JANUARY 1997

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

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Review was granted in the following cases during the month of January:

Secretary of Labor, MSHA v. Christman Quarry, Docket No. LAKE 96-137-M. (Judge Melick, December 12, 1996)

Lafarge Construction Materials v. Secretary of Labor, MSHA, Docket No. LAKE 95-114-RM. (Judge Barbour, December 16, 1996)

Secretary of Labor, MSHA v. Drew Drilling & Blasting, Inc., Docket No. YORK 96-61-M. (Chief Judge Merlin, unpublished Default order of December 16, 1996)

Secretary of Labor, MSHA v. Austin Powder Company, Docket No. YORK 95-57-M. (Chief Judge Merlin, December 19, 1996)

Review was denied in the following case during the month of January:

Prabhu Deshetty v. Manalapan Mining Company, Docket No. KENT 96-201-D. (Judge Melick, December 12, 1996)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 14, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. CENT 95-8-RM CENT 95-9-RM
ASARCO, INC.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of DAVID HOPKINS	:	
v.	:	Docket No. CENT 95-122-DM
ASARCO, INC.	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

ORDER

BY THE COMMISSION:

In these consolidated contest and discrimination proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"), the parties filed a Joint Motion To Approve Settlement on December 20, 1996 ("Joint Motion"). For the reasons set forth below, we grant the Joint Motion.

On March 4, 1996, Administrative Law Judge Richard W. Manning issued a decision finding that ASARCO, Inc. ("ASARCO") violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c), when it discharged David G. Hopkins, the complainant. 18 FMSHRC 317, 335 (March 1996) (ALJ). In a Supplemental Decision and Final Order issued on July 16, 1996, Judge

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[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

Manning awarded Hopkins reinstatement[2] and $12,752 in back pay (minus payroll deductions), interest, and expenses. 18 FMSHRC 1160, 1163-65 (July 1996) (ALJ). Judge Manning also ordered ASARCO to expunge from Hopkins' personnel records any mention of his discharge, and to pay a civil penalty of $800 for its violation of section 105(c). *Id.* at 1165. On August 23, 1996, the Commission granted ASARCO's petition for discretionary review challenging the judge's conclusions.[3]

On October 23, 1996, the parties filed a Joint Motion To Approve Settlement Agreement which proposed that ASARCO pay Hopkins $15,000 in settlement of Hopkins' claims against the company and in consideration of his foregoing any rights to be reinstated or to seek employment at any facility owned by ASARCO, releasing ASARCO from further liability. The motion also proposed that ASARCO pay $500 in settlement of the $800 fine assessed by the judge. In an order dated December 2, 1996, we denied this motion without prejudice. We concluded that, to avoid the possibility of future litigation, the parties were required to indicate whether ASARCO's payment to Hopkins represented a net amount to be paid to Hopkins or whether deductions were to be taken out of the payment. We also concluded that the parties failed to adequately support their proposed settlement of the penalty assessed by the judge, as they were required to do under Commission Procedural Rule 31(b)(3), 29 C.F.R. § 2700.31(b)(3). We invited the parties to file a revised joint motion addressing these two problems.

On December 20, 1996, the parties filed the Joint Motion. In the Joint Motion, the parties state that ASARCO's $15,000 payment to Hopkins is subject to all applicable payroll deductions withholding, and they have complied with Commission Procedural Rule 31(b)(3) by reciting facts in support of their proposal to reduce the penalty assessed by the judge from $800 to $500.

Oversight of proposed settlements is committed to the Commission's sound discretion. *Pontiki Coal Corp.*, 8 FMSHRC 668, 674-75 (May 1986). The Commission has exercised this discretion in the past in both section 105(c)(2) and section 105(c)(3) discrimination cases. *See, e.g., Reid v. Kiah Creek Mining Co.*, 15 FMSHRC 390 (March 1993); *Secretary of Labor on behalf of Gabossi v. Western Fuels–Utah, Inc.*, 11 FMSHRC 134, 135 (February 1989); and *Secretary of Labor on behalf of Corbin v. Sugartree Corp.*, 9 FMSHRC 197, 198 (February 1987). We have reviewed the Joint Motion and the record and, upon full consideration, we grant the motion and approve the settlement.

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[2] Hopkins declined the offer of reinstatement.

[3] In its petition, ASARCO also raises the question of whether the judge properly concluded that ASARCO violated 30 C.F.R. § 57.14100(b) in connection with its discharge of Hopkins. *See* 18 FMSHRC at 331-34, 336. Since the Joint Motion requests Commission approval of ASARCO's withdrawal of its petition, this issue is moot.

Accordingly, the Commission's direction for review is vacated and this proceeding is dismissed.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR

WASHINGTON, D.C. 20006

January 15, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. PENN 94-259
	:	PENN 94-400
ENLOW FORK MINING COMPANY	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DECISION

BY: Jordan, Chairman; Riley, Commissioner

These consolidated civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involve two accumulation violations of 30 C.F.R. § 75.400[2] and related preshift violations of 30 C.F.R.

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[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

[2] Section 75.400, entitled "Accumulation of combustible materials," provides:

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

§ 75.360 (1993)[3] by Enlow Fork Mining Company ("Enlow") on November 15 and December 8, 1993. At issue is whether Administrative Law Judge Avram Weisberger correctly determined that the November accumulation violation was not significant and substantial ("S&S")[4] and not the result of unwarrantable failure,[5] and that Enlow did not violate the preshift regulation by failing to record the accumulation. 17 FMSHRC 563 (April 1995) (ALJ). Also at issue is whether the judge properly concluded that the December accumulation violation was the result of unwarrantable failure and that Enlow violated the preshift requirement. *Id.* For the reasons that follow, we vacate and remand the judge's S&S and unwarrantable failure determinations for the November accumulation violation and affirm his other determinations.

I.

Factual and Procedural Background

A. November Inspection (Order No. 3660021 and Citation No. 3659960)

On November 15, 1993, at 9:00 a.m., Joseph Hardy, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected the B-3 Longwall Section of the Enlow Fork Mine, an underground coal mine located in Greene County, Pennsylvania. 17 FMSHRC at 563-64. At the tailgate area, he observed an accumulation of packed float coal dust

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[3] Former section 75.360, entitled "Preshift examination," provided in part:

> (a) Within 3 hours preceding the beginning of any shift and before anyone on the oncoming shift, other than certified persons conducting examinations required by this subpart, enters any underground area of the mine, a certified person designated by the operator shall make a preshift examination.
>
> (b) The person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction . . . .

Current section 75.360 applies to preshift examinations and expands these requirements.

[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 in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . . ."

[5] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, which 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 . . . ."

and loose coal mixed with hydraulic oil on and around the tailgate gear case, fluid coupler, and electric drive motor. *Id.* He also observed oil-soaked rags on top of the fluid coupler. *Id.* at 564. An accumulation of hydraulic oil under the motor fluid coupler and gear box measured 4 feet by 10 to 15 feet. *Id.* In addition, he observed an accumulation of coal and float coal dust between shields 148 and 152, the shields closest to the tailgate. *Id.*

Hardy issued a withdrawal order pursuant to section 104(d)(1) of the Mine Act alleging a violation of section 75.400, and closed down the area. *Id.* The order was terminated at 11:30 a.m. after the area was cleaned. Gov't Ex. 2; Tr. 99.

After seeing the accumulations, Hardy checked to see if a preshift examination had been performed and learned that William Young had preshifted the area that morning at 5:00 a.m. 17 FMSHRC at 564, 566-67. Upon determining that the accumulations were not recorded in the preshift report, Hardy issued a section 104(d)(1) citation for failing to report them. *Id.* at 564.

B. December Inspection (Order No. 3660375 and Citation No. 3660374)

On December 8, 1993, at 9:00 a.m., as part of a spot inspection conducted pursuant to section 103(i) of the Mine Act, 30 U.S.C. § 813(i), MSHA Inspector Joseph Reid observed, at the 2N belt entry, an area of accumulations of coal dust starting at the belt feeder and extending 200 feet outby. 17 FMSHRC at 570-71. The accumulations were black in color and dry, and consisted of loose coal, float coal dust, and fine coal on and around the belt feeder unit. *Id.* The accumulations included fine float coal dust on the mine floor inby the feeder in a deposit 16 feet long, 4 feet wide, and up to 5 inches deep, and a pyramid-shaped pile of fine float coal dust that, at its deepest point, was 18 inches deep, 2 feet long, and 3 feet wide. *Id.* The inspector also noted coal dust between 1/8 inch to 2 inches deep on cross members of the belt and the belt structure itself. *Id.*

Inspector Reid issued a section 104(d)(1) withdrawal order alleging a violation of section 75.400. Gov't Ex. 13. Enlow abated the violation at 10:30 a.m. by satisfactorily cleaning the area. *Id.* Reid then checked the preshift examination records, which indicated that a preshift had been made of the area between 5 and 7 a.m. that morning. 17 FMSHRC at 570. Because the accumulations were not reported in those records, the inspector issued a citation under Mine Act section 104(a), 30 U.S.C. § 814(a), alleging a violation of section 75.360(b)(1). *Id.* The citation was terminated when the area was cleaned up and an adequate preshift examination was performed. Gov't Ex. 14.

Enlow contested the citations and orders, and the matters were consolidated for hearing before Judge Weisberger. With respect to the November inspection, the judge determined that an accumulation of coal dust, loose coal, and oil existed in violation of section 75.400. 17 FMSHRC at 565-66. He rejected the charge that there had been a preshift violation under section 75.360(b)(1), concluding that the Secretary of Labor had not established that violative accumulations existed at the time of the preshift examination. *Id.* at 566-67. The judge also

concluded that the accumulation violation was not the result of unwarrantable failure. *Id.* at 567-68. In addition, he determined that the violation was not S&S, concluding that the Secretary failed to establish that a fire or ignition was reasonably likely to have occurred because of the violative accumulation. *Id.* at 568-69. Finding the gravity of the accumulation violation high, the judge assessed a penalty of $2,000. *Id.* at 569.

With respect to the violations of December, the judge concluded that Enlow violated section 75.400 because of the existence of accumulations of coal dust. *Id.* at 570-71. Due to the extent of the accumulations, the judge ruled that at least some of the accumulations existed during the preshift examination and concluded that Enlow violated section 75.360(b)(1) by failing to report them. *Id.* at 572. He also determined that the accumulation violation was the result of unwarrantable failure because Inspector Reid had previously issued a citation for an accumulation violation and had discussions with management concerning the hazards of accumulations and inadequate preshift examinations. *Id.* at 572-73. As the judge found no reasonable likelihood of a fire or explosion resulting from the accumulations, he determined that the accumulation violation was not S&S. *Id.* at 573-74. The judge found a high level of gravity and assessed a penalty of $5,000 for the accumulation violation and $500 for the preshift violation. *Id.* at 574.

The Commission granted cross-petitions for discretionary review filed by the Secretary challenging the judge's determinations regarding the November violations, and by Enlow challenging the judge's determinations regarding the December violations.

II.

Disposition

A. November Inspection

1. S&S

The Secretary contends that the judge erred in failing to address material record evidence that established that the November accumulation violation was S&S, specifically pointing to Inspector Hardy's testimony that the accumulations had packed around the gear box causing it to become too hot to touch. S. PDR at 5-6; S. Br. 1, at 4-6.[6] Enlow counters that the judge's S&S determination is supported by substantial evidence,[7] asserting that the inspector's testimony with

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[6] The Secretary filed two briefs in this proceeding. The Secretary's brief of June 28, 1995 is referred to as "S. Br. 1;" his brief of August 1, 1995 is referred to as "S. Br. 2."

[7] When reviewing a judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial 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

regard to the gearbox was speculative, whereas the testimony of its witness William Stewart, the longwall maintenance coordinator, was accurate and reliable. E. Br. 2, at 4-9.[8]

A violation is S&S if, based on 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 Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission further 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.

Id. at 3-4 (footnote omitted). *See also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988) (approving *Mathies* criteria).

At issue here is whether the Secretary proved the third element of *Mathies*. An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985). When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990) ("*UP&L*"); *Texasgulf*, 10 FMSHRC at 500-03.

The substantial evidence standard of review requires that a fact-finder weigh all probative record evidence and that a reviewing body examine the fact-finder's rationale in arriving at his decision. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-89 (1951). In *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222-23 (June 1994), the Commission vacated the judge's conclusion that an accumulation violation was not S&S because the judge failed to

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support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[8] Enlow filed three briefs in this proceeding. Its brief of June 14, 1995 is referred to as "E. Br. 1;" that of August 15, 1995 is referred to as "E. Br. 2;" and its brief of August 25, 1995 is referred to as "E. Br. 3."

adequately address the evidentiary record on the reasonable likelihood of injury. In this case, we agree with the Secretary that the judge failed to adequately address the evidentiary record in determining that it was not reasonably likely that the hazard contributed to by the accumulation violation would result in an injury.

The judge failed to reconcile his finding that the "mine does liberate methane" (17 FMSHRC at 569), with his determination that the violation was not S&S. As the Commission recognized in *Mid-Continent*, 16 FMSHRC at 1222, "[a]ccumulations, in conjunction with a methane ignition in the face area, could propagate and increase the severity of a fire or explosion." Enlow mine liberates more than 2,000,000 cubic feet of methane in a 24-hour period, subjecting it to a 5-day spot inspection under section 103(i) of the Mine Act. Tr. 79. The judge did not analyze the inspector's uncontroverted testimony that, because any methane liberated from the face will pass through this area, the tailgate area was a likely spot for an explosion. Tr. 92-93. We therefore conclude that substantial evidence does not support the judge's finding that there was no "evidence that liberation of methane in explosive concentrations was reasonably likely to have occurred." 17 FMSHRC at 569.[9]

Further, the judge failed to address "whether an injury would have been reasonably likely to occur if mining operations had continued without the inspector's intervention." *U.S. Steel*, 7 FMSHRC at 1130. The inspector testified that the packing of accumulations on the outside of the gear case and fluid coupler caused them to build up heat. Tr. 28-29, 72-75. He stated that the gear case was too hot to touch and that, if the oil saturated coal dust and coal had continued to build and mining continued, the gear box would have grown progressively hotter, posing a serious danger of ignition. Tr. 25-28, 37, 73-75, 105; Gov't Ex. 3, at 8-9. Although the judge determined that the gear box did not represent an ignition source in its present condition, he failed to address the danger of ignition if the packing of coal, oil, and oil-saturated coal dust around the gear box continued unabated. On remand, we instruct the judge to evaluate the effect of continued mining operations. *See Mid-Continent*, 16 FMSHRC at 1222 (remand appropriate when the judge failed to take into account continued normal mining operations).

Additionally, the judge made findings that are not consistent with his S&S determination. As the Secretary notes, his finding on gravity is incongruous with a negative S&S determination. S. Br. 1, at 6 n.4. The judge found, "[S]hould a fire or explosion have occurred, these persons could have suffered serious injuries . . . [and] the gravity of violation was relatively high." 17 FMSHRC at 569. Although the gravity penalty criterion and a finding of S&S are not identical, they are frequently based upon the same factual circumstances. *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (September 1987). He also recognized a number of factors that, taken together, have been held to show a reasonable likelihood of fire or ignition. *See UP&L*, 12

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[9] To the extent the judge suggested that, before an accumulation violation is S&S, methane must be in the explosive range (17 FMSHRC at 569), he erred. In *National Gypsum*, the Commission explained that, to be cited as S&S, the conditions created by the violation need not be so grave so as to constitute an imminent danger. 3 FMSHRC at 828.

FMSHRC at 970-71; *Texasgulf*, 10 FMSHRC at 500-03. For example, the judge found the existence of accumulations of coal dust, loose coal, and oil, the liberation of methane in the mine, the presence of rags over the top of the fluid coupler, dry coal dust on electrical boxes, and ignition sources including bearings on the drive shaft and gear case and a 4160-volt drive motor. 17 FMSHRC at 566, 569. The judge failed to reconcile these findings with his determination that the violation was not S&S.

Accordingly, we vacate the judge's determination that the accumulation violation was not S&S and remand for his evaluation of all the material record evidence.

2. Unwarrantable Failure

The Secretary argues that the judge erred in reaching his unwarrantable failure determination by applying an incorrect legal standard and that, as a result, the judge failed to address material record evidence on the issue. S. Br. 1, at 7-9. Enlow counters that the judge applied the proper legal test and that his unwarrantable failure determination is supported by substantial evidence. E. Br. 2, at 9-17.

In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 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, 193-94 (February 1991); *see also Buck Creek*, 52 F.3d at 136 (approving Commission's unwarrantable failure test). The Commission examines various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody*, 14 FMSHRC at 1263-64.

We agree with the Secretary that the judge employed an incorrect legal analysis with respect to the factor of repeated similar violations and past warnings. The judge, discounting the testimony of MSHA Inspectors Hardy and Robert Newhouse that they had met with mine management to discuss inadequate cleanup and preshift procedures, incorrectly characterized their testimony as "not probative of the degree of [Enlow's] negligence in allowing the *specific materials at issue* to have accumulated." 17 FMSHRC at 568 (emphasis in original). In evaluating evidence of prior warnings as part of the unwarrantable failure analysis, the Commission has not required the previous condition to involve materials identical to those involved in the condition at issue. *See Peabody*, 14 FMSHRC at 1263 (rejecting contention that

only past violations involving same area may be considered for unwarrantable determination). Thus, to the extent that the inspectors' discussions with management placed Enlow on notice of its need for greater compliance efforts with section 75.400, those discussions were relevant to the unwarrantable failure evaluation and should have been considered by the judge.

The judge also failed to address Enlow's claim that it attempted to correct its accumulation problem in response to the prior warnings and violations. Such pre-citation remedial efforts can be pertinent to an evaluation of whether the violative condition resulted from the operator's unwarrantable failure to comply. *See UP&L*, 12 FMSHRC at 972. Additionally, the judge failed to consider that it took three to four miners 2½ hours to clean up the accumulation, evidence relevant to the extensiveness of the violation. Tr. 72, 99.

On remand, the judge should evaluate all the evidence related to prior warnings, including the three citations for accumulations in other areas of the mine that were issued on October 6, 7, and 28, 1993, approximately 1 month prior to the violation (Gov't Exs. 7, 8, 9), and Enlow's 2-year violation history (Gov't Ex. 12). He should also discuss all relevant evidence relating to the operator's compliance efforts and the extensiveness of the violation.

Accordingly, we vacate the judge's conclusion that the violation was not the result of unwarrantable failure and remand for reanalysis.

3. Preshift Violation

The Secretary argues that the judge overlooked material record evidence that proved a preshift violation, asserting that (1) Inspector Hardy provided compelling testimony that the accumulation formed before the preshift examination, and (2) contravening testimony was minimal. S. Br. 1, at 10-12. The Secretary also submits that the judge's finding of no preshift violation is inconsistent with his determination of a violation of section 75.400. *Id.* at 9-10. Enlow responds that substantial evidence supports the judge's determination to vacate the order because the judge properly credited three Enlow witnesses, including the preshift examiner, who denied that the conditions existed at the time of the preshift examination. E. Br. 2, at 17-19.

We agree with Enlow that substantial evidence supports the judge's conclusion that Enlow did not violate the preshift standard. Section 75.360 essentially restates the requirements of section 303(d)(1) of the Mine Act, 30 U.S.C. § 863(d)(1). Under section 75.360(a), a certified examiner must conduct a preshift examination within 3 hours before "the beginning of any shift and before anyone on the oncoming shift . . . enters any underground area of the mine . . . ." Subsections (b) through (g) of section 75.360 set forth the required elements of the examination. Under section 75.360(g), the results of the preshift examination must be recorded in a book at the surface before miners are permitted underground.

We are not persuaded by the Secretary's assertion that the judge overlooked or inadequately addressed the testimony of Inspector Hardy as to duration of the accumulation. S.

Br. 1, at 10-11. The judge discussed at length Hardy's opinion that the accumulations took more than a shift to develop and weighed this testimony against the testimony of preshift examiner Young and the two shield men on the midnight shift before the inspection. 17 FMSHRC at 566-67. Young and the shield men testified they did not observe the cited accumulations and that they cleaned the area during the shift prior to the inspection. Tr. 213, 221-22, 226-27, 262, 301-04. They also testified that they saw some oil that was cleaned off during their shift. Tr. 200-04, 210, 227, 292-94, 317-18. The judge also relied on the preshift examiner's written statement of November 16, 1993, which described cleaning the area during the preshift. 17 FMSHRC at 566 n.1; Ex. C-2. The judge, in holding that "[t]he record does not convincingly establish when the accumulations of oil observed by Hardy occurred" (17 FMSHRC at 567), addressed and rejected the Secretary's contention that the presence of oil and dried oil at the time of the inspection indicated that it was in existence at the time of the preshift.[10] The judge specifically credited the testimony of the preshift examiner (*id.*) and, absent extraordinary circumstances, we will not overturn a judge's credibility findings on review. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1540-41 (September 1992); *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 25 (January 1984).

Additionally, contrary to the Secretary's contention, a finding of an accumulation violation is not inconsistent with a finding that "it [was] . . . not established that [the preshift] examination was inadequate." 17 FMSHRC at 567. In finding the accumulation violation, the judge did not state how long the accumulations were in existence. *Id.* at 566. The judge simply held that at 9:00 a.m. on November 15, 4 hours after the preshift had been conducted, accumulations of coal dust, loose coal, and oil existed that had not been cleaned up. *Id.* Thus, we perceive no internal inconsistencies in the judge's conclusions.

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[10] Our dissenting colleague claims we are "improperly raising the level of proof the Secretary must provide in order to establish a preshift violation." Slip op. at 15 (Commissioner Marks, concurring and dissenting). Since we agree with our colleague that the Secretary "does not have to prove *when* the accumulations occurred" in order to establish a violation of section 75.360 (*id.* (emphasis in original)), he appears to misunderstand our position. We hold the Secretary to the standard articulated by the judge below, who simply required the Secretary to prove "that it was more likely than not that the accumulations observed by Hardy were in existence at the time of Young's preshift examination." 17 FMSHRC at 567.

Moreover, our colleague, contending that the record contains substantial evidence to support the Secretary's charge, would reverse the judge. However, even if the record permits us to draw a different conclusion than the one drawn by the fact-finder, this does not mean the judge's finding lacks substantial support and should be reversed. "[T]he possibility that two inconsistent conclusions may be drawn from the evidence does not mean that the [fact-finder's] findings are unsupported by substantial evidence, considering the record as a whole." *NLRB v. Vincent Brass & Aluminum Co.*, 731 F.2d 564, 567 (8th Cir. 1984). Accordingly, we decline to overturn the judge's finding that no violation occurred.

Accordingly, we affirm the judge's determination that Enlow did not violate the preshift requirements on November 15, 1993.

B. December Inspection

1. Preshift Violation

Enlow claims that, because the December 8 accumulations did not present a hazard and were not found to be S&S,[11] the judge erred in finding a violation of the preshift standard. E. Br. 1, at 4-5. Enlow also asserts that substantial evidence does not support a finding of violation. *Id.* at 7-9. The Secretary counters that accumulations of combustible materials are hazards that preshift examiners must report. S. Br. 2, at 6-11. He further responds that Enlow's argument amounts to an improper attempt to engraft onto the preshift standard the S&S requirement that an injury be reasonably likely to occur. *Id.* The Secretary also submits that the accumulation at issue presented a hazard and the judge's determination of violation is supported by substantial evidence. *Id.* at 11-16.

Section 75.360(b) requires that a preshift examiner "examine for hazardous conditions." We reject Enlow's argument that, because the judge concluded the December accumulations were not S&S, they were not "hazardous" within the meaning of section 75.360(b). The plain language of section 75.360(b) does not support Enlow's construction. Section 75.360(b) does not specify that hazardous conditions are only those reasonably likely to result in serious injury, nor does that section repeat the S&S language from section 104(d) of the Act, requiring that the conditions be "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . . ."

Section 75.360(b) does not define the phrase "hazardous condition." However, the Commission recognized in *National Gypsum* that, based on its dictionary definition, a "hazard" denotes a measure of danger to safety or health. 3 FMSHRC at 827 & n.7. The Commission has approved the definition of "hazard" as "a possible source of peril, danger, duress, or difficulty," or "a condition that tends to create or increase the possibility of loss." *Id.* (citing *Webster's Third New International Dictionary* 1041 (1971)). Accumulations of combustible materials have been recognized by Congress and this Commission as representing hazardous conditions. S. Rep. No. 411, 91st Cong., 1st Sess. 65 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 191 (1975) ("*Coal Act Legis. Hist.*") ("the operator [must] not allow coal dust, loose coal, float coal dust or other combustible materials to accumulate . . . . Tests, as well as experience, have proved that inadequately inerted coal dust, float coal dust, loose coal, or any combustible material when placed in suspension will enter into and propagate an explosion."); *Old Ben Coal Co.*, 2 FMSHRC 2806, 2807 (October 1980) (there exists a "danger of fire or explosion posed by the presence of dangerous quantities of combustible materials"). The

[11] The Secretary did not appeal this ruling.

Senate committee report on the 1969 Coal Act stated that "[t]he presence of . . . coal dust and loose coal must be kept to a minimum through a regular program of cleaning up . . ." and further noted the dangers posed by mine fires along belt conveyors and the necessity for careful preshift examinations of belts. *Coal Act Legis. Hist.* at 183, 191.

The preshift examination requirement "is of fundamental importance in assuring a safe working environment underground." *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (January 1995). Congress explicitly acknowledged the importance of the preshift inspection by making it a longstanding statutory mandate, dating back to the Federal Coal Mine Safety Act of 1952, 30 U.S.C. § 471 et seq. (1955). These provisions were strengthened in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976), and carried over in identical fashion to the Mine Act. The preshift examination is intended to prevent hazardous conditions from developing. Enlow's proposed interpretation of section 75.360(b) would restrict the attention of the preshift examiner to only S&S conditions. This is antithetical to the purpose of the preshift requirement which is to "prevent loss of life and injury." *Coal Act Legis. Hist.* at 183.

Thus, we agree with the Secretary that accumulations of combustible materials qualify as hazardous conditions that should be recorded by a preshift examiner when found. We turn next to Enlow's assertion that substantial evidence does not support the judge's conclusion that Enlow violated section 75.360(b).

The inspector testified that he based his determination that the accumulations had been in existence during the preshift examination upon the extensiveness of the accumulations and the heavy concentrations he encountered. Tr. 474-75, 496-97. The inspector's conclusion is supported by the presence of one accumulation measuring 4 feet by 16 feet by 5 inches in depth, and another measuring 2 feet by 3 feet by 18 inches at its deepest point. Tr. 446-52. In addition, he observed that the air current had picked up coal dust and that it settled on top of the electrical box in a layer up to 2 inches deep, also indicating that coal dust had been left to accumulate for more than one shift. Tr. 474-75.

Although there was some countervailing testimony about whether the accumulations existed at the time of the preshift examination (Tr. 548, 552, 625-26), the judge specifically credited the inspector's testimony over that of Enlow's witnesses. We decline to disturb his credibility determinations. *See Farmer*, 14 FMSHRC at 1540-41; *Hollis*, 6 FMSHRC at 25.[12]

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[12] We are also unmoved by Enlow's assertion that the inspector did not consider the cited accumulations to be hazardous at the time the order was issued. E. Br. 1, at 4-5. This argument is belied by the fact that the inspector issued a section 104(d)(1) order alleging an S&S violation of section 75.400 (Gov't Ex. 13), and testified that the accumulations could either start or add to a fire (Tr. 460, 462).

In sum, we conclude that substantial evidence supports the judge's determination of a violation of the preshift requirement. Accordingly, we affirm the judge's finding that Enlow conducted an inadequate preshift examination, thereby violating section 75.360(b).

2. Unwarrantable Failure

Enlow argues that, because the judge improperly relied on testimony by the inspector that he issued a prior section 75.400 citation and had discussions with management about the accumulation problem, the judge's determination that the December violation resulted from unwarrantable failure is not supported by substantial evidence. E. Br. 1, at 9-12. It further claims that the judge failed to consider the operator's prompt cleanup measures. *Id.* at 11-12. The Secretary counters that substantial evidence supports the judge's determination that the accumulation violation was a result of Enlow's unwarrantable failure. S. Br. 2, at 16-24.

With respect to the extent and obviousness of the violation, the judge accepted the inspector's testimony that the violative accumulations were visible for a distance of approximately 200 feet from the belt feeder to the main belt, over the contrary testimony of Enlow's witnesses. 17 FMSHRC at 571-72. Absent a compelling reason, we will not disturb this credibility determination. *Farmer*, 14 FMSHRC at 1540-41. As to the duration of the violative condition, the judge also credited the inspector's testimony that the accumulations had existed for more than one shift, and implicitly rejected the testimony of the preshift examiner that the accumulations were not present during the preshift. 17 FMSHRC at 572. Again, Enlow has not demonstrated the extraordinary circumstances necessary for overturning this credibility determination.

With respect to repeated similar violations and past warnings, Inspector Reid testified he repeatedly wrote citations at this mine for violations of section 75.400 in the belt entries.[13] Tr. 467-68. Enlow's violation history reveals approximately 60 citations for accumulations from December 8, 1991 through December 7, 1993. Gov't Ex. 12. Inspector Reid testified that, upon issuing citations for such violations, he discussed with Enlow management the importance of cleaning the belts and keeping them free of accumulations. Tr. 468. He further testified that, on several occasions, he questioned the adequacy of the mine's cleanup plan and discussed with management the need to control float dust, "which [was] generated pretty regularly at these crusher dump areas." Tr. 681. Thus, we conclude substantial evidence supports the judge's finding that Enlow had been placed on notice that greater compliance efforts were needed regarding accumulations around all of its belts.

We reject Enlow's assertion that the Secretary did not introduce any past violations into evidence; the operator's violation history was made a part of the record. Gov't Ex. 12. We are

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[13] We correct the judge's misstatement that Inspector Reid had previously issued "a citation" for violation of section 75.400. 17 FMSHRC at 572. The inspector testified that he issued repeated citations for section 75.400 violations. Tr. 468. The operator's history of violations confirms this testimony. Gov't Ex. 12.

also unconvinced by Enlow's argument that the Secretary may not rely on that violation history to demonstrate unwarrantable failure because the judge admitted that exhibit for the limited purpose of penalty assessment, and because the exhibit fails to reveal the specifics of the prior violations. *See* E. Br. 1, at 10; E. Br. 3, at 6-7 & n.4. Although the judge stated that Enlow's violation history was probative of penalty, he did not expressly limit its use for other relevant purposes. Tr. 429. In any event, the Commission may consider these past violations. *See Peabody*, 14 FMSHRC at 1263 ("[T]he Commission has not limited . . . the circumstances under which past violations may be considered by a judge in determining whether an operator's conduct demonstrated aggravated conduct.")

As to the operator's abatement efforts, Inspector Reid testified without contradiction that no one was cleaning the accumulation when he arrived at the section. Tr. 473. Where an operator has been placed on notice of an accumulation problem, the level of priority that the operator places on the abatement of the problem is a factor properly considered in the unwarrantable failure analysis. *Peabody*, 14 FMSHRC at 1263-64; *U.S. Steel Corp.*, 6 FMSHRC 1423, 1437 (June 1984) (unwarrantable failure may be proved by a showing that the violative condition was not corrected or remedied prior to issuance of a citation or order). Although the judge did not mention this factor, the evidence on abatement supports his unwarrantable failure determination. We reject Enlow's assertion that its prompt post-citation abatement efforts militate against an unwarrantable failure determination. In considering the abatement element, the Commission focuses on compliance efforts made prior to the issuance of the citation or order. *See, e.g.*, *Peabody*, 14 FMSHRC at 1263-64; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1933-34 (October 1989). Post-citation efforts are not relevant to the determination whether the operator has engaged in aggravated conduct in allowing the violative condition to occur.

We conclude that evidence about all the unwarrantable failure factors, taken together, constitutes substantial evidence supporting the judge's unwarrantable failure determination. Consequently, we affirm that determination.[14]

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[14] We find no merit in Enlow's other arguments on the unwarrantable failure issue.

III.

Conclusion

For the foregoing reasons, we vacate and remand the judge's determinations that the November 15, 1993 accumulation violation set forth in Order No. 3660021 was not S&S and not the result of Enlow's unwarrantable failure to comply with the standard. If the judge finds that the violation is S&S, the result of unwarrantable failure, or both, he shall assess an appropriate civil penalty. We affirm the judge's dismissal of Citation No. 3659960. We also affirm his determinations that, as to Citation No. 3660374, Enlow violated the preshift standard and, as to Order No. 3660375, Enlow's December 8, 1993 accumulation violation resulted from unwarrantable failure.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Commissioner Marks, concurring and dissenting:

I am in agreement with my colleagues' disposition regarding the two violations cited on December 8, 1993, and therefore I concur in the decision to affirm the judge.

With respect to the November 15, 1993, citation charging a violation of 30 C.F.R. § 75.360, my colleagues have concluded that substantial evidence supports the judge's conclusion that no violation occurred. I do not agree, and therefore I dissent.

My colleagues mistakenly contend that, in finding no violation, the judge adequately considered and relied upon the relevant testimony of Inspector Hardy, as well as the testimony of operator witnesses and the November 16, 1993, statement of the preshift examiner (Ex. C-2). Slip op. at 8-9. I do not agree.

The November 16th statement referenced and relied upon by the majority is not probative of the condition of the subject B-3 longwall section of the mine. In fact, the judge also found it to not be relevant. "It does not set forth in any detail the conditions observed by him [section foreman William Young] on the shift, with the exception of some oil on the bottom mixed with water, and 'oil film' on the toes of the shields." 17 FMSHRC 566 n.1. I agree with the judge's assessment of that document.

By contrast, the testimony of MSHA Inspector Hardy describing the unreported accumulations is both detailed and specific. However, that testimony is rejected by the judge and the majority, apparently because "[t]he record does not convincingly establish when the accumulations of oil observed by Hardy occurred." Slip op. at 9 (citing 17 FMSHRC at 567). In affirming that legal conclusion, the majority is improperly raising the level of proof the Secretary must provide in order to establish a preshift violation.[1]

The Secretary does not have to prove *when* the accumulations occurred. He does, however, have to prove that the accumulations were in existence *when* the preshift was conducted. In this case, substantial evidence supports the Secretary's charge that the conditions observed by Inspector Hardy had existed prior to the time the preshift inspection was conducted. However, if the judge and the majority require a higher level of proof, i.e., that the Secretary prove *when* the accumulations occurred, the Secretary will surely fall short in this case and most other cases. The reason is obvious, the Secretary does not have inspectors posted in the mine at all times observing the conditions. He must rely on circumstantial evidence regarding the physical appearance of the area and in the case of accumulations - the size, color, compaction, and other indices that provide

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[1] Notwithstanding their notation professing to agree that the Secretary does *not* have to prove *when* the accumulation occurred (slip op. at 9 n.10), my colleagues continue to affirm the judge's conclusion which is based on, and infected by, his flawed legal analysis requiring the Secretary to "convincingly establish when the accumulations of oil observed by [Inspector] Hardy occurred." 17 FMSHRC at 567.

a basis for the expert opinion of the inspector. Tr. 10-13, 160-63. In this case, Inspector Hardy's detailed description of the conditions he observed was clearly and thoroughly set forth in the section 104(d)(1) citation, and equally reasserted in his testimony at hearing.

In support of his issuance of the subject section 104(d)(1) citation,[2] charging a violation of section 75.360, Inspector Hardy testified that at approximately 9:05 a.m. on November 15, 1993, he first observed the following conditions which were not recorded in the book containing the report of the preshift conducted 4 hours earlier. Tr. 31, 94.

- Accumulations of float coal dust on and around the legs and lemniscates of longwall shields 148 to 152 (Tr. 23-24, 33-34, 113-14, 122); loose coal scattered throughout the legs of the shields within an area of approximately 20 to 25 feet by 10 to 15 feet (Tr. 24, 31, 114-15); coal dust black in color and dry to the touch. Tr. 34, 120, 122.

