at the mine, one involving Chaparro.

According to Chaparro, after he was hired in June, he was working at the sand screen when a bucket came down and pinched him between the funnel at the top of the screen and the bucket. MSHA inspector Isaac Villahermosa was assigned to investigate the accident. On August 14, Villahermosa went to the mine to interview Chaparro. Jimenez knew when and why Villahermosa was coming to the mine, but he did not try to prevent Chaparro from meeting with Villahermosa.

Villahermosa arrived and began the interview with Chaparro. He spoke with Chaparro for no more than 30 minutes when Chaparro left to see his doctor about his hand.⁶ Before he left,

⁴For example, Jimenez complained that Chaparro would not follow instructions and would not wear gloves or a hard hat.

⁵Although Chaparro was formally advised he was suspended after August 14, the parties appear to agree that the effective date of the suspension was the 14th, and it is certain that August 14 was the last date Chaparro did any work for CAB.

⁶There is no allegation that Chaparro's hand injury was related to the June accident.

Chaparro and Villahermosa agreed to continue the interview on Monday, August 17.

According to Chaparro, on either Saturday, August 15, or Sunday, August 16, he was called by Jimenez and told that he was being suspended until further notice. On Monday, August 17, Chaparro returned to the facility, where he was told that Jimenez wanted to see him and that Villahermosa wanted to talk to him. It was agreed that he should speak with Jimenez first and that he should then meet with Villahermosa alone and in the company's on-site office.

At the meeting with Jimenez, Chaparro again was told that he was fired.⁷ Because he no longer worked for CAB, Chaparro and Villahermosa decided to continue their conversation at a fast food restaurant rather than at the mine office. They left the facility. Their resultant off-site conversation lasted about two hours.⁸

According to Chaparro, around November 20, 2009, Villahermosa called and asked if Chaparro had filed a discrimination complaint with MSHA. Chaparro maintained this was the first time anyone had informed him of his right to do so. Shortly thereafter, on November 24, 2009, Chaparro filed a complaint with the agency, asserting he was discharged on August 14 so that he would not "talk about what went on at the sand plant." See Application for Temporary Reinstatement, Exh. B at 6. The Secretary's application for temporary reinstatement followed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), provides in pertinent part that the Secretary shall investigate a discrimination complaint, "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." The Commission has established a procedure for making this determination. Commission Rule 45(d), 29 C.F.R. § 2700.45(d) states:

The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the complaint was frivolously brought. The burden of proof is upon the Secretary to establish that the complaint was not frivolously brought. In support of [her] application for temporary reinstatement, the Secretary may limit [her] presentation to the testimony of the

⁷Chaparro's termination was entirely oral. It does not appear that he ever was given a written notice that he was suspended.

⁸While it is clear that when Chaparro and Villahermosa met the second time both knew Chaparro had been fired, Chaparro maintained Villahermosa did not advise him of his rights under section 105(c)(2) of the Act.

complainant. The respondent shall have an opportunity to examine any witness called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was not frivolously brought.

As the above makes clear, and as I noted at the hearing, the scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's complaint was frivolously brought. *Sec'y of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (August 1987); *aff'd sub nom. Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong. 1st Sess. 36-37 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., Legislative History of Federal Mine Safety and Health Act of 1977, at 6240625 (1978). The "not frivolously brought" standard has been equated to the "reasonable cause to believe" standard applied in other contexts. *Jim Walter Resources, Inc.*, 920 F.2d at 747; *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (February 2000).

While an application for temporary reinstatement need not prove a *prima-facie* case of discrimination, it is useful to review the elements of a discrimination claim in order to assess whether the evidence meets the non-frivolous test. Under section 105(c) of the Act, a complaining miner bears the burden of establishing: (1) that he or she engaged in protected activity, and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Paula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom.; Consolidation Coal Co. v. Marshall*, 773 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981), *rev'd on other grounds sub nom.; Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

Here, the Secretary has established that Chaparro engaged in protected activity. Chaparro participated in MSHA's investigation of allegedly unsafe conditions when he spoke with Villahermosa on August 14, 2009, regarding the accident at the facility. Speaking with an MSHA inspector about conditions at a facility where the complainant works is protected under the Act. Therefore, she established the first part of a *prima facie* case of discrimination.

The next step is to establish an unlawful motive for adverse action of which the miner complains. To do this, the Secretary had to show that Jimenez's notification to Chaparro that he was laid off was at least in part designed to punish him for participation in MSHA's investigation of conditions at CAB's facility. The Commission has frequently acknowledged the difficulty of

establishing “a motivational nexus between protected activity and that adverse action that is the subject of the complaint.” See, e.g., *Sec’y on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953 (September 1999). Consequently, the Commission has held that, “(1) knowledge of protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action” are all indications of discriminatory intent. *Id.* at 957.

In seeking reinstatement for Chaparro, the Secretary does not need to establish a *prima facie* case of discrimination in order to establish the complaint was not frivolously brought. It is sufficient to show protected activity (something she did) and to show that a non-frivolous issue existed as to whether Chaparro’s termination was at least in part motivated by Chaparro’s discussion with Villahermosa on August 14.

The Secretary has established that Chaparro’s supervisor knew of Chaparro’s protected activity and that Chaparro was laid off shortly after her engaged in the activity. The coincidence in time between the protected activity and Chaparro’s termination can be a basis on which to infer an illegal motive on CAB’s part. *Durango Gravel*, 21 FMSHRC at 957. Whether it is the actual motive or a part of the actual motive need not be decided at this point. By establishing that Chaparro engaged in protected activity, that Jimenez knew of the activity, and that Chaparro was terminated almost immediately thereafter, the Secretary has established that Chaparro’s complaint was “not frivolously brought.”⁹

ORDER

For these reasons, **CAB IS ORDERED** to reinstate Chaparro to the position he held on August 14, 2009, or to an equivalent position, at the same rate of pay and with the same hours and benefits to which he was then entitled. Chaparro’s reinstatement will be deemed effective as of January 14, 2010, the date this decision and the order would have been issued had the case been heard according to the Commission’s rules, and Chaparro will be entitled to back pay and benefits from that date until the date his reinstatement is effective.

Chaparro’s reinstatement is not open-ended. It will end upon a final order on Chaparro’s complaint. 30 U.S.C. § 815 (c)(2). Therefore, it is incumbent on the Secretary to determine promptly whether or not she will file a complaint with the Commission under section 105(c)(2) of the Act based on Chaparro’s November 24, 2009, complaint to MSHA. Accordingly, the

⁹The “not frivolously brought” standard has been described as setting a “low” burden of proof. In practice, the standard means that all the Secretary must do to prevail is establish protected activity and one of the circumstantial indicatives of motive. When the pretrial pleadings support finding that protected activity occurred and that a nexus in time exists between the activity and the adverse action, it is questionable whether a hearing is ever required. Yet, Commission Rule 45(b) states that if the respondent requests a hearing, the hearing “shall be held.” One might well ask, to what effect? Perhaps the Commission should revisit the rule.

Secretary **IS ORDERED** to advise counsel for CAB and me of her decision by **March 24, 2010**, and, if a decision has not been made by that date, to advise us no later than **April 24, 2010**. If a decision is not made by April 24, I will entertain a motion to terminate the reinstatement for failure to diligently comply with the law. Surely, five months is adequate time within which to decide whether or not to go forward.


David F. Barbour
Administrative Law Judge

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February 24, 2010

MACH MINING, LLC, : CONTEST PROCEEDINGS
Contestant :
 :
 : Docket No. LAKE 2009-323-R
v. : Citation No. 8414211; 02/12/2009
 :
 : Docket No. LAKE 2009-324-R
SECRETARY OF LABOR, : Citation No. 8414214; 02/12/2009
MINE SAFETY & HEALTH :
ADMINISTRATION, (MSHA) : Mach #1 Mine
Respondent : Mine ID 11-03141

DECISION

Appearances: Christopher D. Pence, Esq., and David J. Hardy, Esq., Allen, Guthrie, McHugh & Thomas, PLLC, Charleston, West Virginia, for the Contestant,

Barbara M. Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Respondent.

Before: Judge Weisberger

I. Introduction

These cases are before me based on Notices of Contest filed by Mach Mining, LLC, (“Mach”) challenging the issuance of two citations alleging violations of the provisions of two mandatory standards¹ relating to the requirement of providing escapeways. Pursuant to notice, a hearing was held in St. Louis, Missouri, on May 14, 2009.² The parties were directed to file briefs addressing the limited issue of whether the cited area was a “working section”, and thus

¹Citation No. 8414211 (Docket No. LAKE 2009-323-R) alleges a violation of 30 C.F.R. § 75.380(d)(1) which requires that escapeways be maintained in a safe condition. Citation No. 8414214 (Docket No. LAKE 2009-324-R) alleges a violation of 30 C.F.R. § 75.364(b)(5), which requires an examination of an escapeway for hazardous conditions. At the conclusion of the hearing held on May 14, 2009, the Secretary made a motion to amend the latter citation by changing the alleged violative standard to 30 C.F.R. § 75.364(h), which requires that a record be made of hazardous conditions found during weekly examinations. After the parties argued the merits of the motion, it was granted.

²The record was kept open to allow for the possibility of an additional evidentiary hearing.

triggering the requirements of escapeways.³ Each party subsequently filed a brief, and a reply. On July 15, 2009, the undersigned issued a partial decision determining that the cited area was a “working section”.

A conference call was held on November 9, 2009; the parties indicated that they did not seek an opportunity to present additional evidence relating to the remaining issues regarding Citation No. 8414211 (Docket No. LAKE 2009-323-R), which alleges a violation of 30 C.F.R. § 75.380(d)(1). Subsequently, the parties each filed a brief and a reply addressing these issues.⁴

II. Whether the primary escapeway to the Headgate #4 section of Mach #1 Mine was maintained in a safe operating condition pursuant to Section 75.380(d), *supra*.

A. The Parties’ Positions

Mach argues that the escapeway at issue in these cases was “fully passable and traversed without incident on February 12, 2009,” when the citation was issued. Contestant’s Second Post-Hearing Brief at 8. Mach further avers that the material in the escapeway was not significant enough to prevent miners from exiting the mine safely in the event of an emergency. *Id.* Moreover, Mach contends that even if a violation of the regulation existed, the violation was not significant and substantial because the material present in the escapeway was not a discrete safety hazard, potential injury from the material was unlikely, and any injury would not be serious. *Id.* at 10.

The Secretary argues that the objects present in the escapeway, including water, a “gob” pile, concrete blocks, wood pallets and crib ties, created an “obstacle course”. Accordingly, the Secretary contends, the conditions created slip, trip and fall hazards for the inspector, and thus, miners facing an emergency situation would have confronted these obstacles under more challenging circumstances. Furthermore, the Secretary argues that the violation was significant and substantial.

B. Standard

Title 30, Code of Federal Regulations requires each mine escapeway to be “[m]aintained in a safe condition to always assure passage of anyone, including disabled persons.” 30 C.F.R. §

³Pursuant to 30 C.F.R. § 75.380(b)(1), an operator is required to provide an escapeway “for each working section.” Thus, the existence of a working section is a predicate for the imposition of all regulatory mandates relating to escapeways, including those set forth in Sections 75.380(d)(1), and 75.364(h), the standards at issue in the cases at bar.

⁴The parties agreed that if it is found that the Contestant violated Section 75.380(d)(1), *supra* the standard at issue in this case at bar, then a hearing be scheduled on May 5, 2010, regarding the remaining citation, No. 8414214 (Docket No. LAKE 2009-324-R).

75.380(d)(1). The relevant legislative history provides that the required escapeways “allow persons to escape quickly to the surface in the event of an emergency.” S.Rep. No. 91-411, at 83, *Legis. Hist.*, at 209 (1975).

In *American Coal Company*, the Commission held that an operator violates Section 75.380(b)(1)’s requirement to “provide” escapeways when its miners are “substantially hindered or impeded from accessing designated escapeways.” 29 FMSHRC at 948. In reaching this conclusion, the Commission set forth the following regarding the purpose and legislative history of escapeways which is equally applicable to the case at bar:

There is no disputing that escapeways are needed for miners to quickly exit an underground mine and that impediments to a designated escapeway may prevent miners from being able to do so. The legislative history of the escapeway standard states that the purpose of requiring escapeways is “to allow persons to escape quickly to the surface in the event of an emergency.” S. Rep. No. 91-411, at 83, *Legis. Hist.*, at 209 (1975).

29 FMSHRC at 948 (emphasis added).

Based on the regulatory scheme and legislative history, it is manifest that the purpose of escapeways is to allow miners to quickly escape.

The Commission has been guided by this legislative history, and “has relied upon Congressional recognition of the importance of maintaining separate and distinct travelable escapeways that are maintained in a safe condition.” *Maple Creek Mine*, 26 FMSHRC 539, 543 (June 2004)(citing *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993)). The Commission has found such language “plain and unambiguous,” and that the standard “establishes a general functional test of ‘passability.’” *Utah Power and Light Company*, 11 FMSHRC 1926, 1930 (Oct. 1989). Moreover, the Commission has stated that “section 75.380 obligates operators to continually maintain the condition of escapeways,” so that passage of all miners, including those who are disabled or injured, can quickly pass from the beginning of the escapeway to the surface, and that “such passage is not hindered.” *American Coal Company*, 29 FMSHRC 941, 948 (Dec. 2007)(emphasis added).

The parties agree that the escapeway included a number of items, including water, rows of blocks at the bottom of the regulator, a gob pile, loose concrete blocks, take-up track, and a pallet of crib ties. However, significant disagreement remains regarding the nature and effect of these materials on the passability of the escapeway.

C. Summary of the Testimony

Bobby Jones, a coal mine inspector for the Mine Safety and Health Administration, testified for the Secretary. Jones characterized the escapeway as an “obstacle course”. (Tr. 39, 70). Jones stated that he measured the standing water, which was 20 feet long, spanned rib to rib,

ranged in depth from two inches to eight inches, and was generally clear. He also noted that the mine's clay floor was uneven and slick when wet. Jones testified that he observed six to eight concrete blocks loosely strewn on the ground on the inby side of the regulator. He further observed 10 to 12 blocks on the outby side of the regulator, which was described as a hole cut out of the wall that served as the stopping. According to his testimony, there were also three rows of concrete blocks at the base of the regulator. Moreover, while crossing through the regulator, Jones stepped on the blocks, and with the air flowing through the regulator pushing him, he stumbled through the opening.

Jones testified that he encountered a pile of gob, which consisted of "clay, rock and debris from the area that had been pushed into a pile." (Tr. 53) He estimated the pile of gob to be five to eight feet long, stretching rib to rib, and varying in height, from three feet at its highest point to approximately 18 inches at its lowest. Jones next discussed a section of "take-up track" that was atop the gob pile. He identified the track as a steel frame-like structure, and estimated it to be 10 inches tall, 10 feet long and six feet wide. Jones further noted a bundle of crib ties placed on a pallet.

Based on the testimony of its witnesses, Mach contends that any alleged obstacles were items commonly found in mines and routinely negotiated by passing miners. Jeff Wilkins, the examiner at the mine, testified that, during his walk-through with the inspector, he looked through the regulator and observed "probably three inches of water" approximately three or four feet away. (Tr. 206). Wilkins also observed two rows of blocks at the bottom of the regulator, one of which was obscured by the pile of gob. Wilkins estimated the pile of gob was "probably about 18 inches high." (Tr. 201). He also estimated that the gob pile was approximately two feet from the right rib and six feet from the left rib.

Anthony Webb, Mine Manager for Mach, testified that there was an unobstructed span of 10 feet from the left rib to the pile of gob. He also stated that the gob pile was nine feet wide, 18 inches at its tallest point, and 2 ½ feet deep. The gob pile included the piece of take-up track. Webb testified that he measured the distance from the left rib to the take-up track to be 10 feet.

Wilkins testified that there were "probably six blocks to the left scattered" in front of the regulator. (Tr. 204-205). By the time Webb arrived at the Headgate #4 site, he did not see any blocks outby the regulator, and was told that they had been moved. Finally, Webb testified that the pallet of crib ties, located at the bottom of the stairway, covered approximately one foot of the stair width, effectively reducing the width of the stairway from six feet to five feet. Wilkins, however, testified that the pallet of crib ties projected approximately six inches into the width of the stairway.

D. Discussion

I take cognizance of the fact that the inspection that resulted in the citation at issue here was conducted by Jones, who was escorted by Wilkins. I give their testimony greater weight

than that of Webb, as they observed the conditions as they existed during the inspection. In contrast, Webb observed and photographed the area approximately 4 ½ hours later; in that intervening period, the ledge of the regulator had been removed, as were the concrete blocks that had been on the ground.

With regard to the depth of the water in the escapeway, I accord more weight to Jones' version based on his testimony that he measured the water with a tape measure, while Wilkins estimated the depth from three or four feet away. Moreover, with regard to the conflict regarding the number of rows of block in the regulator, I give greater weight to the testimony of Jones, who observed the regulator from both sides. In contrast, Wilkins did not cross through the regulator. Thus, he only observed the ledge from one side; he observed two rows of blocks, but noted that one row was obscured by the pile of gob. Similarly, I find Jones's testimony regarding the height of the gob pile more credible because he based his estimation on a fixed point, the ledge of the regulator.⁵

I find that the combination of the pallet of crib ties, take-up track, pile of gob, loosely strewn concrete blocks on either side of the regulator, and the presence of water on the floor would hinder and delay the emergency evacuation of miners, especially any who were injured. Thus, the clear purpose of Section 75.380(d), *i.e.*, to allow persons to escape quickly in the event of an emergency (*Legislative History, supra*, at 209; *American Coal, supra*, at 948), would be thwarted. Hence, I conclude that the escapeway was not maintained in a safe condition; accordingly, Contestant violated Section 75.380(d), *supra*.⁶

⁵With regard to the rest of the measurements, I note that all three witnesses vary only slightly from one another in their estimations. Hence, for purposes of this decision, it is not necessary to resolve the minor conflict in this testimony.

⁶Mach argues that the case law requires that a significant obstruction that precludes passage through the escapeway must exist before a citation can be upheld. Contestant's Second Post-Hearing Brief at 6. According to Mach, violations are found "where safe passage through the cited escapeway is extremely difficult due to hazardous conditions." *Id.* at 7. Mach relies on *Maple Creek, supra*, (Commission cited the Judge's conclusion that the water, which was black and murky, of varying depths, approximately 420 feet long, did not satisfy the passability test set forth in *Utah Power*. 26 FMSHRC 539, 547 (June 2004), *aff'd in part and rev'd in part*, 27 FMSHRC 555 (Aug. 2005)).

Mach correctly notes that the conditions in the present case are not as severe as those that existed in *Maple Creek, supra*. However, *Maple Creek, supra*, does not mandate a finding of compliance with Section 75.380(d), *supra*, in all cases where conditions are not as severe as those presented in *Maple Creek, supra*. Each case must ultimately be determined on its own facts.

III. Significant and Substantial

Jones designated the violation in the present case as “significant and substantial”. A violation is “significant and substantial” if “based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission, in *Mathies Coal Co.*, 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 will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC 1, 3-4 (Jan. 1984)(footnote omitted).