- Heavy accumulations of float coal dust, hydraulic gear oil and coal on the tailgate gear case, fluid coupler and around the 4,160-volt drive motor causing the gear case to be very hot, hotter than normal, because the accumulation "acts as an insulator, which doesn't permit the heat to dissipate as readily as if it was maintained in a clean condition." (Tr. 24-25, 29, 37, 105, 107-08, 130); coal

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[2] The condition or practice charged states, in part:

> The preshift examination that was conducted on the B-3 longwall section from 5:00 a.m. to 7:00 a.m. on 11/15/93, was not adequate. The preshift examination was called out to Steve Johnson at 7:50 a.m. and no dangers or hazardous conditions were reported. Also no violations were observed or reported or entered into the book provided. Upon traveling to the section and examining the face area the following hazardous conditions were found; the 4,160 V/AC tailgate drive motor, tailgate gear case and housing, were covered with float coal dust, loose coal, and hydraulic gear case oil (Dexron II oil); float coal dust and loose coal had also accumulated between the shields from #148 shield to #152 shield. The preshift examiner's dates, times and initials were observed on the #150 shield which is immediately adjacent to the tailgate drive motor and gear case. These conditions evidenced are in plain view of a preshift examiner and management knew or should have reason to know these hazardous conditions existed. The evidence at this location also indicates the conditions were not recent; the loose coal was packed around the gear case and the hydraulic oil had saturated and penetrated the loose coal packed behind the gear case.

Gov't Ex.1.

surrounding the gear case was saturated with hydraulic gear oil (Tr. 24-25, 27) and "[t]he coal that was packed in around the gear case was loose on top, but packed heavy in the bottom. This doesn't happen in a short period of time. It takes time for coal to settle in and get compacted." Tr. 27. The accumulation had existed "definitely more than one shift with the conditions of the packed coal." Tr. 72; *see also* Tr. 175. The coal accumulated behind the gear case was approximately 2½ feet high and "very visible." Tr. 63, 125, 157, 163.

- The oil underneath the gear case "was apparent. You could see it without getting down on your hands and knees; very obvious," (Tr. 28, 128) and extended to a distance of "four feet by maybe ten to fifteen feet." Tr. 71. "I also used my hand to swish some of the oil that was underneath [the gear case] and no water was evident under the oil as well." Tr. 97-98, 117, 133, 414, 424-25. The oil may have resulted from a blown soft plug on the fluid coupler which occurred on the preceding Friday (the inspection and citation occurred on Monday, November 15, 1993). Tr. 83, 156. There were oil saturated rags located on top of the fluid coupler. Tr. 30.

- "Due to the magnitude of the combustible materials I saw there, the float coal dust, the extent of the float coal dust and the extent of the loose coal and the visibility of this -- it was in plain view -- the pre-shift examiner had to have realized and seen these conditions when he was there putting his dates, times and initials." Tr. 94; *see also* Tr. 116-18, 416. Due to "[t]he magnitude of the accumulation and the magnitude of hydraulic fluid," the accumulation "could not have occurred" after the preshift was conducted. Tr. 94-95, 140-42, 164, 413, 415, 422. Dried hydraulic fluid observed on the machine components indicated that the oil had been there "[m]ore than a shift." Tr. 95, 151, 167-68, 175.

The judge, after hearing this testimony, and presumably reading the subject citation, concluded that Hardy "did not elaborate" upon his basis for concluding that the cited conditions had existed prior to the preshift examination. 17 FMSHRC 567. I find the judge's conclusion astonishing. The charging citation, and the live testimony of the inspector was detailed, clear, and convincing. Of most significance, it was consistent and not impeached on cross-examination. I can only wonder what more the judge could have required to support this charge. However, if more was needed, more was provided by Enlow's own witnesses!

The testimony of Enlow witness William Young, the section foreman who conducted the subject preshift inspection, includes important admissions that corroborate the testimony of Inspector Hardy. Young admitted that in inspecting the tail drive area he "just looked more or less down on what [he] could see there because the way the covers [of the tail drive] fit on there, there was just an inch or two of a gap. [He] didn't look completely up under the covers." Tr. 222, 230, 247. "[He has] never gotten down on [his] hands and knees prior to that time and looked back in there." Tr. 223-25. Moreover, he conceded that he never had been concerned about coal

accumulations behind the gear box. Tr. 227. He disclosed that he had never been told to inspect behind the motor and pan line, and that he only is "concerned about the material that collects in around the motors that are visible to [him]." Tr. 249-50.

Enlow witness Terry Pozum, who was assigned to clean the subject area during the preceding midnight shift, testified on direct examination that he did not know if he had cleaned under the covers of the drive unit, and that he would only clean "[w]hat you can reach . . . like on the open side that is facing the shields." Tr. 264. He went further, conceding that his usual cleanup would not have included the junction box area, and that on the night in question, he was "pretty busy," because he has "a short amount of time to do quite a lot of things. And you usually don't have time to notice and look. Anything that you see really pops right out at you." Tr. 264-65, 268, 276-77, 279.

Enlow witness Timothy Ferrell, who was assigned as a shieldman in the subject B-3 section on the day shift, testified that during the inspection, when the tailpiece covers were removed "[w]e found materials, coal and rock, packed in on the face side of the gear box and the tailgate end." Tr. 323. He indicated that the cleanup took two or three men about 1½ hours to complete. Tr. 324-25.

Further corroborating Inspector Hardy's testimony, Enlow witness and mine foreman Robert Weaver testified that after Inspector Hardy's inspection, Weaver suggested that the accumulated oil observed could have come from a soft plug blow on the torque converter, which had occurred on the preceding Friday, November 12. Tr. 400-01. However, after further investigation, Weaver opined that the oil source was from the "tensioning unit or on the gear case." Tr. 408.

Accordingly, I conclude that the record contains a more than adequate elaboration of evidence supporting the inspector's conclusion that the violative conditions existed at the time of the subject preshift examination.

The only other basis offered by my colleagues' in support of their determination that no violation occurred, is found in their observation that "[t]he judge specifically credited the testimony of the preshift examiner and, absent extraordinary circumstances, we will not overturn a judge's credibility findings on review." Slip op. at 9 (citation omitted).

Initially, I suggest that a close examination of the judge's decision indicates that his credibility ruling only supports his conclusion that a preshift examination occurred - a point not even in dispute.[3] Moreover, in his discussion of the testimony offered, for the related section

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[3] "I find Young's testimony credible, based upon my observations of his demeanor, that he did perform a preshift examination at approximately 5:00 a.m., in the area in question on November 15." 17 FMSHRC 567.

75.400 violation, as well as the subject preshift violation, the judge expressly credited Hardy's testimony and implicitly rejected conflicting testimony from Enlow witnesses:

> I note the conflict in the testimony between Hardy and Respondent's witnesses who were present in the area in question at the time of the inspection on November 15, regarding the existence of the conditions testified to by Hardy. I observed Hardy's testimony and found him to be a credible witness.

17 FMSHRC 565. However, beyond that point, I conclude that this case does not turn on credibility. Assuming *arguendo* that the Enlow witnesses are also credible, the record still contains substantial evidence supporting the inspector's charge. That evidence is drawn not only from the inspector's testimony, but also from the Enlow witnesses who professed not to have observed much of what the inspector observed. This is believable - because it is clear from their testimony that Inspector Hardy's inspection was far more thorough and inclusive. Obviously if one doesn't look very carefully, one can honestly testify that no violative conditions were observed!

For the foregoing reasons, I conclude the violation occurred as charged. Therefore, I would reverse the ruling of the judge and remand for analysis of the special findings charged and assessment of a civil penalty.

With regard to the related violation of section 75.400, cited on the same day, November 15, 1993, my colleagues have vacated the judge's conclusions that the violation was neither unwarrantable nor S&S, and have remanded both issues for proper analysis. I agree with, and concur with, the disposition as it relates to the issue of unwarrantability. However, for reasons set forth below, I conclude that the violation was S&S and therefore, I would reverse the ruling of the judge.

Once again the issue is "whether the Secretary proved the third element of *Mathies*." Slip op. at 5. As indicated in my concurring opinion in *U.S. Steel Mining Co.*, 18 FMSHRC 862, 868 (June 1996), I continue to believe that we must begin to find a way to stop the enforcement confusion that continues to flow from the *Mathies* test and, in particular, the third element. To that end, I again invite my colleagues, the Secretary, and affected operators to formally address this issue in future cases.

With respect to the issue of S&S in this matter, I conclude that the violation was S&S because the risk to miner health and safety was neither purely technical nor remote or speculative. Accordingly, I would reverse the judge on this issue and remand for a proper analysis on the issue of unwarrantability.

Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 21, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. WEST 97-38-M A.C. No. 42-01975-05509
LAKEVIEW ROCK PRODUCTS, INC.	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On December 2, 1996, Lakeview Rock Products, Inc. ("Lakeview") filed with the Commission a Motion to Reopen Case and for Relief from Order Assessing Penalty, and a supporting Memorandum of Points and Authorities. In the motion, Lakeview seeks to reopen a penalty assessment issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). Lakeview asserts that it is entitled to relief under Fed. R. Civ. P. 60(b)(5) and (6).[2] Lakeview attaches the affidavits of its secretary

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[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

[2] Rule 1(b) of the Commission's Procedural Rules provides that the Federal Rules of Civil Procedure shall apply "so far as practicable" in the absence of applicable Commission rules. 29 C.F.R. § 2700.1(b).

Rule 60(b) states, in part:

and treasurer, Gary V. Smith, and its attorney, Gregory M. Simonsen. Smith's affidavit addresses Lakeview's failure to submit a request for hearing ("Green Card") to contest the alleged violations.

The Secretary of Labor opposes the request, arguing that Lakeview has failed to satisfy any of the requirements for obtaining relief under Fed. R. Civ. P. 60(b). S. Opp'n at 4-6. The Secretary also contends that Lakeview's request is untimely, since it actually seeks relief based upon a claim of mistake under Rule 60(b)(1), or misconduct by the adverse party under Rule 60(b)(3). *Id.* at 5. According to the Secretary, Lakeview's motion is therefore subject to the one-year time limitation applicable to motions filed pursuant to Rule 60(b)(1), (2), or (3), which cannot be avoided by invoking a different subsection, such as Rule 60(b)(6). *Id.* In response, Lakeview contends that the Secretary has attempted to mischaracterize its motion as one brought pursuant to Rule 60(b)(1) and (3), and maintains that it has demonstrated its entitlement to relief under Rule 60(b)(5) and (6). L. Reply Mem. at 5-7.

Under section 105(a) of the Mine Act, 30 U.S.C. § 815(a), an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary within that time period, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

Lakeview failed to file its hearing request in this case because of its mistaken belief that the citations at issue in this case would be covered by the Green Card it had submitted in another case involving a different citation that arose out of the same inspection, conducted on May 2, 1994. *See* L. Mem. at 4, ¶ 14; Affidavit of Gary V. Smith ¶¶ 9-12. Although the basis for Lakeview's failure to file a Green Card in this case appears to qualify as "mistake," "inadvertence," or "excusable neglect" within the meaning of Rule 60(b)(1), Lakeview seeks relief pursuant to subsections (5) and (6) of Rule 60(b). Lakeview asserts that it is entitled to relief under Rule 60(b)(5) because three of the citations involved in this case are virtually the

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> [T]he court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b).

same as a prior citation (Citation/Order No. 4170702) that was later vacated by an administrative law judge following a hearing. L. Mem. at 8. Lakeview also asserts that it is entitled to relief under Rule 60(b)(6) because the citations involved herein are also included in two other penalty assessments that are being contested by two employees who are agents of Lakeview. *Id.* at 8-9. In addition, Lakeview contends that it is entitled to relief under Rule 60(b)(6) because it has been faced with an "avalanche of citations and assessments," the number and severity of which are out of proportion to Lakeview's safety record and were the result of unconscionable conduct of MSHA's inspectors and their supervisor in attempting to make an example of Lakeview. *Id.* at 9-10.

The Commission has held that, in appropriate circumstances and pursuant to Rule 60(b), it possesses jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (September 1994). As noted above, relief from a final order is available in circumstances such as a party's "mistake, inadvertence, surprise, or excusable neglect" (Rule 60(b)(1)), or "fraud . . . , misrepresentation or other misconduct of an adverse party" (Rule 60(b)(3)). A Rule 60(b) motion "shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b). This one-year time limit is an outside time limit for motions requesting relief under subsections (1) through (3), and may not be circumvented by utilization of subsections (4) through (6) of Rule 60(b), which are subject only to a reasonable time limit, when the real reason for relief falls within subsections (1) through (3). 7 James Wm. Moore et al., Moore's Federal Practice ¶ 60.28[2], at 60-316 to 60-317 (2d ed. 1996). *See Newball v. Offshore Logistics Int'l,* 803 F.2d 821, 827 (5th Cir. 1986) ("'where the reason for relief is embraced in Clause (b)(1), the one year limitation cannot be circumvented by use of Clause . . . (b)(6)'") (quoting *Gulf Coast Bldg. & Supply Co. v. IBEW, Local No. 480*, 460 F.2d 105, 108 (5th Cir. 1972)); *United States v. Cirami,* 563 F.2d 26, 32 (2d Cir. 1977) ("when the reason asserted for relief comes properly within one of [the first three] clauses, clause (6) may not be employed to avoid the one-year limitation"); *Brown v. Burnside*, 109 F.R.D. 412, 413 (E.D.N.Y. 1986) ("if a case falls within Rule 60(b)(1), a party cannot avoid the one-year time limit by characterizing it as falling within Rule 60(b)(6)"); *see also Klapprott v. United States*, 335 U.S. 601, 613 (1949) ("one year limitation would control if no more than 'neglect' was disclosed by the petition").

Despite its attempt to characterize its motion as one brought pursuant to Rule 60(b)(5) and (6), the explanation offered by Lakeview for its failure to file a Green Card in this case appears to fall squarely within the coverage of Rule 60(b)(1) (or possibly Rule 60(b)(3) to the extent that it alleges unconscionable conduct or other misconduct on the part of MSHA). Lakeview's motion was filed on December 2, 1996 (*see* 29 C.F.R. § 2700.5(d)), more than two years after the proposed penalty assessment became a final order of the Commission. The motion is therefore untimely under Rule 60(b). *See Thomas Hale,* 17 FMSHRC 1815, 1816-17 (November 1995); *Ravenna Gravel*, 14 FMSHRC 738, 739 (May 1992); *Pena v. Eisenman Chemical Co.,* 11 FMSHRC 2166, 2167 (November 1989). As we have previously recognized,

the one year time limit contained in Rule 60(b) "may not be extended." *Pena v. Eisenman Chemical Co.*, 11 FMSHRC at 2167. Accordingly, we deny Lakeview's request for relief under Rule 60(b).

For the foregoing reasons, Lakeview's request for relief is denied.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 21, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 94-126-M
MIDWEST MATERIAL COMPANY	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is whether former Commission Administrative Law Judge Arthur J. Amchan properly concluded that a violation of 30 C.F.R. § 56.14211(a)[2] by Midwest Material Corporation ("Midwest Material"), involving the use of improper and unsafe procedures in dismantling a crane boom that resulted in the death of miner Thomas Reaska, was not the result of unwarrantable failure. 17 FMSHRC 636, 640 (April 1995) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review. For the reasons that follow, we reverse the judge's determination that the violation of section 56.14211(a) was not the result of Midwest Material's unwarrantable failure, and remand this matter for penalty assessment.

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[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

[2] Section 56.14211 provides, in relevant part:

> (a) Persons shall not work on top of, under, or work from mobile equipment in a raised position until the equipment has been blocked or mechanically secured to prevent it from rolling or falling accidentally.

I.

Factual and Procedural Background

In April 1993, Midwest Material acquired a sand and gravel plant on Route 26 in Lacon, Illinois from Midwest Sand & Gravel Company ("Midwest Sand & Gravel"), an unrelated company. 17 FMSHRC at 636-37. Following the acquisition, Jerry Henry, the owner of Midwest Sand & Gravel, served as a consultant for Midwest Material at the Lacon site. *Id.* at 637. In addition, Midwest Material hired some of the individuals previously employed by Midwest Sand & Gravel at the Lacon facility, including Edward Schumacher, a working foreman, and miner Reaska. *Id.* Schumacher and Reaska had both worked in the sand and gravel business for 15 to 20 years, primarily for Jerry Henry and Midwest Sand & Gravel. *Id.* at 639.

In May 1993, Midwest Material was preparing to move the Lacon plant across Route 26, to a site near the river bed from which it extracted sand and gravel. *Id.* at 637. The company planned to use an American 599C mobile crawler crane to disassemble and move the plant. *Id.* In order to accomplish this task, it was necessary to add a 20-foot extension to the crane boom. *Id.* On the morning of May 27, Richard Walsh, an on-site superintendent, instructed Schumacher and Reaska to extend the length of the crane boom. *Id.* Walsh designated Schumacher to be the foreman in charge of the boom extension project. *Id.* at 639. Schumacher and Reaska had both extended crane booms during their previous employment with Midwest Sand & Gravel, and were therefore familiar with the correct procedures for accomplishing this task. *Id.* at 637, 639.

The standard procedure for extending the crane boom is to first lower the tip of the boom to the ground. *Id.* at 637. Next, the suspension lines that run from the top of the cab of the crane along the length of the boom are relaxed and connected to the top, far end of the first section of the boom by the cradle, a device attached to the suspension lines. *Id.;* Tr. 43-46; Gov't Ex. 1, inside cover (diagram). After the first section of the boom is secured in this manner, lifting tension is again taken up on the suspension lines and those parts of the boom suspension lines that go with the remaining sections of the boom are unfastened. 17 FMSHRC at 637; Tr. 43, 46; Resp. Ex. 2, at 2. The lower set of retaining pins connecting the first and second sections of the boom can then be driven out of their holes without danger since the boom will not flex, bend or separate when the lower pins are removed. 17 FMSHRC at 637; Tr. 43, 46; Resp. Ex. 2, at 2. Lifting tension in the boom suspension lines is then slowly released, causing the boom sections to pivot on the upper set of retaining pins and to separate at the bottom (where the retaining pins have been removed) as the boom is lowered to the ground. 17 FMSHRC at 637; Tr. 43, 46-47; Resp. Ex. 2, at 2. At this point, the upper set of retaining pins is removed, thus completing the process of separating crane boom sections. 17 FMSHRC at 637; Tr. 44, 47; Resp. Ex. 2, at 2. The crane and the first section of the boom, safely supported by the crane's suspension lines, are then backed away from the dismantled sections of the boom, and new sections can be safely added. 17 FMSHRC at 637.

On the morning of May 27, Schumacher began the project by entering the cab of the crane and lowering the boom. *Id.* Reaska signaled Schumacher to stop lowering the boom when it was still about five feet off the ground, contrary to standard procedure. *Id.* Schumacher left the cab and went to his truck, located about 50 feet away, to get a cable come-along for use in pulling down the cradle so it could be connected to the first section of the boom. *Id.*; Tr. 49, 73. While Schumacher was at his truck, and prior to securing the first section of the boom, Reaska, from underneath the boom, began driving out the pins that connected the first and second sections. 17 FMSHRC at 638; Tr. 49, 52. This was also contrary to standard procedure. Tr. 74-75, 96.

Consultant Jerry Henry then drove up and had a short conversation with Schumacher on an unrelated manner. 17 FMSHRC at 638; Tr. 49-51. After a minute or two, Schumacher and Henry walked back to the crane and watched Reaska complete the process of driving out the connecting pins from the boom. 17 FMSHRC at 638; Tr. 51-52. Schumacher placed his hand over the bottom angle of the boom. Tr. 52. Schumacher made no effort, however, to warn Reaska not to drive out the pins connecting the boom sections until the boom could be properly secured. Tr. 197. When Reaska drove out the second of two lower retaining pins connecting the first and second sections of the boom, the boom pivoted downward on the upper pins and the first section of the boom fell on top of Reaska, pinning him to the ground. 17 FMSHRC at 638; Gov't Ex. 1, at 1, 3. Henry was knocked down by second section of the boom, but was not seriously injured. 17 FMSHRC at 638; Gov't Ex. 1, at 3. Reaska died at the scene. 17 FMSHRC at 638.

Jerry Spruell, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA"), investigated the accident and issued a citation pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), alleging a "significant and substantial" and "unwarrantable" violation of section 56.14211(a) for permitting an employee to work under a crane boom that had not been blocked or mechanically secured. 17 FMSHRC at 636, 638; Gov't Ex. 2. The Secretary of Labor proposed a penalty of $20,000 for the alleged violation. 17 FMSHRC at 636. Midwest Material challenged the proposed assessment, contending that it had not violated the standard and, alternatively, that any violation was not the result of its unwarrantable failure.

Following an evidentiary hearing, the judge concluded that Midwest Material had committed a significant and substantial violation of section 56.14211(a), but that the violation was not the result of unwarrantable failure. *Id.* at 638, 640, 642 & n.2. The judge therefore affirmed the citation under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), rather than under section 104(d)(1), and assessed a civil penalty of $1,500. *Id.* at 640, 642.

The judge found that the negligence of foreman Schumacher in connection with the improper dismantling of the crane boom was imputable to Midwest Material, but concluded that Schumacher's conduct was not sufficiently aggravated to rise to the level of unwarrantable

failure. *Id.* at 639-40.[3] The judge noted that although the hazard was obvious, it existed only briefly before the accident, and therefore was distinguishable from situations where an operator allowed an obvious hazard to persist for a significant period of time. *Id.* at 640. The judge also relied on the lack of any evidence in the record that Reaska and Schumacher were under pressure to dismantle the crane quickly or that Midwest Material gained any production advantage from performing this task improperly. *Id.* While finding that Schumacher was aware that the correct procedures for disassembly of the crane boom had not been followed, the judge concluded that Schumacher's conduct "is better described as 'thoughtless' or 'inattentive,' rather than 'inexcusable or aggravated.'" *Id.* The judge concluded that the evidence did not support an unwarrantable failure finding, but rather indicated only that "two competent, experienced miners who knew how to do this job properly did it improperly for inexplicable reasons." *Id.*

The Commission granted the Secretary's petition for discretionary review, which challenged the judge's finding that the violation of section 56.14211(a) was not the result of unwarrantable failure.

II.

Disposition

The Secretary argues that the evidence regarding the improper manner in which the boom disassembly operation was performed compels a finding that Schumacher's conduct was intentional and deliberate, which qualifies as "aggravated conduct" under the test for establishing unwarrantable failure. S. Br. at 6-7. The Secretary also contends the judge failed to adequately consider evidence that the violative conduct was extraordinarily dangerous, and that the hazardous condition that resulted, and the operator's failure to respond to it, were visually obvious. *Id.* at 7-8. In addition, the Secretary contends the judge failed to correctly apply the legal test for determining the existence of unwarrantable failure. *Id.* at 5-6, 8-10. The Secretary argues that the judge improperly relied upon the inexplicable nature of Schumacher's negligent conduct as evidence of a lack of aggravated conduct. *Id.* at 8-9. The Secretary also contends the judge erred in finding that Schumacher's conduct was not unwarrantable because the violative condition existed only for a brief period before the fatal accident. *Id.* at 9-10.

In response, Midwest Material argues that the judge correctly determined that its violation of section 56.14211(a) was not the result of unwarrantable failure.[4] Midwest Material contends

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[3] The judge concluded that only Schumacher's conduct was relevant in determining whether the violation was the result of "unwarrantable failure," noting that the Secretary had not alleged negligence an the part of superintendent Walsh or any other company official, including consultant Jerry Henry. *Id.* at 639.

[4] The position of Midwest Material is set forth in a letter dated May 28, 1995 submitted by its president, Paul Williams, in opposition to the Secretary's petition for discretionary review,

that the judge's ruling on the unwarrantability issue should not be overturned because it was based upon his direct assessment of the testimony of witnesses who were at the scene of the fatal accident.

The unwarrantable failure terminology is taken from section 104(d) of the Mine Act and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. This determination was derived, in part, from the plain meaning of "negligence" — the failure to use such care as a reasonably prudent and careful person would use, characterized by "inadvertence," "thoughtlessness," and "inattention." *Id.* 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 (February 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

We conclude that the judge misapplied the applicable standard for determining whether the violation of section 56.14211(a) was the result of unwarrantable failure, and that his finding that the violation was not due to unwarrantable failure is not supported by substantial evidence.[5] First, the judge failed to adequately consider that the negligent conduct of foreman Schumacher resulted in a highly dangerous situation — a miner working directly underneath unsecured heavy equipment to dismantle that very same equipment. The high degree of danger inherent in the situation is evidenced by the fatal accident that resulted when Reaska removed the last pin connecting the first and second sections of the boom. The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (August 1992) (finding unwarrantable failure where the unsaddled beams "presented a danger" to miners entering the area); *Warren Steen Construction, 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, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where "roof conditions were highly dangerous").

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as explained in a subsequent letter from Williams dated September 23, 1995.

[5] The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The term "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 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

The judge's decision also fails to recognize that the violation took place in the presence of a foreman, who, under Commission precedent, is held to high standard of care. *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987) ("section foreman is held to 'demanding standard of care in safety matters'") (quoting *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (April 1987)); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995) (heightened standard of care required of section foreman and mine superintendent).

In view of the extreme danger posed to a miner working directly underneath the crane boom left in an unsecured position, five feet off the ground, and the high level of responsibility to which he is held, foreman Schumacher had a duty to exercise extreme caution and care until the hazardous condition could be eliminated. In our view, Schumacher breached that duty in several important respects. First, he failed to lower the crane boom completely to the ground, in accordance with standard procedure. In addition, he left Reaska in the immediate vicinity of a crane boom that he knew was unsecured, several feet off the ground, without warning him about the danger that existed or instructing him not to work under the crane boom. Finally, he watched Reaska drive out connecting pins from under the unsecured boom without providing any warning of the disastrous consequences that could, and in fact did, occur.

In addition, the judge did not take adequate account of the obvious nature of the hazard created by Schumacher's negligent conduct, which is a further indication that the violation involved a "serious lack of reasonable care." Even a casual observer at the accident scene could have perceived that Reaska was being placed in a precarious and highly dangerous position as a result of the failure to adhere to proper procedures for disassembly of the crane boom.[6] Certainly Schumacher, given his experience and familiarity with this task, and the high degree of care required of him, should have appreciated the obvious hazard that existed and insisted on adherence to proper procedures by, at a minimum, warning Reaska not to remove the connecting pins or work underneath the crane boom until it could be properly secured. We have relied upon the obvious nature of a hazard in making an unwarrantable failure determination. *See, e.g.*, *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (August 1994) (inoperable brakes on shuttle car); *Quinland Coals,* 10 FMSHRC at 708-09 (obvious nature of poor roof conditions).

Further, we agree with the Secretary's contention that Schumacher's inability to provide any explanation for his negligence and the lack of safety precautions that resulted in this fatal accident supports, rather detracts from, an unwarrantable failure finding. Although Schumacher was familiar with the proper procedure for dismantling the crane boom, as well as the hazard of working under a raised load, he testified that in the period immediately prior to the accident neither he, Henry nor Reaska noticed they had missed a critical step in the process of the dismantling the boom — attaching the cradle and the suspension lines to the first section of the

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[6] As even Schumacher acknowledged, anyone walking up to the scene of the accident would have recognized that a critical step in the process of dismantling the boom — attaching the crane's suspension lines by the cradle to the first section of the boom — had not been completed when Reaska removed the connecting pins. Tr. 96.

boom. Tr. 74-75, 148, 163. In explaining the failure to notice that the appropriate procedures had not been followed, Schumacher testified as follows: "[N]obody noticed anything. We [were] all just brain dead or just mentally blocked." Tr. 52.[7] This lapse of judgment or presence of mind on the part of the mine foreman with respect to the proper procedures for dismantling the crane boom, in our view, qualifies as the type of "indifference" or "serious lack of reasonable care" that constitutes unwarrantable failure, particularly in light of the extremely dangerous position that Reaska was placed in as a result. Therefore, we conclude that the judge erred in finding that the "thoughtless" and "inattentive" character of Schumacher's conduct supports a finding that his conduct was not sufficiently aggravated to amount to unwarrantable failure.

In addition, we find that several other elements of the judge's analysis of Schumacher's conduct are faulty, and further undermine his conclusion that the violation of section 56.14211(a) was not the result of unwarrantable failure. The judge's reliance on the relatively brief duration of the violative conduct was misplaced, in view of the high degree of danger posed by the hazardous condition and its obvious nature. Given the extreme hazard created by Schumacher's negligent conduct, that misconduct is readily distinguishable from other types of violations — such as those involving the accumulation of coal dust — where the degree of danger and the operator's responsibility for learning of and addressing the hazard may increase gradually over time. Moreover, the judge failed to recognize that the hazardous condition existed for a brief period of time only because it culminated in the collapse of the boom on Reaska, resulting in his death.

In finding that this violation was not unwarrantable, the judge also relied upon the lack of evidence in the record that Schumacher failed to insist on proper procedures because the miners were under pressure to dismantle the crane quickly or that Midwest Material gained any sort of production advantage from performing this task improperly. 17 FMSHRC at 640. This analysis is also erroneous, however, because even though the record does not support the Secretary's contention that Schumacher's conduct was intentional and deliberate, this does not preclude a finding that Schumacher's reckless indifference to the safety of a fellow miner is aggravated conduct that constitutes unwarrantable failure. It is well established that intentional and deliberate conduct is not a condition precedent to a determination of unwarrantable failure. *See Emery Mining*, 9 FMSHRC at 2003-04; *Rochester & Pittsburgh*, 13 FMSHRC at 193-94; *S&H Mining*, 17 FMSHRC at 1923.

Based on these considerations, we conclude that the judge misapplied the unwarrantable failure test, and that the record as a whole does not support the judge's determination that Midwest Material did not engage in aggravated conduct. Rather, the record compels the conclusion that Schumacher's conduct reflected reckless indifference and a serious lack of

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[7] In addition, MSHA Inspector Jerry Spruell testified that, when he questioned Schumacher about the failure to follow proper procedures for dismantling the crane boom, Schumacher stated, "[w]e drew three blank minds" — referring to himself, Reaska, and Henry. Tr. 147.

reasonable care. Accordingly, we reverse the judge's determination that the violation was not the result of Midwest Material's unwarrantable failure, convert the section 104(a) violation to a section 104(d)(1) violation, and remand this matter to the Chief Administrative Law Judge for assignment to a judge for penalty assessment.[8]

III.

Conclusion

For the foregoing reasons, we reverse the judge's determination that the violation of section 56.14211(a) was not the result of Midwest Material's unwarrantable failure, and remand this case for assessment of an appropriate civil penalty.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

[8] Judge Amchan has since transferred to another agency.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 24, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	
AUSTIN POWDER COMPANY	:	
	:	Docket Nos. YORK 95-57-M
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	YORK 96-13-M
v.	:	
BRUCE EATON	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DIRECTION FOR REVIEW

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). On October 31, 1996, Administrative Law Judge Paul Merlin affirmed Citation No. 4424405 under section 104(d)(1), 30 U.S.C. § 814(d)(1) of the Act. 18 FMSHRC 1878, 1889. On December 10, 1996, the Commission granted in part the joint petition for discretionary review filed by Austin Powder Company and Bruce Eaton. The Commission agreed to review the issue of whether the judge erred by affirming the citation as one issued under section 104(d)(1) of the Act.

On December 12, 1996, the Commission issued its decision finding that the judge failed to take into account the Secretary's modification of the citation. The judge's decision was vacated and the matter was remanded to the judge to determine the proper designation of the citation and whether the penalty should therefore be reduced.

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[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

On December 16, 1996, the judge issued a decision on remand wherein he deleted the unwarrantable failure finding and affirmed the citation under section 104(a). He did not modify his penalty assessment because he continued to find very high negligence.

On December 19, 1996, Austin Powder Company and Bruce Eaton filed a petition and motion seeking reconsideration of the Commission's decision to deny review of the remaining issues raised in their original November 27, 1996 petition for discretionary review. Subsequently, on December 20, 1996, petitioners also filed a petition for discretionary review of the December 16, 1996 decision on remand. That petition incorporates the essential assignments of error contained in both the November 27, 1996 petition for discretionary review and the petition and motion filed on December 19, 1996.

Upon consideration of the foregoing, we grant the petition for discretionary review filed on December 20, 1996.[2]

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

[2] The December 19, 1996, petition and motion, which requests substantially the same relief as the subject petition for discretionary review, is moot.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

January 24, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. YORK 96-61-M
DREW DRILLING & BLASTING INC.	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On December 16, 1996, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Drew Drilling & Blasting Inc. ("Drew") for failing to answer the proposal for assessment of penalty filed by the Secretary of Labor on August 21, 1996, or the judge's Order to Respondent to Show Cause issued on October 18, 1996. The judge assessed civil penalties of $2,500 proposed by the Secretary.

On January 13, 1997, the Commission received a letter from Edwin E. Drew, Jr., president of Drew, asserting that he was unable to respond to the proposal for assessment and show cause order because he was then undergoing chemotherapy treatments which left him incapacitated. Mr. Drew also asserts that his niece, who had worked part-time for the company as a bookkeeper/secretary, left to take a full-time job elsewhere, and that other friends and family who assisted with the company's paperwork during the period of his treatment "did not recognize the importance of the notice sent by the Secretary of Labor and it was overlooked." He also indicates in the letter that Drew is a small company with only two employees.

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[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

The judge's jurisdiction in this matter terminated when his decision was issued on December 18, 1996. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Drew's letter to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Resources, Inc.*, 10 FMSHRC 1130 (September 1988).

On the basis of the present record, we are unable to evaluate the merits of Drew's position. In the interest of justice, we vacate the default order and remand this matter to the judge, who shall determine whether relief from default is warranted. *See Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990).

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

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WASHINGTON, D.C. 20006

January 30, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. CENT 96-84 CENT 96-103
H M I a.k.a. HEATHERLY MINING, INC.	:	CENT 96-104
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 95-201
P & K CO., LTD.	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

ORDER

BY THE COMMISSION:

In each of the above-captioned cases, Chief Administrative Law Judge Paul Merlin issued an Order of Default to H M I a.k.a. Heatherly Mining, Inc. ("HMI") or P & K Co., Ltd. ("P&K"), and assessed civil penalties, for failure to answer the Secretary of Labor's petition for assessment

[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

of civil penalty or the judge's Order to Respondent to Show Cause.[2]

In November 1996, the Commission received an Application to File Answer Out of Time, Answer to Petition for Assessment of Penalty, and Motion to Dismiss in each case from HMI or P&K.[3] In their motions, HMI and P&K assert that they understood that they had settled all outstanding citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") against them on or before June 30, 1996, pursuant to a settlement agreement dated July 23, 1996.[4]

In late November of 1996, the Commission was advised by counsel for the Secretary that MSHA had decided to write off the penalties covered by these default orders as uncollectible. In a subsequent letter dated December 27, 1996, the Secretary's counsel confirmed that MSHA had agreed to deem all civil penalties assessed against HMI and P&K before August 1, 1996, to be uncollectible, and recommended that these cases be withdrawn from consideration by the Commission.

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[2] In No. CENT 96-84, Chief Judge Merlin issued a Default Order on August 14, 1996, after HMI failed to respond to his Order to Show Cause dated June 7, 1996. In Nos. CENT 96-103 and CENT 96-104, Chief Judge Merlin issued Default Orders on October 11, 1996, after HMI failed to respond to show cause orders issued in each case on August 13, 1996. In No. CENT 95-201, Chief Judge Merlin issued a Default Order on October 27, 1995, after P&K failed to respond to his show cause order dated August 14, 1995.

[3] The Commission received an application, answer, and motion to dismiss filed by HMI in No. CENT 96-84 on November 8, 1996, and in Nos. CENT 96-103 and 96-104 on November 13, 1996. The Commission received an application, answer, and motion to dismiss filed by P&K in No. CENT 95-201 on November 12, 1996.

The Commission received an amended motion to dismiss filed by HMI in No. CENT 96-104 on November 18, 1996. The Commission received amended versions of the application, answer and motion to dismiss filed by P&K in No. CENT 95-201 on November 25, 1996. These amended pleadings do not differ in material respects from the original versions of the documents filed previously.

[4] This settlement agreement, which is attached to each motion to dismiss, contains an express agreement by MSHA that "upon the wire transfer of funds [in the amount of $75,000]. . . on the 19th day of July, 1996, or thereafter, MSHA shall be deemed paid in full for all MSHA violations assessed through June 30, 1996, ..." HMI and P&K assert that they paid this sum to MSHA by wire transfer on or about July 31, 1996.

In light of the Secretary's response, we deem there to be no live controversy regarding the penalty. Accordingly, this case is dismissed as moot.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 31, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 94-97-M
WALKER STONE COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves an alleged significant and substantial ("S&S")[2] violation of 30 C.F.R. § 56.14105[3] by Walker Stone Company, Inc. ("Walker"), for failure to protect a miner from hazardous motion during testing of a rock crusher

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[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

[2] The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . . ."