I have found the condition of the escapeway to be a violation of a mandatory safety standard. With regard to the second element of the *Mathies* test, Mach asserts that with good visibility, miners “could easily have maneuvered around the clearly visible material.” *Id.* Mach argues that if visibility was low, miners could have held the lifeline and would likewise avoid any trip or fall risk. However, I note that in low visibility, the miners would have followed the lifeline, which went through or directly over these obstacles. *Id.* As set forth above, Jones described various objects in the escapeway along with the presence of a wet and slick floor. Based on all of the above, I find the conditions of the escapeway constituted a discrete safety hazard.

In evaluating the reasonable likelihood of an injury to satisfy the third criterion of the *Mathies* test, the evaluation should be made in the context of normal “continuing mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). I find, due to the combination of accumulated items in the escapeway, as set forth above, that the hazard of stumbling and tripping, and the resultant impediment to a prompt evacuation in an emergency, was reasonably likely to have resulted in an injury to a miner, especially given the multitude of dangers, such as explosions, fires, collapses and other risks facing miners on a continual basis that require swift evacuation.

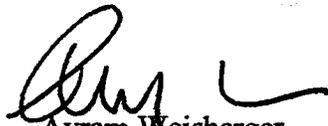
The final element of the *Mathies* test is the likelihood that the injury would be of a reasonably serious nature. Jones testified that the concrete blocks laying on the inby and outby sides of the regulator presented “a slip/trip hazard where miners could fall and have strains, sprains, broken limbs, any number of injuries like that.” (Tr. 62). Likewise, Jones added that if a miner were to slip, trip or fall on a concrete block, or on the gob pile and fall onto the take-up track, “there is a very real possibility of broken bones and strains and sprains, back and neck injuries.” (Tr. 68). Considering the nature of the obstacles, particularly the concrete blocks, the

steel take-up track and the pallet of crib ties, I find that it is reasonably likely that an injury sustained by a miner would be of a reasonably serious nature.

Accordingly, I find that the violation is significant and substantial.

ORDER

It is **Ordered** that Docket No. LAKE 2009-323-R be **Dismissed**. It is further **Ordered** that Docket No. LAKE 2009-324-R be severed from Docket No. LAKE 2009-323-R, and scheduled for hearing on May 5, 2010, at a site to be designated in a subsequent notice.



Ayram Weisberger
Administrative Law Judge
202-434-9964

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 25, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2007-273
Petitioner	:	A.C. No. 15-17587-115853
	:	
v.	:	Docket No. KENT 2007-497
	:	A.C. No. 15-17587-123693
	:	
OHIO COUNTY COAL COMPANY, LLC,	:	Mine: Freedom
Respondent	:	

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Melissa M. Robinson, Esq., William B. King, II, Esq., Jackson Kelly, PLLC, Charleston, West Virginia, on behalf of Ohio County Coal Company.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The Petitions allege that Ohio County Coal Company, LLC, is liable for six violations of the Secretary’s Mandatory Safety Standards for Underground Coal Mines, and propose the imposition of civil penalties in the total amount of \$20,281.00. Prior to the scheduled hearing, the parties filed motions to approve settlements of Citation Nos. 8988718 and 6695143 in Docket No. KENT 2007-497. A hearing was held in Evansville, Indiana, and the parties filed briefs after receipt of the transcript. At the commencement of the hearing, the parties moved for approval of a settlement agreement resolving the remaining two violations in Docket No. KENT 2007-497. The proposed settlements will be approved herein. For the reasons set forth below, I find that Ohio County committed the two violations alleged in Docket No. KENT 2007-273, and impose civil penalties in the total amount of \$1,800.00 for those violations.

Findings of Fact - Conclusions of Law

Ohio County operates the Freedom Mine, located in Henderson County, Kentucky. Ohio County’s controlling entity is Patriot Coal Corporation. On December 12, 2006, Anthony Fazzolare, an MSHA inspector, conducted an inspection of the mine. The citations remaining at issue were issued during that inspection. Ohio County timely contested the violations and the assessed civil penalties.

Citation No. 6692136

Citation No. 6692136 alleges a violation of 30 C.F.R. § 75.342(a)(4), which requires that methane monitors be maintained in “proper operating condition and shall be calibrated with a known air-methane mixture at least once every 31 days.”

The violation was described in the “Condition and Practice” section of the Citation as follows:¹

The machine-mounted methane monitor on the Joy Continuous Miner, Co. No. M-12, located in MMU 001-0, was not being maintained in an operable condition. When tested with a known amount of CH₄ (2.5%), the monitor would only read 2.1% CH₄. These monitors must read the exact amount of CH₄ present while cutting coal. This is a known problem at this mine, and several meetings have been held with company officials and MSHA inspectors to discuss the problem. This is the 19th violation of this standard at this mine since 01/01/2006.

Ex. RG-1.

Fazzolare determined that it was reasonably likely that the violation would result in a lost work days or restricted duty injury, that the violation was significant and substantial (“S&S”), that one person was affected, and that the operator’s negligence was high. A specially assessed civil penalty in the amount of \$5,100.00 was proposed for this violation.

The Violation

Most of the methane liberated in the process of mining coal is liberated where coal is being cut, which at the Freedom mine is the cutting head of a continuous mining machine. Continuous miners are required to have methane monitors mounted in a location “as close to the working face as practicable” and in the primary flow of air away from the cutting head. 30 C.F.R. § 75.342. They are to sound an audible warning when they detect a methane concentration of 1%, and to cut power to the miner if the concentration reaches 2%. Operators of continuous mining machines are also required to conduct methane checks with a hand-held monitor every 20 minutes. They typically carry their monitors in an exposed pouch on the chest of their coveralls. The monitors remain activated, and will provide a visual and audible warning when they encounter a methane concentration of 1%.

As noted in the citation, the Freedom mine had a history of problems maintaining calibration of methane monitors on its continuous mining machines, and had received numerous citations over the course of many months for monitors that did not provide accurate readings

¹ Grammar and spelling errors have been corrected in quotations from documents prepared in the field.

when tested by MSHA inspectors. Eighteen of the previously issued citations were introduced into evidence. Ex. G-3. The problem was not unique to the Freedom mine. Two other mines operated by Patriot, the Dodge Hill and Highland mines, also used monitors manufactured by General Monitors, and were encountering similar problems. Safety managers at Dodge Hill had been in extended discussions with MSHA officials, including inspectors and representatives of MSHA's Directorate of Technical Support, in an effort to solve the problem.

Walter Wood became manager of maintenance at Freedom in January 2006. From past experience, he knew it was difficult to maintain calibration on machine mounted methane monitors, and implemented a policy requiring that the monitors be calibrated weekly. Around May or June, after several citations had been issued, he was aware that the calibration problems continued. He required that calibration be performed every other day. He also made adjustments to the calibration procedure over the course of several months, and consulted with MSHA inspectors, his cohorts at Dodge Hill and Highland, and with representatives of the manufacturer. Nevertheless, it proved extremely difficult to maintain calibration of the monitors, and the monitor tested by Fazzolare on December 12 was not in calibration.

Ohio County does not contest the fact of violation. It argues that the violation was not S&S and that its negligence was less than high, and requests a corresponding reduction in the assessed penalty.

Significant and Substantial

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

The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 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*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The fact of the violation has been established. A measure of danger to safety was contributed to by the failure to properly maintain the methane monitor. An injury to a miner resulting from a methane ignition would most likely be reasonably serious. Therefore, the primary issue in the S&S analysis is whether the violation was reasonably likely to result in an injury causing event.

The Secretary argues that the violation was reasonably likely to result in a methane ignition causing smoke inhalation and/or burns to the continuous miner operator. Conceding that very little methane is liberated at Freedom, the Secretary nevertheless maintains that the violation was S&S because on one day in 2001 an abandoned oil well was encountered at Freedom releasing enough methane to shut power to a continuous miner, and because "all mines are capable of producing methane." Sec'y. Br. at 4-5. Charles Jones, an MSHA supervisory mine inspector, was present at the Freedom mine in 2001 when a continuous miner encountered an abandoned oil well that was not shown on the mine map. Tr. 91-93. Methane was released in sufficient quantity to cut power to the miner. The methane did not ignite and was quickly dissipated by the mine's ventilation system. Later that day, another well was struck, but it is unknown whether a significant quantity of methane was liberated. Jones also believed that there were other wildcat wells in the vicinity of the Freedom mine that would not be shown on the mine map, and that there is "no such thing as a non-gassy mine." Tr. 95-96. Fazzolare, too, believed that there were wildcat wells in the area, and that "all mines are gassy." Tr. 109, 121. Both conceded, however, that very little methane was liberated at Freedom, dangerous levels of methane had never been found, and there had not been any methane ignitions at the mine. Tr. 97-98, 121-22.

Approximately 12,000 to 13,000 cubic feet of methane was liberated at the Freedom mine in a 24-hour period. In contrast, the Dodge Hill and Highland mines liberated close to 500,000 cubic feet of methane, and were subject to 15-day spot inspections under the Act. Tr. 123. James Nichols, a safety professional at Freedom, testified that the reason that the oil wells were struck in 2001 was that an engineering firm had failed to activate a "layer" in a computer-based mine mapping program and, as a result, the wells were not depicted on the mine map at that time. Tr. 133,138. Freedom had since done extensive surveying and testing to identify abandoned wells, and he was confident that there were no wells, whether metal cased or not, that were not reflected on the mine map. Tr. 133-37.