[3] Section 56.14105 states:

> Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.

following its repair or maintenance. Administrative Law Judge Roy Maurer concluded that the operator did not violate the standard. 17 FMSHRC 600, 604-05 (April 1995) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's determination. For the reasons that follow, we reverse and remand.

I.

Factual and Procedural Background

On June 25, 1993, the primary impact crusher at Walker's open-pit limestone quarry in Dickinson County, Kansas, became clogged with rock, causing its drive motor to stall. 17 FMSHRC at 600-02; Tr. 191. The primary impact crusher is located below a hopper into which trucks dump loads of rock. Tr. 30-33. The crusher is powered by a diesel motor, which turns a rotor inside the crusher. Tr. 27. As the rotor turns, rock is tossed inside the crusher housing until it breaks into pieces small enough to drop out of the crusher onto a splash pan and conveyor belt, which transports the rock for further processing. 17 FMSHRC at 602 n.1; Tr. 33-35, 38-39, 219, 225-26. When rock becomes lodged inside the crusher, it prevents the rotor from turning and stalls the drive motor, rendering the crusher inoperable until the rock is removed. Tr. 45, 62-63, 231-32.

Rock frequently clogged the crusher and had clogged it earlier that day. 17 FMSHRC at 602, 607. As usual when this occurred, the crusher operator, Roy Brooner, changed the signal light at the hopper from green to red to indicate to the truck drivers to stop dumping their loads and to help him unclog the crusher. *Id.* at 602. Truck drivers Danny Boisclair, Bill Scott, and Frank Esterly arrived at the scene. *Id.* at 602-03. Boisclair and Scott entered the interior of the crusher and, using a sledgehammer, broke up large boulders that were resting on top of the rotor. *Id.* at 602. Upon their exiting the crusher, the crusher operator attempted to jog the rotor to see if it had been unclogged. *Id.* The rotor did not turn, so Scott, after conferring with the crusher operator, went underneath the rotor to see if rock was lodged in the area of the splash pan. *Id.* at 602-03. Unbeknownst to the crusher operator, Boisclair reentered the interior of the crusher. *Id.* at 603. Esterly followed Boisclair but remained just outside the crusher. *Id.* While Scott cleared rock from under the rotor, Boisclair used his hunting knife to remove rock that was lodged between the top of the rotor and the crusher housing. *Id.* Esterly observed Scott working below and asked him if he needed help. *Id.* Scott responded that he thought he had removed the rock that was clogging the rotor and that he was ready to leave. *Id.* Esterly told Boisclair to hurry and get out of the crusher because Scott was done. *Id.* Boisclair began to exit the crusher but, before he was out, Scott told the crusher operator that the rotor was clear and the crusher operator jogged the rotor. *Id.* The rotor turned and Boisclair was pulled between the rotor and the crusher housing, causing massive injuries to his upper and lower torso that resulted in his death. *Id.*

The next day, Roger Nowell and Lloyd Caldwell, inspectors from the Department of Labor's Mine Safety and Health Administration ("MSHA"), began an investigation of the accident. 17 FMSHRC at 603; Gov't Ex. 1. Based on the results of the investigation, Inspector

Nowell issued Walker Citation No. 4337450, pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging an S&S violation of section 56.14105 for failure to protect Boisclair from hazardous motion during testing of the rotor following removal of the obstruction. 17 FMSHRC at 603-04; Gov't Ex. 2. In addition, Nowell issued Walker Citation No. 4337451, pursuant to section 104(a), alleging an S&S violation of 30 C.F.R. § 56.14200[4] for failure to warn Boisclair before jogging the rotor. 17 FMSHRC at 603, 605; Gov't Ex. 3. The Secretary subsequently proposed civil penalty assessments of $9,000 for each of the alleged violations and Walker challenged the proposed assessments.

Following an evidentiary hearing, the judge concluded that section 56.14105 is inapplicable to the facts of this case. 17 FMSHRC at 605. He based his determination on his finding that, under the plain meaning of the standard, the phrase "repairs or maintenance of machinery or equipment" is not intended to encompass the work of removing rocks which are clogging a crusher. *Id.* at 604. The judge explained that the standard "was written to apply to repair or maintenance evolutions, as those terms are commonly used and not relatively minor annoyances that arise during the on-line production usage of the machinery or equipment, that do not involve any adjustments, maintenance or repairs to the equipment itself." *Id.* at 605. The judge determined that no repairs or maintenance were being performed because miners were not doing mechanical, maintenance, or repair work or making a structural modification to the crusher. *Id.* at 604. He found that "[t]he only thing [the miners] were actually working on were the rocks, breaking them up with a sledgehammer, and/or otherwise dislodging them from the crusher." *Id.* Accordingly, he vacated the citation. *Id.* at 605, 607. The judge, however, concluded that Walker had committed an S&S violation of section 56.14200 and assessed a civil penalty of $7,500. *Id.* at 605-07.

II.

Disposition

The Secretary argues that the judge erred in failing to accord deference to his interpretation of the terms "repairs or maintenance" to include the process of removing rock that had stalled the crusher. S. Br. at 4-10. He asserts that his interpretation is consistent with the language and safety-promoting purpose of the standard. *Id.* Walker responds that the judge properly rejected the Secretary's overly broad interpretation of the standard because its language is clear and unambiguous, and breaking up rock does not constitute repairs or maintenance of the

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[4] Section 56.14200 states:

> Before starting crushers or moving self-propelled mobile equipment, equipment operators shall sound a warning that is audible above the surrounding noise level or use other effective means to warn all persons who could be exposed to a hazard from the equipment.

crusher itself. W. Br. at 3-16. Walker further contends that, if the Commission accords deference to the Secretary's interpretation, it was not provided notice that unclogging the crusher is an activity that the standard addresses. *Id.* at 12-16.

The Commission has recognized that where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning. *See, e.g., Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-43 (1984)). If, however, the standard is ambiguous, the Commission has examined whether the Secretary's interpretation is reasonable. *See, e.g., Rochester & Pittsburgh Coal Corp.*, 12 FMSHRC 189, 193 (February 1990); *Missouri Rock, Inc.*, 11 FMSHRC 136, 139 (February 1989); *see also Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994). As the D.C. Circuit Court of Appeals has stated, deference is accorded "*only* when the plain meaning of the rule itself is doubtful or ambiguous." *Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984) (emphasis in original); *see also Udall v. Tallman*, 380 U.S. 1, 16 (1964); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

We conclude that the language of section 56.14105 clearly and unambiguously reaches the facts presented in this case, i.e., the breakup and removal of rocks clogging the crusher. The term "repair" means "to restore by replacing a part or putting together what is torn or broken: fix, mend . . . to restore to a sound or healthy state: renew, revivify . . . ." *Webster's Third New International Dictionary, Unabridged* 1923 (1986). The term "maintenance" has been defined as "the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep . . . " and "[p]roper care, repair, and keeping in good order." *Id.* at 1362; *A Dictionary of Mining, Mineral, and Related Terms* 675 (1968). That the miners were trying to dislodge rock rather than working on the motor or other parts of the crusher does not remove the activity from the definition of repair or maintenance within the meaning of section 56.14105. The broad language of section 56.14105 does not limit the types of "repairs or maintenance of machinery or equipment" that are included within its scope. In this case, it is undisputed that the obstructing rock caused the crusher's drive motor to stall, rendering the crusher defective or inoperable until the rock was removed. The purpose of Boisclair's work was to unclog the malfunctioning crusher and restore it to functioning condition. 17 FMSHRC at 602-03. The removal of rock was necessary to "restore [the crusher] to a sound state" or "keep [it] in a state of repair or efficiency." Whatever the definitional distinctions between repair and maintenance, the effect of removing the rock was to eliminate the malfunctioning condition and enable the crusher to resume operation. In our view, the removal of rock to restore the crusher to working condition is clearly covered by the broad phrase "repairs or maintenance of machinery or equipment," and, therefore, the standard adequately expresses the Secretary's intention to reach the activity to which he applied it.

We find unpersuasive Walker's reliance on *Southern Ohio Coal Co.*, 14 FMSHRC 978 (June 1992), to support the judge's determination that the activity of removing rock from the crusher is not repair or maintenance. W. Br. at 6-7. In that case, the Commission concluded that

the activity of extending a conveyor belt was not "maintenance" within the plain meaning of 30 C.F.R. § 75.1725(c).[5] 14 FMSHRC at 982-83. The Commission reasoned:

> [T]he belt move was not designed to prevent the belt from lapsing from its existing condition or to keep the belt in good repair but, rather, to increase its usefulness . . . . [N]o work was performed . . . to keep the belt in the same condition that it was in the day before, . . . no "deteriorating condition" was being "upgrad[ed]," and . . . the belt would run without adding additional length to it. . . . [T]he belt move did not preserve the ability of the existing belt to convey material. The belt was not in need of upkeep. Instead, the belt move was an improvement of the belt system . . . .

Id. at 983 (citations omitted). Here, in contrast, the operation of the crusher had ceased due to a malfunction; removal of rock was necessary to restore the crusher to the same condition that it was in before it became clogged; the malfunctioning condition was being eliminated; the crusher would not operate without removal of rock; and removal of rock was necessary to restore the ability of the crusher to process material. Thus, we conclude that the activity of extending a conveyor belt is readily distinguishable from that of removing rock that is clogging a crusher.

Based on the foregoing, we conclude that the judge erred in determining that section 56.14105 is inapplicable to the facts of this case. Accordingly, we reverse the judge's determination.[6]

Having determined that Boisclair's and Scott's efforts to dislodge rock constitute repair or maintenance, we next consider whether the operator violated the standard by failing to protect Boisclair from hazardous motion during testing of the rotor. The record indicates that activation of the crusher was necessary to test it. Tr. 165, 188. Moreover, Walker does not dispute that the crusher operator failed to accurately account for all employees present before he jogged the rotor and, therefore, that Boisclair was unprotected from hazardous movement of the crusher machinery.[7] Thus, we conclude that the record as a whole supports no other conclusion than that

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[5] Section 75.1725(c) is an underground coal standard similar to section 56.14105.

[6] In light of our conclusion that the standard is clear, we do not reach the question of whether the Secretary's interpretation is reasonable and entitled to deference.

[7] Instead, Walker contends that it had policies that prohibited employees from working in the crusher alone and from working above other employees. 17 FMSHRC at 606. Walker argues that Boisclair violated its policies when he reentered the crusher to perform work above Scott. Tr. 202-03, 213-15; W. Post-Hearing Br. at 4-5. Although Walker's purported reliance on its policies is a factor that may be considered in determining the level of negligence for purposes of assessing the penalty, it has no bearing on whether the operator violated the standard. As the

the Secretary established a violation of section 56.14105. In addition, we conclude that the violation was S&S. Clearly, it was a significant contributing cause to the fatal accident.[8] Because the record as a whole allows only one conclusion, we need not remand the issues of violation and S&S to the judge. *See American Mine Services, Inc.*, 15 FMSHRC 1830, 1834 (September 1993) (citing *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984) (remand would serve no purpose because evidence could justify only one conclusion)).

In sum, we conclude that the judge erred in determining that section 56.14105 is inapplicable to the facts of this case. We further conclude that the Secretary proved that Walker violated the standard and that the violation was S&S. Accordingly, we remand the matter to the judge for assessment of an appropriate civil penalty.

Commission has frequently observed, the Mine Act imposes liability without regard to fault. *E.g.*, *Fort Scott Fertilizer - Cullor, Inc.*, 17 FMSHRC 1112, 1115 (July 1995).

[8] We note that, in affirming the violation of section 56.14200, which arose from the same facts as the violation at issue, the judge concluded that such violation was S&S.

III.

Conclusion

For the foregoing reasons, we reverse the judge's determination that section 56.14105 is inapplicable, find an S&S violation, and remand for penalty assessment.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 31, 1997

BILLY R. McCLANAHAN	:	
	:	
v.	:	Docket No. VA 95-9-D
	:	
WELLMORE COAL CORPORATION	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DECISION

BY THE COMMISSION:

In this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Billy R. McClanahan seeks review of a decision by Administrative Law Judge David Barbour dismissing a complaint that he filed pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3).[2] 17 FMSHRC 1773

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[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

[2] Section 105 provides in part:

> (c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a coal or other mine, or because of the exercise by such miner . . . of any statutory right afforded by this Act.
>
> (c)(2) Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may . . . file a complaint

(October 1995) (ALJ). The judge determined that McClanahan's safety complaints regarding the weight haulage limitation required by his employer, Wellmore Coal Corporation ("Wellmore"), were not based on a good faith belief that hauling the required weight was hazardous. For the reasons that follow, we reverse and remand.

I.

Factual and Procedural Background

In 1978, McClanahan began working for Wellmore as a haulage truck driver.[3] 17 FMSHRC at 1774. On August 20, 1992, McClanahan was advised that Wellmore was terminating its trucking business but that its former truckers could purchase trucks and haul as independent contractors at Knox Creek's No. 3 Preparation Plant, or Wellmore's No. 7 or No. 8 plants. *Id.*; Tr. 316-18. McClanahan entered into an agreement, dated August 21, 1992, to purchase Truck No. 42, the truck he usually drove. 17 FMSHRC at 1775. As an independent contractor, McClanahan hauled refuse regularly at the No. 3 Preparation Plant and continued to be paid by the hour for hauling at that location. *Id.* at 1775; Tr. 61, 319.

In December 1993 or January 1994, a new refuse fill area was opened at Knox Creek No. 3. *Id.* The haulage route to the new area was approximately two miles longer than the route previously traveled by the truckers, and included a one-lane road over a hill. *Id.* As a result,

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> with the Secretary alleging such discrimination. . . .
>
> (c)(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify . . . the miner . . . of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right . . . to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). . . . Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner . . . for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation.

30 U.S.C. § 815(c).

[3] Wellmore and Knox Creek Coal Corporation ("Knox Creek") were affiliated with United Coal Company ("United"). 17 FMSHRC at 1774; W. Br. at 1-2.

trucks took longer to travel the distance to dump refuse. *Id.* At approximately this time, in an effort to increase refuse removal, the company instituted a policy requiring trucks to haul at least 25 tons per load. *Id.*; Tr. 300, 362, 366, 438. The policy was later modified to allow trucks to haul no less than 24 tons. 17 FMSHRC at 1775. A trucker with a load weighing less than 24 tons was prohibited from hauling for the remainder of the shift and the next day. Tr. 77-78.

McClanahan testified that he repeatedly made safety complaints about the weight requirement from its inception.[4] 17 FMSHRC at 1788. He maintained that, on January 27, he told Danny Estep, the trucking foreman, that he was afraid to haul 25 tons up the one-lane road, that 25 tons was too much weight for the truck, and that if the truck's drive line broke, the truck could travel over the highwall. *Id.*; Tr. 74. McClanahan stated that, on January 31, he told Estep that it was unsafe and unfair to make the truckers choose between being injured or going home, and that on February 1, he informed Estep that he could not haul that much weight safely or efficiently. 17 FMSHRC at 1788; Tr. 78-79. He testified that, on February 4, he complained on the CB radio about "overloading being so hazardous," and that, on February 27, he told Charles Carter, the president of Wellmore, that he was "scared of trying to haul that much weight because of the hazards." 17 FMSHRC at 1788; Tr. 79, 87.

On March 2, McClanahan's truck was weighed. 17 FMSHRC at 1778. The load was 100 pounds under 24 tons. *Id.* Estep told McClanahan that he could not return to work the next day. *Id.* McClanahan testified that it was snowing and that he told Estep that he already was "scared to death" but that the snow made it worse. *Id.*; Tr. 93. He stated that Estep told him that he did not want to hear any excuses. Tr. 93. After McClanahan hauled that load, Estep ordered him to have his next load weighed. Tr. 93-94. McClanahan's next load weighed 21 tons. Tr. 94. McClanahan stated that Estep informed him that Dave Fortner, the company's vice president of preparation, would fire him if he refused to haul 24 tons. Tr. 94, 294-95. McClanahan replied that he was refusing to haul because he was scared, not because he "didn't want to work." Tr. 94. McClanahan testified that he also informed Estep about the manufacturer's recommended maximum gross vehicle weight ("GVW") for his truck,[5] and tried to show him the portion of the

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[4] Wellmore witnesses denied that McClanahan had made safety complaints, testifying that McClanahan's only stated concern was for the wear-and-tear that the weight requirement would inflict on his truck. 17 FMSHRC at 1788. The judge found that, at least by September 22, 1994, management understood that McClanahan's complaints about the weight requirement were related to safety. *Id.* at 1788-89. Wellmore challenged that finding for the first time at oral argument. Oral Arg. Tr. 38-40. Although we need not address arguments raised for the first time at oral argument (*Tarpley v. Greene*, 684 F.2d 1, 7 n.17 (D.C. Cir. 1982)), we conclude that the judge's finding is supported by substantial evidence. As noted by the judge, McClanahan meticulously documented the dates and substance of his complaints. 17 FMSHRC at 1788; C. Ex. 4. At least nine of those complaints were related to safety. 17 FMSHRC at 1788.

[5] The manufacturer's recommended maximum GVW is the weight of the empty truck plus the amount that the manufacturer recommends that the truck haul. McClanahan's truck had

manufacturer's manual stating that it was hazardous to haul loads exceeding the recommended GVW, but that Estep had responded, "Bull." 17 FMSHRC at 1778. Estep denied that McClanahan ever mentioned the GVW sticker or any other safety concerns at any time. *Id.*; Tr. 450, 473, 477, 479.

On March 3, McClanahan went to the mine office and spoke with David Wampler, the president of Knox Creek. 17 FMSHRC at 1778-79. McClanahan stated that as soon as he walked in the office, Wampler told him that he had to haul the 24-ton limit. *Id.* at 1779. McClanahan told him that hauling that much weight scared him. *Id.* He stated that Wampler said that the company would buy back the truck for McClanahan's ownership interest in it. *Id.* McClanahan testified that he then offered to sell the truck for the book or appraised value, but Wampler replied that he would just terminate McClanahan. Tr. 97. McClanahan testified that he tried to get Wampler to look at the GVW information and the truck owner's manual, but that Wampler refused. 17 FMSHRC at 1779. Wampler testified that McClanahan had informed him that he could not haul the 24-ton limit because of the wear-and-tear to his truck. *Id.*; Tr. 323.

McClanahan testified that, on March 4, he called MSHA but was informed that MSHA could not help. 17 FMSHRC at 1779. He stated that he also called Virginia's Department of Mine Land Reclamation ("DMLR") and eventually spoke with Inspector Lawrence Odum. *Id.* On March 7, Odum met McClanahan at the plant. *Id.*

During the March 7 meeting, McClanahan expressed concern over dumping refuse into the slurry basins. *Id.* at 1780. He was afraid that his truck would get too near the edge of a basin and fall in, and that the weight that he was hauling would make it more likely that the edge would give way. *Id.* Odum informed McClanahan that the conditions at the mine did not look like something his agency would be involved in, rendered no opinions about safety, and referred McClanahan to the Occupational Safety and Health Administration ("OSHA"), MSHA, or the Virginia Division of Mines. *Id.*; Tr. 26, 43.

On September 12, McClanahan's load was weighed at 23.65 tons. 17 FMSHRC at 1781. According to McClanahan, Estep told McClanahan to "straighten up [his] attitude." *Id.* According to Estep, after McClanahan's load was found to be underweight, Estep told him that he needed to haul the required weight and to stop being stubborn about it. Tr. 450. When Estep pressed McClanahan about whether he was going to comply with the haulage requirements, Estep testified that McClanahan had replied, "I might be light again and I might not." 17 FMSHRC at 1781. McClanahan was told to go home and to not come to work the next day. *Id.*

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a manufacturer's recommended GVW of 56,800 pounds and weighed 26,900 pounds empty. Tr. 230-31. The maximum amount that the truck could haul in accordance with the manufacturer's GVW is calculated by subtracting the weight of the empty truck (26,900 pounds) from the GVW of the truck (56,800 pounds) to arrive at the difference of 29,900 pounds. Tr. 230-31. To convert the amount of 29,900 pounds to tons, the figure of 29,900 is divided by 2,000 to arrive at the amount of 14.95 tons, or approximately 15 tons. Tr. 231.

On September 14, when McClanahan returned, his load was again weighed. *Id.* His load weighed 22.74 tons. *Id.* McClanahan was laid off for the rest of the shift and the next day. *Id.* When he returned to work on September 19, his load was weighed again. *Id.* His load weighed 23.50 tons. *Id.* McClanahan was again sent home for the remainder of the shift and the next day. *Id.* When he returned on September 21, McClanahan's load was again weighed. *Id.* McClanahan's load weighed 24.96 tons. *Id.* McClanahan explained that he had been loaded with mud, which is heavy, along with slate. Tr. 122.

On the morning of September 22, Estep called McClanahan via the CB radio and asked him to go the mine office. 17 FMSHRC at 1781. Estep, Fortner and Gross were waiting for him when he arrived. *Id.* According to McClanahan, Fortner told McClanahan that he would be fired if he hauled under the weight limit again. *Id.* at 1782. McClanahan testified that when he tried to explain that he was scared of hauling that excessive weight and that he did not want to risk his health or life, Fortner replied that he had a solution for him and offered him a job at Wellmore No. 8. Tr. 123. McClanahan rejected the offer because truckers at Wellmore No. 8 were paid by the ton hauled, and he believed that he would have to haul twice his truck's recommended GVW "just to make a living." Tr. 123.

Later that day, McClanahan's truck was weighed. Tr. 124. McClanahan's load weighed 22.96 tons. 17 FMSHRC at 1783. Gross told McClanahan, "That's all for you." Tr. 124. When McClanahan asked him if that was all for the day or for good, Gross replied, "You're fired." Tr. 124.

On November 7, 1994, McClanahan filed with MSHA a complaint alleging discrimination in violation of section 105(c) of the Mine Act. *Id.* at 1773. After an investigation, MSHA advised McClanahan of its conclusion that no violation of section 105(c) had occurred. *Id.* On January 6, 1995, McClanahan filed with the Commission a complaint on his own behalf pursuant to section 105(c)(3) of the Act. *Id.*

The judge denied McClanahan's discrimination complaint. 17 FMSHRC at 1793. He found that McClanahan had made safety complaints to management regarding dumping refuse into slurry basins, but that those complaints lost their protected status under the Mine Act because management had adequately addressed them. *Id.* at 1787. He also found that McClanahan had expressed safety concerns to management about hauling 24 or more tons. *Id.* at 1788-89. The judge concluded, however, that McClanahan's concerns were those of a truck owner for cost and repair, and were not based on a good-faith belief that the haulage requirement was hazardous to his safety. *Id.* at 1789. The judge based his conclusion on evidence that, as an employee of Wellmore's, prior to McClanahan's purchase of the truck, McClanahan repeatedly hauled more than 24 tons without making known his complaints to management or MSHA. *Id.* at 1789-91. In addition, the judge relied on evidence that, after purchasing his truck, McClanahan failed to complain to MSHA about the purported hazards of the weight limit. *Id.* at 1791-92. The judge also found unsupported by the record McClanahan's assertion that hauling

loads in excess of the manufacturer's recommended GVW was inherently dangerous. *Id.* at 1792. Accordingly, the judge dismissed the proceedings.

On November 29, McClanahan filed a petition for discretionary review, challenging the judge's decision, which the Commission granted.[6] The Commission subsequently heard oral argument.

II.

Disposition

McClanahan argues that the judge erred in dismissing his discrimination complaint. He submits that substantial evidence does not support the judge's findings that he consistently hauled loads of 24 or more tons as an employee, that he failed to contact MSHA, and that it is not inherently dangerous to haul loads exceeding the manufacturer's recommended GVW. M. Br. at 7-15. McClanahan also asserts that substantial evidence does not support the judge's finding that his concerns about dumping refuse into the slurry basins were adequately addressed by management. *Id.* at 15-17. He requests that the Commission sustain his discrimination complaint, reverse the judge's decision, and grant him "reinstatement with full back pay and benefits, including any and all costs related to his unlawful discharge, and including attorney's fees." *Id.* at 19. Wellmore responds that each of the judge's findings is supported by substantial evidence and that the judge correctly dismissed the complaint. W. Br. at 4-24.

A. General Principles

A miner alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it is also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18;

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[6] Prior to filing his petition for discretionary review, McClanahan mailed a letter to Judge Barbour, which was forwarded to and received by the Commission on November 20, 1995. The existence of the letter was disclosed to counsel of both parties and copies were provided upon counsels' requests. The Commission determined that the letter is outside of the record on review and, accordingly, did not consider it in its disposition of the case. *See* 30 U.S.C. § 823(d)(2)(C).

see also Eastern Assoc. Coal Corp. v. United Castle Coal Co., 813 F.2d 639, 642 (4th Cir. 1987).

The Mine Act grants miners the right to complain of a safety or health danger or violation, but does not expressly grant the right to refuse to work under such circumstances. Nevertheless, the Commission and the courts have inferred a right to refuse to work in the face of a perceived danger. *See Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 519-21 (March 1984), *aff'd*, 780 F.2d 1022 (6th Cir. 1985); *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (August 1990). A miner refusing work is not required to prove that a hazard actually existed. *See Robinette*, 3 FMSHRC at 812. In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Id.*; *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. *Robinette*, 3 FMSHRC at 807-12; *Secretary of Labor on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (June 1983). A good faith belief "simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810. The purpose of this requirement is to "remove from the Act's protection work refusals involving frauds or other forms of deception." *Id.*

The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The term "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 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). While we do not lightly overturn a judge's factual findings and credibility resolutions, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

B. Weight Requirement Complaints

1. Good Faith Belief that Weight Requirement was Hazardous

a. McClanahan's Actions as an Employee

We conclude that substantial evidence does not support the judge's finding that McClanahan's actions, including his complaints about hauling 24 or more tons as an independent contractor, were not based on a good faith belief in a hazard. Although, as an employee, McClanahan hauled loads with actual weights in excess of 24 tons on the seven days enumerated

by the judge, a large majority of his weighed loads over the course of his employment weighed less than 24 tons. *See* R. Ex. 2, at 27, 33-36, 38, 39, 43, 45, 46, 49, 51, 54, 59, 62, 67, 70, 74, 76. In addition, on January 4 and 5, 1990, two of the days listed by the judge, McClanahan was driving Truck No. 33, a different truck than the truck he usually drove and ultimately purchased. C. Ex. 8, at 31-33. Contrary to the judge's finding that McClanahan did not maintain that the trucks were essentially different (17 FMSHRC at 1790), McClanahan testified that Truck No. 33 was "a little bit heavier duty truck" that probably had a higher GVW than Truck No. 42. Tr. 216.

Moreover, it is not clear that McClanahan knew the actual tonnage he was carrying when he hauled as an employee. McClanahan explained that, as an employee, he did not know how much weight he was hauling because the truck was loaded by an endloader operator with just one "hump," or mound, of material.[7] Tr. 151-52, 227. He believed that one hump generally weighed 20 tons. Tr. 226, 228.

In any event, evidence that McClanahan hauled loads in excess of 24 tons on the occasions relied upon by the judge does not establish that McClanahan was unconcerned with his safety. On October 12 and December 20, 1990, two of the seven days listed by the judge, McClanahan complained to his supervisor that his loads were too heavy. Tr. 144, 217-18, 219. McClanahan also generally testified that when he was hauling in Kentucky or loading out of a gob pile, his weights were high and that, after he got to the scales and found out his weight, he told his supervisor at the first opportunity that "was way too much weight for the trucks." Tr. 216-17. It is difficult to construe this statement as anything other than a safety-based complaint; there is no evidence that McClanahan had an economic motivation, as McClanahan did not own the truck at that time, and McClanahan was paid the same hourly rate regardless of the tonnage that he hauled. McClanahan's failure to expressly link these complaints to safety does not preclude the characterization of those complaints as relating to safety, particularly given the possibility of equipment failure resulting from hauling excessive weight. C. Ex. 16, at 2-3; Tr. 75, 108, 112, 191.

Unlike the judge, we do not find demonstrative of a lack of good faith evidence that "McClanahan's complaints concerning the hauling of 24 tons or more are definitely linked to safety only *after* he became the owner of the truck." 17 FMSHRC at 1790 (emphasis in original). The basis for the safety complaints that McClanahan made as an independent contractor was not present at the time that McClanahan was an employee. Wellmore did not begin its practice of regularly weighing trucks and sending home drivers that were not hauling at least 24 tons per load until January 1994.[8] 17 FMSHRC at 1775. McClanahan owned the truck

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[7] In contrast, during the time that Wellmore enforced its weight requirement, truckers were responsible for operating the hopper that loaded their trucks. Tr. 509.

[8] Wellmore, relying upon testimony of its witnesses, asserts that there had been a 25-ton haulage requirement at the plant for years while McClanahan was an employee. W. Br. at 5-8. The judge declined to credit such testimony. 17 FMSHRC at 1775. Even if this testimony were

for one-and-a-half years before making complaints that hauling 24 or more tons was hazardous. His complaints began not after he assumed ownership of the truck in August 1992 but, rather, after Wellmore implemented its policy requiring truckers to consistently haul at least 24 tons or be sent home.

Nor do we find determinative of a lack of good faith evidence that, as an employee, McClanahan repeatedly estimated that he hauled loads weighing 25 tons. *See* R. Ex. 2. The judge, relying upon such evidence, stated that "it strikes me as completely incongruous to McClanahan's purported belief in the inherent hazards of hauling more than 24 tons, that he would have indicated he was engaging consistently in hazardous work." 17 FMSHRC at 1790. The judge discredited McClanahan's testimony that, although he estimated 25 tons, he was hauling less, relying upon evidence of the seven days in which loads were actually weighed in excess of 24 tons. *Id.* As noted, a majority of the weighed loads that McClanahan hauled as an employee had actual weights of less than 24 tons. Moreover, we do not agree with the judge that, because McClanahan signed weight sheets estimating his loads at 25 tons, McClanahan essentially acknowledged the safety of hauling loads that actually weighed that amount.[9] Section 105(c) was enacted in recognition that miners are sometimes placed in the situation where they must effectively choose between engaging in an activity that would compromise their safety or forfeiting employment in areas where employment opportunities are scarce. *See* S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978) (recognizing that miners must be protected against discrimination as a result of their participation in safety matters and that "mining often takes place in remote sections . . . and in places where work in the mines offers the only real employment opportunity").

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credited, the evidence is undisputed that the policy requiring truckers to haul 24 or more tons or be sent home was not instituted at the preparation plant until January 1994. Tr. 77, 300-01, 366.

[9] There is evidence in the record supporting McClanahan's perception that he was actually hauling less than those estimated weights. McClanahan and Curtis Christian, a former trucker for United, testified that, at the time that United owned the trucks, truckers were sent home for hauling loads that weighed more than 20 tons. Tr. 226, 249, 275-76. In addition, McClanahan testified that the truckers had estimated their loads to be 20 tons until approximately 1989, when their foreman had told them to begin estimating their loads at 25 tons although they did not have to actually load more weight. Tr. 142-43, 145-46, 215. He explained that other United operations wanted them to haul more, while the truck supervisors did not. Tr. 215. He stated that his supervisors asked the truck drivers to estimate 25 tons to "keep them off their back[s]." Tr. 215. McClanahan stated that management knew that the estimates of 25 tons were not accurate and told the truckers to estimate 25 tons "no matter if you had half a load or a full load or two buckets full." Tr. 215, 221.

b. McClanahan's Contacts with MSHA

The judge determined that McClanahan did not have a good faith belief that the weight requirement was hazardous because the judge found McClanahan failed to make a safety complaint to MSHA. This conclusion is premised on errors of fact and law.

Even if McClanahan had not made a safety complaint to MSHA, the judge erred in considering that as evidence of a lack of good faith. In making that inference, the judge rejected out of hand McClanahan's testimony that he feared his identity would not be kept confidential by MSHA if he filed a complaint and that he might be the subject of retribution. 17 FMSHRC at 1792. Despite the Act's confidentiality requirements, we do not consider McClanahan's fear to be unreasonable. *See United Mine Workers of America on behalf of Nelson v. Secretary of Labor*, 15 FMSHRC 365 (March 1993) (involving allegations that MSHA officials failed to protect confidentiality of miners who had reported safety violations). Moreover, the Commission has previously rejected the contention that a miner must file a complaint with MSHA in order to make a protected safety complaint to an operator. *Sammon v. Mine Services Co.*, 6 FMSHRC 1391, 1396-97 (June 1984).

In any event, substantial evidence establishes that McClanahan engaged in actions that clearly constitute a safety complaint, and fails to support the judge's conclusion to the contrary. McClanahan testified that he contacted MSHA about the weight requirement, but was informed that MSHA could not help. The judge discredited this testimony based on his findings that: (1) McClanahan later modified that testimony, stating that either he or his wife had called; (2) McClanahan's failure to keep records of that alleged contact was inconsistent with his record-keeping habits; and (3) if Mr. or Ms. McClanahan had contacted MSHA, MSHA would not have responded that there was nothing it could do. 17 FMSHRC at 1791.

First, contrary to the judge's findings, the record establishes that Mr. or Ms. McClanahan did, in fact, contact MSHA. Ms. McClanahan testified that she made two calls to MSHA on March 4, 1994, related the conditions at the mine, and was informed that an effort would be made to find the correct contact for her. Tr. 260-62. She stated she was given various agency names and phone numbers because MSHA was not sure that it was the appropriate agency to contact. Tr. 266. Ms. McClanahan explained that she made several calls and that every agency she contacted referred her to a different person or agency to contact. Tr. 263. She stated that MSHA called back prior to the time that McClanahan filed his discrimination complaint and spoke with each of them on different dates. Tr. 265. She stated that, at the time, MSHA "didn't think it was their department to handle it until [she] explained in detail, and [she] ended up sending some information to them to help them decide that they should follow up on it." Tr. 266. She said that they later heard from MSHA when they took McClanahan's statement in connection with his discrimination complaint. Tr. 266. The McClanahans' phone bill introduced at trial, and ignored by the judge in his decision, indicates two calls to MSHA on March 4 for three minutes and twenty-seven minutes. C. Ex. 31.

In addition, it appears that McClanahan made a concerted effort to have his concerns addressed by other government agencies, although he may have been uncertain as to which agency to contact. The McClanahans' phone bill reflects a March 4 call to DMLR, a March 4 call to the Virginia Employment Commission, two March 4 calls to the National Labor Relations Board, and March 4, March 11 and March 14 calls to the Virginia Department of Labor. M. Br. at 13-14; C. Ex. 31. On March 7, 1994, McClanahan met with DMLR Inspector Odum at the refuse dumping site. Tr. 26. Odum also informed McClanahan that his agency was not the appropriate agency to contact and referred McClanahan to OSHA or MSHA or the Virginia Division of Mines. Tr. 26. Such repeated efforts do not support the judge's finding of lack of good faith.

c. Summary

In sum, substantial evidence does not support the judge's finding that McClanahan failed to demonstrate a good faith belief that hauling 24 or more tons was hazardous. Accordingly, we reverse the judge's finding that McClanahan's safety complaints regarding Wellmore's weight requirements were not based on a good faith belief in a hazard.

2. Reasonableness of Belief that Weight Requirement was Hazardous

Because the judge dismissed McClanahan's complaints regarding Wellmore's weight requirement on the basis that they were not made in good faith, he did not reach the question of the reasonableness of McClanahan's belief that the weight requirement was hazardous. However, the judge rejected McClanahan's assertion that it was inherently dangerous to haul over the manufacturer's recommended GVW. 17 FMSHRC at 1792. The judge reasoned the assertion was not supported by the record because McClanahan had consistently hauled loads in excess of that amount, and Virginia and Kentucky licensed the truck to haul loads beyond the manufacturer's maximum GVW. *Id.* McClanahan argues that substantial evidence does not support the judge's finding. M. Br. at 7-13.

The Commission has "rejected a requirement that miners who have refused to work must objectively prove that the hazards existed . . . [and has] adopted a 'simple requirement that the miner's honest perception be a reasonable one under the circumstances.'" *Secretary of Labor on behalf of Pratt v. Hurricane Coal Co.*, 5 FMSHRC 1529, 1533 (September 1983), *quoting Robinette*, 3 FMSHRC at 812. Our focus, therefore, is on the reasonableness of McClanahan's belief that the weight requirement was hazardous.

The record reveals that, after January 1994, McClanahan was required to haul on a regular basis an amount that exceeded the manufacturer's recommended GVW by approximately 60 percent. M. Reply Br. at 4. As acknowledged by the judge, "if the truck was going to have to haul 24 tons or more each time it was loaded, there was going to be wear and tear on the truck." 17 FMSHRC at 1790-91. Equipment failure could lead to serious accidents. C. Ex. 16, at 2-3;

Tr. 75, 108, 112, 191. For instance, McClanahan testified that if the driveline broke, the truck would be unable to stop and could travel over the highwall. Tr. 74-75, 85.