While the cutting head of a continuous miner would present an ignition source, there would have had to have been a significant quantity of methane present to result in an explosion or fire. Methane typically is explosive in concentrations of 5%-15%. Fazzolare testified that it may ignite at a concentration as low as 3% in the presence of coal dust, and that there typically is more coal dust in mine atmospheres during winter months, because they are dryer. However, he did not identify the basis for that statement, which was not reflected in the citation or his notes. Nor did he indicate that such dust was, in fact, present in the Freedom mine. Nichols testified that the mine operates on a blowing ventilation system, which makes it less susceptible to drying during cold weather. Tr. 134. The monitor in question gave a reading of 2.1% when exposed to a 2.5% mixture. Of the previously issued monitor calibration citations, 15 of 18 were not rated as S&S. Fazzolare had issued 14 of the prior citations, only one (a reading of 1.1%) as an S&S violation, and also had rated as non-S&S a permissibility violation issued five days earlier because of the low levels of methane at the mine. Tr. 114-15; Ex. G-3. Jones who had cited three monitor calibration violations, two S&S and one non-S&S, explained that one of the S&S determinations was made because the monitor read less than 1% when exposed to the 2.5% mixture, i.e, it was essentially non-functional. Tr. 101. The other two violations were virtually identical, and were issued on March 1 and May 22, 2009. The March violation, which was issued during a winter alert period, was rated as non-S&S, and the May violation was rated as S&S. Jones did not explain why those violations were treated differently.

Considering the uniformly low levels of methane encountered at the Freedom mine, it was unlikely that a fire or explosion would result from the violation. MSHA inspectors, including Fazzolare and Jones, had reached the same conclusion on the vast majority of previously issued citations, under virtually identical circumstances. Additionally, the fact that the monitor was examined frequently, was calibrated at least every other day, and was reading only 0.4% less than the actual concentration of methane, makes it unlikely that the monitor would not have provided a warning and cut power to the miner in the unlikely event that dangerous levels of methane were encountered.

The Commission and courts have observed that an experienced MSHA inspector's opinion 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). Fazzolare certainly qualifies as an experienced MSHA inspector. However,

while it is possible that a miner could have been injured as a result of the violation, I find that the Secretary has failed to prove that it was reasonably likely that an injury causing event would occur, as opposed to could occur. *See 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). Accordingly, I find that the violation was not S&S, and that it was unlikely that the violation would result in a lost work days or restricted duty injury.

Negligence

The Secretary argues that Ohio County's negligence was high because it was well aware that the monitors were not maintaining calibration and did not take adequate steps to address the problem.² Fazzolare determined that Ohio County's negligence was high because he believed that it was not doing enough to address the calibration problem, which had been ongoing for several months, and had resulted in the issuance of numerous violations. Tr. 106-07. He originally testified that he "was aware of the steps being taken," but later acknowledged that he did not know "everything they were doing." Tr. 105, 120. He knew that calibration was required every shift at Dodge Hill and every day at Highland, and believed that Freedom was not calibrating the monitors often enough. Tr. 109. However, he acknowledged that problems persisted at Highland, that only limited improvement was realized at Dodge Hill, and that both of those mines liberated substantially more methane than Freedom. Tr. 122.

² The Secretary raised two arguments that proved to be in the nature of red herrings. She placed emphasis on the fact that Freedom did not seek to use monitors made by a different manufacturer. However, Wood testified that, in his experience, the monitor made by the only other available manufacturer was less reliable than General Monitors'. Tr. 41. The Secretary did not seek to introduce any evidence to challenge that assertion, or to demonstrate that another viable option was available. She suggested that Freedom could have petitioned for a modification of the requirement for placement of the monitors, or sought to amend its ventilation plan to move the monitors. However, she did not seek to introduce evidence to establish that relocating the monitors may have offered a solution, and Fazzolare testified that neither Highland, nor Dodge Hill, which was working with MSHA's technical support group, had proposed a petition or amendment. The Secretary did not seek to introduce evidence to establish that any permissible change in location could have improved the situation. In any event, monitors are required to be located as close as possible to the face and in the primary stream of air passing from the cutting head. Patriot's maintenance director was informed of developments at Dodge Hill, and would have been aware of any suggestion by MSHA or General Monitors, to change the location of the sensor. Obviously, none of the involved parties believed that such a change would be beneficial, because none was advanced. For the Secretary to rely on the fact that Freedom did not seek such a change is disingenuous at best. Fazzolare opined that changing the location of the monitor would not have improved the calibration problem, which was attributable to a defective cap design. The retrofit of the calibration cup eventually resolved the issue many months later.

Ohio County was certainly well aware that the monitors were not maintaining calibration. Wood knew of the problem when he became maintenance manager in January of 2006. Calibration of monitors was his responsibility throughout the pertinent time period, and he was aware of all pertinent developments with respect to monitor calibration, including the issuance of citations by MSHA. While the steps he took did not resolve the problem, it is not at all clear that they amounted to high negligence.

Freedom's response to the problem was incremental. Based on his previous experience, Wood implemented a policy in January 2006 requiring that monitors be calibrated every week, rather than every 31 days as required by the regulation. Around May or June he was aware that there were still problems, and he directed that calibrations be performed every other day. Tr. 14. Over the course of the next few months, he consulted with the chiefs of maintenance on each shift to check on the status of monitor calibrations. He implemented changes to the calibration procedure, requiring that specific personnel perform the calibrations, and that they be performed after the machines had warmed up. Efforts were made to better guard the monitors, and more comprehensive records were kept of calibration problems and performance. Tr. 30. In addition to calibration, bump tests were required to verify the accuracy of monitor readings, a procedure later required by MSHA.³

Wood talked to MSHA inspectors about the problems, and was advised to consult the manufacturer and his counterparts at other mines. Tr. 59. He contacted representatives of General Monitors, and implemented suggestions that they made, including cleaning and replacing the sniffer caps, modifying the sniffer caps, and checking the power sources and the resistance of the cables for the monitors. Tr. 47-48. General advised Freedom to wash the sniffer caps frequently. However, Freedom found that washing was ineffective, so the caps were replaced, rather than re-used. Wood set up a meeting at the mine with General Monitors' field service representative, to discuss the issues. Fazzolare attended, at Wood's invitation. All four continuous mining machines were checked, and Freedom's procedures were reviewed. General's representative concluded that, "everything we [Freedom] were doing was proper and right." Tr. 47-48.

³ In order to calibrate the monitor, a calibration cup is placed over the monitor's sniffer cap. Air with no methane content is passed through the monitor for 2-5 minutes. A magnet is then placed on the monitor's "read" switch, which puts it into calibration mode. Air containing 2.5% methane is then passed through the monitor. When the monitor has calibrated itself, i.e., sets its reading at 2.5% for the known mixture, the display flashes "cc," indicating that calibration is complete. This process does not indicate whether the monitor was providing accurate measurements of methane content prior to being calibrated. In order to test whether a monitor is providing accurate readings, it is subjected to a "bump test." Air with 2.5% methane content is passed through the monitor, and the monitor's display is observed over a period of time. If the monitor displays a reading between 2.3% and 2.7%, within six minutes of exposure, it is determined to be in calibration.

Wood was also in communication with Steve Withers, Patriot's chief maintenance director, who was responsible for three mines, Freedom, Highland and Dodge Hill. Wood was aware, through Withers, that Dodge Hill was working with MSHA's technical support group in attempting to resolve the calibration problems. Dodge Hill had implemented a policy of calibrating the monitors every shift, but it continued to have problems, although not as many. Tr. 122. Highland required calibration every day, which proved of little help in addressing the problem. Tr. 108, 122. Wood was aware of the progress, or lack thereof, that all parties were making on resolving what was uniformly viewed as a problem with the sniffer cap and/or calibration cup design. Withers had representatives of General visit the Freedom and Dodge Hill mines to attempt to resolve the calibration issues. Their only suggestion was to attempt to dry the monitor's sensing unit for a longer period prior to doing a bump test. Tr. 48-50. Freedom responded to that suggestion, which proved to be unavailing.

The inability of methane monitors manufactured by General Monitors to maintain calibration was an ongoing and widespread problem, for which there was no simple solution. The operators, the manufacturer and MSHA's technical support personnel were working to resolve the problem during the pertinent time period, without much success. As Fazzolare indicated, the problem was believed to be related to the design of the sniffer cap and/or calibration cup. Tr. 129. Miner operators were required to check the monitor cap after mining one place, and to change the protective cap after mining two places. Fazzolare conceded that nothing could have been done to assure that the monitors remained in calibration. Tr. 122. Almost a year after the subject citation was issued, the calibration cup was re-designed and the calibration procedure was modified to require a bump test to verify the accuracy of the calibration. MSHA issued a Program Information Bulletin in November of 2007 informing mine operators of the retrofit program.⁴ Throughout the process, MSHA did not retract its approval of the General monitors.

The problem was largely resolved by a re-design of the calibration cup. Apparently, efforts to improve the design of the sniffer cap are ongoing. Tr. 51, 63. Throughout the latter part of 2006, the efforts of General, MSHA and the operators to solve the problem were unsuccessful. There is no evidence that Freedom failed to implement any measures that were suggested by those involved in the process that had proved to be effective. The only thing being done differently, was that at Dodge Hill calibrations were done every shift, with some improvement, and at Highland, calibrations were done every day, with little or no improvement. As previously noted, those were gassy mines, and both continued to have problems.

I find Ohio County's negligence with respect to the violation to have been no more than low.

⁴ MSHA Program Information Bulletin No. P07-27, "General Monitors Model 420, 420d, S500, and S800 Machine Mounted Methane Monitoring Systems," November 2, 2007. Ex. R-3.

Citation No. 6692140

Citation No. 6692140 alleges a violation of 30 C.F.R. § 75.380(d)(7)(i), which requires that a “continuous directional lifeline or equivalent device” be “installed and maintained throughout the entire length of each escapeway.”