In recognition of such hazards, MSHA issued an alert, dated November 22, 1994, cautioning mine operators and independent contractors that accidents involving haulage trucks are the leading cause of death at surface mines. C. Ex. 16, at 1. The MSHA alert states in part that, to prevent haulage accidents, equipment operators should not overload their trucks. C. Ex. 16, at 3. *See also* C. Ex. 17, at 1 (to prevent surface haulage accidents, truck[ers] . . . should . . . [n]ever exceed the truck's rated load capacity"). Similarly, the 1990 Ford Truck Owner's Guide states that "[u]nder no circumstances should your vehicle be loaded in excess of the [recommended GVW]," while the warranty booklet provides that exceeding the recommended GVW may void the truck's warranty. C. Exs. 18, 19. A memorandum from MSHA District Manager Ray McKinney, dated November 1, 1994, also refers to problems at the mine associated with hauling in excess of the maximum GVW:

> The trucks hauling slate to the slate dump are required to haul at least 24 tons which exceeds the manufacturer recommended load by 7 to 9 tons (depending on type of truck). Several of the employees interviewed felt like at certain times this is unsafe. When the haul road is wet and muddy it is difficult to control the truck. The excessive weight that the trucks are required to haul also causes breakdowns while operating the truck which causes unsafe operating conditions. . . .

C. Ex. 27, at 3.

We find unavailing evidence relied upon by Wellmore to support its contention that McClanahan's safety concerns about the weight requirement were unfounded. Wellmore emphasizes that, during a haulage technical inspection conducted at the mine on November 9, 1994, MSHA investigators did not observe any unsafe conditions or practices at the mine. C. Ex. 27, at 1-2. However, the trucks observed during that inspection were not weighed and could have been hauling under Wellmore's weight limitation. C. Ex. 27, at 1-2. In addition, the Commission has repeatedly recognized that the "fact that a subsequent investigation fails to confirm an actual violative condition does not vitiate the reasonableness of a miner's work refusal." *Secretary of Labor on behalf of Hogan v. Emerald Mines Corp.*, 8 FMSHRC 1066, 1073 n.4 (July 1986) (citations omitted). Moreover, Wellmore offered no persuasive evidence to refute the assertion that consistently hauling in excess of the rated capacity of trucks posed safety risks. In fact, the only evidence it offered was testimony by its witnesses that they did not consider Wellmore's haulage requirement unsafe. Tr. 491, 517-18; R. Ex. 1, at 25-37.[10] The

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[10] Evidence was offered showing that Virginia and Kentucky licensed the truck to carry loads beyond the manufacturer's recommended GVW. 17 FMSHRC at 1792. However, Wellmore's counsel confirmed at oral argument that these limits applied only to highway, not

operator's vice president of preparation acknowledged that Wellmore instituted the 24-ton requirement without consideration of the size of the trucks or their GVW. Tr. 302-03. Wellmore's sole criterion in establishing the weight limit was simply the amount of refuse that needed to be hauled by each truck in order to keep the plant operating. Tr. 302-03.

We therefore conclude that the record supports no other conclusion than that McClanahan reasonably believed Wellmore's weight requirement was hazardous. In such circumstances, a remand to the judge for consideration of the issue would serve no purpose. *See American Mine Services, Inc.*, 15 FMSHRC 1830, 1834 (September 1993), *citing Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984) (remand unnecessary because evidence could justify only one conclusion). Accordingly, we conclude that McClanahan expressed a good faith, reasonable concern about the safety of Wellmore's weight requirement.

3. Adequacy of Operator's Response

Once it is determined that a miner has expressed a good faith, reasonable concern about safety, the analysis shifts to an evaluation of whether the operator addressed the miner's concern "in a way that his fears reasonably should have been quelled." *Gilbert*, 866 F.2d at 1441; *see also Bush*, 5 FMSHRC at 997-99; *Thurman v. Queen Anne Coal Co.*, 10 FMSHRC 131, 135 (February 1988), *aff'd*, 866 F.2d 431 (6th Cir. 1989). A miner's continuing refusal to work may become unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged task or condition. *Bush*, 5 FMSHRC at 998-99. Having dismissed McClanahan's complaint on the ground of lack of good-faith belief in the existence of a hazardous condition, the judge did not reach the issue of the adequacy of Wellmore's response to McClanahan's concerns.

At the September 22 meeting, the last time McClanahan expressed his safety concerns to Wellmore about the weight requirement, McClanahan was offered work at Wellmore No. 8, where truckers were paid by the tonnage hauled rather than by the hour. 17 FMSHRC at 1775, 1782. McClanahan testified he declined the offer because he would have to haul twice the GVW just to make a living, that the truckers there were "having all kinds of problems," and that the hazardous conditions would remain unchanged. Tr. 123. McClanahan testified that in late 1992, Clifford Hurley had informed him that since the company had begun paying truckers at Wellmore No. 8 by the ton, truckers were "more or less racing," and Hurley was afraid to visit the site because he might get run over. Tr. 155-56. McClanahan testified that truckers were being paid approximately 65 cents a ton and those truckers had informed him they were hauling 35 to 40 tons per trip to make a living. Tr. 156. Wellmore presented no evidence rebutting McClanahan's testimony.

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off-road, travel. Oral Arg. Tr. 51-52. Moreover, even if the Virginia weight limit had applied, it only would have permitted McClanahan to haul about 16.5 tons. 17 FMSHRC at 1778.

We conclude the record supports no other conclusion than that Wellmore's offer for alternate employment did not adequately quell McClanahan's safety concerns about the 24-ton weight requirement. Wellmore took no action to determine whether McClanahan's concerns regarding consistently hauling approximately 60 percent in excess of the truck's recommended GVW were reasonable. Rather, it ignored those concerns, essentially offering McClanahan the choice of hauling equal or greater weights than the 24-ton limit that he reasonably and in good faith believed to be unsafe, or transferring him to Wellmore No. 8 where McClanahan believed the working conditions were unsafe and where he would be taking an untenable reduction in pay. A conclusion that Wellmore adequately quelled McClanahan's fears under such circumstances would run counter to the remedial purposes of section 105(c) of the Mine Act. *See Secretary of Labor on behalf of Parker v. Metric Constructors, Inc.*, 766 F.2d 469, 472 (11th Cir. 1985), *aff'g* 6 FMSHRC 226 (February 1984) (discrimination found where operator offered discriminatees the choice of returning to hazardous conditions or going home).[11] Therefore, we conclude Wellmore failed to address McClanahan's concern about the weight requirement in a way that his fears reasonably should have been quelled. Accordingly, we hold that McClanahan's refusal to haul Wellmore's weight requirement was protected under the Act, and that Wellmore's termination of McClanahan violated section 105(c)(1) of the Act.[12]

4. Remedy

Wellmore is hereby ordered to immediately reinstate McClanahan to the position he held as a trucking contractor to the operator prior to his termination on September 22, 1994. By this decision we also advise the Secretary of Labor, who was not a party to this action, that we have ordered reinstatement and that, pursuant to section 103(a)(4) of the Mine Act, 30 U.S.C. § 813(a)(4), the Secretary has the authority and duty to ensure that "there is compliance with the . . . decision" rendered herein. We remand for calculation of the amount of back pay, interest, hearing expenses and reasonable attorney's fees to be awarded McClanahan.

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[11] An offer of reemployment conditioned upon a miner's willingness to work under dangerous conditions of which he has previously complained has been held to constitute a separately actionable violation of section 105(c) of the Mine Act. *Secretary of Labor on behalf of Keene v. Mullins*, 888 F.2d 1448 (D.C. Cir. 1989).

[12] Given our holding, we need not address whether McClanahan's slurry basin complaints lost their protected status under the Act because management adequately addressed them.

III.

Conclusion

For the foregoing reasons, we reverse the judge's conclusion that Wellmore did not discriminate against McClanahan in violation of section 105(c)(1) of the Mine Act. We order McClanahan's immediate reinstatement and remand for expeditious calculation of a monetary award consistent with this decision.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 3 1997

BUCK CREEK COAL, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. LAKE 95-26-R
	:	Citation No. 4054811; 10/3/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 95-64-R
	:	Citation No. 4260208; 10/7/94
	:	Docket No. LAKE 95-86-R
	:	Citation No. 4260198; 10/31/94
	:	Docket No. LAKE 95-96-R
	:	Citation No. 4260199; 11/7/94
	:	Docket No. LAKE 95-97-R
	:	Citation No. 4262573; 11/3/94
	:	Docket No. LAKE 95-98-R
	:	Citation No. 4262574; 11/3/94
	:	Docket No. LAKE 95-99-R
	:	Citation No. 4262575; 11/7/94
	:	Docket No. LAKE 95-100-R
	:	Citation No. 4262576; 11/8/94
	:	Docket No. LAKE 95-101-R
	:	Citation No. 4262577; 11/9/94
	:	Docket No. LAKE 95-102-R
	:	Citation No. 4262578; 11/9/94
	:	Docket No. LAKE 95-103-R
	:	Citation No. 4262579; 11/9/94
	:	Docket No. LAKE 95-104-R
	:	Citation No. 4262580; 11/10/94

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 95-158 A.C. No. 12-02033-03659
v.	:	
	:	Buck Creek Mine
BUCK CREEK COAL, INC., Respondent	:	
	:	
BUCK CREEK COAL, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. LAKE 94-702-R Citation No. 4386055; 9/1/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 95-115-R Citation No. 4259541; 11/14/94
	:	Docket No. LAKE 95-116-R Citation No. 4259542; 11/14/94
	:	Docket No. LAKE 95-117-R Citation No. 4259543; 11/15/94
	:	Docket No. LAKE 95-118-R Citation No. 4259544; 11/18/94
	:	Docket No. LAKE 95-136-R Citation No. 4259595; 11/21/94
	:	Docket No. LAKE 95-137-R Citation No. 4259596; 11/21/94
	:	Docket No. LAKE 95-139-R Citation No. 4259598; 11/21/94
	:	Docket No. LAKE 95-140-R Citation No. 4259599; 11/22/94
	:	Docket No. LAKE 95-143-R Citation No. 4259854; 11/23/94
	:	Docket No. LAKE 95-144-R Citation No. 4259485; 11/23/94
	:	Docket No. LAKE 95-145-R Citation No. 4259486; 11/23/94
	:	Docket No. LAKE 95-146-R Citation No. 4259487; 11/23/94
	:	

On May 1, 1996, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the Respondent. On June 24, counsel filed a Motion to Compel stating that Buck Creek had received the discovery requests on May 3, but had not responded to them. Consequently, the Secretary requested that the company be compelled to respond to the requests and that if the company did not respond to the requests a default decision be issued in the proceedings. Buck Creek did not respond to the Motion to Compel.

Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on July 29, 1996. Buck Creek was ordered to respond to the Secretary's discovery requests within 21 days of the date of the order. The company was further cautioned that "[f]ailure to respond will result in the issuance of an Order of Default, **without the issuance of a prior Order to Show Cause.**"

The order was sent by Certified Mail-Return Receipt Requested to Chuck Shultise, President of Buck Creek; Randall Hammond, Mine Superintendent; and Terry G. Farmer, Esq., the company's bankruptcy counsel. Return Receipt Cards have been received from all three indicating that the order was received on either July 31 or August 1.

On September 17, 1996, the Secretary filed a Motion for an Order of Default stating that as of that date the company had not responded to the discovery requests. Therefore, the Secretary requested that an order of default be issued. Buck Creek has not responded to the motion.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically stay proceedings before the Commission or foreclose an entry of judgment against the company. 11 U.S.C. § 362(b)(4); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (February 1995); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1530 (August 1990).

Commission Rule 59, 29 C.F.R. § 2700.59, states that "[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate . . . ." Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal."

	:	Docket No. LAKE 95-147-R
	:	Citation No. 4259488; 11/23/94
	:	
	:	Docket No. LAKE 95-148-R
	:	Citation No. 4259489; 11/28/94
	:	
	:	Docket No. LAKE 95-149-R
	:	Citation No. 4259490; 11/28/94
	:	
	:	Docket No. LAKE 95-151-R
	:	Citation No. 4259492; 11/28/94
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 95-173
Petitioner	:	A.C. No. 12-02033-03660
v.	:	
	:	Buck Creek Mine
BUCK CREEK COAL, INC.,	:	
Respondent	:	

DEFAULT DECISION

Before: Judge Hodgdon

These cases are before me on Notices of Contest filed by Buck Creek Coal, Inc., Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Buck Creek pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 29 violations of the Secretary's mandatory health and safety standards and seek penalties of $14,084.00. For the reasons set forth below, I find the company in default, affirm the orders and citations, and assess penalties of $14,084.00.

These cases are several in a long line of proceedings involving Buck Creek.[1] At various times during the past two years proceedings in these cases have been stayed pending the outcome of criminal actions brought by the U.S. Attorney against the company. The criminal cases were completed in the spring of this year when the company pleaded guilty to all 12 counts of the indictment against it.

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[1] Because of the number of cases involving Buck Creek, Docket No. LAKE 94-72 was designated as the master docket for filings in any of the cases. However, this decision identifies, in the caption, the specific docket numbers of the cases involved.

In view of the Respondent's consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the Respondent in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The Respondent's subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

ORDER

Based on the above, I find the Respondent, Buck Creek Coal, Inc., **IN DEFAULT** in these cases. Accordingly, Citation Nos. 4054811, 4260208, 4260198, 4260199, 4262573, 4262574, 4262575, 4262576, 4262577, 4262578, 4262579 and 4262580 in Docket Nos. LAKE 95-26-R, LAKE 95-64-R, LAKE 95-86-R, LAKE 95-96-R, LAKE 95-97-R, LAKE 95-98-R, LAKE 95-99-R, LAKE 95-100-R, LAKE 95-101-R, LAKE 95-102-R, LAKE 95-103-R, LAKE 95-104-R and LAKE 95-158; and Order No. 4386055 and Citation Nos. 4259541, 4259542, 4259543, 4259544, 4259595, 4259596, 4259598, 4259599, 4259854, 4259485, 4259486, 4259487, 4259488, 4259489, 4259490 and 4259492 in Docket Nos. LAKE 94-702-R, LAKE 95-115-R, LAKE 95-116-R, LAKE 95-117-R, LAKE 95-118-R, LAKE 95-136-R, LAKE 95-137-R, LAKE 95-139-R, LAKE 95-140-R, LAKE 95-143-R, LAKE 95-144-R, LAKE 95-145-R, LAKE 95-146-R, LAKE 95-147-R, LAKE 95-148-R, LAKE 95-149-R, LAKE 95-151-R and LAKE 95-173 are **AFFIRMED**. Buck Creek Coal Inc., or its successor,[2] is **ORDERED TO PAY** civil penalties of **$14,084.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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[2] According to a July 19, 1996, news release, issued by the United States Attorney for the Southern District of Indiana, the company is now known as Indiana Coal Company.

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604 (Certified Mail)

Mr. Chuck Shultise, President, Buck Creek Coal Co., Inc., RR5, Box 203, Sullivan, IN 47882 (Certified Mail)

Mr. Randall Hammond, Superintendent, Buck Creek Coal Co., Inc., 2156 S. County Rd., 50 West St., Sullivan, IN 47882 (Certified Mail)

Terry G. Farmer, Esq., Bamberger, Foreman, Oswald, & Hahn, 708 Hulman Bldg., P.O. Box 657, Evansville, IN 47704 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 3 1997

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 94-235-R
	:	Citation No. 3101220; 4/19/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Robinson Run No. 95 Mine
	:	Mine ID 46-01318

DECISION AFTER REMAND

This contest proceeding, arises under section 105 of the Federal Mine Safety and Health Act 1977 (the Act) (30 U.S.C. § 815) and involves the validity of a citation issued pursuant to section 104(a) of the Act. The citation alleges that Consolidation Coal Company (Consol) violated mandatory safety standard 30 C.F.R. § 75.342(b)(2) and that the violation was a significant and substantial contribution to a mine safety hazard. Consol maintains it did not violate the standard.

The matter was assigned to Commission Administrative Law Judge Arthur Amchan who scheduled an expedited hearing. At the hearing, the Secretary moved to amended the citation to one issued pursuant to section 104(d)(2) of the Act (30 U.S.C. § 814(d)(2)) and to add to the citation a finding of unwarrantable failure.

In a decision on the merits, (Consolidation Coal Company, 16 FMSHRC 1241 (June 1994)), Judge Amchan held that Consol did not violated section 75.342(b)(2). The standard requires methane monitors on longwall face equipment to give warning signals when methane concentrations reach 1.0 percent and that the warning signal devices be visible to persons who can deenergize the equipment. The judge concluded Consol's method of compliance provided "equivalent protection" to the standard (16 FMSHRC 1245). Accordingly, the judge vacated the citation.

The Secretary sought and was granted review. On review, the Commission held that the evidence established a clear violation of the standard (Consolidation Coal Company, 18 FMSHRC ___ (November 4, 1996)). Therefore, the Commission reinstated the citation and remanded the case for consideration of the Secretary's motion to modify the citation to a section 104(d)(2) order and for the assessment of a civil penalty 18 FMSHRC ___ (November 4, 1996) (Slip Op. 5). (On remand, the case was reassigned to me, as Judge Amchan had left the Commission.)

Subsequent to the Commission's decision, the parties entered into settlement negotiations. As a result, the Secretary has withdrawn his motion to modify the citation. Further, the Secretary and Consol have agreed that a civil penalty of $204 is appropriate for the violation of section 75.342(b)(2). Finally, the parties have agreed that the settlement in no way affects "[Consol's] right to appeal the Commissions's decision . . . once that decision becomes final" (Motion to Enter Order Assessing Civil Penalty 2).

Having considered the proposed settlement in light of the statutory civil penalty criteria and the purposes of the Act, I find it is reasonable and in the public interest. Accordingly, the motion is **GRANTED** and the settlement is **APPROVED**.

ORDER

Consol is **ORDERED** to pay a civil penalty of $204 for the violation of section 75.342(b)(2) as set forth in Citation No. 3101220, dated April 19, 1994. Payment shall be made to MSHA within 30 days of the date of this decision. Upon receipt of full payment, this proceeding is **DISMISSED**.

David Barbour
David Barbour
Administrative Law Judge

Distribution:

Elizabeth Chamberlin, Esq., CONSOL, Inc., Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241-1421 (Certified Mail)

Robert S. Wilson, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Suite 516, Ballston Towers No. 3, Arlington, VA 22203 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JAN 6 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 95-169 A.C. No. 46-07166-03536
v.	:	
	:	No. 1 Surface
ANCHOR MINING INCORPORATED, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 96-74 A.C. No. 46-07166-03539 A
v.	:	
	:	No. 1 Surface
JAMES SIMPKINS, Employed by ANCHOR MINING INCORPORATED, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 96-75 A.C. No. 46-07166-03540 A
v.	:	
	:	No. 1 Surface
JAMES TACKETT, Employed by ANCHOR MINING INCORPORATED, Respondent	:	

DECISIONS

Appearances: James B. Crawford, Esq., Office of the Solicitor, U.S. Dept. of Labor, Arlington, Virginia, for the Petitioner;
David J. Hardy, Esq., John T. Bonham, Esq., Jackson and Kelly, Charleston, West Virginia, for the Respondents.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondents pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Docket No. WEVA 95-169, concerns civil penalty proposals filed by the petitioner against the respondent Anchor Mining Inc., for alleged violations of mandatory safety standards 30 C.F.R. § 77.1006(a) and 77.1006(b). The petitioner seeks civil penalty assessments of $8,500, for the alleged violations.

Docket Nos. WEVA 96-74 and WEVA 96-75, concern civil penalty proposals filed by the petitioner against the named individual respondents pursuant to section 110(c) of the Act for allegedly "knowingly" authorizing, ordering, or carrying out an alleged violation of 30 C.F.R. 77.1607(g). The petitioner seeks civil penalty assessments of $2,000 against Mr. Simpkins, and $2,500 against Mr. Tackett for the alleged violations.

The respondents filed timely answers denying the alleged violations, and a consolidated hearing was held in Charleston, West Virginia. The parties filed posthearing briefs and I have considered their arguments in the course of my adjudication of these matters.

Issues

In Docket No. WEVA 95-169, the issues include (1) whether the corporate operator violated the cited mandatory safety standards; (2) whether the violations were "significant and substantial" (S&S), (3) whether the violations were the result of unwarrantable failures to comply with the cited standards; and (4) the appropriate civil penalties to be assessed, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

In the two individual section 110(c) cases, the principal issue is whether or not the named respondents knowingly authorized, ordered, or carried out the alleged violation, and if so, the appropriate civil penalties that should be assessed for the violation taking into account the relevant criteria found in section 110(i) of the Act. Also in issue is whether or not the violation was "S&S" and the result of an unwarrantable failure to comply with the requirements of the cited standard.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

2. Commission Rules, 20 C.F.R. § 2700.1 et seq.

3. Sections 110(a) and 110(c) of the Act. Section 110(a) provides for assessment of civil penalties against mine operators for violations of any mandatory safety or health standards, and section 110(c) provides as follows:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) (emphasis added).

An "agent" is defined in Section 3(e) of the Act (30 U.S.C. § 802(e)) to mean "any person charged with responsibility for the operation of all or part of a coal mine or other mine or the supervision of the miners in a coal mine or other mine."

Stipulations

The parties stipulated in relevant part to the following (Tr. 8-12):

1. The respondent is the operator of the subject mine and the operations of the mine are subject to the jurisdiction of the Mine Act.

2. The Commission and the presiding Judge have jurisdiction to hear and decide these matters.

3. The information contained in the proposed assessments (MSHA FORM 1000-179) is accurate.

4. MSHA's computer print-out concerning Anchor Mining's listing of prior violations (Exhibit G-1) is authentic and admissible, except that the proposed penalty assessments associated with the two instant section 110(c) cases should be excluded as part of the history.

5. Respondent James Simpkins served as an officer of Anchor Mining and as an "agent" as defined in section 3(e) of the Mine Act.

6. Respondent James Simpkins has the financial ability to pay the assessed penalty in this matter.

7. Respondent James Tackett served as an "agent" of Anchor Mining as that term is defined in Section 3(e) of the Mine Act, and, was employed as mine superintendent at the time of the violations.

8. The section 104(d)(1) and (d)(2) "chain" was procedurally correct and followed the sequence pursuant to the Act.

Docket No. WEVA 95-169

Section 104(d)(1) "S&S" Order No. 4001122, October 12, 1994, cites an alleged violation of 30 C.F.R. 77.1006(a), and the cited condition or practice is described as follows:

> It was revealed during an investigation of a non-fatal machinery accident that James G. Tackett, superintendent, performed work in a underdrain at the Dorothy Pit on September 15, 1994. Tackett exposed himself to the hazards of the unstable spoil on the sides of the underdrain. James Simpkins, President/Owner, was directing the construction of the underdrain.

Section 104(d)(1) "S&S" Order No. 4001124, October 12, 1994, cites an alleged violation of 30 C.F.R. 77.1006(b), and the cited condition or practice is described as follows:

> It was revealed during an investigation of a non-fatal machinery accident that James G. Tackett, superintendent, performed work in an underdrain at the Dorothy Pit on September 15, 1994, while an Hitachi Model EX 1000 excavator was positioned at the top of the underdrain which blocked Tackett's egress. The spoil on both sides of the underdrain was unstable. James Simpkins, President/Owner, was operating the excavator and directing the construction of the underdrain.

Respondents James Simpkins and James Tackett are both charged with a "knowing" violation of mandatory safety standard 30 C.F.R. 77.1607(g), as stated in a section 104(d)(1) "S&S" Citation No. 3745835, issued on September 19, 1994. The cited condition or practice states as follows:

> It was revealed during a non-fatal accident investigation that James Simpkins, mine operator, failed to insure that all persons were in the clear before moving a Hitachi EX 1000 excavator at the Dorothy Pit on September 15, 1994. Simpkins was placing rock into an underdrain when Dempy Cline, Dozer operator, stepped between the excavator and a spoil pile. Cline sustained serious injuries to his right leg which became pinned between the excavator and spoil. Simpkins knew that 3 persons were standing in close proximity to the excavator and said that he should have instructed them to move to a safe location.

MSHA's Testimony and Evidence

Ricky D. Adams, Environmental Engineer, employed by Cumberland River Coal Company, testified that his company holds the coal mine leases and that the respondent was mining coal as a contractor. Since Cumberland River was responsible for surface environmental compliance, Mr. Adams was at the mine on September 15, 1994, to observe the construction of a French drain. He confirmed that he took photographs to document that the drain was constructed properly to drain the water from the underground mine, and he explained what was taking place when the photographs were taken (Exhibits G-2 through G-11; Tr. 22-51).

Mr. Adams stated that the excavator was digging at the base of the highwall creating a drainage ditch running away from the highwall. The highwall was approximately 80 feet high above the edge of the ditch nearest the highwall, and the loose spoil materials excavated from the ditch were placed on either side of the ditch (Tr. 28). He confirmed that Mr. Tackett went into the ditch to spread a Typar covering material that had fallen off the excavator teeth over the rocks that were placed in the ditch (Tr. 33, 35).

Mr. Adams stated that the ditch was approximately six-foot deep near the edge of the excavator and at least six-foot deep or more at the end of the ditch near the spoil bank at the base of the highwall. After the initial layers of rock and Typar were

placed in the ditch, there was still depth to the ditch and spoil was piled on each side when he observed Mr. Tackett in the ditch (Tr. 39-40).

Mr. Adams stated that the Typar material had to be stretched from end-to-end in the drain. However, Mr. Tackett did not go further into the ditch than the location shown in photographic exhibits G-8 and G-9-A and "he just reached over and brought the Typar back to completely cover the section of ditch that they had constructed" (Tr. 42). He confirmed that Mr. Tackett was below the height of the spoil material that was on each side of the ditch (Tr. 45).

Mr. Adams marked a red circle on exhibit G-11, to show the vicinity of the area where he was standing for a good view of the drain. He stated that it was a flat area composed of the spoil material that was dug out of the ditch (Tr. 51). He confirmed that at one time he, Troy Perry, Dempy Cline, Mr. Simpkins, and Mr. Tackett were all standing at that location before the accident (Tr. 52-53).

Mr. Adams stated that Mr. Cline was standing to his left within "a step and a reach," and that they were 16 to 18 feet from the rear machine counterweight before it turned and swiveled. When the machine swiveled, he estimated that they were 5 or 6 feet from the rear counterweight. After standing with the group looking at the ditch, Mr. Simpkins commented "let's finish the job," and he and Mr. Tackett walked around the other side of the machine. The machine then started to turn and he noticed that Mr. Cline was in its path. He did not notice that Mr. Cline had moved from his prior position. Mr. Cline was looking toward the ditch and did not see the machine. Mr. Adams yelled at Mr. Cline and reached to grab him, but the machine trapped his leg and dragged him into the spoil pile under the machine (Tr. 54-59).

Mr. Adams stated that before Mr. Cline was struck, he (Adams) knew that Mr. Simpkins was going to get on the machine, but did not know the instant he was going to swivel the machine. Mr. Adams noticed no signal from Mr. Simpkins and Mr. Simpkins did not tell him that he was going to move the machine. Mr. Adams stated that Mr. Tackett gave no warning to him, and he noticed no warning to anyone else (Tr. 60).

Mr. Adams confirmed that when the accident occurred preparations were being made to construct and extend the next section of the ditch. He identified exhibit G-12 as a photograph of the counterweight that struck Mr. Cline (Tr. 63).

Mr. Adams stated that his safety training included spoil bank loose and unconsolidated materials. He saw nothing about Mr. Tackett's location in the drain ditch that would cause him any safety concern, and saw no dangerous situation involving Mr. Tackett (Tr. 69-70).

Mr. Adams was of the opinion that the accident was preventable if the drain had been constructed two or three weeks earlier before pushing any spoil off the highwall because little excavation work would have been required, and if Mr. Cline had been standing somewhere else behind him. However, he conceded that the state regulations did not prohibit constructing the drain the way the respondent was doing it, and he felt reasonably safe where he was standing, and Mr. Cline was near him (Tr. 72-76).

On cross-examination, Mr. Adams confirmed that he holds a mining engineering degree from West Virginia Tech and has had daily experiences with spoil banks and highwalls (Tr. 80). He stated that the drain design called for a six-foot deep ditch with rock in it four-feet high and four-feet wide. The drain area was five or six feet wide (Tr. 81-82).

Mr. Adams confirmed that photographic exhibit G-9-A shows where Mr. Tackett was standing in the ditch and he did not see him go further into the ditch when he was stretching the Typar over the rock. He stated that in the photograph the rock appears to be directly over Mr. Tackett, but that is not the way he recalled the situation when he took the picture. At that time he had no safety concerns that Mr. Tackett was in danger of being covered up, and the spoil banks on either side of Mr. Tackett were not in danger of giving way (Tr. 83). He characterized those spoil banks as "tapered out" to zero, and the ditch where Mr. Tackett was standing was probably six feet deep and four to six feet wide (Tr. 84). Mr. Adams stated that Mr. Tackett was in the ditch less than a minute and he did not recall that he had any difficulty in leaving (Tr. 85). He confirmed that he would have spoken out if he believed Mr. Tackett was in an unsafe position (Tr. 88).

Mr. Adams stated that the area in which he was standing prior to the accident was loose, unconsolidated spoil material near the toe of the spoil bank, and it consisted of ninety percent sandstone rock. The material never slipped while he was standing on it, and it showed no indication that it would slip (Tr. 89). The area was level and it was approximately "five-by-six, four-by-six, twenty-four feet square" (Tr. 90). The area was close to the elevation of the counterweight, and he observed that the counterweight had made a clear indentation in the spoil bank between the level area where he was standing and the excavator (Tr. 90-91).

Mr. Adams believed that everyone was in the clear while standing on the level area in question, including himself and Mr. Cline, and he perceived no hazard from that position. If he had, he would have relocated and informed the others to do so. He confirmed that Mr. Cline moved from the position that he had originally observed him in, and it was not clear when he was struck, but he did not observe him move (Tr. 93).

Mr. Adams stated that Mr. Tackett had to come "back behind, back toward the excavator" to get out of the ditch and he was sure that he "could get out on either side of the excavator" (Tr. 97). He observed no problem, did not believe that the excavator was blocking Mr. Tackett's egress, and saw nothing that prevented him from leaving the ditch area from where he was standing.

In response to further questions, Mr. Adams stated that although the rock shown in exhibit G-9-A was away from Mr. Tackett towards the highwall, it was part of the loose, unconsolidated spoil bank material above the spoil bank in front of Mr. Tackett, and if the spoil bank gave way, it could have affected him (Tr. 108). He further confirmed that anyone going further into the ditch to stretch the Typar all the way to the back of the ditch would be exposed to 20 feet of spoil bank on either side of the ditch (Tr. 119).

Mr. Adams stated that the Typar was spread by the bucket teeth of the excavator and that Mr. Tackett did not go into the ditch to spread it out against the farthest end of the ditch (Exhibit G-4, G-5). He characterized the installation of the Typar as a "sloppy job," and to spread the Typar "nice and tidy" would require someone to do it by hand (Tr. 127-130). However, he saw no one do this while he was there (Tr. 131).

With regard to the accident involving Mr. Cline, Mr. Adams stated that he knew the machine was going to move and was not surprised by the swinging of the counterweight, and he expected it (Tr. 133-134). Mr. Simpkins was operating the machine the entire time, and before it swiveled striking Mr. Cline he did not hear or see Mr. Simpkins give an audible signal or "eyeball" anyone standing at the rear (Tr. 137). He did not believe the machine had an alarm that sounded when the counterweight swiveled, and the area to the rear of the machine was not posted, flagged, or barricaded. He was not aware that industry practice or the regulations required an alarm or posting and he believed that he and the other individuals were at a safe distance where they were standing (Tr. 139).

Roy T. Perry, employed by the respondent as a security guard, testified that he was present at the time of the accident on September 15, 1994, and was taken to the site by Mr. Tackett

to help cut the Typar material that was installed in the drainage ditch. The Typar was placed on the bucket teeth of the excavator to be placed into the ditch, and Mr. Tackett, assisted by Mr. Cline, were hanging the Typar on the excavator. The fabric fell off, and he saw Mr. Tackett go into the ditch and hang the Typar up again. After this was done, he stood to the rear left side of the machine with Mr. Cline and Mr. Adams (Exhibit G-11; Tr. 147-148). Mr. Cline was looking into the ditch when the machine swung and struck him (Tr. 150). Mr. Perry further explained as follows at (Tr. 151-152):

> Q. And before the machine moved, did you have any signal or any type of warning from anyone that it was going to move?
>
> A. I wasn't – myself, I wasn't expecting it. I don't know whether there was any indication of it, you know, to let me know or somebody else know. I was interested in watching him work the material in the hole.
>
> Q. Do you recall anyone signaling you or notifying you at all that it was going to move?
>
> A. I didn't see no one. Like I said, I wasn't paying no attention. You know, I was just looking over in the hole.
>
> Q. How close were you to the counterweight, the rear part of the machine, as it went by you?
>
> A. Well, I thought I was far enough away, but after it went by me there, if I would have made one step, I would have probably been under it. I could have reached up and probably tipped it. That is why I looked off. When it went by me, I felt the wind of it and I jumped and looked back.
>
> Q. How many feet would you estimate that you were close to it?
>
> A. It's like I told the others, an arm's length. I could have reached out and tipped (sic) it.

Mr. Perry stated that Mr. Tackett explained the possible dangers to him before he started the work and told him to "watch the machine. Be careful," and warned him not to get too close.

When he observed Mr. Tackett in the ditch, Mr. Tackett was on the right side of the bucket hanging up the Typar (Tr. 153).

On cross-examination, Mr. Perry stated that Mr. Simpkins was operating the excavator when Mr. Cline was struck, and he described what occurred as follows at (Tr. 156):

> A. Like I said, he was standing out in front of me. I was looking at the hole and I could see him. He moved his foot like he was going to turn. And when he done that, that is when everything went into motion and I looked off. I never did see him put down his foot. The next time I looked back around, he was under the machine and Rick was trying to get him out.

Mr. Perry stated that he did not realize that he and Mr. Cline were close to the counterweight or in danger. He confirmed that he observed Mr. Tackett hook the Typar on the teeth of the excavator but saw no one in the ditch laying it out, and he did not observe Mr. Tackett straightening out the Typar (Tr. 159). In response to bench questions, Mr. Perry viewed Exhibit G-9-A, and confirmed that it shows Mr. Tackett in the ditch next to the excavator bucket straightening out the Typar. However, he indicated that he only observed Mr. Tackett hang the Typar on the excavator teeth (Tr. 161).

Dempy Cline, testified that he was unemployed, and that he worked for the respondent for eight years as an equipment operator. He confirmed that he was working on September 15, 1994, helping Mr. Simpkins in the construction of the ditch. Mr. Cline operated a D-9 dozer pushing dirt out of the way while Mr. Simpkins excavated dirt out of the ditch (Tr. 163-168). Mr. Simpkins was operating the excavator, and after holes were cut into the end of the Typar material, it was placed on the excavator teeth and Mr. Simpkins dropped it in the ditch and stretched it out with the machine (Tr. 168).

Mr. Cline stated that when the second piece of Typar was dropped in the ditch "it didn't go in there good," and Mr. Tackett went into the ditch to move and stretch the material. He stated that Mr. Tackett stretched the material toward the back of the ditch to the farthest distance from the edge of the excavator (Tr. 170).

Mr. Cline stated that he and Mr. Simpkins, Mr. Perry, and Mr. Adams were standing at the left rear of the excavator talking, and Mr. Tackett was in the ditch. Mr. Cline then moved to the area circled in red on exhibit G-11, with Mr. Perry and

Mr. Adams, and they were talking and looking up the hill where a strip job was working. Mr. Cline stated that he was looking up and to the left, with his back turned toward the excavator when "Rick Adams grabbed me by the shoulder and I sort of turned around. About that time, the machine hit me and knocked me down, cut my leg off" (Tr. 173).

Mr. Cline stated that he had no warning that the excavator was going to move and he believed that Mr. Simpkins should have known where he was positioned because he got on the machine on the left side where the cab ladder was located, and that was the same side where he (Cline) and the others were standing at the left rear of the machine. Mr. Cline stated that Mr. Tackett was not aware where he was standing (Tr. 174). He confirmed that he was standing on recently placed spoil (Tr. 175). Mr. Cline stated that he had no indication by the sound of the machine that it was going to turn in the direction where he was standing, and he did not expect that the counterweight would turn to the left before it hit him (Tr. 176, 179)).

Mr. Cline estimated that the height of the spoil bank on each side of the ditch was 10 to 15 feet at the excavator end of the ditch, and 40 feet at the end toward the highwall (Tr. 179). Based on his experience, Mr. Cline believed that a prudent distance for anyone to be close to the machine would be 50 feet away from the back of the machine. He was not 50 feet back because the excavator was idling, and he was not present when the counterweight was previously moving from right to left because he was operating the bulldozer (Tr. 183-184).

On cross-examination, Mr. Cline confirmed that he previously gave a taped interview to MSHA immediately following the accident, has given at least one deposition, and has filed a civil lawsuit against the respondent as a result of his injuries (Tr. 187-188).

Mr. Cline agreed that people around machinery have a responsibility to look out for its movements. He confirmed that he was at the work location for three and one-half hours prior to the accident and observed Mr. Simpkins swing the machine more than once (Tr. 190).

Mr. Cline stated that he heard no loud machine noises and observed no diesel smoke immediately prior to the accident and that he had his back to the machine. He did not believe that it was idle with no one in it (Tr. 197). He did not notice Mr. Simpkins leave the group when they were standing at the rear of the machine talking and Mr. Simpkins said nothing to him that he heard. He thought Mr. Simpkins "was still there hanging around" (Tr. 198). Conceding that it was possible that he took a step

into the path of the counterweight, Mr. Cline did not recall ever moving. He also stated that it was possible that he told MSHA that this is what occurred (Tr. 199).

Respondent's counsel stated that he was prepared to play the tape of Mr. Cline's MSHA interview statement that it was possible that he took a step to the side or forward at the same time the machine started to turn. MSHA's counsel stipulated that the tape would reflect that Mr. Cline did make the proffered statement (Tr. 200). Mr. Cline confirmed that he stated "it was possible," but he did not recall moving (Tr. 203).

Mr. Cline confirmed that he was standing when he was struck and that he did not slip or fall, and the area where he was standing did not give way (Tr. 205). He confirmed that he did not actually see Mr. Tackett positioning the Typar at the point farthest away from the excavator, and stated "that is what he was supposed to have done" (Tr. 206). Mr. Cline read a portion of his prior deposition on October 31, 1995, at page 73, stating that he did not know where he was standing prior to the time he was struck. He could not recall making the statement, but confirmed that he didn't know exactly where he was standing (Tr. 207-209).

Mr. Cline confirmed his prior deposition statement that since the excavator was not operating he didn't believe he had anything to worry about, and had he known it was operating he would have been back out of the way (Tr. 213). Further, since Mr. Simpkins was near him immediately before he was struck, Mr. Cline had no concern about the rotation of the machine because there was no operator on it (Tr. 215-216). The second phase of the operation would entail Mr. Simpkins tramming the machine back to continue placing rock and Typar in the ditch (Tr. 219). Mr. Cline confirmed that Mr. Tackett was on the right side of the machine prior to the accident and would not have known where he was positioned before he was struck (Tr. 222).

Roderick R. Wallace, West Virginia state surface mine inspector, testified that he has inspected the respondent's mining operation and investigated the accident that occurred on September 15, 1994. The investigation took place the following day and Mr. Simpkins and Mr. Tackett were present and he spoke with them. He explained what he covered and observed during his investigation, including the dimensions of the French drain and how it was constructed (Tr. 223-236).

Mr. Wallace stated that the loose unconsolidated soil material that was excavated out of the drain ditch constituted "a very high potential of this stuff slipping and sliding off of there," and he believed "it would be foolish to go into that hole

for any reason" (Tr. 236). He further stated that the spoil in and around the ditch was "all near vertical. It was all loose, unconsolidated material" (Tr. 236). Based on his interviews, he determined that the people who were present at the time of the accident were standing on loose, unconsolidated material that was on a slope, and they were in very close proximity to the swinging arc of the excavator. He confirmed that he interviewed Mr. Simpkins, Mr. Tackett, Mr. Adams, and Mr. Perry (Tr. 243). In his opinion, any location within the swinging radius of the excavator is a hazardous position, and standing on unconsolidated spoil will increase the potential for personal injury (Tr. 245, 248).

Mr. Wallace stated that no one told him that they were standing on unconsolidated material or were unsure of their footing. Nor did they tell him that they were slipping or sliding or thought that they were in a hazardous position (Tr. 245). He stated that Mr. Perry told him he was within an arm's length of the excavator (Tr. 246). Mr. Wallace stated that anyone within the swinging radius of the excavator boom could come in contact with the machine (Tr. 251).

Mr. Wallace stated that in an interview with Mr. Cline after his initial investigation Mr. Cline told him that Mr. Tackett went into the drain to spread the Typar, and Mr. Tackett later confirmed that he was in the ditch (Tr. 255). Mr. Wallace was of the opinion that it was not safe for anyone to be anywhere in the ditch because of the surrounding unconsolidated material (Tr. 256).

Mr. Wallace stated that in the event of a spoil bank collapse, anyone in the ditch would have to come out the front, and the excavator would partially block that area and make it "a little more difficult to get out" (Tr. 258). He confirmed that Mr. Simpkins indicated to him that if he had made sure everyone was in a safer location the accident would not have occurred (Tr. 260). Mr. Wallace stated that if he had observed the individuals standing in the location indicated, he would have cited them for being in close proximity to the moving machine (Tr. 260).

On cross-examination, Mr. Wallace confirmed that he has no mining engineering degrees, has no experience operating an excavator, and took no measurements concerning the width or depth of the ditch. He also confirmed that his accident report reflects that there is conflicting evidence concerning Mr. Cline's position in that Mr. Adams and Mr. Perry indicated that Mr. Cline stepped down into the excavator, and Mr. Cline did not recall that he had done so (Tr. 268). His report also reflects that "as the excavator began to move, Dempy Cline appeared to step onto a flat area where the counterweight had scruffed off on the spoil bank" (Tr. 269).

Mr. Wallace stated that no state personal action was taken against Mr. Tackett, Mr. Adams, Mr. Cline, or Mr. Perry, but charges were recommended against Mr. Simpkins for a knowing violation (Tr. 280-281). He confirmed that his report contains no statement that anyone was within the zone of danger on the swing of the excavator boom (Tr. 284). He further confirmed that he did not personally know whether Mr. Tackett had a means of egress and ingress to the left of the excavator, and it was possible that he could have exited on the right side or under the tracks of the machine (Tr. 285).

Mr. Wallace confirmed that he cited Mr. Simpkins "for operating a piece of equipment with people in such proximity as to be injured" (Tr. 287). He also cited the company for the same violation and for operating an excavator within four feet of a spoil pile, and the citations were issued as "unknowing" violations (Tr. 290).

William A. Blevins, MSHA supervisory mine inspector, testified that he went to the mine on September 16, 1994, in response to a notification by the respondent that a serious accident occurred the prior evening, and he discussed his investigation and what he observed, including a sketch of the accident scene, his accident report, and several photographs (Exhibits G-12, G-13, G-18; Tr. 291-311).

Mr. Blevins confirmed that he issued all of the citations in question. He issued section 104(d)(1) Citation No. 3745835, for a violation of section 77.1607(g), because of the respondent's failure to assure that everyone was clear of the excavator at the time of the accident (Exhibit G-14, Tr. 315). He based his "S&S" gravity conclusions on the fact that an accident occurred and Mr. Cline lost part of his leg. He based his "high negligence" finding on the fact that Mr. Simpkins was directing the work being performed and Mr. Tackett was in the area helping with the work (Tr. 317-318).

Mr. Blevins stated that he based his unwarrantable failure findings on the fact that Mr. Simpkins and Mr. Tackett were in the area directing the work force, had direct knowledge of the position of Mr. Adams, Mr. Perry, and Mr. Cline, and failed to exercise reasonable care to assure that they were in a safe location before moving the machine. He believed that this constituted aggravated conduct (Tr. 319). He further explained that he was told that before getting back on the machine, Mr. Simpkins glanced to the left to see where the three people were located and Mr. Tackett was to the right side of the machine. Mr. Simpkins signaled Mr. Tackett that he was getting back on the machine, but did not signal the other individuals (Tr. 320).

Mr. Blevins stated that the cited regulation requires the equipment operator to check around the machine to be sure that everyone is in the clear, or give a signal or use other means to assure that everyone is in the clear before moving the machine (Tr. 322). Mr. Blevins stated that during his interview, Mr. Simpkins told him that he saw the three individuals standing in close proximity to the excavator. He further stated that he asked Mr. Simpkins what he could have done to prevent the accident, and Mr. Simpkins stated "have the people move to a safe location" (Tr. 327).

With regard to section 104(d)(1) Order No. 4001122, citing a violation of section 77.1006(a) because Mr. Tackett entered the drain ditch and exposed himself to loose and unstable spoil, Mr. Blevins stated that he based it on statements made by Mr. Cline, Mr. Adams, and Mr. Tackett that Mr. Tackett had indeed entered the ditch (Exhibit G-15; Tr. 331-332). He based his "S&S" and gravity findings on the fact that the unstable materials would cover up a person in the ditch if work were to continue. He based his high negligence finding on superintendent Tackett's admission that he entered the ditch and exposed himself to a hazard. His unwarrantable failure finding was based on the following (Tr. 334):

> A. Well, when I went back to the mines and talked to Mr. Tackett about it, he then admitted that he had gone into the ditch and realized that it was unsafe for him to do so and said that he shouldn't have done it. And I don't remember his exact remarks, but he wouldn't ask anybody else to go in and do it, but he would do it himself, something of that nature.

Mr. Blevins confirmed that he issued section 104(d)(1) Order No. 4001124, citing a violation of section 77.1006(b), after concluding that Mr. Tackett's egress from the ditch where he had worked would be blocked by the manner in which the excavator was positioned (Exhibit G-16; Tr. 334). He believed the only access out of the ditch was up by the excavator tracks, but that mode of access "was just about blocked," although not completely. While it is possible that Mr. Tackett could have escaped under the machine and between the tracks, Mr. Blevins believed this would be unsafe (Tr. 336).

Mr. Blevins explained his gravity findings, and he stated that Mr. Tackett had a small area on each side of the machine that would possibly have allowed him through depending on where unstable spoil fell, but in the event of a spoil failure, "it would probably have been fatal," and he would have been covered up (Tr. 337). He based his unwarrantable failure finding

basically on the fact that Mr. Tackett was the superintendent and agent of the operator and placed himself in a dangerous position by getting in the ditch (Tr. 339).

On cross-examination, Mr. Blevins confirmed that he has worked at a surface strip mine but has never operated an excavator. He further confirmed that he made no measurements during his investigation, and that all of the distances he mentioned were estimates (Tr. 344). He stated that Mr. Tackett admitted that he was in the ditch but that the boom was not extended out over him (Tr. 346-347).

Mr. Blevins agreed that nothing in his investigation led him to believe that any of the witnesses thought they were in a dangerous situation prior to the accident. He confirmed that his accident report does not address the swing of the excavator boom in the "zone of danger" associated with the range of the boom (Tr. 349-350).

Mr. Blevins confirmed that his report reflects that Mr. Cline positioned himself in a location where he would be struck by the counterweight, and Mr. Blevins cold not recall that Mr. Adams believed that the material he was standing on was loose and unconsolidated. Mr. Blevins could not recall whether he asked Mr. Tackett or Mr. Simpkins whether they recognized the area where they were standing as hazardous, and he confirmed that Mr. Simpkins believed they were in a safe location (Tr. 352).

Mr. Blevins confirmed that the statement attributed to Mr. Simpkins as reflected on the face of the citation was made in response to "what could we do to prevent a reoccurrence," and that it was made after the accident (Tr. 354-355).

Mr. Blevins confirmed that Mr. Simpkins told him that he looked back to see the location of the three miners. Mr. Blevins stated that this was an unobstructed view to the left of the machine and he found no evidence to refute Mr. Simpkins' statement, or to refute his statement that he looked and made visual contact with Mr. Tackett on the right side of the machine (Tr. 357).

Mr. Blevins confirmed that Mr. Adams and Mr. Perry stated that Mr. Cline took a step in towards the machine, and these statements were made a day after the accident. Mr. Cline's interview was conducted approximately three weeks later afer Mr. Cline's attorney contacted him and advised him that Mr. Cline was available at his home for an interview (Tr. 357-359).

Mr. Blevins was of the opinion that the men were in an unsafe location even before the counterweight swung around, and

the fact that the miners did not recognize the hazard would not mitigate the respondent's negligence (Tr. 360). He believed that the hazard should have been obvious to the miners, but he did not consider Mr. Cline's movement as part of his unwarrantable failure finding, and he based his determination on their position prior to the accident (Tr. 361).

Mr. Blevins did not know whether or not Mr. Tackett could have gone around the right or left side of the machine when he was in the ditch, but stated it was possible. He also did not know if Mr. Tackett could have exited the ditch under the machine and between the tracks because the machine had been moved. The question of Mr. Tackett's ability to get himself in and out of the area was not addressed during his initial investigation interviews, but he obtained the information weeks later. He spoke to no eyewitnesses and issued the citation based on his judgment alone (Tr. 375-376).

Mr. Blevins stated that during his interviews of Mr. Perry, Mr. Adams, and Mr. Cline, they gave no indication that Mr. Simpkins warned or informed them that he was going to move the machine, and they stated that they did not know that Mr. Simpkins had gotten back into the machine (Tr. 380). Mr. Blevins observed that there was an indentation in the spoil where the accident occurred, and according to the statements of the miners they were standing within a few feet of the indentation. He concluded from this that they were too close to the machine (Tr. 382).

Dr. Kelvin K. Wu, PH.D., Chief, Mining Engineering Division, MSHA Pittsburgh Safety and Health Technology Center, was accepted as an expert in geotechnical matters, including ground control (Exhibit G-19; Tr. 12-21). He testified that he reviewed the accident report and gained further information concerning the respondent's mining operation through discussions with MSHA's counsel and Inspector Blevins, and also reviewed the photographic exhibits and equipment specifications for the Hitachi Model 1000 excavator. He also gave a deposition attended by respondent's counsel and has been present during the testimony in these proceedings (Tr. 30). Based on his review of the photographs and witness testimony, Dr. Wu was of the opinion that the ditch was not very wide and that the sloped sides of the ditch consisted of loose materials that "can fall in unpredictably anytime" (Tr. 37). He also believed that anyone standing at the end of the ditch closest to the excavator would be in a hazardous location because the sloped materials can slide and cover him up (Tr. 41).

Dr. Wu described the working parameters of the machine that was used in excavating and constructing the ditch (Tr. 48-53). He confirmed that the machine boom can make a complete 360 degree turn, with a resulting 45 foot radius. He agreed that the boom

may not swing completely around in a circle while excavating, but since it is capable of doing so, he was of the opinion that a location outside of the 45 foot boom swing would be a "safe location" for people to be in. He further believed that only those people necessary to the work being performed be allowed around the machine, and that in order to avoid an accident it was critical for the machine operator to make acknowledged eye contact with persons near the machine (Tr. 57-60).

Dr. Wu stated that depending on the prevailing conditions, and in an emergency, Mr. Tackett could have crawled out of the ditch under and through the openings of the undercarriage of the machine (Tr. 62-66). However, given the fact that the ditch area is sloped, a sudden slide of materials would make it very difficult to get out of the ditch (Tr. 66-67). Reviewing photographic exhibits G-9(a) and G-11, Dr. Wu believed that Mr. Tackett would be exposed to a hazard if he were positioned between the machine shovel bucket and the front of the machine, and in the event of a massive slide of loose material, the machine boom area would be covered up (Tr. 68-70). Dr. Wu believed that providing clearance on either side of the machine, or providing a wider area on either side of the ditch slopes, could have provided a means of egress for Mr. Tackett (Tr. 84-86).

Dr. Wu believed that the area outside the farthest reach of the machine would be a "safe zone." Although Mr. Simpkins may have made visual contact with the people standing behind the machine, he did not receive any acknowledgment (Tr. 72). Dr. Wu believed that the people standing behind the machine on loose materials as shown by the red circle on photographic exhibits G-2 and G-11, could have lost their footing while the machine was turning, and he was of the opinion that these hazardous conditions would be obvious to the equipment operator, and precautions should have been taken (Tr. 78, 81-82). He further stated as follows at (Tr. 90):

> Q. Would a reasonably prudent equipment operator, first of all, under these circumstances, have been aware that these miners, as testified to were in the counterweight area, were in an unsafe area?
>
> A. As I stated before, based on this specification, I can comfortably say there is a blind area or spot behind this piece of equipment the operator wouldn't see. So if he knows there is a certain blind spot and very close if he knows people are there, then special precaution should be taken.

Q. And from testimony as was stated earlier, there was testimony that Mr. Simpkins looked toward these people. And would a reasonably prudent equipment operator do that? Was that enough under the circumstances to - -

A. Under this circumstances, I would say no, because when the machine was faced to the highwall, the operator sitting in the cab, when he turns left, he can see those people. As I stated, you might misjudge the distance. And the major things happening here is miscommunication. Seems to me that testimony is no acknowledgment of those people receive his visual contact. When the machine swing to the right, then those people behind the counterweight is in the blind spot. He no longer can see them.

And at (Tr. 92):

Q. And in terms of the spoil bank conditions surrounding the ditch, would a reasonably prudent superintendent or someone in charge of the health and safety of the area of the mine permit someone to go into that ditch to work under those conditions?

A. If those people responsible for the operation have a knowledge of the hazardous conditions, then they probably would recognize it. If they do not, then probably not.

On cross examination, Dr. Wu acknowledged that he has never worked as a miner or operated an excavator (Tr. 97). He confirmed that his involvement in this case began in July 1996, and he has never visited the accident scene (Tr. 100). He agreed that no exact measurements were made with respect to the areas in and around the excavator, and after reviewing photographic exhibits G-2, G-9(A), G-10 and G-11, he agreed that they do not show a lack of clearance on the left or right of the machine tracks (Tr. 104-106). He confirmed that he was aware of no definite or clear testimony indicating the clearance between the left and right tracks where Mr. Tackett was moving the Typar material (Tr. 107-108). Dr. Wu was of the opinion that a minimum of 2 ½ feet of clearance on each side of the tracks would be sufficient clearances to meet the requirements of the regulation. In addition, a further safe practice would be to stabilize the side slopes in order to maintain the clearances, even though this is not required by the cited regulation (Tr. 116-118).

Reviewing photographic exhibit G-9(A), Dr. Wu described what he believed were loose materials around the area where Mr. Tackett is standing. He estimated that the machine boom is extended 25 feet from the front of the excavator track, and that Mr. Tackett is approximately 5 to 10 feet from the boom bucket teeth (Tr. 122-124). Dr. Wu could not speculate or predict where the rock that is circled in the photograph would go if it fell and rolled down the slope (Tr. 124-125).

Dr. Wu estimated from the photographs and testimony that the ditch was approximately 30 to 40 feet long, and from 0 to 30 feet deep. He further estimated that the ditch was 10 to 15 deep where Mr. Tackett was standing, and that he was standing within 25 feet of the end of the ditch (Tr. 131-135). He believed that a safe depth for Mr. Tackett to stand with loose material around him would be 4 ½ feet (Tr. 136).

Dr. Wu stated that an equipment operator has a duty to make sure he makes eye contact with a person in a hazardous area before he moves the equipment, and the person needs to acknowledge that he received the signal and must also be alert that he is in a hazardous area (Tr. 138-139). He agreed that when Mr. Simpkins looked left before swinging the machine, he could see the people and they were not in his blind spot. It could take two seconds for the machine to swing in the other direction, and someone could move to his blind spot and he would not have time to do anything once he starts the turn. Under this scenario, it is extremely important that the person acknowledge the operator's signal (Tr. 141). The operator sits on the left side of the machine and has a blind spot on the right side for anything below his visual line of sight (Tr. 142).

Dr. Wu was not aware of any MSHA policy guidelines or bulletins regarding an equipment operator's duty pursuant to sections 77.1006(a) and (b) (Tr. 143-144). Although he believed that Mr. Adams honestly believed he was standing on stable material when the accident occurred, Dr. Wu believed that Mr. Adams' belief was based on a lack of training. He would have expected Mr. Adams to understand that loose materials are unstable and that any disturbance can cause the materials to flow (Tr. 147). Dr. Wu acknowledged that there is no evidence that the area where Mr. Adams and the others were standing moved an inch or caused the accident, and the accident report reflects that Mr. Cline, for whatever reason, "got himself down in that indentation" (Tr. 148). Dr. Wu was unaware of any MSHA regulation that would have prevented the way the drain was constructed (Tr. 153).

Dr. Wu confirmed his deposition testimony that a slope such as the one at the ditch would generally be hazardous if it was

over six feet, or at the height of the individual standing in the ditch (Tr. 153-157). He also confirmed that he performed no calculations in formulating his opinion (Tr. 163).

In response to further questions, Dr. Wu stated that there would be no serious safety concern if Mr. Tackett were standing in the five or ten foot area at the end of the ditch coming out, but there would be a hazard if he were beyond that point in the ditch towards the highwall. However, if he were standing in the ditch where it was four feet deep, and the ditch slope bank was an additional four feet, this would be hazardous because of the presence of the loose materials (Tr. 165-166). He also believed that the individuals who were behind the excavator when it swung around were too close to the machine, and they were standing on loose, unconsolidated materials. Under these conditions, they were exposed to a hazard of slipping or loosing their footing while in close proximity to the machine (Tr. 167-168).

Respondent's Testimony and Evidence

James G. Tackett, mine superintendent, testified that he was serving in that capacity on the day of the accident, but he did not observe it take place, and did not observe Mr. Cline's actions immediately prior to the accident because the excavating machine was between them and blocked his view (Tr. 180).

Mr. Tackett stated that Mr. Simpkins called him and asked him to come to the area where the ditch was being constructed and he explained the work that was being performed, including preparing and installing the first layer of Typar material in the ditch. He stated that he never entered the ditch during the installation of the first layer because Mr. Simpkins used the excavator bucket to spread the Typar (Tr. 181-185). He stated that he and Mr. Cline and Mr. Perry then stood to the left side of the rear of the machine in a flat area approximately 10 feet wide and watched Mr. Simpkins loading rock into the ditch over the Typar. Everyone was standing 8 to 10 feet away from the machine at that time, and he confirmed that the counterweight of the machine was swinging around and digging into the soil bank (Exhibit G-11; Tr. 185-188).

Mr. Tackett believed that everyone was in the clear and in no danger while Mr. Simpkins was loading the rock into the ditch over the first layer of Typar. He also believed that the rock and dirt spoil materials in the area where they were standing "was good and stable there, because it was solid and there was no loose rock, everything was compact and I wasn't walking on no loose rock," and no one had any trouble with their footing (Tr. 191).

Mr. Tackett confirmed that he went into the ditch when the second layer of Typar was being spread over the rocks and it overlapped itself close to the front of the machine, and he looked to both sides and under the machine, checked the spoil on both sides, and determined that it would be safe to step onto the rock and spread the Typar. He believed he had at least three feet on each side of the machine as an escapeway in the event spoil materials came into the ditch (Tr. 195).

Mr. Tackett stated that the ditch was approximately two to three feet deep at the end closest to the excavator where he was standing in front of the machine bucket on the other side of the track. He was able to see around and out of the area while he was in that position (Tr. 196-197, Exhibit G-11). He believed he had access in and out of the ditch to the right and left, and could have gone out under the machine, and he estimated the tracks to be three to four feet high (Tr. 199).

Mr. Tackett stated that he was never in front of the machine bucket toward the highwall side of the ditch area and from what he observed he believed he was safe and would not have gone into the ditch if he thought he would be hit by a rock. He confirmed that he did not initially inform Inspector Blevins that he was in the ditch because "I didn't even think nothing about it two or three weeks later." He denied telling Mr. Blevins that he "should have known better" or should not have done it. He did not believe that it was unsafe for anyone else to go into the ditch, but stated "I wouldn't care to put either one of them men in there" (Tr. 201-203).

Mr. Tackett stated that Anchor Mining is presently doing reclamation work and is not mining coal, and when the reclamation is completed the company has no further contractual obligations to mine coal. He expects that Anchor Mining will close its operation and be out of business by October 1996, and he will probably be laid off and will have to look for a job. He expects to earn $50,000 in 1996, has savings accounts and a car payment of $520 a month. His wife is unemployed, and if he is laid off, he expects to receive $1,000 a month in unemployment. He owes $10,000 for his wife's 1994 automobile. He stated that if he were required to pay the proposed $2,000 assessment it would create a hardship for him and he would have to use some of the $1,900, he has saved for his 13 year old daughter's college fund (Tr. 206).

Mr. Tackett stated that he was approximately five feet ten inches tall and at the location where he was standing, he estimated that the ditch was three to four feet high, or "waist high" on each side of him (Tr. 207).

On cross-examination, Mr. Tackett could not recall stating in his deposition of July 16, 1996, that the ditch was "between five and ten feet or something like that" where he was standing (Tr. 209). He explained further that this statement referred to the height of the spoil bank on the side of the machine where he had been walking and standing and where the machine counterweight was rubbing the spoil (Tr. 214; Exhibit G-9-A).

Mr. Tackett estimated that there was three feet of spoil material on the edge of the ditch where he was standing and "plenty of spoil," approximately 30 to 40 feet, toward the highwall. However, he was not in that area (Tr. 215). When he stretched out the Typar at the point where it was overlapping he pulled it toward the back of the machine, and at no time did he stretch it back in the direction of the highwall (Tr. 216-218).

Mr. Tackett stated that he was never instructed to stretch the Typar along the entire length of the ditch as shown in Exhibit R-12, nor was he instructed to go into the ditch, and stated "I took that on myself to do that" (Tr. 221). He confirmed that he was aware of the spoil bank material on each side of the ditch as shown in exhibit G-9-A. He was also aware of the spoil bank at the highwall area, and knew that the spoil bank materials were loose and unconsolidated materials that were dug out from the ditch. He also knew that none of these materials were supported by any shoring, posts, or timbers (Tr. 224). Referring to exhibits G-7 and G-8, he stated that Mr. Simpkins stretched out the rest of the Typar with the machine bucket as shown in exhibit R-12 (Tr. 228-230). He confirmed that he was between the machine bucket and the machine when he stretched out the Typar (Tr. 235-236).

Mr. Tackett reiterated that he never stated to Mr. Blevins that he knew it was unsafe to go into the ditch, and he explained further as follows at (Tr. 238):

> I just got in the ditch. I observed both sides, looked carefully, seen if there was a way to get in and out of that ditch. I could have walked to either side of the machine, went under the machine. I chose to just step off the rock, onto the flat area.

Mr. Tackett stated that just before the accident he was standing to the left side of the machine with Mr. Perry, Mr. Cline, and Mr. Adams, and with the machine counterweight swinging, they were in the "danger zone." He stated that he observed that everybody was safe and away from the machine. He did not recall if Mr. Simpkins was there at that time, but he was not in the machine and "was probably off, on the ground" (Tr.

239-240). He received no communication from Mr. Simpkins at that time that he was going to move the machine, nor could he recall Mr. Simpkins tell him that he was going to do so (Tr. 241-242).

Mr. Tackett stated that after he left the area where the three individuals were standing he went to the right side of the machine and saw Mr. Simpkins in the operator's seat. Mr. Simpkins did not give him any signal. However, he signaled to Mr. Simpkins with his arm that he was in the clear and he knew that after spreading the Typar, Mr. Simpkins would move the machine (Tr. 247-248).

Mr. Tackett stated that he did not signal the people standing to the left side of the machine or try to warn Mr. Simpkins that they were there because he was on the right side of the machine and Mr. Simpkins "was aware" and "was over there with the people on the left side of the machine" (Tr. 250). He stated that Mr. Simpkins made eye contact with him, but he did not signal Mr. Simpkins to stop the machine to check the other side because "the last time I was on the other side of the machine, all the men were in the clear when I was over there with them" (Tr. 252).

In response to further questions, Mr. Tackett stated that the excavator dual diesel engines are noisy, and when the machine throttles up to swing around, it was very loud and everyone in the area could hear it. Mr. Tackett stated that he never had any concern that the three people standing to the left of the machine were not in the clear. While he was in that area everyone was safe and out of the swing of the machine. He stated that Mr. Cline was an experienced miner and had operated the excavator ninety percent of the time. Mr. Tackett stated that he advised Mr. Perry to stay away from the swing of the machine because he was inexperienced. Mr. Tackett reiterated that it would be difficult for him to live on his unemployment if he were laid off and that it would be "tough" for him to make ends meet if he had to pay the proposed penalty assessment (Tr. 263).

James Simpkins, testified that he is one of the mine owners and has been in business for 8 to 10 years. He confirmed that he was operating the excavator constructing the ditch in question on the day of the accident, and has operated excavators for 20 years. He considered himself to be an excellent operator and explained how the ditch was excavated and how he spread the Typar with the machine. (Tr. 265-274).

Mr. Simpkins stated that the rock shown in Exhibit G-9-A, that appears to be above Mr. Tackett's head was secure and nearly halfway up into the ditch and he tried to dig it out but could not move it (Tr. 277). He attempted to remove it because he was

concerned that materials might flow from under the rock into the ditch while he was digging at the bottom. He speculated that the rock was 5 to 10 feet in front of Mr. Tackett (Tr. 178).

Mr. Simpkins stated that he tested and checked the rocks and the sides of the ditch, and did not believe that there was a potential for Mr. Tackett to be covered up by any loose spoil where he was located. If Mr. Tackett had gone inby that area he would have exposed himself to some danger, but he did not do so (Tr. 279). Mr. Simpkins stated that the company has no assets, no prospects for future coal production, and "has been in the red for the last four years," and has no way of paying any assessments (Tr. 281).

Mr. Simpkins described what occurred prior to the accident. After Mr. Tackett stretched the Typar, he came out of the ditch and went to the right side of the machine and Mr. Adams, Mr. Cline, and Mr. Perry were in the area where they had been standing all day (Exhibits G-11). He estimated that they were 15 to 20 feet from where he was located and clearly out of the way of the swing of the machine counterweight (Tr. 283-285). He further explained at (Tr. 285-286):

> A. At that point in time, Tackett had flipped the Typar back over. The bucket was already turned down into the hole with the teeth down in the right direction. I simply made a couple of quick, short passes to stretch the Typar, looked to the left and right, revved the machine up and proceeded to swing the machine to the right, but could not, since I had raised the boom up, see Jim Tackett and I had to lean up and look forward to locate him.
>
> Having spotted Jim, knowing he was now in the clear, I proceeded to swing, and at that point, made a swing out of the hole with the machine, turned it around almost a ninety degree turn. And at that point in time, Troy Perry came running around the side of the machine, waving me down, and I knew something had happened.

Mr. Simpkins stated that after the last swing of the machine his work was finished and he planned to tram the machine out of the ditch. He stated that "I told the men that I was finished and I was going to tram the machine out of the hole," but up to that point, he gave Mr. Cline no indication that he would turn the machine around and tram out. Although he could not state for certain whether Mr. Cline heard him state that the work was finished, Mr. Simpkins stated "If he didn't, he should have" (Tr. 288).

Mr. Simpkins stated he "felt perfectly comfortable" with the three individuals standing on the left side of the machine, and he further explained at (Tr. 289-290):

> Q. Would you rather have had them in a different position?
>
> A. I liked having them where I could see them.
>
> Q. Why?
>
> A. Because I knew where they were. Had they been to my rear, all the time, then I would have had to swing around completely to have located them. And when they were standing off to my left - - that is why Rick had chosen that spot to take the pictures, so I could see him, and not gotten off on right side or behind me. He got on my left where there was clear visible contact between the two of us and I could always see where he was.
>
> Q. Did you have any reason - - did you have any indication at all that anyone was going to step into the path of the counterweight?
>
> A. No, I had no idea that Dempy was going to do that.
>
> Q. Did you have any reason to believe that Mr. Cline or anyone else out there was going to move - - that any one of those people on the left-hand side of your machine was going to move from the position that you last saw them in?
>
> A. No. They had been there for two or three hours in that position and they seemed to be quite content there.
>
> Q. Had they all been in that position?
>
> A. At times. Troy and Rick had been there most of the time and even, I think, at times, Tackett was there with them, and Dempy at different times.

Mr. Simpkins stated that the company paid the assessment for the violation that was issued for failure to make certain that people were in the clear because he had instructed his controller to promptly pay for all violations. He did not have time to stop the payment, and he would not have paid it (Tr. 291).

Mr. Simpkins confirmed that he made a statement to the MSHA inspectors during the accident investigation, but he could not recall the exact words, and indicated that "the only thing that could have been done was just not to have those people there, period." He stated that he had no control over what any of the people would do "because they could have walked up to the machine while I was busy with the equipment and had my back to it" (Tr. 292). He further stated that "he may have" acknowledged to the inspector that the people were not in the clear when he began to move the machine (Tr. 293). Mr. Simpkins stated that Mr. Cline was a close friend of his and worked for him for 8 years, and he "was heartbroken" and grief stricken over the accident, the first such incident at the mine (Tr. 293-294).

On cross-examination, Mr. Simpkins stated as follows at (Tr. 294-295).

> Q. All right, Mr. Simpkins, according to our transcription from the tape recording interview of you by Mr. Blevins, you were asked by him, as indicated by Mr. Bonham, what could be done to prevent this accident from happening. And the answer from the tape transcription is, "If I had, before I moved the machine, if I had moved everybody from the area and made sure they were back away completely, this accident would not have happened." Does that refresh your memory as to what you said?
>
> A. Yes. If you're reading from the transcript, then that is what I said, yes.
>
> * * * *
>
> Q. And you made mention to them that you were going to tram the machine out of there?
>
> A. Yes.
>
> Q. And you didn't mention to them, did you, that you were going to swing the counterweight to the left and swing the boom to the right, did you?
>
> A. It would have been necessary to have done that to have trammed the machine.

Mr. Simpkins confirmed that he did not exchange any signals with the people standing on the left side of the machine because "they were already in the clear and I could plainly see them" (Tr. 299). He believed they should have known he was going to

move the machine when he throttled it up because it would have been impossible for them not to hear the engines, and he acknowledged that the machine responds quickly and the counterweight turns in seconds (Tr. 302-303).

With regard to the rock near Mr. Tackett as shown in Exhibit G-9-A, Mr. Simpkins confirmed that it was secure, but that it was located in loose, unconsolidated material, and even at 8 feet away, it could have caved in and effected Mr. Tackett. However, he tried to move the rock and found it very secure (Tr. 310). He stated that the machine bucket is five feet wide and that the ditch was approximately ten feet wide and the reach of the bucket boom is 47 feet (Tr. 311).

Mr. Simpkins confirmed that the mine produced 1,000 tons of coal per day until mid-July 1996, and he sold it for $10 or $15 a ton. He stated that the company is owned by Pehem Industries, Inc., a parent company, and it has mined coal in 1995 and 1996 (Tr. 317-318). He confirmed that he also owns the cattle that are at the mine and is co-owner of Pehem Industries, the owner of Anchor Mining's stock (Tr. 319).

Dr. Wu was recalled, and stated as follows at (Tr. 323-324):

> A. I do believe as what Mr. Simpkins stated, that he did try to loosing the material and the rock is his concern. It should be a simple thing to do with this particular piece of equipment. And my concern is for loose materials, we're not only talking one piece of rock or one particular piece of rock when you try to move it and you're sure the thing will not come down.
>
> Basically, when we're talking dealing with loose material, he is talking overall the spoil bank. So there could be this piece of rock at the time was firm, but as time goes and the bottom, the material, starts getting loose and a big piece can come down anytime. So it's always important to slope back those banks, the spoil banks, to provide a safe working environment.

Findings and Conclusions

Docket No. WEVA 95-169. Fact of Violations.

Section 104(d)(1) "S&S" Order No. 4001122, October 12, 1994, 30 C.F.R. 77.1006(a)

Inspector Blevins cited Anchor Mining Company with a violation of mandatory safety standard 30 C.F.R. 77.1006(a) after

making a determination that Mr. Tackett went into the ditch that was under construction at the base of the highwall to smooth out a part of the Typar covering material that was over the rock that had been placed in the ditch. The cited section 77.1006(a), provides as follows:

> § 77.1006 Highwalls; men working.
> (a) Men, other than those necessary to correct unsafe conditions, shall not work near or under dangerous highwalls or banks.