The violation was described in the “Condition and Practice” section of the Citation as follows:

The operator failed to install and maintain a continuous directional lifeline or equivalent device in the primary escapeway for MMU 001-0. The closest continuous directional lifeline or equivalent device was located on the 1st West Sub Mains, more than 1,000 feet from the working unit. If a fire were to start on any of the Intake air courses, the miners attempting to evacuate the unit could easily become disoriented in the smoke and become lost in their attempt to escape the mine.

Ex. G-4.

Fazzolare determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial (“S&S”), that eleven persons were affected, and that the operator’s negligence was high. A specially assessed civil penalty in the amount of \$8,400.00 was proposed for this violation.

The Violation

Prior to 2006, there was no federal requirement that coal mines have directional lifelines in escapeways.⁵ As a result of well-publicized mine disasters in January 2006, regulations were promulgated and legislation was enacted requiring their installation in all underground coal mines. The first requirement, an Emergency Temporary Standard (“ETS”), was published by the Secretary on March 9, 2006. 71 Fed. Reg. 12251. The ETS amended 30 C.F.R. § 75.380(d) by adding sub-paragraph (7), establishing a requirement for continuous directional lifelines throughout escapeways. 30 C.F.R. § 75.380(d)(7)(i), 71 Fed. Reg. 12269. It was recognized in the ETS that mine operators would have difficulty obtaining lifelines, and other newly required equipment. It provided that “MSHA will accept as good faith evidence of compliance, purchase orders or contracts to buy lifelines or SCSRs.” 71 Fed. Reg. 12258.

The MINER Act, which became effective on June 15, 2006, amended the Mine Act and addressed many of the requirements of the ETS. It included a requirement that mine operators develop emergency response plans that provided for directional lifelines in escapeways. Ohio

⁵ Three states, Kentucky, West Virginia and Virginia, had required directional durable lifeline cords in escapeways for many years. 71 Fed. Reg. 12257 (March 9, 2006).

County complied with the Act, providing in its August 2006 emergency response plan that escapeways would have lifelines. On December 8, 2006, the Secretary promulgated the Emergency Mine Evacuation Final Rule ("Final Rule"). 71 Fed. Reg. 71429. The Final Rule reconciled the ETS with applicable provisions of the MINER Act, and made permanent the amendments to the regulation at issue here. Because the ETS was scheduled to lapse on December 8, the Department of Labor found good cause to waive the 60-day effective date requirement for major rules, and made the Final Rule effective on the date of publication. 71 Fed. Reg. 71450. The Final Rule provided for good faith compliance for certain specified equipment and training requirements, but, it did not include a good faith compliance provision for installation of lifelines. 71 Fed. Reg. 71431.

On May 3, 2007, MSHA published guidance to operators on compliance with the Final Rule. Emergency Mine Evacuation Final Rule Questions and Answers ("Q&A"), May 3, 2007. Ex. R-12. Question numbered 3 of the Q&A read as follows:

Q3. When does the final rule take effect?

A. The final rule was effective immediately upon publication in the Federal Register on December 8, 2006. There are specific compliance dates for certain items, such as 60 days from the date of publication to submit revised training plans. For certain equipment not addressed in the specific compliance dates, such as SCSRs, multi-gas detectors, etc., that may be in short supply and back ordered, the mine operator must have executed a purchase order to procure this equipment within 30 days of publication and must make a good-faith effort to obtain and deploy this equipment as soon as practicable.

Ex. R-12 at 1.

In response to the ETS, Ohio County had purchased and installed lifelines in its primary and secondary escapeways. Blue/white reflective lifeline was used in its primary escapeways, and green/white lifeline was used in its secondary escapeways. In mid-November 2006, Ohio County's supply of lifelines was becoming depleted. Tr. 155. On November 28, it ordered 20 units of blue/white lifeline from its supplier, United Central Industrial Supply. Tr. 156-57; Ex. R-10, R-11. Normally, United Central delivers supplies within two days of receiving an order. Tr. 156-57; Ex. R-10. However, United Central did not have the lifeline in stock. The Affidavit of Charles Fuller, manager of United Central's Madisonville, Kentucky facility, states that there was an industry-wide shortage of continuous directional lifelines in November and December of 2006. Ex. R-10. United Central ordered 20 units of blue/white lifeline from its supplier on December 7. It delivered 10 units of lifeline to Ohio County on December 12, and the remaining 10 units on December 15. Ex. R-10, R-11. Ohio County receives supplies at its warehouse, verifies the items received, stocks the material, and notifies the mine foreman or the safety department of receipt so that installation can be scheduled. Tr. 158. While the lifeline

was received in the warehouse on December 12, it had not been installed at the time of the inspection, and Fazzolare issued the citation at 8:45 p.m., on December 12.

Ohio County argues that the Final Rule “provides the same good faith compliance provisions as did the ETS.” Resp. Br. at 29. It relies on the May 2007 Q&A published by MSHA as evidence that the good faith compliance provision was intended to be extended to lifelines as well in the Final Rule. Since Ohio County had issued a purchase order for lifelines on November 28, it contends that it was in full compliance with the good faith provision, and cannot be found in violation of the Final Rule. The Secretary argues that lifelines were required to be installed “on or before December 8, 2006,” i.e., that the Final Rule did not include a good faith compliance provision for lifelines. Sec’y. Br. at 6. The Secretary concedes that the Final Rule became effective only “a few days” before the citation was issued, but argues that Ohio County was on notice of the lifeline requirement since publication of the ETS in March, 2006. Sec’y. Br. at 7. The Secretary objected to admission of the Q&A, noting that Ohio County could not have relied on the May 2007 publication.

MSHA’s belatedly published Q&A certainly appears to announce that, at least as of May 3, 2007, the Secretary would employ a good faith compliance rule in enforcing the lifeline requirement. However, there is no such provision in the text of the Final Rule, and I am compelled to accept the Secretary’s argument that the Final Rule terminated the ETS’s good faith compliance rule immediately upon its publication.⁶ Operators, like Ohio County, that had outstanding purchase orders for lifelines that needed to be installed, and were in full compliance with the ETS on December 7, were in violation of the Final Rule on December 8, 2006. I find that Ohio County violated the standard, as alleged.⁷

⁶ In publishing the Final Rule, the Department of Labor noted that “SCSRs and lifelines were proven technologies long available in the marketplace and already installed and used in the underground coal mining industry.” 71 Fed. Reg 71448. Ohio County does not contend that enforcement of the Final Rule is barred by lack of fair notice of elimination of the good faith compliance rule, or that the Secretary’s finding of good cause to waive a delay in the effective date of the Rule was ineffective.

⁷ Ohio County argues that the Secretary did not prove that there was no “equivalent device” in the escapeway and, thus, cannot establish a violation. While Fazzolare could not describe an equivalent device, he correctly noted that it would have to be a “continuous directional lifeline.” Tr. 147. The ETS and Final Rule cited as examples of equivalent devices “a pipe or handrail.” 71 Fed. Reg 12257,71436. There is no evidence that there was anything in the escapeway that could have been considered an equivalent device, and Ohio County does not so contend. I reject Ohio County’s argument on both factual and legal grounds. Ohio County was free to attempt to prove that it had installed an equivalent device that would meet the requirements of the standard. For obvious reasons, it chose not to do so.

S&S

Fazzolare determined that the violation was S&S because a miner attempting to use the primary escapeway in the event of a fire would easily become disoriented in smoke and could not tell where he was going. Tr. 145. He had issued the violation for the defective methane monitor, which he had also determined to be S&S, and he felt that that was "significant." Tr. 153. However, that violation was found to be not S&S because it was unlikely that a methane ignition would occur. The Secretary did not prove that there was any other type of fire that was reasonably likely to occur in the mine.

Moreover, even if a fire had occurred, the occurrence of a reasonably serious injury would have been unlikely. The Freedom mine operates on a blowing ventilation system, and the main intake air flow is inby in the primary escapeway, i.e., miners attempting to evacuate the mine would travel upstream in the intake air. Once they had traveled 1,000 feet, they would have encountered a proper lifeline. In the event of a fire, it was highly unlikely that there would be smoke in the primary escapeway. There were virtually no potential fire sources in the intake entry. Nichols explained that the only thing located in the intake entry was a well-insulated high voltage cable, and that rock dust was applied throughout. Tr. 179-80. Smoke generated by a fire elsewhere in the mine would not enter the escapeway, but would travel out the return. Tr. 177. Permanent stoppings separate the intake entries from other entries. Tr. 179. While Fazzolare believed that smoke could enter the escapeway if a ventilation control was not in place, e.g., a man-door had been left open, that does not seem likely. The higher air pressure in the intake would cause fresh air to flow through an open man-door into the return. It would not allow smoke-filled air to enter the escapeway.

The Secretary has not carried her burden of proving that an injury causing event was reasonably likely to have occurred as a result of the violation. I find that the violation was not S&S, and that it was unlikely that the violation would result in a permanently disabling injury.

Negligence

From the perspective of compliance with applicable standards, it is difficult to fault Ohio County for its failure to have lifeline installed in the last 1,000 feet of the primary escapeway on December 12. When its supply of lifeline was low, it placed an order with its supplier. Having issued the purchase order, it was in full compliance with the ETS. Under normal circumstances, it would have received the lifeline by November 30. Through no fault of Ohio County's, the lifeline was not received until December 12. Ohio County was in compliance with the applicable standard through December 7. On December 8, it was no longer in compliance, because the Final Rule became effective.

The Secretary points to the fact that one of the Patriot mines apparently made its own lifeline, and argues that the Freedom mine could also have done so. Tr. 168. However, there is no evidence as to the length of time it would have taken to fabricate lifeline, or whether

necessary materials were available. In any event, the Final Rule was published on Thursday, December 8, 2006, and the lifeline was delivered the following Tuesday, December 12. Assuming that Ohio County was aware of the publication, I find that it was not unreasonable for Ohio County to have relied on its procurement system, and its pending order, to secure a supply of lifeline manufactured in compliance with MSHA's requirements.

The Secretary also argues that Ohio County made estimates of how much coal it was going to mine six months in the future, and that it should have predicted how far its entries would have been advanced and how much lifeline it would have needed sufficiently in advance that it should not have exhausted its supply. The Secretary's argument has some appeal, but it fails to consider the regulatory framework. While Ohio County's claim that it had sufficient supplies of lifeline when it placed the November 28 order is open to question, by issuing the purchase order it was in full compliance with the ETS, the only applicable standard.⁸ It was not obligated to assure that it never exhausted its stock of lifeline, which was in short supply. If lifeline had been readily obtainable, it would have received the lifeline within a day or two, and it most likely would have been installed before publication of the Final Rule, and the December 12 inspection. It was the Final Rule's summary elimination of the good faith compliance provision for lifelines that rendered Ohio County in violation. As previously noted, it was not unreasonable for Ohio County to have relied on its procurement system, and its pending order, to secure a supply of lifeline manufactured in compliance with MSHA's requirements.

The Secretary also cites, as evidence of negligence, that Ohio County knew that lifeline had to be installed in the escapeway before December 12, but did not assure that the lifeline delivered that day was installed prior to issuance of the citation at 8:45 p.m. Ohio County points out that there is no evidence of the time that the lifeline was delivered. There is also nothing to indicate that it was on notice to expect a delivery that day. Ohio County's procedure for handling deliveries of supplies at its warehouse was that shipments were examined to verify the material and quantity, records were updated to show that the material was in stock, and appropriate personnel were notified so that installation could be scheduled. The process appears appropriate from a business standpoint, and appears to be consistent with the Q&A guidelines later published by MSHA, wherein it is noted that mandated equipment on back order was to be deployed "as soon as practicable." Ex. R-12 at 1. The fact that Ohio County did not implement a special procedure to assure that lifeline was installed immediately upon delivery does not significantly increase the level of Ohio County's negligence.

Upon consideration of all of these factors, I find Ohio County's negligence with respect to the violation to have been no more than low.

⁸ Nichols testified that there was sufficient lifeline in stock when the order was placed. Tr. 155. However, mining advanced approximately 70 feet per day, and it would have taken close to two weeks to have advanced 1,000 feet. Tr. 175-76. November 28, the date of the order, was 14 days prior to December 12, the date the citation was issued.

The Appropriate Civil Penalties

Ohio County is a large operator, with a very large controlling entity. The assessment data reflects that it averaged 1.6 violations per inspection day during the relevant period, a relatively high incidence of violations. Ohio County does not contend that payment of the proposed penalties will affect its ability to continue in business. The violations were promptly abated.

Citation No. 6692136 is affirmed. However, the gravity of the violation was less serious than alleged. It was not S&S. In addition, the operator's negligence was low. A specially assessed civil penalty of \$5,100.00 was proposed by the Secretary. The lowering of the levels of negligence and gravity justify a significant reduction in the proposed penalty. Upon consideration of the above, the factors enumerated in section 110(i) of the Act, and informed by the Secretary's then-applicable penalty assessment regulations, I impose a penalty in the amount of \$300.00.

Citation No. 6692140 is affirmed. However, the gravity of the violation was less serious than alleged. It was not S&S. In addition, the operator's negligence was low. A civil penalty of \$8,400.00 was proposed by the Secretary. The lowering of the levels of negligence and gravity justify a significant reduction in the proposed penalty. Upon consideration of the above, the factors enumerated in section 110(i) of the Act, and informed by the Secretary's then-applicable penalty assessment regulations, I impose a penalty in the amount of \$1,500.00.

The Settlements

Through two written motions, and an oral motion made at the hearing, the parties sought approval of negotiated settlement agreements resolving the four alleged violations in Docket No. KENT 2007-497. Ohio County has agreed to withdraw its contest and pay the assessed penalties as to Citation Nos. 6692607, 6695143 and 6695144, and the parties propose that the penalty for Citation No. 9898718 be reduced from \$4,500.00 to \$3,000.00. I have considered the representations and evidence submitted and conclude that the proffered settlements are appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motions for approval of settlement are **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of \$6,281.00 for the citations that are the subject of the settlement agreements.

ORDER

Citation Nos. 6692136 and 6692140 are **AFFIRMED, as modified**, and Respondent is **ORDERED** to pay a civil penalty in the amount of \$1,800.00 for those violations.

Respondent shall pay civil penalties in the total amount of \$8,081.00 for the settled and contested violations within 30 days.



Michael E. Zielinski
Senior Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

February 25, 2010

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Petitioner	:	Docket No. YORK 2008-104-M
	:	A.C. No. 28-00975-137827
v.	:	
	:	
PC SAND & GRAVEL,	:	PioCosta T/A PC Sand & Gravel
Respondent	:	

DECISION AND ORDER APPROVING SETTLEMENT

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). The parties filed a Joint Motion to Approve Settlement, which was received on September 8, 2008. On August 21, 2009, the undersigned issued an Order to Submit More Information. The Secretary was ordered to submit additional information supporting the vacation of thirteen citations as a part of the settlement. By letter, dated August 31, 2009, the Secretary, through her representative, argued that she has “unreviewable prosecutorial discretion to vacate citations after issuance.”

In support of her position, the Secretary cites *RBK Construction, Inc.*, 15 FMSHRC 2099 (Oct. 1993). In *RBK Construction*, the Commission held that the Secretary had the authority to vacate the citations, citing the decision of the U.S. Supreme Court in *Cuyahoga Valley Ry. Co. v. United Transportation Union*, 474 U.S. 3 (1985). In *Cuyahoga Valley Ry. Co.*, the Supreme Court concluded that, based on the distinct roles of the Secretary and the Commission, established by the Mine Act, the Secretary’s decision to withdraw a citation is not reviewable by the Commission. 474 U.S. at 7-8.

RBK Construction dealt solely with citation withdrawals; the present case, however, involves the vacation of citations in the context of a motion to approve a settlement agreement. Section 110(k) of the Mine Act states, in relevant part, that “No proposed penalty which has been contested before the Commission under Section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission.” 30 U.S.C. § 820(k)(emphasis added). Interestingly, the Secretary has previously recognized a difference between cases involving vacated citations and cases involving settlements. In *RBK Construction*, for example, the Secretary argued before the Commission “that 110(k) applies only to settlements of penalties, not to vacations of citations or orders.” 15 FMSHRC at 2101.

Moreover, Section 307 of the Act empowers the Secretary to promulgate rules and regulations to enforce the Act. 30 U.S.C. § 801(g). The regulation entitled “Penalty Assessment”, included in Section 2700.31, reads:

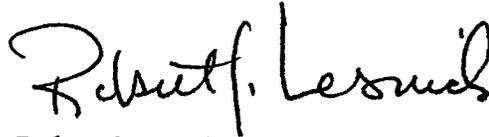
- (a) General. A proposed penalty that has been contested before the Commission may be settled only with the approval of the Commission upon motion.
- (b) Settlement Motion. A motion to approve settlement shall include the following information for each violation:
 - (1) The amount of the penalty proposed by the Secretary;
 - (2) The amount of the penalty agreed to in settlement; and
 - (3) Facts in support of the penalty agreed to by the parties.
- (c) Order approving settlement. Any order by the Judge approving a settlement shall set forth the reasons for approval and shall be supported by the record. Such order shall become the final decision of the Commission 40 days after the issuance unless the Commission has directed that the order be reviewed.

29 C.F.R. § 2700.31.

Under the Rules, promulgated by the Secretary, a settlement must be moved, and approved, by the Commission. 29 C.F.R. § 2700.31(a). Furthermore, a motion to approve settlement must include facts supporting the agreed-to penalty. 29 C.F.R. § 2700.31(b)(3). In the present case, such relevant facts were not included in the initial motion. Similarly, the regulations require that an order approving a settlement, issued by an administrative law judge, “set forth the reasons for approval and shall be supported by the record.” 29 C.F.R. § 2700.31(c). Based on the motion filed by the parties, the record was incomplete, and did not provide adequate reasons upon which to base approval.

Despite the initial resistance to offer any explanation for the withdrawal of thirteen citations, however, the Secretary complied with my order by proffering legitimate reasons for vacating the citations in the August 31, 2009 letter. Accordingly, I find the record now substantiates approval of the parties’ joint motion and that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the Joint Motion to Approve Settlement in **GRANTED** and it is **ORDERED** that Respondent pay a penalty of \$784.00, within 60 days of this order.¹



Robert J. Lesnick
Chief Administrative Law Judge

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¹Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT
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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 22, 2010

BILLY BRANNON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 2009-302-D
	:	BARB CD 2008-07
	:	
PANTHER MINING, LLC,	:	No. 1 Mine
Respondent	:	Mine ID 15-18198
	:	
BILLY BRANNON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 2009-1225-D
	:	BARB CD 2009-07
	:	
PANTHER MINING, LLC and	:	
MARK D. SHELTON,	:	No. 1 Mine
Respondents	:	Mine ID 36-00017
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
on behalf of BILLY BRANNON,	:	
Complainant,	:	Docket No. KENT 2009-1259-D
	:	BARB CD 2009-09
v.	:	
	:	
PANTHER MINING, LLC,	:	No. 1 Mine
Respondent	:	Mine ID 15-18198
	:	
BLACK MOUNTAIN RESOURCES, LLC,	:	
Respondent	:	

ORDER DENYING MOTION TO COMPEL

Docket No. KENT 2009-1259-D is a discrimination case based on a complaint brought under section 105(c)(2) of the Mine Act by the Secretary of Labor ("Secretary") on behalf of Billy Brannon ("Brannon") against Panther Mining, LLC and its parent, Black Mountain Resources, LLC (collectively, "Panther"). While the party filing the section 105(c)(2) complaint is the Secretary, pursuant to Commission Rule 4(a), Brannon is a party in his own right. 29

C.F.R. § 2700.4(a). Brannon, as a party, is represented by counsel, Tony Opegard. The section 105(c)(2) case has been consolidated with two related proceedings: KENT 2009-302-D, a section 105(c)(3) discrimination case brought by Brannon against Panther; and KENT 2009-1225-D, a second section 105(c)(3) discrimination case brought by Brannon against Panther.¹ The consolidated cases will be heard beginning on March 2, 2010.