Based on the evidence adduced with respect to this violation, I conclude and find that the construction of the drainage ditch in question was taking place near or under a dangerous highwall and spoil banks that were located on either side of the ditch and formed by the materials that either came off the highwall or were excavated from the ditch during construction and placed on either side of the ditch. Accordingly, the cited safety standard clearly applied to the work that was being performed on September 15, 1994, the day of the accident in question.

Mr. Tackett admitted that he went into the ditch to pull back and straighten out a piece of the Typar material, and this act on his part was confirmed by eye witnesses Adams, Cline, and Simpkins. I conclude and find that Mr. Tackett was in the ditch near and under the dangerous ditch spoil banks performing work and that his presence there was a clear violation of section 77.1006(a). Under the circumstances, the violation IS AFFIRMED.

Section 104(d)(1) "S&S" Order No. 4001124, October 12, 1994, 30 C.F.R. 77.1006(b).

Inspector Blevins cited Anchor Mining Company with a violation of 30 C.F.R. 77.1006(b), after concluding that the excavator being used to construct the drainage ditch on September 15, 1994, was positioned in such a way as to block Mr. Tackett's egress from the ditch which he had entered to perform the work that resulted in the issuance of the prior section 104(d)(1) "S&S" Order No. 4001122. Section 77.1006(b), provides as follows:

> § 77.1006 Highwalls; men working.
> * * * *
> (b) Except as provided in paragraph (c) of this section, men shall not work between equipment and the highwall or spoil bank where the equipment may hinder escape from falls or slides.

Photographic exhibits G-8 and G-9-A, clearly depict Mr. Tackett in the ditch pulling on the Typar material, and he is

positioned between the excavator and the highwall and adjacent ditch spoil banks that were on either side of him. Further, his location in the ditch was observed by several of the witnesses, and I conclude and find that Mr. Tackett presented no credible evidence to rebut the fact that he was in the ditch between the excavator and the highwall and spoil banks. The critical issue however, is whether or not the excavator would have hindered Mr. Tackett's escape from his location in the ditch in the event of a fall or slide of the spoil materials. Webster's New Collegiate Dictionary, defines "hinder"as follows at pgs. 536-537:

> to make slow or difficult the progress of; to delay, impede, or prevent action.

The burden of proof is on the petitioner to establish the violation by a preponderance of all of the credible and probative evidence presented in support of the charge described in the citation. I take note of the fact that although section 77.1006(b), prohibits an individual from working between equipment and a highwall or spoil bank where the equipment may hinder his escape from falls or slides, the citation issued by Inspector Blevins states that the excavator blocked Mr. Tackett's egress from the ditch. The word "block" is defined by Webster's New Collegiate Dictionary, as "to make unsuitable for passage by obstruction; to hinder the passage of;." I conclude and find that both words have essentially the same meaning and the fact that the citation states "blocked" rather than "hindered" is not critical to the charge.

Eyewitness mining engineer Adams, testified credibly that Mr. Tackett was in the ditch for less than a minute and he did not recall that Mr. Tackett experienced any difficulty in leaving after he pulled back the Typar (Tr. 85). Mr. Adams further believed that the excavator did not block Mr. Tackett's egress and he was certain that he could have exited the ditch on either side of the excavator (Tr. 97).

State mine inspector Wallace, who investigated the accident the following day, confirmed that he made no measurements of the width or depth or the ditch, and he was of the opinion that in the event of a collapse of the spoil bank anyone in the ditch would have to exit out of the front of the ditch and that the excavator would partially block the area and make it "a little more difficult to get out" (Tr. 258, 268). Mr. Wallace conceded that he had no personal knowledge as to whether Mr. Tackett had a means of egress or ingress to the left side of the excavator, and that it was possible that Mr. Tackett could have exited the ditch on the right side of the excavator or under the tracks (Tr. 285).

MSHA Inspector Blevins confirmed that he too made no measurements during the course of his accident investigation and

his report is confined to the accident itself and contains no information concerning this alleged violation. Indeed, Mr. Blevins admitted that Mr. Tackett's ability to get in and out of the ditch was not included as part of his accident investigation and that he spoke to none of the eyewitnesses about this violation at that time. He confirmed that he obtained information about this event "weeks later" and that the citation was based on his judgement alone (Tr. 375-376).

Mr. Blevins believed that the only access out of the ditch was by the excavator tracks that "was just about blocked," but not completely (Tr. 336). However, he also believed that assuming there was no spoil failure, there was an area on each side of the machine that would possibly have allowed Mr. Tackett to pass through (Tr. 337). He later testified that he had no knowledge as to whether or not Mr. Tackett could have exited the ditch around the right or left side of the excavator, but nonetheless believed this was possible (Tr. 367-368). I find Mr. Blevins's testimony in support of this particular violation to be rather equivocal, contradictory, and less than credible.

Mr. Tackett's credible and unrebutted testimony is that he had access in and out of the ditch to the left and right side of the excavator, as well as under the machine tracks, and that before going into the ditch he looked carefully to both sides and determined that there was a way to get in and out by walking to either side of the excavator or under the tracks (Tr. 199-238). His testimony is essentially corroborated by Dr. Wu, who, after viewing several photographic exhibits, agreed that they do not show a lack of clearance on the right and left sides of the excavator, and that Mr. Tackett could have crawled out of the ditch and through the undercarriage of the machine in an emergency (Tr. 66, 104-106).

Although Dr. Wu believed than a minimum of 2 ½ feet of clearance on each side of the machine would provide sufficient clearance to meet the requirements of section 77.1006(b), he agreed that no measurements were taken by anyone in connection with this violation, and as noted above, his own testimony lends support to Mr. Tackett's belief that he had sufficient clearance on either side of the machine, as well as under it, to leave the ditch unimpeded by the position of the machine.

After careful review and consideration of the evidence and testimony adduced with respect to this alleged violation, I conclude and find that the petitioner has not established a violation of section 77.1006(b), by a preponderance of the credible and probative evidence presented in this case. Under the circumstances, the violation and contested order ARE VACATED.

Fact of violation, Section 104(d)(1) "S&S" Citation No. 3745835, September 19, 1994, 30 C.F.R. 77.1607(g).

Mr. Tackett and Mr. Simpkins are charged individually pursuant to section 110(c) of the Act as agents of Anchor Mining Company with "knowingly authorizing, ordering, or carrying out" a violation of mandatory safety standard 30 C.F.R. 77.1607(g), which states as follows:

> § 77.1607 Loading and haulage equipment; operation.
>
> (g) Equipment operators shall be certain, by signal or other means, that all persons are clear before starting or moving equipment.

Respondent Anchor Mining Company did not contest section 104(d)(1) Citation No. 3745835, issued on September 19, 1994, for a violation of section 77.1607(g), and pursuant to section 105(a) of the Act, the uncontested violation and proposed civil penalty assessment became a final order of the Commission. Pursuant to the Commission's decision in Old Ben Coal Company, 7 FMSHRC 205, 209 (February 1985), such final orders reflect violations of the Act and the asserted violation contained in the citation is regarded as true.

Although Mr. Simpkins and his counsel stated that the $4,000 civil penalty assessed against Anchor Mining was paid (Tr. 291, 320), an MSHA computer print-out of the respondent's history of prior violations prepared on July 8, 1996, reflects that the penalty was not paid and that a delinquency letter was issued (Exhibit G-1). Further, at page 4 of his post-hearing brief, MSHA's counsel states that as of the filing of the brief on October 28, 1996, the penalty assessment of $4,000 has not been paid.

The respondent's suggestion that Mr. Cline caused the accident and violation by stepping in front of the excavator counterweight, thereby absolving Anchor Mining and its management from any responsibility or liability for the violation is rejected. It is well settled that mine operators are liable without regard to fault for violations of the Act. See: Secretary v. Fort Scott Fertilizer-Cullor, Inc., 17 FMSHRC 1112, 1115 (July 1995); Secretary v. Western Fuels-Utah, Inc., 10 FMSHRC 256 (March 1988). However, the absence of fault by the mine operator may mitigate its negligence and any civil penalty assessment for the violation.

In Austin Power, Inc., 9 FMSHRC 2015, 2018-2019 (December 1987), the Commission stated as follows:

> We hold that section 77.1607(g) requires the operator of equipment subject to the standard to be certain that all persons within the potential zone of danger are clear from reasonably foreseeable hazards resulting from the starting or moving of the equipment. * * *
>
> As contrasted with more detailed regulations, the requirement of section 77.1607(g) that "[e]quipment operators be certain . . . that all persons are clear before starting or moving equipment" is the kind of regulation made "simple and brief in order to be broadly adaptable to myriad circumstances." Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). Generally, the adequacy of an equipment operator's efforts to comply with section 77.1607(g) is evaluated in each case with reference to an objective test of what actions would have been taken by a reasonably prudent person familiar with the mining industry, relevant facts, and the protective purpose of the standard. See, e.g., United States Steel Corp., 6 FMSHRC 1908, 1910 (August 1984); United States Steel Corp., 5 FMSHRC 3, 5 (January 1983); Alabama By-Products, 4 FMSHRC 2128, 2129 (December 1982).

The critical issue here is whether or not Mr. Simpkins, who was operating the excavator, acted reasonably and prudently in making certain that Mr. Cline was clear of the machine when he put it in motion by swinging the boom to the right, causing the rear counterweight to swing to the left into Mr. Cline, causing serious injuries to his leg.

Mr. Adams, Mr. Perry, and Mr. Cline were standing together to the left rear of the machine shortly before Mr. Simpkins put it in motion. Mr. Adams testified that they were standing in a level area close to the elevation of the machine and he saw that the machine counterweight had made an indentation in the spoil bank between the area where they were standing and the excavator as it swung around in the course of the work that was taking place (Tr. 90-91).

Mr. Adams testified that he perceived no hazard to Mr. Cline where he was standing, and he felt "reasonably safe" where he (Adams) was standing, and that Mr. Cline was near him. However, he nonetheless believed that the accident was preventable, in part, if Mr. Cline had been standing somewhere else behind him (Tr. 72-76). Mr. Adams also indicated that he and Mr. Cline were 5 or 6 feet, or "a step and a reach" from the counterweight when it swiveled (Tr. 54-57).

Although Mr. Adams stated that he was not surprised by the swinging counterweight and expected it, he confirmed that he did not hear Mr. Simpkins give any audible signal or see him "eyeball" anyone before putting the machine in motion (Tr. 133, 137).

Mr. Perry and Mr. Cline testified credibly that they had no advance warning that Mr. Simpkins would put the machine in motion, and Mr. Perry observed no signal from Mr. Simpkins (Tr. 151-152). Mr. Perry further testified that he was "one step" and an "arm's length" away from the counterweight as it swung by him, and that he "felt the wind" as it passed him (Tr. 151-152).

Mr. Tackett testified that Mr. Cline, Mr. Perry, and Mr. Adams were standing 8 to 10 feet from the excavator on the level area to the rear left of the machine while Mr. Simpkins loaded rock into the ditch. Although they were in the "danger zone," Mr. Tackett believed the men were clear and in no danger at that time (Tr. 188, 190). He could not recall that Mr. Simpkins ever told him that he was going to move the machine and he received no communication from Mr. Simpkins that he was going to do so (Tr. 241-242).

Contrary to the testimony of Mr. Perry, Mr. Cline, and Mr. Tackett, Mr. Simpkins testified that he told them that he was going to tram the machine out of the area. With respect to Mr. Cline, Mr. Simpkins did not know if Mr. Cline heard him, and stated, "if he didn't, he should have" (Tr. 288). I find the testimony of Mr. Simpkins to be less than credible, and conclude that he did not inform Mr. Cline that he was going to move the machine before he put it in motion.

Mr. Simpkins' assertion that the machine was loud enough for Mr. Cline to hear it and realize that it was going to move is rejected. The cited standard requires the equipment operator to be certain "by signal or other means" that all persons are clear before moving the equipment. I reject as unreasonable any notion that revving up the engine is an acceptable means of warning anyone to stand clear of the machine, particularly since the machine boom can swing around in a matter of seconds (Tr. 302-303).

Mr. Simpkins acknowledged his prior statements to MSHA's inspector that the accident would not have happened if he had moved Mr. Cline and the other individuals from where they were standing to the rear left of the machine and made sure they were completely clear of the machine (Tr. 295). Mr. Simpkins also admitted that he did not exchange any signals with these individuals, and claimed he did not do so because he believed they were clear of the machine and he could see them (Tr. 299).

Mr. Simpkins' assertion that he was in complete compliance with section 77.1607(g), because he made certain that all men in the vicinity of the excavator were in the clear before he moved is rejected. The evidence establishes that Mr. Simpkins did not signal the men standing to the rear of the machine that he was going to move it and swing the counterweight around in their direction. He clearly violated that part of section 77.1607(g) that requires a signal by the equipment operator. The "other means" of compliance argued by Mr. Simpkins is that he visually observed the men standing to the rear of the machine, and based on his experience and judgment, concluded that they were clear of the machine counterweight (Tr. 284-285).

I conclude and find that the credible testimony of Mr. Cline, Mr. Perry, and Mr. Tackett establishes that they were not completely clear of the swing of the counterweight and were in the "danger zone" when Mr. Simpkins put the machine in motion. While it may be true that Mr. Cline may have stepped into the counterweight when it swung in his direction, the evidence strongly suggests that he did not step far before the machine contacted his leg, and reasonably supports a conclusion that he was not completely clear of the counterweight. The same can be said of Mr. Perry who was standing near Mr. Cline and testified that he could have reached out and touched the counterweight and heard the rush of air as it passed him.

I conclude and find that Mr. Simpkins acted less than a reasonably prudent mine operator when he failed to make sure that the three individuals who he observed standing to the rear of the excavator acknowledged the fact that he saw them and clearly understood that he was about to put the machine in motion and swing the counterweight in their direction. In the absence of a clearly communicated and acknowledged signal by Mr. Simpkins indicating that he was going to put the machine in motion, I conclude and find that his unilateral observation of the three men standing to the rear of the machine was an inadequate and unreasonable means of making certain that the men were in fact clear of the counterweight before putting the machine in motion. This is particularly true in this case where Mr. Simpkins claimed that his work with the machine was finished and that he intended to tram the machine out of the area. If this were the case, I can only conclude that the three individuals had no particular reason for being so close to the machine, and that it would have been a rather simple matter for Mr. Simpkins to make sure that the men were completely removed from the area before moving the machine. I believe that a reasonably prudent mine operator would have done so in these circumstances. I further believe that Mr. Simpkins's tacit admission that he should have removed all of the individuals from the area and made sure they were completely away from the machine supports these conclusions.

Based on the foregoing findings and conclusions, I conclude and find that the petitioner has established a violation of section 77.1607(g), by a preponderance of all of the credible evidence adduced in these proceedings.

The alleged "knowing" violation.

The Commission has defined the term "knowingly" as used in the statutory predecessor to section 110(c), in Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8 (January 1981), aff'd 669 F.2d 632 (6th Cir. 1982), cert denied, 461 U.S. 928 (1983), as follows:

> "Knowingly," as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence . . . . We believe this interpretation is consistent with both the statutory language and the remedial intent of the Coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. 3 FMSHRC 16.

In Secretary of Labor (MSHA) Bethenergy Mines, Inc., et al., 14 FMSHRC 1232 (August 1991), the Commission reaffirmed its prior holding in Kenny Richardson, supra, and stated that "the proper legal inquiry for purposes of determining liability under section 110(c) of the Act is whether the corporate agent knew or had reason to know" of a violative condition, and that the Secretary must prove only that the cited individual knowingly acted and not that he knowingly violated the law, 14 FMSHRC 1245. The Commission has also stated that a corporate agent in a position to protect employee safety acts knowingly when, based on the facts available to him, he knew or had reason to know that a violation would occur, but failed to take preventive steps. Roy Glenn, 6 FMSHRC 1583 (July 1984). Further, a "knowing" violation requires proof of aggravated conduct exceeding ordinary negligence. Wyoming Fuel Co., 16 FMSHRC 1618, 1630 (August 1994); Beth Energy Mines, Inc., 15 FMSHRC 1232, 1245 (August 1992).

WEVA 96-75, James Tackett.

The evidence establishes that as the mine superintendent, Mr. Tackett was an "agent" of Anchor Mining Company on the day of the violation, and he has stipulated that this was the case. The petitioner argues that Mr. Tackett and Mr. Simpkins were both supervisory personnel with a heightened standard of responsibility for the safety of the miners at the work site, and its theory of section 110(c) liability on the part of Mr. Tackett for the violation seems to be based on the fact that Mr. Tackett occupied a supervisory position and was present at the area where the violative conduct took place.

The evidence in this case establishes that Mr. Simpkins, and not Mr. Tackett, was supervising and directing the drain construction work on the day in question. Indeed, at page 19 of its post-hearing brief, the petitioner recognizes that this was the case. The evidence further establishes that Mr. Simpkins summoned Mr. Tackett to the ditch area to explain the work that was to be performed, and although Mr. Tackett was the mine superintendent, Mr. Simpkins was in charge and directed the work force which I find included Mr. Tackett. Under the circumstances, I conclude and find that Mr. Tackett had little, if any, supervisory authority or responsibility for the ditch construction work that was taking place on September 15, 1994, when the violation occurred.

The evidence further establishes that Mr. Simpkins was operating the excavator when the violation occurred and was aware of the fact that Mr. Adams, Mr. Cline, and Mr. Perry were standing to the rear of the machine. As the operator of the equipment, Mr. Simpkins was directly obligated under section 77.1607(g), to make sure that the individuals were clear of the machine, and I conclude and find that he, rather than Mr. Tackett, was in the best position to make sure that this was done.

Mr. Tackett testified credibly that before leaving the area where the three individuals were standing, he was satisfied that they were clear of the machine. Mr. Tackett then went to the other side of the machine, and he had no further visual contact with the individuals because the excavator blocked his view and he assumed that Mr. Simpkins had them in view because his operator's compartment was on the left side of the machine. Mr. Tackett's credible testimony that his view was blocked is corroborated by Mr. Cline, the injured miner, who was an experienced excavator operator who often operated the machine. Mr. Cline testified credibly that Mr. Tackett was not aware where he (Cline) was standing when Mr. Simpkins put the machine in motion. Further, Mr. Perry, who was inexperienced and normally

worked as a security guard, testified credibly that before the work was started, Mr. Tackett explained the hazards associated with the ditch work to him and warned him to be careful and not to get too close to the machine (Tr. 153).

In view of the foregoing, and in particular the fact that Mr. Tackett was not supervising the ditch work that was taking place and was located in an area where he could not see the three individuals standing behind the machine before Mr. Simpkins put it in motion, I cannot conclude that Mr. Tackett acted in a knowing and intentional manner, or engaged in any aggravated conduct. In short, I cannot conclude that the credible evidence adduced with respect to Mr. Tackett establishes that he knowingly authorized, ordered, or carried out a violation of section 77.1607(g), within the meaning of section 110(c) of the Act, and the applicable case law. Accordingly, the alleged violation charged to Mr. Tackett is VACATED, and the proposed civil penalty assessment filed against him IS DENIED and DISMISSED.

WEVA 96-74, James Simpkins

I agree with the petitioner' assertion that in his supervisory capacity as the part mine owner, Mr. Simpkins had a heightened duty and standard of care to insure compliance with the cited standard. As I found earlier, Mr. Simpkins was supervising the work, while at the same time operating the excavator, and he clearly gave no signal to the individuals behind the machine before placing it in motion. I have also concluded that Mr. Simpkins acted less than a reasonably prudent operator when he failed to make sure that the individuals who he observed to the rear of the machine either acknowledged the fact that he had seen them, or to remove them completely from the area near the machine.

As the supervisor in charge of the ditch construction, Mr. Simpkins was in the best position to provide protection for Mr. Cline and the other individuals standing to the rear of the excavator, and by failing to take reasonable steps to insure that they were not in close proximity to the machine when he put it in motion, causing the counterweight to swivel around and strike Mr. Cline, I conclude that he acted knowingly within the meaning of section 110(c) of the Act. Under the circumstances, I conclude and find that the petitioner has carried its burden of proving by a preponderance of the evidence that Mr. Simpkins knowingly carried out the cited violation. Accordingly, the violation IS AFFIRMED.

Significant and Substantial Violations

A "significant and substantial" (S&S) violation is described in section 104(d)(1) of the Act as a violation "of such nature as

could significantly and substantially contributed to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated S&S "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 reasonable serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 3-4 (January 1984), the Commission explained its interpretation of the term "S&S" as follows:

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

See also Austin Power, Inc. V. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

The question of whether any particular violation is S&S must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). Further, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, 3 FMSHRC 327, 329 (March 1985). Halfway, Incorporated, 8 FMSHRC 8 (January 1986).

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

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

The Commission reasserted its prior determinations that as part of his "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. Peabody Coal Company, 17 FMSHRC 508 (April 1995); Jim Walter Resources, Inc., 18 FMSHRC 508 (April 1996).

Section 104(d)(1) "S&S" Citation No. 3745835, September 19, 1994, C.F.R. 77.1607(g)

After careful consideration of all of the evidence and arguments presented with respect to this citation, I conclude and find that the petitioner has established by a preponderance of the credible evidence that this violation was significant and substantial (S&S).

I have concluded that a violation of section 77.1607(g) has been established. I further conclude and find that the failure of Mr. Simpkins to signal or take other reasonable precautions to insure that the three individuals who were located behind and close to the excavator when he put the machine in motion were clear of the machine, or to remove them from the area where they were standing, presented a discrete hazard of the machine counterweight striking one of the individuals when it was placed in motion and turned to the right by Mr. Simpkins.

I further conclude and find the failure to signal the individuals or otherwise insure that they were clear of the machine, or moved away from the area, presented a reasonable likelihood that the machine would come in contact with any individual in close proximity to the swinging machine counterweight. If this were to occur, I further conclude and find that the individual contacting the counterweight as it turned would reasonably likely suffer injuries of a reasonably serious nature. Indeed, in this case, that is precisely what happened, and Mr. Cline lost a leg as a result of the accident. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

Section 104(d)(1) "S&S" Order No. 4001122, October 12, 1994, 30 C.F.R. 77.1006(a)

After careful consideration of all of the evidence and arguments presented with respect to this violation, I conclude and find that the petitioner has established by a preponderance of the credible evidence that the violation was significant and substantial (S&S).

The respondent's assertion that Mr. Tackett went no further than the outside edge of the drain area to grasp and pull taut the Typar fabric is not well taken. While there is no evidence

to establish that Mr. Tackett ventured beyond the excavator bucket in the direction of the highwall while he was in the ditch, the fact remains that the testimony and evidence presented, including the photographs, establishes that he was in the ditch, and not simply "at the outside edge." Mr. Adams testified that the location where Mr. Tackett was standing was approximately 6 feet deep and 4 to 6 feet wide, and that Mr. Tackett was below the spoil bank material that was on each side of the ditch (Tr. 45, 84).

Mr. Tackett estimated that the height of the ditch where he was standing was 3 to 4 or 5 feet or "waist high" on each side of him, and he estimated that there was 3 feet of spoil material on the edge of the ditch where he was standing (Tr. 207, 215). Mr. Tackett confirmed that he was 5 feet, 10 inches tall, and I conclude and find that if the spoil bank where Mr. Tackett was standing in the ditch had given away, he could have been covered up by the materials.

The fact that Mr. Tackett may have been in the ditch for less than a minute, as testified to by Mr. Adams (Tr. 85), is not particularly relevant in my view. Accidents involving roof falls, falling rocks, and sliding loose unconsolidated spoils materials have been known to occur instantaneously and in less than a minute.

Although Mr. Simpkins indicated that the rock shown in photographic exhibit G-9-A, was secure, and that he also tested and checked the sides of the ditch and did not believe that Mr. Tackett could potentially be covered up by any loose spoil where he was located in the ditch, Mr. Simpkins further testified that the secured rock was located in loose, unconsolidated material, and even though it was 8 feet away from Mr. Tackett, if these materials caved in, it would have affected Mr. Tackett (Tr. 279-310). He also testified that he attempted to remove the rock because he was concerned that loose materials might flow from under the rock and into the ditch that was being constructed (Tr. 178).

Mr. Adams did not believe that the spoil banks on either side of the ditch at the location where Mr. Tackett was standing were in danger of giving way. However, he stated that the rock that Mr. Simpkins found to be secure was part of the loose, unconsolidated spoil bank material in front of where Mr. Tackett was located, and if it were to give way, the rock may have affected Mr. Tackett (Tr. 83, 108).

State mine inspector Wallace viewed the scene of the accident the next day and testified credibly that the spoil banks around the ditch consisted of loose, unconsolidated materials and were nearly vertical. He believed that these materials had a

very high potential of slipping or sliding and that that "it would be foolish" for anyone to go into the ditch for any reason (Tr. 236).

MSHA inspector Blevins, who also viewed the scene the day following the accident, testified credibly that he based his "S&S" finding on the fact that the unstable spoil materials would cover up anyone in the ditch if work were to continue (Tr. 216).

Dr. Wu, who did not view the scene, but was nonetheless competent to express his expert opinion, stated that standing in a 4 foot deep ditch adjacent to an additional 4 foot sloped spoil bank, would be hazardous to Mr. Tackett because of the presence of the loose spoil materials (Tr. 165-166).

I have concluded that a violation of section 77.1006(a), has been established. I further conclude and find that working near or under spoil banks consisting of loose unconsolidated soil and rock materials presents a discrete hazard of anyone working in such a location to be covered up or being hit in the event of a slide or fall of the materials into the ditch. If this were to occur in the normal course of mining activities, I find that it would be reasonably likely that the person in the ditch would suffer injuries of a reasonably serious nature. In this case, I conclude and find that Mr. Tackett placed himself in just such a position when he went into the ditch in close proximity to a slide or fall of materials hazard. Accordingly, I conclude and find that the violation was significant and substantial (S&S), and the inspector's finding in this regard IS AFFIRMED.

Unwarrantable Failure Violations

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held, in pertinent part, as follows at 295-96:

> In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it

means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

> We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

> We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect or an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged), 2514, 814 (1971) ("Webster's"'). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtless," and "inattention." Black's Law Dictionary 930-931 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

Section 104(d)(1) "S&S" Order No. 4001122, October 12, 1994, 30 C.F.R. 77.1006(a).

As noted earlier, Mr. Tackett did not deny that he went into the ditch, and he did so with the full knowledge of the presence of loose and unconsolidated materials on both sides of the spoil banks where he was standing. I conclude and find that he failed to exercise such care as a reasonable and prudent person would be expected to use, particularly someone in a responsible position like Mr. Tackett, who in his capacity as the mine superintendent, should set an example. I conclude and find that Mr. Tackett's conduct was aggravated and inexcusable, exceeded ordinary negligence, and constituted an unwarrantable failure on his part to comply with the requirements of the cited standard. Accordingly, the inspector's finding in this regard IS AFFIRMED.

Although Mr. Tackett asserted that he was not instructed to go into the ditch, and took it upon himself to do so, and exposed no one other than himself to a hazard, I nonetheless conclude and find that his conduct and negligence may be imputed to Anchor Mining Company, particularly in light of the fact that a high level agent of Anchor Mining (part-owner and officer), in the person of Mr. Simpkins, was supervising the work and obviously observed Mr. Tackett go into the ditch and did nothing to prevent him from doing so. See: NACCO Mining Co., 3 FMSHRC 848 (April 1981); Rochester & Pittsburgh Coal Company, 13 FMSHRC 189, 197 (February 1991).

Section 104(d)(1) "S&S" Citation No. 3745835, September 19, 1994, 30 C.F.R. 77.1607(g).

After careful review and consideration of all of the testimony and evidence presented with respect to this violation, and based on my findings and conclusions with respect to Mr. Simpkins' "knowing" violation of section 77.1607(g), which I incorporate herein by reference, and where I found that Mr. Simpkins acted in a knowing and intentional manner because he knew or had reason to know that Mr. Cline and the other individuals with him were standing dangerously close to the rear area of the excavator when he was about to put the machine in motion causing the counterweight to swing around and contact Mr. Cline's leg, I conclude and find that Mr. Simpkins's conduct was aggravated, exceeded ordinary negligence, and resulted in an unwarrantable failure to comply with the cited standard. Accordingly, the inspector's finding in this regard IS AFFIRMED.

I further conclude and find that the negligence of Mr. Simpkins, including his unwarrantable failure conduct in his supervisory capacity, is imputable to Anchor Mining Company, NACCO Mining Co., 3 FMSHRC 848, 849-850 (April 1981).

History of Prior Violations

With respect to Anchor Mining Company, a computer print-out for the period beginning on October 12, 1992, and ending October 11, 1994, reflects that it paid penalty assessments for 41 prior section 104(a) citations, none of which are for violations of the same standards at issue in these proceedings. Further, there is no evidence that Mr. Tackett or Mr. Simpkins have ever been previously charged pursuant to section 110(c) of the Act.

I have considered the compliance record of the respondents in these proceedings in assessing the penalties which I have affirmed and I conclude that any additional increases over those penalty assessments are not warranted.

Gravity

Based on my "S&S" findings and conclusions, I conclude and find that the violations that have been affirmed were serious violations.

Good Faith Compliance

I conclude and find that the violations were all abated in good faith by the respondents.

Negligence

Based on my unwarrantable failure findings, I conclude and find that the violations resulted from a high degree of negligence on the part of the respondents.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

I conclude and find that Anchor Mining Company was a small to medium sized mining operation at the time of the violations. Mr. Simpkins stipulated that he has the financial ability to pay the assessed penalty in his case, and I find no credible evidence to the contrary. With regard to the respondent Anchor Mining Company, I find no credible evidence to establish that it lacks the resources to pay the penalty assessment for the violation that I have affirmed.

Civil Penalty Assessments

On the basis of my foregoing findings and conclusions, and my de novo consideration of the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the following penalty assessments are reasonable and appropriate for the violations that have been affirmed in these proceedings:

Docket No. WEVA 95-169

Order No.	Date	30 C.F.R. Section	Assessment
4001122	10/12/94	77.1006(a)	$4,500

Docket No. WEVA 96-74

Citation No.	Date	30 C.F.R. Section	Assessment
3745835	09/19/94	77.1607(g)	$2,500

ORDER

IT IS ORDERED as follows:

1. Section 104(d)(1) "S&S" Order No. 4001122, October 12, 1994, 30 C.F.R. 77.1006(a), IS AFFIRMED.

2. Section 104(d)(1) "S&S" Order No. 4001124, October 12, 1994, 30 C.F.R. 77.1006(b), IS VACATED, and the proposed civil penalty assessment IS DENIED AND DISMISSED.

3. The section 110(c) charge that Respondent James Tackett violated mandatory safety standard 77.1607(g), as stated in section 104(d)(1) "S&S" Citation No. 3745835, issued on September 19, 1994, IS VACATED and DISMISSED, and the proposed civil penalty assessment IS DENIED and DISMISSED.

4. The section 110(c) charge that Respondent James Simpkins violated mandatory safety standard 77.1607(g), as stated in section 104(d)(1) "S&S" Citation No. 3745835, issued on September 19, 1994, IS AFFIRMED.

5. The respondents Anchor Mining Company and James Simpkins shall pay civil penalty assessments in the amounts shown above for the violations that have been affirmed. Payment is to be made to MSHA within thirty (30) days of the date of these decisions and order, and upon receipt of payment, these matters ARE DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 6 1997

SAMUEL J. McLAUGHLIN, employed By CONSOLIDATION COAL COMPANY Applicant	:	EQUAL ACCESS TO JUSTICE PROCEEDING
	:	Docket No. EAJ 96-5
v.	:	
	:	Formerly WEVA 94-366
SECRETARY OF LABOR, MINE SAFETY AND HEALTH by CONSOLIDATION COAL COMPANY, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Barbour

The Applicant, Samuel J. McLaughlin, through counsel has stated that he wishes to withdraw his application. In a response, Counsel for the Secretary recognizes the discretion of the administrative law judge to rule on McLaughlin's request. However, counsel suggests that any withdrawal be with prejudice, since McLaughlin "was given full opportunity to present his . . .claims and future reconsideration of these matters could unnecessarily expend judicial time and present an undue burden" (letter, December 20, 1996).

Commission Rule 11 provides that a party may withdraw a pleading at any stage of a proceeding with the approval of the judge (29 C.F.R. § 2700.11). There is no reason apparent why McLaughlin should not be permitted to withdraw.

Also, there is no reason apparent why the withdrawal should not be with prejudice. I agree with counsel that McLaughlin has had ample opportunity to establish his claims and that future reconsideration of the matter would be unwarranted and intrusive.

Accordingly, McLaughlin's application is **WITHDRAWN** and this proceeding is **DISMISSED WITH PREJUDICE**.

David F. Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 6 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. LAKE 94-72
	:	A.C. No. 12-02033-03606
v.	:	
	:	Docket No. LAKE 95-327
BUCK CREEK COAL, INC., Respondent	:	A.C. No. 12-02033-03676
	:	
	:	Docket No. LAKE 96-359
	:	A.C. No. 12-02033-03681
	:	
	:	Docket No. LAKE 96-10
	:	A.C. No. 12-02033-03690
	:	
	:	Docket No. LAKE 96-13
	:	A.C. No. 12-02033-03691
	:	
	:	Docket No. LAKE 96-20
	:	A.C. No. 12-02033-03693
	:	
	:	Buck Creek Mine

DEFAULT DECISION

Before: Judge Hodgdon

These cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Buck Creek Coal, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 40 violations of the Secretary's mandatory health and safety standards and seek penalties of $39,808.00. For the reasons set forth below, I find the company in default, affirm the orders and citations, and assess penalties of $39,808.00.

These cases are several in a long line of proceedings involving Buck Creek.[1] At various times during the past two years proceedings in these cases have been stayed pending the outcome of criminal actions brought by the U.S. Attorney against the company. The criminal cases were completed in the spring of this year when the company pleaded guilty to all 12 counts of the indictment against it.

On May 1, 1996, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the Respondent. On June 24, counsel filed a Motion to Compel stating that Buck Creek had received the discovery requests on May 3, but had not responded to them. Consequently, the Secretary requested that the company be compelled to respond to the requests and that if the company did not respond to the requests a default decision be issued in the proceedings. Buck Creek did not respond to the Motion to Compel.

Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on July 29, 1996. Buck Creek was ordered to respond to the Secretary's discovery requests within 21 days of the date of the order. The company was further cautioned that "[f]ailure to respond will result in the issuance of an Order of Default, **without the issuance of a prior Order to Show Cause.**"

The order was sent by Certified Mail-Return Receipt Requested to Chuck Shultise, President of Buck Creek; Randall Hammond, Mine Superintendent; and Terry G. Farmer, Esq., the company's bankruptcy counsel. Return Receipt Cards have been received from all three indicating that the order was received on either July 31 or August 1.

On September 17, 1996, the Secretary filed a Motion for an Order of Default stating that as of that date the company had not responded to the discovery requests. Therefore, the Secretary requested that an order of default be issued. Buck Creek has not responded to the motion.

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[1] Because of the number of cases involving Buck Creek, Docket No. LAKE 94-72 was designated as the master docket for filings in any of the cases. However, this decision identifies, in the caption, the specific docket numbers of the cases involved.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically stay proceedings before the Commission or foreclose an entry of judgment against the company. 11 U.S.C. § 362(b)(4); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (February 1995); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1530 (August 1990).

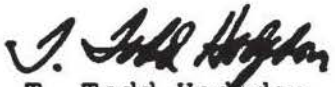
Commission Rule 59, 29 C.F.R. § 2700.59, states that "[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate . . . ." Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal."

In view of the Respondent's consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the Respondent in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The Respondent's subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

ORDER

Based on the above, I find the Respondent, Buck Creek Coal, Inc., **IN DEFAULT** in these cases. Accordingly, Order No. 3843667 and Citation Nos. 4054444, 3843807, 3843811, 4055896, 4055897, 3843784, 4055898 and 3843941 in Docket No. LAKE 94-72; Order No. 4262944 in Docket No. LAKE 95-327; Order No. 4262951 in Docket No. LAKE 95-359; Order Nos. 4050151 and 4050152 in Docket No. LAKE 96-10; Order Nos. 4050155, 4050156, 4050157, 4050158 and 4049744 and Citation Nos. 4262986, 4262994, 4049748, 4049749, 4049750, 4049754, 4049755, 4050241, 4050242, 4050243, 4050244, 4050246, 4049961 and 4049962 in Docket No. LAKE 96-13; and Order Nos. 4049527, 4049529 and 4050094 and Citation Nos. 4050253, 4050254, 4050255, 4050256 and 4050259 in Docket No. LAKE 96-20

are **AFFIRMED**. Buck Creek Coal Inc., or its successor,[2] is **ORDERED TO PAY** civil penalties of **$39,808.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.