On January 11, 2010, the Commission received and docketed Panther's Fifth Motion to Compel Discovery in Docket No. KENT 2009-1259-D. For reasons stated below, Panther's motion **IS DENIED**.

Panther seeks an order requiring Mr. Opegard to submit to a deposition. Panther notes that in her Amended Complaint, the Secretary alleges Brannon "initiated" safety complaints to MSHA and to the Kentucky Office of Mine Safety and Licensing ("KOMSL"). Amended Complaint ¶ 8. However, according to Panther, Brannon actually reported the conditions by telephone to his attorney, Tony Opegard, but told Opegard that he, Brannon, did not consider the conditions to be dangerous. Panther asserts that Opegard, not Brannon, reported the conditions to MSHA inspector Craig Clark and to KOMSL, and that Opegard described the conditions to Clark as an imminent danger. Panther also states that another client of Opegard, Scott Howard, was a party to both the telephone call from Brannon to Opegard and to the call from Opegard to Clark. Mot. at 1-2.

Panther further notes that on March 27, the day Brannon was fired, Opegard wrote to Rick Raleigh, Black Mountain's personnel director, informing him that Brannon was the source of the previous day's imminent danger complaint. Brannon's subsequent complaint to MSHA indicated that Brannon believed Opegard's letter to Raleigh caused Panther to terminate Brannon. Panther contends that Brannon did not believe a safety hazard existed when he called Opegard and that the report he made to Opegard was "part of an ongoing campaign to harass and intimidate his employer and mine management." Mot. at 2.

Panther wants to question Opegard about these events. It states that it notified Opegard of its intent to depose him on December 29, and that Opegard lodged no objection. However, when the time came to be sworn and deposed, Opegard refused. Mot. at 2. Therefore, Panther moves Opegard be ordered to appear and to be deposed.

Brannon opposes the motion. He maintains that because the information Panther seeks can be obtained through other witnesses, Opegard's deposition should not be allowed. He also maintains the information sought by Panther is irrelevant and that Panther is "attempting to harass Brannon and his counsel."² Response at 3.

¹Docket No. KENT 2009-1259-D is the last-filed of the three cases.

²Because I agree with Brannon's first assertion regarding Panther's ability to obtain the information it seeks through other sources, I do not reach the issue of relevance. Nor do I ascribe

Granting a motion to order the deposition of opposing counsel would be an unprecedented and extraordinary act. I have never heard of such an order being issued in a matter brought under the Mine Act, and the parties have not directed me to; nor have I otherwise learned of any such order ever being issued by the Commission or its judges. I expect the reason is because allowing the deposition of opposing counsel is bad policy. It is bad for the legal system. It is bad for Commission litigants. It is bad for the Commission. As Brannon points out, the United States Court of Appeals for the 8th Circuit put it best:

Taking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and costs of litigation. It is not hard to imagine additional pretrial delays to resolve work-product and attorney-client objections, as well as delays to resolve collateral issues raised by the attorney's testimony.

Shelton v. American Motors Corporation, 805 F.2d 1323, 1327 (8th Cir. 1986). For these reasons I will be hard pressed to *ever* allow a party to depose opposing counsel, and this is doubly true where, as here, other persons who can be deposed were parties to the events in question.


David Barbour
Administrative Law Judge

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a motive to Panther's motion.

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 29, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2008-71-M
Petitioner	:	A.C. No. 40-03269-127960
v.	:	
	:	
	:	
	:	
CLAYSVILLE QUARRY,	:	Claysville Quarry
Respondent	:	

ORDER CANCELING HEARING
AND
ORDER REQUESTING PENALTY CRITERIA INFORMATION

Dennis Roy Hinch is the owner/operator of the Claysville Quarry. The facility is a dimensional stone quarry where stone used in the installation of patios and walkways is extracted and stacked on pallets for customer delivery. Hinch performs the blasting. The quarry employs a total of four additional employees who operate mine equipment. Hinch uses the services of Francisco Morales Stone Stackers, a contractor that supplies the laborers that load the dimensional stone onto the pallets. This information was provided by Hinch during conference calls with both parties to this proceeding conducted on January 20 and January 27, 2010.

On August 21, 2007, 104(g)(1) Order No. 6123908 was issued for an alleged violation of the mandatory training standard in section 46.8(a)(1) that requires the training of new miners. The citation was issued because Hinch failed to provide new miner training to nine contract employees who were stacking stone on pallets. The Secretary designated the citations as significant and substantial (S&S) and attributed the violation to a high degree of negligence. The Secretary proposes a civil penalty of \$3,224.00 for this 104(g)(1) order.

During the January 27, 2010, conference call Hinch stipulated to the fact of the violation and its designation as S&S in nature. This matter had been scheduled for hearing on February 9, 2010. However, there are now no unresolved issues of material factual that require a hearing. As discussed below, the only remaining issue is the application of the facts in this matter to the statutory section 110(i) penalty criteria. 30 U.S.C. § 820(i). Consequently, **IT IS ORDERED** that the scheduled hearing **IS CANCELED**.

Commission judges make *de novo* findings with respect to the penalty criteria in section 110(i) of the Mine Act, and they are not bound by the Secretary's proposed civil penalties. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Section 110(i) of the Act sets forth the statutory civil penalty criteria used to determine the appropriate civil penalty to be assessed. In this regard, section 110(i) provides, in pertinent part:

The Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

During the January 27th conference call Hinch stated: that his Claysville Quarry has been previously cited for approximately six citations; that the quarry is a small business with only four employees; that he was unaware of the requirement of training contract employees; that the \$3,224.00 penalty proposed by the Secretary would be a hardship given his small business size; and that he immediately provided the required training after the 104(g) order was issued.

The Commission has noted that the *de novo* assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1503 (Sept. 1997). Rather, the judge must qualitatively analyze each of the penalty criteria to determine the appropriate civil penalty to be assessed. *Cantera Green*, 22 FMSHRC 616, 625-26 (May 2000).

In view of the above, **IT IS ORDERED** that the Secretary address the application of the penalty criteria in section 110(i) to the facts of this case. Specifically, the Secretary should answer yes or no, with a supporting explanation, if appropriate, to the following questions:

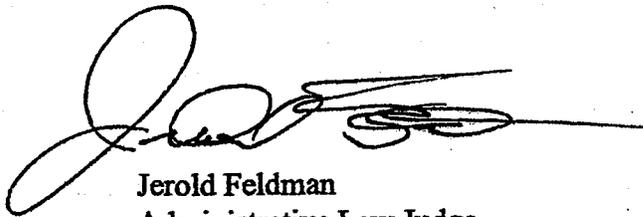
- (1) Is the Claysville Quarry history of violations an aggravating factor in the imposition of the civil penalty the Secretary proposes in this matter?
- (2) Is the Claysville Quarry properly designated as a small operator?
- (3) Is the proposed \$3,224.00 civil penalty disproportionate to the size of the operator's business, particularly in view of the total \$281.00 civil penalty proposed for two training violations in SCP Investments, LLC, Docket Nos. SE 2006-148-M and SE 2006-163-M?

(4) Did the Claysville Quarry demonstrate good faith in attempting to achieve rapid compliance after notification of the violation?

(5) Is there a correlation between the number of persons affected and the degree of negligence attributable to the Claysville Quarry for the subject training violation?

ORDER

IT IS ORDERED that the Secretary shall provide answers to the above questions within 21 days of the date of this Order. The Secretary may provide any additional information and arguments that she deems appropriate to support her assertion that the proposed civil penalty in this matter should not be substantially reduced. Failure to timely respond may result in vacating the subject 104(g)(1) order. **IT IS FURTHER ORDERED** that Claysville Quarry shall file a response to the Secretary's submission within 14 days of the receipt of the Secretary's answers.