T. Todd Hodgdon
Administrative Law Judge

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[2] According to a July 19, 1996, news release, issued by the United States Attorney for the Southern District of Indiana, the company is now known as Indiana Coal Company.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
Washington, D.C. 20006-3868

January 7, 1997

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. SE 96-355-M
Petitioner	:	A. C. No. 54-00333-05510
v.	:	
ARENAS MATILDE INCORPORATED,	:	Arenas Matilde
Respondent	:	

ORDER DENYING MOTION TO WITHDRAW
DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Secretary of Labor against Arenas Matilde Incorporated under section 105(d) of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 815(d).

One violation is involved in this case. The originally assessed penalty was $119. On October 25, 1996, the Solicitor and the operator's attorney filed a joint motion seeking approval of a settlement in the amount of $70. To support their request they advised that the operator was small in size and the violation was promptly abated. The motion was signed by both the Solicitor and the operator's attorney.

The motion is well taken. Section 110(i) of the Act, 30 U.S.C. § 820(i), sets forth six factors that must be taken into account in determining the appropriate amount of penalty. The motion identifies two of the relevant factors in explaining why a reduction from the original assessment is warranted. The motion also provides the basis for me to determine that the recommended settlement is a proper amount under all the criteria specified in section 110(i). The motion is therefore, entitled to approval.

However, on December 16, 1996, the Commission received a copy of a letter dated December 13, 1996, from operator's counsel to the Solicitor. Operator's counsel requested that all settlement proceedings be stopped unless it was understood that the

Mine Safety and Health Administration had no jurisdiction in the future. On December 26, 1996, the operator filed a motion to clarify or withdraw the settlement. By letter dated December 31, 1996, the Solicitor opposed the operator's request to withdraw the settlement and stated that the settlement represented a binding agreement of the parties.

It is well established that settlements are favored as a way of avoiding protracted and expensive litigation. Core-Vent Corp. v. Implant Innovations, Inc., 53 F.3d 1252, 1259 (Fed Cir. 1995). In this case there is no question that the terms of the settlement were understood and accepted by both parties. Also, it is undisputed that counsel for both sides were authorized to enter into the settlement on behalf of their clients. In Re Artha Management, Inc., 91 F.3d 326, 328-329 (2nd Cir. 1996); U.S. v. International Broth. Of Teamsters, 986 F.2d 15, 19-20 (2nd Cir. 1993). All that appears is that some time after entering into the settlement, the operator decided to challenge the jurisdiction of the Mine Safety and Health Administration.[1] However, the settlement into which the operator freely and knowingly entered is binding. Wilson v. Wilson, 46 F.3d 660, 667 (7th Cir. 1995). The Commission has recognized that settlement is an integral part of dispute resolution under the Mine Act. Kathleen I. Tarmann v. International Salt Company, 12 FMSHRC 1, 2 (January 1990). A settlement agreement may be reopened only on the grounds of mutual mistake or fraud. A unilateral mistake is not sufficient to allow the mistaken party to avoid the effect of an otherwise valid settlement agreement. UMWA v. Utah Power and Light Company, 12 FMSHRC 1548, 1555 (August 1990).

The operator is free to raise jurisdictional questions with respect to future citations.

Accordingly, it is ORDERED that the request to withdraw settlement be DENIED.

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[1] A previous jurisdictional challenge by this operator was rejected and no appeal was taken. Arenas Matilde Incorporated, 15 FMSHRC 2304, 2309-2311 (November 1993).

It is further ORDERED that the settlement motion be APPROVED and that the operator PAY $70 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JAN 7 1997

SECRETARY OF LABOR,	:	DICRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 93-339-D
on behalf of PERRY PODDEY,	:	MSHA Case No. MORG CD 93-01
Complainant	:	
	:	Coal Bank No. 12
v.	:	Mine ID No. 46-07062
	:	
TANGLEWOOD ENERGY, INC.,	:	
Respondent	:	

REMAND DECISION
and
ORDER

Before: Judge Koutras

Statement of the Case

This case concerns a decision of November 29, 1993, by former Commission Judge Arthur Amchan, concluding that the respondent violated section 105(c) of the Mine Act in discharging the complainant Perry Poddey on January 6, 1993, and assessing a civil penalty of $100 against the respondent for the violation, 15 FMSHRC 2401 (November 1993), and a subsequent decision of January 25, 1994, awarding damages and other relief to Mr. Poddey, 16 FMSHRC 176 (January 1994).

Judge Amchan's damages decision reflects that the parties stipulated to the damages amount due Mr. Poddey, and the judge stated as follows in this regard at 16 FMSHRC 176:

> * * * * Pursuant to this stipulation, Respondent is hereby ordered to pay Mr. Poddey $9,094.38. This figure represents the back wages due Mr. Poddey from January 7, 1993, through May 17, 1993 minus $4,000 received in unemployment compensation benefits from the state of West Virginia. It also includes interest calculated at the short-term federal interest rate on all net backpay earnings (gross backpay minus unemployment insurance benefits) through the end of calendar year 1993, payment for Mr. Poddey's travel expenses related to this case, and compensation

for one day of work missed to attend the hearing in this matter.

The Secretary filed an appeal of Judge Amchan's decision, and the issues on appeal included Judge Amchan's civil penalty assessment of $100 for the violation, a "significant reduction of the $2,500 to $3,000 penalty proposed by the Secretary," and his reduction of Mr. Poddey's backpay award by the amount of unemployment compensation he had received.

On August 5, 1996, the Commission issued its decision reversing Judge Amchan's deduction of unemployment compensation from Mr. Poddey's backpay award, and vacating his $100 penalty assessment, 18 FMSHRC 1315, 1326 (August 1996). The matter was remanded for a penalty assessment with further findings on the respondent's history of prior violations. The case was reassigned to me for further adjudication.

The parties were afforded an opportunity to further resolve this matter in accordance with the Commission's remand, and in response to my remand order of October 29, 1996, the petitioner advised me by letter dated January 2, 1997, that the parties have reached a dispositive agreement of the case. The agreement is as follows:

> The parties have agreed that $1,000.00, is an appropriate penalty, given the determinations made by the Federal Mine Safety and Health Review Commission concerning negligence, gravity, and the operator's history of previous violations.
>
> In addition, the parties agree that, pursuant to the Commission's ruling, the $4,000.00, received by Perry Poddey as unemployment compensation should not be deducted from his back pay award, and that additional interest is due on the unpaid portion of the back pay award from the date of Judge Amchan's Decision and Order to the present.

Order

In view of the foregoing, IT IS ORDERED as follows:

1). The respondent shall pay a civil penalty assessment of $1,000, for its violation of section 105(c) of the Act. Payment is to be made to MSHA

within thirty (30) days of the date of this decision and order.

2). In addition to the $9,094.38, damage award that the respondent was ordered to pay by Judge Amchan in his January 25, 1994, Decision on Damages, 16 FMSHRC 176 (January 1994), the respondent shall pay to the complainant Perry Poddey, the sum of $4,000, received in unemployment compensation benefits from the state of West Virginia, and previously deducted from his back pay award, with interest from the date of Judge Amchan's Decision and Order of November 29, 1993, to the present, 15 FMSHRC 2401, 2416 (November 1993). Interest should be computed in accordance with the short-term Federal rate applicable to the underpayment of taxes. Clinchfield Coal Co., 10 FMSHRC 1493 (November 1988).

Payment shall be made to the Complainant Perry Poddey within thirty (30) days of this Remand Decision and Order.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JAN 8 1997

BUCK CREEK COAL, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. LAKE 94-255-R
	:	Citation No. 3862187; 6/1/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 94-257-R
	:	Citation No. 3862188; 6/1/94
	:	Docket No. LAKE 94-268-R
	:	Citation No. 4056453; 5/31/94
	:	Docket No. LAKE 94-295-R
	:	Citation No. 4259841; 5/28/94
	:	Docket No. LAKE 94-296-R
	:	Citation No. 4259842; 5/28/94
	:	Docket No. LAKE 94-297-R
	:	Citation No. 4259843; 5/28/94
	:	Docket No. LAKE 94-298-R
	:	Citation No. 4259845; 5/28/94
	:	Docket No. LAKE 94-377-R
	:	Citation No. 4262302; 5/20/94
	:	Docket No. LAKE 94-381-R
	:	Citation No. 4262306; 5/20/94
	:	Docket No. LAKE 94-392-R
	:	Citation No. 4262318; 5/31/94
	:	Docket No. LAKE 94-393-R
	:	Citation No. 4262319; 5/31/94
	:	Docket No. LAKE 94-409-R
	:	Citation No. 4262370; 5/23/94

: Docket No. LAKE 94-410-R
: Citation No. 4262371; 5/23/94
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: Citation No. 4262373; 5/23/94
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: Citation No. 4262124; 6/11/94
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: Citation No. 4262126; 6/13/94
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: Docket No. LAKE 94-703-R
: Citation No. 3844461; 8/18/94
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: Docket No. LAKE 94-717-R
: Citation No. 4386056; 9/6/94
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: Docket No. LAKE 95-141-R
: Citation No. 4259852; 11/22/94
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: Docket No. LAKE 95-153-R
: Citation No. 9941923; 11/29/94

DEFAULT DECISION

Before: Judge Hodgdon

These cases are before me on Notices of Contest filed by Buck Creek Coal, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. With the exception of Docket Nos. LAKE 95-63-R, LAKE 95-65-R and LAKE 95-66-R, all of the notices pertain to violations for which either no civil penalty has been assessed or Buck Creek has not contested the penalty proposed. For the reasons set forth below, I find the company in default, affirm the orders and citations, and dismiss the Notices of Contest.

These cases are several in a long line of proceedings involving Buck Creek.[1] At various times during the past two years proceedings in these cases have been stayed pending the outcome of criminal actions brought by the U.S. Attorney against the company. The criminal cases were completed in the spring of this year when the company pleaded guilty to all 12 counts of the indictment against it.

On May 1, 1996, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the Respondent. On June 24, counsel filed a Motion to Compel stating that Buck Creek had received the discovery requests on May 3, but had not responded to them. Consequently, the Secretary requested that the company be compelled to respond to the requests and that if the company did not respond to the requests a default decision be issued in the proceedings. Buck Creek did not respond to the Motion to Compel.

Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on July 29, 1996. Buck Creek was ordered to respond to the Secretary's discovery requests within 21 days of the date of the order. The company was further cautioned that "[f]ailure to respond will result in the issuance of an Order of Default, **without the issuance of a prior Order to Show Cause.**"

The order was sent by Certified Mail-Return Receipt Requested to Chuck Shultise, President of Buck Creek; Randall Hammond, Mine Superintendent; and Terry G. Farmer, Esq., the company's bankruptcy counsel. Return Receipt Cards have been received from all three indicating that the order was received on either July 31 or August 1.

On September 17, 1996, the Secretary filed a Motion for an Order of Default stating that as of that date the company had not responded to the discovery requests. Therefore, the Secretary requested that an order of default be issued. Buck Creek has not responded to the motion.

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[1] Because of the number of cases involving Buck Creek, Docket No. LAKE 94-72 was designated as the master docket for filings in any of the cases. However, this decision identifies, in the caption, the specific docket numbers of the cases involved.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically stay proceedings before the Commission or foreclose an entry of judgment against the company. 11 U.S.C. § 362(b)(4); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (February 1995); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1530 (August 1990).

Commission Rule 59, 29 C.F.R. § 2700.59, states that "[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate . . . ." Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal."

In view of the Respondent's consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the Respondent in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The Respondent's subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

ORDER

Based on the above, I find the Respondent, Buck Creek Coal, Inc., **IN DEFAULT** in these cases. Accordingly, Citation No. 3862187 in Docket No. LAKE 94-255-R, Citation No. 3862188 in Docket No. LAKE 94-257-R, Citation No. 4056453 in Docket No. LAKE 94-268-R, Citation No. 4259841 in Docket No. LAKE 94-295-R, Citation No. 4259842 in Docket No. LAKE 94-296-R, Citation No. 4259843 in Docket No. LAKE 94-297-R, Citation No. 4259845 in Docket No. LAKE 94-298-R, Citation No. 4262302 in Docket No. LAKE 94-377-R, Order No. 4262306 in Docket No. LAKE 94-381-R, Citation No. 4262318 in Docket No. LAKE 94-392-R, Citation No. 4262319 in Docket No. LAKE 94-393-R, Citation No. 4262370 in Docket No. LAKE 94-409-R, Citation No. 4262371 in Docket No. LAKE 94-410-R, Order No. 4262373 in Docket No. LAKE 94-411-R, Citation No. 4262124 in Docket No. LAKE 94-452-R, Citation No. 4262126 in Docket No. LAKE 94-461-R, Citation No. 4261555 in Docket No. LAKE 94-467-R, Citation No. 4261556 in Docket No. LAKE 94-468-R, Citation No.

4261557 in Docket No. LAKE 94-469-R, Citation No. 4261558 in Docket No. LAKE 94-470-R, Citation No. 4261559 in Docket No. LAKE 94-471-R, Citation No. 4261560 in Docket No. LAKE 94-472-R, Citation No. 4261561 in Docket No. LAKE 94-473-R, Citation No. 4056790 in Docket No. LAKE 94-474-R, Citation No. 4056792 in Docket No. LAKE 94-476-R, Citation No. 4056793 in Docket No. LAKE 94-477-R, Order No. 4056794 in Docket No. LAKE 94-478-R, Citation No. 4056795 in Docket No. LAKE 94-479-R, Citation No. 4056796 in Docket No. LAKE 94-480-R, Citation No. 4056797 in Docket No. LAKE 94-481-R, Citation No. 4056798 in Docket No. LAKE 94-482-R, Citation No. 4056799 in Docket No. LAKE 94-483-R, Citation No. 4056800 in Docket No. LAKE 94-485-R, Citation No. 4258861 in Docket No. LAKE 94-486-R, Citation No. 4261562 in Docket No. LAKE 94-487-R, Citation No. 4261563 in Docket No. LAKE 94-488-R, Citation No. 4261564 in Docket No. LAKE 94-489-R, Order No. 4262077 in Docket No. LAKE 94-491-R, Citation No. 4258862 in Docket No. LAKE 94-493-R, Citation No. 4258863 in Docket No. LAKE 94-494-R, Citation No. 4261566 in Docket No. LAKE 94-496-R, Citation No. 4261758 in Docket No. LAKE 94-497-R, Citation No. 4261901 in Docket No. LAKE 94-501-R, Order No. 4262079 in Docket No. LAKE 94-502-R, Citation No. 3862539 in Docket No. LAKE 94-506-R, Citation No. 3862710 in Docket No. LAKE 94-509-R, Citation No. 3862711 in Docket No. LAKE 94-510-R, Citation No. 3862712 in Docket No. LAKE 94-511-R, Citation No. 3862713 in Docket No. LAKE 94-512-R, Citation No. 3862714 in Docket No. LAKE 94-513-R, Citation No. 3862715 in Docket No. LAKE 94-514-R, Order No. 3862716 in Docket No. LAKE 94-515-R, Citation No. 4259232 in Docket No. LAKE 94-518-R, Citation No. 4259233 in Docket No. LAKE 94-519-R, Citation No. 3826719 in Docket No. LAKE 94-521-R, Citation No. 3859802 in Docket No. LAKE 94-522-R, Citation No. 4259234 in Docket No. LAKE 94-523-R, Citation No. 3861582 in Docket No. LAKE 94-528-R, Citation No. 3862720 in Docket No. LAKE 94-529-R, Citation No. 3861583 in Docket No. LAKE 94-531-R, Citation No. 3861584 in Docket No. LAKE 94-532-R, Citation No. 3861585 in Docket No. LAKE 94-533-R, Citation No. 3861586 in Docket No. LAKE 94-534-R, Citation No. 3861588 in Docket No. LAKE 94-536-R, Citation No. 4261568 in Docket No. LAKE 94-539-R, Citation No. 4261567 in Docket No. LAKE 94-540-R, Citation No. 4261569 in Docket No. LAKE 94-541-R, Citation No. 4261570 in Docket No. LAKE 94-542-R, Citation No. 4267425 in Docket No. LAKE 94-544-R, Citation No. 4267426 in Docket No. LAKE 94-545-R, Order No. 4261905 in Docket No. LAKE 94-550-R, Citation No. 4261944 in Docket No. LAKE 94-553-R, Citation No. 4261881 in Docket No. LAKE 94-557-R, Order No. 4261951 in Docket No. LAKE 94-572-R, Order No. 4050832 in Docket No. LAKE 94-573-R, Order No. 3037099 in Docket No. LAKE 94-576-R, Citation No. 4054808 in Docket No. LAKE 94-577-R, Citation No. 4054809 in Docket No. LAKE 94-578-R, Citation No. 4267448 in Docket No. LAKE 94-579-R, Citation No. 3847802 in Docket No. LAKE 94-586-R, Order No. 4267450 in Docket No. LAKE 94-587-R, Citation No. 4267451 in Docket No. LAKE 94-588-R, Citation No. 4267452 in Docket No. LAKE 94-589-R, Citation

No. 4259795 in Docket No. LAKE 94-613-R, Order No. 4259800 in Docket No. LAKE 94-622-R, Order No. 4260061 in Docket No. LAKE 94-625-R, Order No. 4260063 in Docket No. LAKE 94-627-R, Citation No. 3843969 in Docket No. LAKE 94-639-R, Citation No. 4286052 in Docket No. LAKE 94-672-R, Order No. 4260034 in Docket No. LAKE 94-699-R, Order No. 3844461 in Docket No. LAKE 94-703-R, Order No. 4386056 in Docket No. LAKE 94-717-R, Citation No. 4260186 in Docket No. LAKE 95-37-R, Citation No. 4260187 in Docket No. LAKE 95-38-R, Citation No. 4260188 in Docket No. LAKE 95-39-R, Order No. 4260207 in Docket No. LAKE 95-63-R,[2] Citation No. 4260192 in Docket No. LAKE 95-65-R,[3] Order No. 4260193 in Docket No. LAKE 95-66-R,[4] Order No. 4262571 in Docket No. LAKE 95-72-R, Order No. 4260215 in Docket No. LAKE 95-82-R, Order No. 4259852 in Docket No. LAKE 95-141-R, and Citation No. 9941923 in Docket No. LAKE 95-153-R are **AFFIRMED** and the Notices of Contest are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

---

[2] This order was affirmed in a Default Decision encompassing Docket No. LAKE 95-214 issued on November 1, 1996. *Buck Creek Coal, Inc.*, 18 FMSHRC 1925 (November 1996).

[3] This citation was affirmed in a Default Decision encompassing Docket No. LAKE 95-111 issued on December 27, 1996. *Buck Creek Coal, Inc.*, 18 FMSHRC ____ (December 1996).

[4] This order was affirmed in a Default Decision encompassing Docket No. LAKE 95-206 issued on November 1, 1996. *Buck Creek Coal, Inc.*, 18 FMSHRC 1925 (November 1996).

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/lt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
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303-844-3577/FAX 303-844-5268

JAN 13 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 96-81 A.C. No. 32-00491-03514
v.	:	
FALKIRK MINING COMPANY, Respondent	:	Falkirk Mine

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Andrew S. Good, Esq., North American Coal Corporation, Dallas, Texas, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of a civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Falkirk Mining Company ("Falkirk"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petition alleges one violation of the Secretary's safety regulations.

A hearing was held in Washburn, North Dakota. The parties presented testimony and documentary evidence, but waived post-hearing briefs. For the reasons set forth below, I affirm the citation and assess a civil penalty of $50.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

Falkirk operates the Falkirk Mine, a surface coal mine, in McLean County, North Dakota. On September 13, 1995, MSHA inspector Calvert Browning issued Citation No. 4058725 to Falkirk alleging a violation of 30 C.F.R. § 77.502. The citation states:

> The electrical power connections were unguarded and exposed where the welding leads connected to the generator mounted on the 369

> belt maintenance truck. Adequate examinations were not made to disclose a potentially dangerous condition.

On November 5, 1995, MSHA issued a subsequent action notice for the citation, which states as follows:

> Citation No. 4058725, issued on 09-13-95, for a violation of 77.502, was modified during a Health and Safety Conference held 10-27-95. Mitigating information provided by the operator and the results of the conference were as follows:
>
> > The Part and Section of Title 30 CFR was modified to indicate the proper standard. The electrical connections were not insulated to the same degree of protection as the remainder of the wire.
> >
> > Section I, item 9c is modified to indicate 77.504.

Section 77.504, entitled "Electrical Connections or Splices; Suitability," provides:

> Electrical connections or splices in electric conductors shall be mechanically and electrically efficient, and suitable connectors shall be used. All electrical connections or splices shall be reinsulated at least to the same degree of protection as the remainder of the wire.

Inspector Browning determined that the alleged violation was neither serious nor of a significant and substantial nature ("S&S"). He also determined that Falkirk's negligence was moderate. The Secretary proposed a penalty of $50 for the citation.

The basic facts in this case are not in dispute. The cited equipment is a welding machine that generates DC current for welding operations. Two posts are on the front of the welding machine (the "welder"), one marked positive and the other marked negative. These posts are recessed from the vertical plane of the front of the welder. Welding leads are attached to each of the posts with lugs. The lugs are placed around the posts and tightened. A nut is also attached to the top of each post. An

insulated wire is attached to each lug. These wires are welding leads that are used in welding operations.

On the day of the inspection, the positive lead was insulated with insulating material. The positive post and lug were insulated by their recessed position. An insulating sleeve was present where the wire entered the lug. The area where the negative lead attached to the welder was not fully insulated. A bare conductor was present where the welding lead entered the lug because an insulating sleeve was not present. Part of this bare conductor was outside the vertical plane of the front of the welder. The conditions at the welder are depicted in Ex. G-7.

B. Arguments of the Parties

The Secretary contends that he established a violation because the electrical connection on the negative side was not reinsulated to the same degree of protection as the remainder of the wire as required by section 77.504. The Secretary relies on the plain language of the standard and the deference that is owed his reasonable interpretations of safety standards.

Falkirk argues that the Secretary's interpretation of the safety standard is not reasonable. First, it contends that the application of the standard is limited to splices and similar electrical connections. It argues that the cited area was neither a splice nor an electrical connection. Second, it contends that because the cited area was never insulated, the standard does not apply. Section 77.504 requires wires to be "reinsulated" where they have been stripped of insulation to make a splice or similar connection. Third, Falkirk argues that the Secretary did not require it to insulate the alleged electrical connection to abate the citation.

Finally, Falkirk argues that the Secretary failed to provide the mining community with notice of his interpretation of the safety standard. It states that the Secretary's witness could not think of a single MSHA document that supports the Secretary's interpretation of the standard. Falkirk also maintains that MSHA did not make any other attempt to provide notice of his interpretation. In addition, it notes that the Secretary's witness was unaware of any other citations issued by MSHA under similar conditions prior to September 1995.[1]

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[1] Falkirk raised other issues in a motion for summary decision. I ruled on these issues in an order denying Falkirk's motion. *Falkirk Mining Co.*, 18 FMSHRC 1521 (August 1996). At the time I issued that order, genuine issues of material fact had not been resolved. Accordingly, any findings and conclusions contained in that order that are inconsistent with this decision are hereby superseded.

C. Analysis of the Issues

I find that the Secretary's interpretation of section 77.504 is reasonable and is supported by the plain language of the standard. Thus, I do not consider issues of deference. Mr. Terrance D. Dinkel, an electrical engineer with MSHA's Denver Safety and Health Technology Center, testified that the cited area is an electrical connection as that term is used in the standard. He defined an electrical connection as a connection of an insulated wire to another insulated wire or to a piece of electric equipment to allow electric current to flow through the connection. (Tr. 14-16, 22, 37-38). Examples of electrical connections include a splice, a junction box, a plug in an electric outlet, and an insulated wire attached to a terminal of a light switch.

The safety standard states on its face that it applies to "all electrical connections." The term "electrical connection" is not so complicated that it necessarily requires the Secretary to provide written policy guidance to mine operators. An electrical connection, as applicable here, is simply a connection between an insulated wire and a piece of electric equipment which allows current to flow either from the wire to the equipment or from the equipment to the wire. An electrical connection need not be a splice between two wires. The connection must include at least one insulated wire to be covered by the standard, however. Connections between uninsulated wires or between an uninsulated wire and a piece of electric equipment are not required to be "reinsulated" at the point where they are connected. (Tr. 15).

The connection between the welder and a welding lead is clearly an electrical connection. (Tr. 62-63). The welder generates DC current. This current passes through the electrical connection to the end of the welding lead. As explained above, the connection is very similar to the connection on an automobile or truck battery. The lead is attached to a post on the welder by means of a lug that is tightened to the post. The electricity passes through the post, through the lug, and into the lead. The lead is an insulated wire. Thus, I find that the cited connection is an electrical connection in insulated wire as that phrase is used in the standard.

The cited standard requires wires to be reinsulated at electrical connections. Falkirk maintains that because the area where the leads connect to the welder (the "terminals") had never been insulated, the standard cannot apply. How can you reinsulate something that was never insulated in the first place? It is clear that the posts and the lugs on the welder were never insulated in the sense of an insulating material being applied to them. It is not clear whether the bare conductor at the negative post was ever insulated. Mr. Dinkel testified that there are two

basic ways to insulate connections under section 77.504. First, insulating material can be placed around the connection. (Tr. 23-25, 52-54). Second, the connection can be insulated by isolation. *Id.* For example, the connection can be placed in a junction box or an air gap can be created by recessing the connection. *Id.*

Mr. Dinkel testified that, at the time the citation was issued, the posts and part of the lugs were insulated by isolation. (Tr. 27-31). These parts of the connection were recessed from the vertical plane of the front of the welder. He testified that although someone could deliberately come in contact with the posts, they were protected by location and were therefore insulated. That part of the lug on the positive side that protruded outside of the vertical plane of the welder was protected by an insulating sleeve. Part of the lug on the negative side also protruded outside the vertical plane of the welder, but this area had not been reinsulated with an insulating sleeve. *Id.* The sleeve was either missing from the negative welder lead or a lead without such a sleeve had been installed. Dinkel testified that it was this lug and the bare wire entering the lug that was not reinsulated as required by the standard.

Thus, according to Mr, Dinkel, Falkirk was not required to "reinsulate" those areas of the terminals that were recessed because they were already insulated by location. (Tr. 58). Or, to put it another way, Falkirk actually reinsulated these areas of the terminals because they were recessed behind the vertical plane of the welder. Dinkel testified that Falkirk was only required to reinsulate the lug on the negative side where the insulating sleeve was not present. I credit Mr. Dinkel's testimony in this regard. *Id.*

Falkirk also argues that the Secretary did not require it to insulate the terminals to abate the citation. Falkirk abated the citation by installing a rubber flap in front of the terminals. I find that Falkirk reinsulated the terminals when it abated the citation. Mr. Dinkel's broad definition of insulation would include the rubber guard that Falkirk installed. The guard provided physical separation and the guard was made of an insulating material.

Finally, Falkirk contends that the Secretary failed to provide any notice to the mining community of its requirement that terminals on welders are electrical connections that must be reinsulated. As stated above, I have determined that the Secretary's interpretation of section 77.504 is supported by the plain language of the standard. Ordinarily, when the plain language of safety standard supports a violation, the Secretary is not required to show that he provided additional notice of the requirements of the standard. Nevertheless, the language of the standard is "simple and brief in order to be broadly adaptable to

myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1982). Such broad standards must afford reasonable notice of what is required or proscribed. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (January 1983). In "order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be 'so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990)(citation omitted). A safety standard must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Lanham Coal Co.*, Inc., 13 FMSHRC 1341, 1343 (September 1991)(citation omitted). In this context, the Commission further explained:

> When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, *i.e.*, the reasonably prudent person test. The Commission recently summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."

Id. (citations omitted).

I find that a reasonably prudent person would have recognized that the terminals on a welder that generates electricity are electrical connections in insulated wire and that section 77.504 requires that these terminals be insulated to prevent inadvertent contact with the terminals by persons working in the area. As stated above, the plain language of the standard states that "[a]ll electrical connections ... in insulated wire shall be reinsulated at least to the same degree of protection as the remainder of the wire." Given the Secretary's broad, commonsense definition of the term insulation set forth by Mr. Dinkel, a reasonable prudent person would have recognized that the missing sleeve on the lug attached to the negative post needed to be replaced to comply with the safety standard. Additional explanation or interpretation of the standard by the Secretary was not necessary in this instance.

In addition, a safety booklet published by the American Welding Society entitled "Safety in Welding and Cutting," makes clear that the accepted industrial safety practice is to protect terminals for welding leads from "accidental electrical contact." (Tr. 19-20, 48-49, 61-62; Ex. G-5). This document is consistent with the testimony of Mr. Dinkel.

D. Civil Penalty Assessment

Section 110(i) of the Mine Act sets forth six criteria I must consider in determining the appropriate civil penalty. Based on this criteria, I assess a civil penalty of $50 for the violation. Falkirk was issued 9 citations in the 20 months preceding the inspection in this case. (Ex. G-1). None of the citations were S&S. It appears that the mine produced 26,000 tons of coal and employed 251 individuals. *Id.* I find that the Falkirk Mine is a small to medium sized operation. The violation was promptly abated in good faith.

I find that the violation was not serious or S&S. Only a small area of the electrical connection was exposed. In addition, the area that was exposed would generally be the ground for the welder and would not pose a safety hazard. (Tr. 59). A hazard would be presented only if negative welding was being performed with the welder. In such an instance, the voltage between the negative terminal and the earth would be approximately 75 volts. (Tr. 55). There is no evidence that negative welding ever occurs at the mine. (Tr. 64).[2]

I find that Falkirk's negligence was low. There is no evidence that the mine's employees were inattentive to safety in general or believed that the condition of the welder presented a safety hazard. As stated above, there is no showing that the cited condition presented a serious hazard to employees.

II. ORDER

Accordingly, Citation No. 4058725 is **AFFIRMED** and Falkirk Mining Company is **ORDERED TO PAY** the Secretary of Labor the sum of $50.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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[2] To establish a violation of a safety standard, the Secretary is not required to prove that the violation contributed to a safety hazard. *Asarco Inc. v. FMSHRC*, 868 F.2d 1195, 1197 (10th Cir. 1989); *Allied Products Co.*, 666 F.2d 890, 892-93 (5th Cir. 1982). The degree of the hazard is taken into consideration when assessing a civil penalty.

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JAN 13 1997

KENNETH L. DRIESSEN, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEST 96-291-DM
NEVADA GOLDFIELDS INC., Respondent	:	WE MD 96-08 Nixon Fork Mine

DECISION

Appearances: Patrick J. Blackburn, Esq., Anchorage, Alaska, for Complainant;
Parry Grover, Esq., Davis Wright Tremaine LLP, Anchorage, Alaska, for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by Kenneth L. Driessen against Nevada Goldfields, Inc., under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). For the reasons set forth below, I find that while the Complainant may have engaged in activities protected under the Act, he was not discharged by Nevada Gold Fields for engaging in those activities.

Driessen filed a discrimination complaint with the Secretary of Labor's Mine Safety and Health Administration (MSHA) pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2),[1] on March 4, 1996. On June 4, 1996, MSHA informed both the company and the Complainant that on the basis of its investigation it had determined that "the complainant was not discriminated against in

[1] Section 105(c)(2) provides, in pertinent part, that: "Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

violation of Section 105(c)." (Resp. Ex. C.) Driessen then instituted this proceeding before the Commission, on July 2, 1996, under section 105(c)(3), 30 U.S.C. § 815(c)(3).[2]

A hearing on the complaint was held on November 13, 1996, in Anchorage, Alaska.[3]

Background

The Nixon Fork Mine, in the central interior of Alaska, began mining operations in October 1995. It has 50 employees and produces gold and some silver and copper. The only access to the mine is by air; everything brought in or shipped out is by airplane. The ore comes out of the mine in rocks which are then conveyed through crushers, ball mills and other processors until it is shipped out as bagged concentrate or dore ingots.

The miners work 12-hour shifts, seven days a week. The shifts begin at 7:00 a.m. and 7:00 p.m. The miners work either two weeks on, one week off, or four weeks on, two weeks off.

Kenneth Driessen began working at the mine on October 23, 1995, as a mechanic. On December 8, 1995, he was promoted to Senior Mechanic. He was fired on February 7, 1996.

Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act,[4] a complaining miner bears the

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[2] Section 105(c)(3) provides, in pertinent part, that: "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission . . . ."

[3] At the hearing the parties elected to make final arguments and waive the filing of proposed findings of fact and conclusions of law. (Tr. 200.) On December 17, 1996, Driessen "faxed" to my office a letter which he characterized on the cover sheet as "a few afterthoughts." As the parties decided not to file briefs and the record was not kept open to receive additional evidence, I have neither read nor considered this letter.

[4] Section 105(c)(1), 30 U.S.C. § 815(c)(1), of the Act provides that a miner cannot be discharged, discriminated against

burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

In his complaint with MSHA as well as in his complaint before the Commission, Driessen claims to have twice engaged in protected activities. The first occurred on January 24, 1996, when he advised the mill superintendent that it would be dangerous to start up the No. 1 ball mill. The second transpired on the morning of February 7, 1996, when he informed company vice president Joe Kercher what problems he believed still existed with the No. 1 Ball Mill. The Complainant maintains that, as a result of bringing to the company's attention what he considered

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fn. 4 (continued)
or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;" or, (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act."

to be dangerous situations, he was fired shortly after talking with Kercher.

Not surprisingly, the company views the matter differently. It is the company's position that Driessen was assigned three specific tasks on the night of February 6 and the morning of February 7 and that he failed to complete any of them. In fact, the Respondent asserts that not only did the Complainant fail to do what he was assigned, but he spent his time working on matters on which he was told not to work. Consequently, the company contends that Driessen was terminated for insubordination and that his safety complaints were not considered at all.

I find that the Complainant engaged in protected activity, but that he has not established that he was fired because he engaged in that activity. I find that the Respondent's explanation of events is the more believable one. Therefore, I conclude that Driessen was not terminated in violation of section 105(c).

Driessen testified that on January 24, while working on the night shift, he was assigned to "clean [the No. 1 Ball Mill] and grease it, and put it back together as it was." (Tr. 20.) He stated that while he was performing this task he observed defects in parts of the ball mill which lead him to conclude that it would be dangerous to restart the machine. The Complainant related that in the early morning hours of January 25 he told this to Mike Rusesky, the mill superintendent, who decided, without consulting anyone else, not to restart the ball mill.[5]

Driessen claimed that Ted Botnan, the maintenance supervisor and his direct supervisor, reproached him the next day for shutting down the mill. He testified:

> And he said some — something. This is paraphrased because I can't get his exact words, but part of it is his exact words. He had said by making this decision to call it unsafe was a million dollar call, and that I should have not made that decision or made that statement on my own. And he also said that if there was any other problems of this type that were either dangerous or — or severe, you know, equipment problems, that I would talk only to him about these problems.

(Tr. 22.)

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[5] Driessen testified that the ball mill was not restarted because he had advised that it was a dangerous situation "and it was not totally put back together and ready to go at that time." (Tr. 21.)

In fact, both Botnan and Mel Swanson, the Mine Manager, were upset that they had not been informed that the ball mill was going to be shut down. Rusesky testified that Swanson got mad at him for not informing him right away. Botnan testified with regard to his discussion with Driessen:

> I told him that if you're going to make these million dollar decisions, please get me involved in it, you know, we'd like to go through the standard procedures. If you're going to shut down the mill, you know, I'd like to know about it. I don't want to find out about it when I wake up in the morning, you know, I am part of this, and Mel has to authorize any of these things. If you're going to make these big decisions, please go through the normal channels.

(Tr. 140.)

As can be seen, both Botnan's and Driessen's versions of the incident are essentially the same. Viewing the matter objectively, it is apparent that what Botnan and Swanson were mad about was not being awakened and consulted before a decision to shut the mill down was made, not that Driessen had raised safety matters. Thus, I find that Driessen's subsequent conclusion that he was being admonished because he had a safety concern about the ball mill was mistaken. His claim, first articulated at the hearing, that Botnan threatened to fire him if he talked to anyone but Botnan about such problems is not corroborated by any other evidence and certainly cannot be inferred from what Driessen maintains that Botnan said to him.[6]

Turning to February 6, it was Driessen's testimony that he was assigned to troubleshoot the ball mill and not given any other assignments. His testimony, however, was so filled with inabilities to recall, irrelevancies, blanks, inconsistencies and lack of corroboration that it lacks credibility. The following are some examples of his testimony.