Jerold Feldman
Administrative Law Judge

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February 12, 2010

KNOX CREEK COAL CORP.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. VA 2010-81-R
	:	Order No. 8169137; 11/04/2009
	:	
	:	Docket No. VA 2010-82-R
	:	Citation No. 8169140; 11/04/2009
	:	
	:	Docket No. VA 2010-83-R
	:	Citation No. 8169138; 11/04/2009
	:	
v.	:	Docket No. VA 2010-84-R
	:	Citation No. 8170372; 11/02/2009
	:	
	:	Docket No. VA 2010-85-R
	:	Citation No. 8170368; 11/02/2009
	:	
	:	Docket No. VA 2010-86-R
	:	Citation No. 8164762; 11/01/2009
	:	
	:	Docket No. VA 2010-87-R
	:	Citation No. 8170373; 11/04/2009
	:	
SECRETARY OF LABOR,	:	Docket No. VA 2010-88-R
MINE SAFETY AND HEALTH	:	Citation No. 8170374; 11/04/2009
ADMINISTRATION, (MSHA),	:	
Respondent	:	Docket No. VA 2010-89-R
	:	Citation No. 8170375; 11/04/2009
	:	
	:	Docket No. VA 2010-90-R
	:	Citation No. 8170376; 11/04/2009
	:	
	:	Docket No. VA 2010-91-R
	:	Citation No. 8170350; 10/26/2009
	:	
	:	Docket No. VA 2010-92-R
	:	Citation No. 8169126; 10/27/2009
	:	
	:	Docket No. VA 2010-93-R
	:	Citation No. 8169127; 10/27/2009

: Docket No. VA 2010-94-R
: Citation No. 7318304; 11/03/2009
:
: Docket No. VA 2010-95-R
: Citation No. 8170358; 10/28/2009
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: Docket No. VA 2010-96-R
: Citation No. 8170360; 10/28/2009
:
: Docket No. VA 2010-97-R
: Citation No. 8170352; 10/26/2009
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: Docket No. VA 2010-98-R
: Citation No. 8170353;10/26/2009
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: Docket No. VA 2010-99-R
: Citation No. 8170361;10/28/2009
:
: Docket No. VA 2010-100-R
: Citation No. 8170364;10/30/2009
:
: Docket No. VA 2010-101-R
: Citation No. 8170363; 10/20/2009
:
: Docket No. VA 2010-102-R
: Order No. 8170395;11/10/2009
:
: Docket No. VA 2010-103-R
: Citation No. 8170387; 11/09/2009
:
: Docket No. VA 2010-104-R
: Citation No. 8169146;11/16/2009
:
: Docket No. VA 2010-105-R
: Citation No. 8169147; 11/16/2009
:
: Docket No. VA 2010-106-R
: Citation No. 8169149;11/16/2009
:
: Docket No. VA 2010-107-R
: Citation No. 8170398; 11/16/2009
:
: Docket No. VA 2010-108-R
: Citation No. 8169141; 11/09/2009

: Docket No. VA 2010-109-R
: Citation No. 8169142;11/09/2009
:
: Docket No. VA 2010-110-R
: Citation No. 8169143; 11/09/2009
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: Docket No. VA 2010-111-R
: Citation No. 8170391;11/09/2009
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: Docket No. VA 2010-112-R
: Citation No. 8170393; 11/09/2009
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: Docket No. VA 2010-113-R
: Citation No. 8170394;11/09/2009
:
: Tiller No. 1
: Mine ID 44-06804

ORDER DENYING MOTION TO AMEND CITATIONS IN PART
AND
GRANTING MOTION TO AMEND IN PART

In these contest cases, the Secretary has moved to amend Citation No. 8169137 (VA 2010-81-R), which was issued for an alleged violation of 30 C.F.R. § 75.1403, to allege as alternative violations section 75.1403 and 30 C.F.R. § 75.363(a), and to amend Citation No. 8170372 (VA 2008-84-R), which she maintains was issued for a violation of 30 C.F.R. § 75.1403-10(j), to allege as alternative violations 30 C.F.R. § 75.1403 and 30 C.F.R. § 75.1725(a).¹ The Secretary's motion is triggered by the fact that the Commission's judges have reached different conclusions on the question of whether section 75.1403 can be a basis for an inspector's finding that a violation is a significant and substantial contribution to a mine safety hazard ("S&S" finding). As the Secretary notes, Judges Feldman and Miller have held such a finding can be made (Wolf Run Mining, 30 FMSHRC 1198, 1206 (January 2009); Black Beauty Coal Co., Docket No. LAKE 2008-327 (September 3, 2009)), while Judge Zielinski and I have held it cannot (Cumberland Coal Resources, LP, 30 FMSHRC 1180 (December 2008); Big Ridge, Inc. 30 FMSHRC 1172 (November 2008); Rockhouse Energy Mining Co., 31 FMSHRC 622 (May 2009)). Counsel for the Secretary asserts that the Commission's holding in Empire Iron Mining Partnerships, 29 FMSHRC 999, 1005 (December 2007), allowing the Secretary to

¹While the Secretary states in the motion that Citation No. 8170372 was issued alleging a violation of section 75.1403-10(j), she subsequently has made clear the statement is erroneous and that the citation alleges a violation of section 75.1403. Accordingly, I will treat the motion as one to amend Citation No. 8170372 from a citation alleging a violation of section 75.1403 to one alleging alternative violations of either section 75.1403 or section 75.1725(a).

amend a citation to charge alternative violations where a prior decision created “some legal doubt regarding which of the two standards applied,” is pertinent to this situation, as is the fact that the trial at issue will not be unduly delayed and the company will not suffer recognizable prejudice if the motion is granted. Motion 3-4 (*citing Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289-90 (August 1992)).

The company opposes the motion. It asserts that unlike the situation in Empire, there is no doubt about which standard applies. The company quotes from the motion wherein the Secretary explicitly states that she wants to “cite violations in the alternative because, although she believes that violations of . . . [section] 75.1403 can be designated S&S, that question is currently in dispute and unresolved.” Mem. Opposing Sec.’s Mot. 4 (*quoting* Motion 2). In the company’s view, the Secretary is moving for amendments not to clarify which standard applies, but to save her S&S allegations. *Id.* As the company puts it, the Secretary is attempting “to procure S&S designations where judges have held that none exist.” *Id.* at 2.

Further, the company claims that allowing the amendment will be prejudicial. With regard to Citation No. 8169137, she asserts that violations of section 75.1403 and section 75.363(a) may be based on entirely different facts and that with the hearing near, it is too late to require the company to reassess the facts and prepare new defenses. Mem. Opposing Sec.’s Mot. 5-6. The company makes essentially the same argument with regard to Citation No. 8170372. The company notes that section 75.1725 requires mobile equipment to be maintained in safe operating condition and to be removed from service immediately when not so maintained, whereas section 75.1403 requires compliance with a specific safeguard particular to the conditions in the mine. (In this instance, the safeguard required is Notice to Provide Safeguards 6636286 (February 4, 2008).) *Id.* 7.

RULING

I do not agree with the company that the situation here is antithetical to that in Empire. Rather, I believe that the principles underlying the holding in Empire are fully applicable in this situation. The Secretary never has wavered in maintaining section 75.1403 can serve as a basis for an S&S finding and that section 75.1403 is a proper standard to cite. It is true that the Secretary is trying to “save” her inspector’s S&S findings by pleading in the alternative, but there is nothing wrong with such an approach. S&S findings play an important role in and of themselves. They may trigger the enhanced enforcement tools of section 104(d) of the Act, as well as be the basis for a pattern of violation designations. 30 U.S.C. § 814(e). The findings are essential for the Secretary to be able to effectuate the safety goals of the Mine Act, and the ability to plead in the alternative is, as I have noted before, necessary at times to prevent the government from being deprived of the tool[s] that are needed to achieve the Act’s objectives. Empire Iron Mining Partnership, 29 FMSHRC 317, 327 (April 2007).

For this reason, I believe I would grant the motion but for the fact that doing so would prejudice the company. The company is right when it points out that section 75.1403 and section 75.363(a) are different in their requirements. The violation of section 75.1403 set forth in Citation No. 8169137 alleges a violation of the safeguard requirement set forth in a notice to

provide safeguard No. 7325844 issued on April 15, 2002. This safeguard is unique to the mine. On the other hand, section 75.363(a) is a standard that is applicable to all mines, one that requires the posting of danger signs to warn of hazardous conditions. (The signs must remain posted until the hazard is corrected.) The conditions set forth in Citation No. 8169137 -- not maintaining the track haulage way in a safe operating condition in the No. 4 entry along the No. 5 conveyor belt from crosscut 4 to crosscut 6 for 120 feet by allowing water to accumulate, causing the rails to be unseen by track equipment operators -- are not at all similar to the failure to post signs warning of hazardous conditions.

The hearing on this matter will begin on March 16, 2010. It is being conducted on a "speeded up" basis because Knox Creek is operating under the threat of being designated as exhibiting a pattern of violations at its Tiller No. 1 Mine. 20 U.S.C. §814(e). As the company points out, there are different considerations involved in defending against the particular violation of section 75.1403 as set forth in notice to provide safeguard No. 7325844 and in defending against the more general requirements of section 75.353(a). It is too late in the day to allow the amendment. The Secretary must prevail on the citation as alleged or not at all.

The same is true of the motion to amend Citation No. 8170372 from a citation alleging a violation of section 75.1403 to one alleging in the alternative a violation of section 75.1725(a). The violation of section 75.1403 set forth in Citation No. 8170372 alleges a violation of the safeguard requirements set forth in notice to provide safeguard No. 6636286 issued on February 4, 2008. The facts needed to show whether the safeguard notice was violated if, as the Secretary alleges, a rubber-tired mantrip used in the mine was not provided with a well-maintained parking brake (*see* Citation No. 8170372) may differ significantly from those required to show whether the mantrip was maintained in safe operating condition and, if not, whether it was removed from service as required by section 75.1725(a). Allowing the amendment would prejudice Knox Creek, and the Secretary must proceed on the basis of the citation as issued originally.

For these reasons, the Secretary's motion to amend Citations No. 8169137 (VA 2010-81-R) and 8170372 (VA 2010-84-R) to allege alternative violations **IS DENIED.**

The Secretary also moves to amend Citation No. 8170372 to state that the depth of the water was "2.5 inches to 4 inches" instead of "1 inch to 4 inches." She asserts the amendment is necessary to correct a typographical error. The company does not address this part of the motion, and it **IS GRANTED**.


David F. Barbour
Administrative Law Judge

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