On direct examination, he was questioned about what he was told to do and the following colloquy took place:

> Q. Were you given any specific orders for that night other than to troubleshoot the piece of equipment which you had already testified to?

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[6] It is not clear from the evidence when Driessen arrived at the conclusion that Botnan was threatening him for raising a safety issue. There is no evidence that the incident was mentioned again, or that Driessen took any actions because of the incident, until Driessen was fired and filed his discrimination complaint.

A. There is — it's not up for exhibit, but there was a shop log which also contained work projects to do, and there was a big loader tire that was, you know, it was mentioned that we had to keep filling it up with air, and . . . .

Q. Did you . . .

A. . . . I think it was . . .

Q. . . . in fact do that?

A. . . . in fact flat. I — I did not. There was also another mechanic on duty, and — there was at least another mechanic on duty. I did not — I do not believe I worked on that loader tire.

Q. But had you been given instructions to work on that loader tire?

A. The loader tire was on our list of things to do, and there was also other things on the list such as the water. We were having problems with the water freezing up and — and running out of water. And so I — as I remember, I be- — I worked on the mill and on the water. And there was sometimes other little chores, like if a miner needed some piece of equipment or whatever looked at, there might have been a few other things that I did.

(Tr. 31-32.) Later on he claimed that he did help work on the loader tire.

With regard to cutting the intake spout, or flange, to the ball mill, Driessen seemed to have trouble recalling what occurred. Thus, he testified: "I do not think that I cut the flange. I said that it should be cut or moved, but at that night I do not recall cutting any flange." (Tr. 32.) Later on the following discussions took place:

Judge: Was [the flange] cut?

A. I don't think that the — that I cut that . . .

Judge: I'm not asking . . .

A. . . . flange that night.

Judge: . . . if you cut it. Was it cut?

A. I don't — I don't know. I don't think — I don't think so be- — because I didn't even want it to be

cut. I wanted the flan- — the — the fill pipe to be moved or it to be aligned so that if could be tight.

Q. (By Mr. Grover.) You don't remember whether it was cut or not. Is that what you're saying?

A. Yeah. I don't think I cut it because that rubber was awful darn thick.

. . . .

Q. Mr. Driessen, Mr. Swanson and Mr. Botnan are going to testify the next morning when they got up they found that the flange had been cut. They found a half-moon piece of rubber cut laying [*sic*] on the ground underneath the mill. Do you have any idea how that happened?

A. I'm — I'm trying to think, you know, I was doing my best to try and get that thing going, and . . .

Q. So you don't recall. You just can't say how that happened?

A. I can't say. I — I don't know.

(Tr. 62-63, 65-66.) Finally, he testified, "I'm like in lack of memory on it, and I — I really don't think I cut it. And if I did, it was maybe a — I don't think I cut it. I really don't think I cut it that night." (Tr. 97.)

Conversely, Botnan and Swanson testified that after letting Driessen try various remedies to get the mill running again, none of which worked, they became convinced that the problem was electrical.[7] Accordingly, sometime around 10:30 or 11:00 p.m. on February 6, they told Driessen to stop working on the ball mill. Swanson testified:

> He — he was instructed to tighten up the feed chute tube, put that back as it was, put the coupling back together, put the guard back on it, and that was it. That would make the mill operative when we determined what the other problem was. And he was given specific instructions to get that loader tire fixed because it is our prime mover on the site.

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[7] They were correct. The electrical problem was corrected by the electrician the next day and the ball mill had run without incident up through the date of the trial.

During the discussion and throughout the evening, we fixated on this rubber seal, and he pointed out that it was out of alignment and yeah, that was — we knew that, but it had never been a problem other than it does wear and it leaks, and so we replace those things every four to six weeks. And we had just — day shift had just spent about four hours fabricating a new one and installing it. And he and I had a bit of a discussion. He pointed out that the mill foundation was sinking, and — and I said no, it if was sinking then the floor must be sinking with it because I don't see any differential sinking here.

And some other, you know, strange discussions that — I had already made up my mind that it was an electrical problem. I want to wait for the electrician. And he wanted to make — he suggested cutting this flap to release that binding, and we determined though that that was not the problem. The thing failed to function when we had it relieved. And instructions were specifically given, "Do not touch that seal. Do not cut that seal."

(Tr. 182-83.)

Botnan and Swanson testified that when they arrived at the mill on the morning of February 7, Driessen was working on some drawings of the ball mill. On going to the mill, they found that the chute had not been tightened up to the mill, the flange had been cut, the coupling had not been put back together, and nothing had been done on the loader tire since Botnan had blocked it and taken off some of the lug nuts the night before. After discussing the matter between themselves and with Joe Kercher, they decided to fire Driessen because "we had given him three specific instructions on what to do and he failed to do them, and he had done a project that he was, you know, he was not instructed to do." (Tr. 186.)

Driessen bears the burden of proving that he was fired for engaging in protected activities. While in is own mind he may have convinced himself that this was why he was fired, his rambling, contradictory, inconsistent and somewhat illogical testimony has not convinced me. Furthermore, his story is not supported by any corroborating witnesses or evidence. I find that the Complainant's conclusions that it would be dangerous to operate the ball mill on January 24 and February 6 - 7 had no bearing on his being terminated. I conclude that he was fired, as claimed by the Respondent, because he was insubordinate. Consequently, he was not discriminated against because he engaged in protected activity.

ORDER

Accordingly, since the Complainant has failed to show that he was terminated for engaging in activity protected under the Act, it is **ORDERED** that the complaint of Kenneth L. Driessen against Nevada Goldfields, Inc., under section 105(c) of the Act, **is DISMISSED.**

T. Todd Hodgson
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JAN 2 3 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LONNIE BOWLING, Complainant v. MOUNTAIN TOP TRUCKING CO., INC., ELMO MAYES; WILLIAM DAVID RILEY; ANTHONY CURTIS MAYES; and MAYES TRUCKING COMPANY, INC., Respondents	:	DISCRIMINATION PROCEEDING Docket No. KENT 95-604-D MSHA Case No. BARB CD 95-11 Mine ID No. 15-17234-NCX Huff Creek Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of EVERETT DARRELL BALL, Complainant v. MOUNTAIN TOP TRUCKING CO., INC. ELMO MAYES; WILLIAM DAVID RILEY; ANTHONY CURTIS MAYES; and MAYES TRUCKING COMPANY, INC., Respondents	:	DISCRIMINATION PROCEEDING Docket No. KENT 95-605-D MSHA Case No. BARB CD 95-11 Mine ID No. 15-17234-NCX Huff Creek Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of WALTER JACKSON Complainant v. MOUNTAIN TOP TRUCKING CO., INC., ELMO MAYES; and MAYES TRUCKING COMPANY, INC., Respondents	:	DISCRIMINATION PROCEEDING Docket No. KENT 95-613-D MSHA Case No. BARB CD 95-13 Huff Creek Mine

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of DAVID FAGAN, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 95-615-D
	:	MSHA Case No. BARB CD 95-14
v.	:	Huff Creek Mine[1]
MOUNTAIN TOP TRUCKING CO., INC., ELMO MAYES; WILLLIAM DAVID RILEY ANTHONY CURTIS MAYES; and MAYES TRUCKING COMPANY, INC., Respondents	:	

DECISION ON LIABILITY

Appearances: Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Complainants;
Tony Oppegard, Esq., Mine Safety Project of the Appalachian Research & Defense Fund of Kentucky, Inc., Lexington, Kentucky, for the Complainants;
Edward M. Dooley, Esq., Harrogate, Tennessee, for the Respondents.

Before: Judge Feldman

These consolidated discrimination proceedings are before me as a result of complaints filed by the Secretary on behalf of Lonnie Bowling, Darrell Ball, Walter Jackson and David Fagan, pursuant to section 105(c)(2) of the Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(c)(2). The complaints were filed against the captioned Respondents, Mountain Top Trucking Company, Inc., (Mountain Top), Mayes Trucking Company, Inc., (Mayes Trucking), Elmo Mayes (Elmo), Anthony Curtis Mayes (Tony); and William David Riley (David Riley). Also before me are amended discrimination complaints, filed by the Secretary on September 15, 1995, seeking to impose total civil penalties of $9,000 on the respondents, consisting of a $3,000 civil penalty for each of the three alleged violations of section 105(c) that are the subject of these proceedings.

On October 5, 1995, I issued a Decision ordering Mayes Trucking, as the successor of Mountain Top, to temporarily

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[1] The Huff Creek mine and the Darby Fork mine are essentially adjacent mine sites located along State Road 38. Previous captions in these proceedings noted Darby Fork as the mine site. The caption has been corrected to reflect the complainants were engaged in hauling coal from the Huff Creek facility.

reinstate Bowling to his former position as a haulage truck driver at the same rate of pay and with the same work hours as the other truck drivers at the Huff Creek mine site.[2] 17 FMSHRC 1695, 1709. Bowling was never reinstated and the Secretary brought no action in his behalf to enforce the temporary reinstatement decision.[3]

The reinstatement decision determined that Mayes Trucking was a proper party to these proceedings. As discussed herein, the reinstatement decision also determined that Mayes Trucking was the successor to Mountain Top Trucking, and, as successor, Mayes Trucking is liable for the discriminatory conduct of Mountain Top. The temporary reinstatement decision was not timely appealed and has become final. Mayes Trucking Co. v. Secretary of Labor and FMSHRC, No. 95-4170 (6th Cir. April 19, 1996).

Although these discrimination complaints were brought on behalf of the complainants pursuant to section 105(c)(2) of the Act, Tony Oppegard appeared on behalf of the complainants as their personal counsel. Commission Order, 18 FMSHRC 487 (April 1986). Edward M. Dooley appeared on behalf of all of the respondents in these proceedings.

These discrimination cases were consolidated for hearing by Order dated February 6, 1996. The hearing was convened on three separate occasions in June, July and August 1996.[4] On June 11, 1996, the initial hearing day, the Secretary and Mr. Oppegard moved to withdraw the discrimination complaint of David Fagan. The motion to withdraw was granted on the record and Fagan's complaint docketed as KENT 95-615-D shall be dismissed. (I, 35-37).

The hearing in the Bowling and Ball complaints was held on June 11 through June 14, 1996, and July 16 through July 18, 1996. The hearing in the Jackson complaint was held on August 7 and

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[2] Mayes Trucking was also ordered to reinstate Fagan. However, the underlying discrimination complaint filed by Fagan has been withdrawn. The Secretary withdrew the application for temporary reinstatement filed on behalf of Jackson. Ball did not seek temporary reinstatement.

[3] The transcript and exhibits in the temporary reinstatement proceedings conducted on August 23 and August 24, 1995, are incorporated by reference and have been considered in the disposition of these discrimination matters.

[4] The hearing transcripts for June, July and August are cited as Volumes I, II and III, respectively.

August 8, 1996. During the course of these proceedings, to avoid the repetition of evidence, I ruled that any pertinent evidence adduced during the Bowling and Ball hearing was applicable to Jackson and vice-versa. (III, 299-300).

The parties have filed thorough post-hearing proposed findings and conclusions, and replies. These post-hearing filings have been considered in my disposition of the issues raised in these proceedings.

Statement of the Case

Bowling and Ball assert that Riley and Mountain Top discharged them on March 7, 1995, in violation of section 105(c) of the Act because of their good faith, reasonable refusal to continue driving their coal trucks after they became exhausted and fatigued as a result of working excessive and unsafe hours.

Bowling and Ball were subsequently called back to work by Mountain Top after they filed discrimination complaints with the Mine Safety and Health Administration (MSHA) as a result of their March 7, 1995, discharges. Ball argues that after having been briefly reinstated to his truck driving job by Mountain Top, he was constructively discharged on March 28, 1995, when he was compelled to quit because of intolerable working conditions imposed upon him by the company.

Bowling contends that, although he agreed to return to work after he had filed his discrimination complaint, he was never actually reinstated because Mountain Top would not provide him with a safe truck to operate. Thus, Bowling argues that the respondents are liable under section 105(c) as a result of his unlawful discharge on March 7, 1995. In the alternative, Bowling argues, he too was constructively discharged on March 28, 1995, in violation of section 105(c), when he was compelled to quit because of intolerable working conditions.

Jackson maintains that Elmo Mayes and Mountain Top Trucking discharged him on February 17, 1995, in violation of the anti-discrimination provisions of section 105(c) of the Act after he refused to continue operating a coal truck that he reasonably and in good faith believed was unsafe to drive.

The discrimination complaints of Bowling and Ball are factually similar and involve contemporaneous events. The alleged discrimination suffered by Jackson occurred at a different time and involves circumstances and issues that are distinguishable from the Bowling and Ball cases. Thus, the Bowling and Ball complaints will be addressed separately from the complaint filed by Jackson.

Findings of Fact

Mountain Top is incorporated in the State of West Virginia. Its corporate officers are Tommy C. (Kip) Bays, President, and his son, Tommy Bays, Jr. Mayes Trucking is also incorporated in the State of West Virginia. Tony Mayes is the corporate President and his wife, Mary Mayes, is the Secretary. Mountain Top and Mayes Trucking leased their haulage trucks from E&T Trucking, a sole proprietorship owned and operated by Elmo Mayes, Tony's father. E&T Trucking has approximately 40 trucks registered to it in the name of Elmo Mayes, d/b/a E&T Trucking. E&T Trucking is the registered operator in the State of Kentucky for fuel tax purposes. Mountain Top and Mayes Trucking do not own any trucks.

From 1991 until 1993 Mountain Top hauled coal in Mount Carbon, West Virginia from the Cypress Mine at Armstrong Creek. Mayes Trucking also hauled coal from the Cypress mine site during this period. The trucks operated by Mountain Top and Mayes Trucking were leased from Elmo Mayes.

On July 12, 1993, Mountain Top contracted with Lone Mountain Processing, Inc., (Lone Mountain) to haul coal from Lone Mountain's Huff Creek mine, an underground mine located immediately off State Road 38 at Holmes Mill in Harlan County, Kentucky, to Lone Mountain's processing plant at St. Charles in Lee County, Virginia. Mountain Top operated approximately 30 trucks to haul Lone Mountain's coal from the Huff Creek mine. Mountain Top continued to lease its trucks from Elmo Mayes. Helen Mayes, Elmo's wife, signed and issued the pay checks for Mountain Top's employees.

Mountain Top's truck lot, where trucks are parked for the night, and where trucks are repaired, is located off the haul road directly across from the scale house at Lone Mountain's processing plant. Each morning the truck drivers depart from the truck lot for Huff Creek to begin haulage operations.

The Huff Creek facility is approximately 7½ to 8 miles from the processing plant. Upon arriving at the mine, the trucks would line up to be loaded. After loading, the haulage truck drivers drove the first 2½ miles on Route 38, a 2-lane public road maintained by the State of Kentucky. The drivers then exited the state road onto a gravel haulage road maintained by Lone Mountain. The drivers traveled this haulage road up and over a mountain down to the dumping point in Virginia, a distance of approximately 6 miles. The haulage road had steep grades and sharp curves. There were areas called "switchbacks" where the road was only wide enough for the passage of one truck.

There were usually 35-40 coal trucks driving simultaneously on the haul road, which consisted of 20-30 trucks operated by Mountain Top as well as 10-12 trucks operated by Hillis Breese, another haulage contractor.[5] (I, 403). Lone Mountain used a grader to smooth out bumps and potholes on its haulage road. (I, 403).

Upon approaching the dump site destination, the trucks would line up to be weighed at Lone Mountain's scale house which was located approximately .3 mile from the dump site. After being weighed, the drivers would proceed to the dump site. The waiting time for loading, weighing and unloading varied. For example, Ball stated waiting time for loading varied from 2 to 8 minutes. (I, 155-56). There were presumably similar waiting times during the weighing and unloading process. The entire round trip from Huff Creek to the dump site, including the loading and unloading process, took approximately 1 hour and 15 minutes. Truck drivers communicated with each other, with Mountain Top management, and with the scale house, via CB radio.

The haulage hours were determined by Lone Mountain based on its scale house operating hours. The scale house hours were determined by Craig Mullen, Lone Mountain's preparation plant manager. The scale house always opened at 6:00 a.m. Mullen would convey the cutoff time to Bruce Kelly, Lone Mountain's scale man. Kelly stated that normal cutoff time was between 5:00 and 6:00 p.m. The same cutoff time applied to Mountain Top and Hillis Breese trucks. (III, 131).

The "cutoff" time does not refer to the drivers' quitting time. Rather, it is the time when a cutoff truck is designated to make the last round trip to load and unload a truck of coal. For example, if the cutoff time is 5:00 p.m., the truck passing the scale house at 5:00 p.m. must return to the mine for the last load of coal. This cutoff truck will return to the scale house at approximately 6:15 p.m. All truck drivers passing the scale house after 5:00 p.m. that are behind the designated cutoff truck proceed to the truck lot to end their workday.

Kelly would designate the cutoff truck according to the cutoff schedule established by Mullen. Kelly experienced resentment from truck drivers who were designated as cutoff.

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[5] The trucks operated by Hillis Breese hauled coal from Lone Mountain's Darby Fork mine, located along Route 38, approximately 1 mile from the Huff Creek mine. The Breese trucks were weighed at the same scale house and they unloaded their coal at the same dump site as the Mountain Top trucks.

Therefore, Kelly began communicating the cutoff time to David Riley, Mountain Top's truck boss, so that Riley could select and inform the cutoff driver.

In the fall of 1994, Mountain Top truck drivers generally reported to the truck lot between 5:00 and 5:30 a.m so as to return to the scales when they opened at 6:00 a.m. As previously noted, the "cutoff" time, established by Lone Mountain, was between 4:00 and 6:00 p.m. Mountain Top paid truck drivers $13.00 per load of coal. Drivers were paid $6.00 per hour for down periods when trucks were being repaired.

Lone Mountain was dissatisfied with Mountain Top's haulage production. Consequently, Mountain Top's contract was extended for only six months on October 12, 1994. This relatively brief contract extension apparently placed additional pressure on Mountain Top to satisfy Lone Mountain's haulage requirements.

Near the end of December 1994, David Riley had a meeting with the truck drivers and informed them that from that point starting time was promptly at 5:00 a.m. However, there was no change in the normal 6:00 a.m. opening of Lone Mountain's scales.

In late January or early February 1995, Lone Mountain opened a new section of the Huff Creek mine. Contemporaneous with the opening of this new section, inclement snowy and icy conditions interfered with Mountain Top's normal haulage operations. Consequently, Lone Mountain's coal stockpile increased substantially.

Lone Mountain pressured Mountain Top to increase haulage in order to reduce its stockpile. In order to comply with Lone Mountain's demand, Mountain Top's truck drivers were required to haul more loads per day. Thus the cutoff time got progressively later: from 6:00 to 8:00 p.m. During February 1995, it was not unusual for Mountain Top's drivers to work 15 to 16 hours per day 6 days per week. Kelly testified he recalled some evenings in February 1995 when the last load passed the scales as late as 10:30 p.m. These long work hours continued into mid to late March. As spring approached and the stockpile receded the normal cutoff time was moved back to between 4:00 and 6:00 p.m.[6] The complaints of Bowling and Ball must be viewed in the context of this factual background.

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[6] Kelly testified the average cutoff time during the previous two years was between 4:00 and 6:00 p.m. (I, 554-55).

The Bowling and Ball Discrimination Complaints

Everett Darrell Ball was hired by Mountain Top trucking in July 1994. Lonnie Bowling was hired by Mountain Top in August 1994.

Shortly after Ball was hired, his assigned truck was taken out of service for repair. After a week of reporting to work with nothing to drive, Ball asked Riley for a "lay off slip." Ball returned to work for Mountain Top approximately two months later.

When Ball returned to work in November or December 1994, he testified there was no particular set starting time, although truck drivers routinely reported in the early morning hours. Bowling testified the normal starting time was 5:00 a.m. Consistent with the testimony of scale man Kelly, Ball and Bowling testified that the normal cutoff time, prior to the onset of bad winter weather and the increase in the size of the stockpiled coal, was between 4:00 and 6:00 p.m. Ball estimated the normal cutoff was "probably five o'clock, on average." (I, 215-16, 405, 467).

Bowling and Ball's duties included general preshift inspections and minor maintenance such as "keeping the tires and the wheels tight and the oil levels checked and the water fluids." (II, 71). Truck drivers routinely completed checkoff slips noting any truck defects or other maintenance problems experienced during the shift. Each driver submitted his checkoff slip detailing his truck's condition at the end of each workday when the truck was parked in the truck lot.

Bowling and Ball testified about the challenging nature of the haulage trip. They related that route 38 is narrow and winding. They described Lone Mountain's haulage road as very steep with an almost continuous up or down grade. Ball stated "it was one of the roughest hauls I've ever been on in my life, I think." (II, 75). Bowling stated the haul road was in "real bad shape" in February and March 1995. Bowling and Ball did not work for three days in February 1995 because of snow.

Bowling and Ball routinely drove to work together. They arrived at the truck lot at approximately 5:00 a.m. They would preshift their trucks and start them to allow for warm-up and to let the air build up. They would then drive the trucks across the mountain to Huff Creek where they would load for the first return trip. They would continue to make return trips until the 4:00 to 6:00 p.m cutoff.

Ball stated it took between 30 to 40 minutes after the last scale reading to finish work. During this time, Ball dumped his last load, drove to the truck lot, spent approximately 20 minutes fueling his truck, completed his checkoff list, and turned in his time sheets.

As discussed above, Bowling and Ball testified about the significant increase in the length of the workday beginning in February 1995. They stated it was not uncommon to work 14 to 16 hours per day from February until early March. Ball stated in February and early March 1995, Big Dave (David Riley) was the boss if he was alone. Riley deferred to Tony Mayes if Tony was at the job site. Both Riley and Tony Mayes deferred to Elmo Mayes if he was present at the mine site. Elmo Mayes had a two-way radio at his home that was capable of communicating with Riley in his truck. Both Riley and Kip Bays had worked for Elmo Mayes in the past.

Beginning in February 1995, Bowling and Ball periodically complained to David Riley, Tony Mayes and Bill Lefevers, the loader man, about the long hours and the road conditions.[7] In fact, most drivers complained about the extremely long workday that was required during this catch-up period. Riley responded that when they got "caught-up" the company would do what it could to cut back the hours - but the cutoff time would still be between 5:00 and 6:00 p.m. (I, 115).

Bowling and Ball discussed the long hours. They decided to call the State Of Kentucky's Division of Motor Vehicle Enforcement to complain about the long working hours at Mountain Top Trucking. Major Michael Maffett testified that he received calls from Bowling and Ball. Ball's telephone records reflect calls to Maffett on February 21 and March 2, 1995. Bowling and Ball complained that Mountain Top's long hours "would cause somebody to get killed." (I, 90). As an initial matter, Maffett determined Mountain Top Trucking had no Kentucky Fuel Tax License. Maffett determined that Mountain Top was operating under the Fuel Tax License issued to Elmo Mayes d/b/a E&T Trucking. (I, 287).

Maffett told Bowling and Ball there were Federal and State laws that governed how many hours truck drivers could drive. For example, Maffett advised them of 49 C.F.R. Part 395 of the Department of Transportation (DOT) regulations concerning 10 hour, 15 hour, and 60/70 hour service hour limitations. Maffett

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[7] Driving on narrow, winding roads with steep grades was a normal condition of the complainants' employment. There is no evidence of any complaints concerning road conditions that are relevant to these proceedings.

explained a truck driver cannot drive after having driven ten hours, without an eight hour qualifying break. A driver cannot drive after having been on duty 15 hours. If a company operates six days per week, drivers cannot drive after having been on duty 60 hours in seven days. Similarly, if a company operates seven days a week, a driver cannot drive after having been on duty 70 hours in eight days. (I, 292; Gov. Ex. 1; 49 C.F.R. § 395.1).

Although not a DOT official, Maffett opined that the ten hours driving limitation was determined based upon the period a truck was in gear. Maffett was uncertain about the applicability of this DOT regulation to situations where drivers wait to load and unload throughout the day. However, the applicable DOT regulations provide all time spent loading and unloading a vehicle as "on-duty time" rather than actual "driving time." 49 C.F.R. § 395.2.

Moreover, the record is unclear with regard to DOT's application of this regulation to the 8½ mile trip in this case, which is comprised of 6 miles over a private road. The complainants did not call a DOT official to testify in these proceedings to explain how its Part 395 Hours of Service regulations impact on short haulage operations with frequent loading and unloading throughout the day.

Maffett considered their complaint to be a "labor" issue because Ball expressed the opinion that he would be terminated if he refused to drive. Maffett recommended that Bowling and Ball contact the Occupational Safety and Health Administration in Atlanta, Georgia. Maffett also recommended that they file a written complaint with the Federal Highway Administration's Office of Motor Carriers located in Frankfort, Kentucky. No one from Maffett's office investigated Bowling and Ball's complaint. (I, 296). To the best of Maffett's knowledge, the respondents were never cited by any state or federal authorities for any violations related to excessive working or driving hours.

On the morning of March 7, 1995, Bowling and Ball decided to confront management about the excessive hours. Later that day, they heard over the CB radio that cutoff time was 7:00 o'clock. At approximately 5:30 p.m., Ball pulled into the truck lot to talk to Riley. Ball was followed into the truck lot by trucks driven by Bowling and Leonard McKnight. Ball and Bowling told Riley they couldn't continue working these hours because they were exhausted and it was unsafe. They informed Riley they had contacted DOT and that they had been advised about a ten hour workday rule.

Ball testified that Riley was sympathetic until Elmo Mayes pulled into the truck lot. They informed Elmo of their concerns.

Elmo responded "the cutoff time tonight is 7:00 o'clock, you get your ass back out there and haul coal." They informed Riley and Elmo Mayes that they had called DOT and that DOT said they were not supposed to be hauling such long hours. Ball stated Riley said he "didn't give a shit what the DOT said" because they worked for him. Ball further testified Riley told them if they couldn't work the hours they were supposed to work, "that they didn't need us and to get our ass to the house." (I, 116).

Bowling asked Riley, "if I park up, am I fired?" Riley replied, "I can't make it any plainer, you work when I tell you to work or I don't need you." Although McKnight supported Bowling and Ball's concerns, he decided to return to work to avoid losing his job. (I, 118, 241).

Bowling and Ball turned in their time sheets. Ball testified Elmo Mayes "hollered and told us both, said, don't bring your ass back." (I, 120).

Bowling and Ball filed discrimination complaints with MSHA on March 9, 1995. Their discrimination complaints sought the following:

> Back-pay for all lost wages, jobs back with regulated 10 hour work days with required breaks and lunch periods for all employees and we request our regular trucks back, Bowling truck #144 and Ball truck #147. We also request that load sheets be required to reflect starting and stopping times. (Gov. Ex 9).

Bowling and Ball's complaints were investigated by MSHA investigator Gary Harris. On March 22, 1995, following Harris' interviews with company personnel, Tony Mayes telephoned Harris. Tony Mayes explained to Harris that everyone at Mountain Top was under a lot of pressure because of the backed up coal. Tony Mayes conceded that everyone had been complaining about the long hours. He informed Harris that Bowling and Ball were "good truck drivers" and he expressed a willingness to work things out. (III, 473-75).

Shortly after talking to Harris on Wednesday, March 22, 1995, Tony Mayes called Bowling and Ball to offer them their jobs back. Tony Mayes called Bowling at home first. Bowling stated he thought he was unjustly fired. Tony Mayes told him he was trying to get him back to work so that things could be worked out. Bowling agreed to return to work the following day on Thursday, March 23, 1995.

Tony Mayes then called Ball and left a message with Ball's wife. Ball was not home because he was traveling to Bowling's house. When Ball arrived at Bowling's house, Bowling informed

him that Tony Mayes had just called to offer their jobs back. Ball returned to his home to return Mayes' call. Ball agreed to return to work. (I, 121). There is conflicting testimony concerning on which day Ball agreed to return. Tony Mayes and Riley testified Ball agreed to return to work on Friday, March 24, 1995. (II, 331, 477; Ex. R-4). Ball testified he did not agree to return to work until Monday, March 27, 1995, because he "didn't have any money for gasoline, and [he] had an appointment to get [his] CDL license upgraded in Somerset and I already borrowed a truck to do so." (I, 121).

Bowling had 20 years experience as a truck driver. He was somewhat familiar with the Federal regulations concerning driving hours and time. (I, 452). Bowling concluded, based on the information provided by Major Maffett, that upon his return to work, he would work "ten hours, not one minute longer." (I, 414, 419, 456). Thus, Bowling believed that an appropriate quitting time was 3:00 p.m. on days when he began driving at 5:00 a.m. without significant out-of-service interruptions. (I, 490). Ball also was unwilling to work significantly more than ten hours per day. (I, 126).

Bowling reported to work at approximately 5:00 a.m. on Thursday, March 23, 1995. Tony Mayes and Riley testified that they informed Bowling he would be driving truck #139. Prior to Bowling's March 7, 1995, discharge he generally drove truck #144 which was a newer 1989 model in better condition. (I, 426, 663). Bowling asked Mayes why he couldn't have his regular truck back. Mayes responded that he didn't want to cause any conflict with his drivers. (I, 426).

Bowling testified he told Tony Mayes truck #139 "probably wouldn't pass inspection" because he didn't think it was tagged (had license plates)." (I, 427). Bowling contends he was concerned about the truck's wipers and lights. Bowling also was concerned about a broken wheel stud on the rear wheel. Mountain Top truck mechanic William Bennett testified he did not discuss the operational condition of truck #139 with Bowling on the morning of March 23, 1995. (I, 657). In this regard, Bowling conceded he never inspected #139 on the morning of March 23. His objections to driving it were based on "his previous experience with the truck." (I, 448-49).

Riley and Mayes indicated Bowling left the site shortly after his arrival at 5:00 a.m. Bowling testified he left the truck lot at approximately 7:30 to 8:00 a.m., after having waited for Tony Mayes to arrive at work. (I, 428). When Bowling departed, Mayes and Riley testified that Bowling informed them that he would not drive truck #139, and that he would wait on MSHA's investigative decision. (II, 331, 477-78).

Tony Mayes testified that he called investigator Harris after Bowling left on March 23 to inform him of the situation. Harris told Mayes he would talk to Bowling. (II, 479).

Mayes and Riley indicated Bowling did not report to work or otherwise contact them on Friday, March 24, 1995. Bowling also testified he did not show up for work on March 24. Bowling stated on that morning he "called in sick to the guard shack because that was the quickest way to get in touch with David Riley." (I, 429). There is no evidence that Bowling ever spoke directly to Tony Mayes or Riley to provide an explanation for his absence on March 24, 1995.

Although Tony Mayes testified that Ball had agreed to return to work on Friday, March 24, 1995, Ball also did not report to work on that day. Mayes testified that Ball left a telephone message on March 24 with someone at the mine indicating he would not come to work because he was waiting on a check, and he had no gas money. Ball denies making this telephone call because he maintains that he did not agree to return to work until Monday, March 27, 1995. However, Ball does attribute the delay in his return to work to a lack of gas money.

Both Bowling and Tony Mayes testified that, at approximately 6:00 a.m. on Monday, March 27, 1995, Bowling telephoned Mayes to ask if he could come back to work. Mayes told him that the job offer from the previous week still stood. (I, 430; II, 481). Bowling reported to work at approximately 8:00 a.m. but he found that the wheel stud on #139 was still broken. Bowling complained to mechanic Bennett about the wheel stud. (II, 335). Bowling also complained to Bennett about a recapped tire on the front wheel. Bennett told Bowling the recapped tire was permissible and would not be changed. Bennett told Bowling he could not replace the wheel stud because there was no welder available to remove it. (I, 657, 659-61). Bennett indicated the lights on #139 and "other stuff" had been worked on. (I, 664).

The haulage trucks driven by the complainants were Model RD 800, manufactured by Mack Truck. Each truck is equipped with two front tires and eight rear tires. The rear tires consist four rear pairs of tires, with two pairs of tires on each side of the rear axles. There are a total of 24 rear wheel studs comprised of six wheel studs on each rear set of wheels. The wheel studs consist of a lug nut and bolt with a spacer placed between each double set of rear tires. The wheel studs hold the double wheels together on the axle.

The broken stud in issue had a missing lug nut. The shaft of the stud remained in the wheel and could be removed by welding a fitting on the end of the shaft to enable the shaft to be unscrewed from the wheel axle. Both Hank Villadsen, a Service

Manager for Mack Trucks, and Bennett testified that broken wheel studs are not uncommon. Villadsen opined that it is not necessary to immediately remove a truck from service with one broken and five intact wheel studs. (III, 301-07). Bennett stated one broken wheel stud "wouldn't really make a whole lot of difference." (I, 671). In an effort to moderate his initial opinion, Bennett went on to state that 60 percent of drivers would not consider such a condition hazardous and that 40 percent of drivers would consider it a hazard. (I, 672). MSHA inspector Adron Wilson opined that one broken wheel stud puts additional pressure on the five remaining wheel studs. He concluded that there was a danger that the wheel could come off if an additional wheel stud on the same wheel broke.[8] (II, 610).

Bowling testified that he "concluded my truck was not going to get fixed that day unless I was to stand around there all day long and see to it myself .... I told Bill Bennett to have my truck fixed by five o"clock the next morning, I would be back to work. (I, 436). Bowling then went home approximately 1½ hours after he arrived. Bowling was paid $9.00 for the 1½ hours down time on March 27, 1995. (II, 335-36).

Ball returned to work at 5:45 a.m. on Monday, March 27, 1995. (Resp. Ex. 6). Tony Mayes told Ball truck #147, previously driven by Ball, was not available. Mayes gave Ball a choice between truck #134 and #139. Ball chose #134. Ball told Mayes he would preshift #134 and that he "would work a ten-hour shift and that was all I was going to work." (I, 126; II, 184). Mayes told Ball he didn't want to hear anymore about "any ten hour bullshit." Mayes told Ball if everyone parked at 4:00 p.m. he would need 30 trucks to haul the coal. (II, 126). Ball's operator checklist for March 27 reflects he completed 7 round trips from 5:45 a.m. until approximately 4:00 p.m., with 45 minutes down time. Mayes testified the cutoff time on that day was between 5:00 and 6:00 p.m. Mayes inquired about Ball and was told he had left at approximately 4:00 p.m. Parking at 4:00 p.m. would indicate that Ball last loaded at Huff Creek at approximately 3:00 p.m.

Ball indicated that he parked about 4:00 p.m. At approximately 4:15 p.m., before leaving the truck lot, Ball told mechanic Lee Payne there was a loose U-joint that caused truck #134 to "wander real bad" whenever it hit a hole. Lee Payne did

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[8] As discussed infra, Bowling's refusal to drive #139 because of the broken wheel stud was protected activity under the Act if made in good faith. However, there is conflicting evidence regarding whether one broken wheel stud on one set of rear wheels, that could only be removed with welding, constituted an out-of-service defect.

not testify in these proceedings. Tony Mayes testified that, upon learning of Ball's complaint, he and Riley checked the U-joint and found nothing wrong with it. (II, 495).

At approximately 5:00 a.m. on Tuesday, March 28, 1995, Bowling and Ball arrived at the truck lot together in Bowling's pickup truck. Mayes told Bowling the wheel stud on #139 had not been fixed. Bennett testified he could not fix the wheel stud because the diesel powered welding tool required to remove the stud was not working. (I, 661, 665-66). Bowling stated he would not drive #139 in that condition. Mayes asked Bowling to get out of his pickup so they could discuss the situation. Bowling remained in his pickup.

Ball asked Riley if he was fired because he left at 4:00 p.m. the previous day. Riley answered, "I never said that, did I." Ball said he would not drive #134 until the U-joint was replaced. Tony Mayes told Ball to drive #147, his former truck. Ball testified he told Tony Mayes he would preshift the truck. Ball testified Tony Mayes called Ball a "cry-ass" who wanted to "preshift everything in the damn lot." Ball also stated that Mayes called him a "sorry ass" and accused him of just wanting to find some "bullshit" because he "wasn't interested in working." (I, 146). Ball stated he told Mayes he was not going to allow himself to be "cussed" and he turned to leave.

Mayes denies that Ball wanted to preshift #147. Mayes testified that when he told Ball he could drive #147, Ball said he wanted to see if he had a ride home. Mayes alleges Ball got in Bowling's pickup and they both left without saying anything further.

Tony Mayes telephoned Bowling and Ball on the morning of Wednesday, March 29, 1995. Bowling told Mayes he had a meeting with the "investigator." When Mayes asked Bowling if that was why he wasn't coming to work, Bowling replied he wasn't coming to work because he was sick. (II, 487). Bowling's version of events is that Mayes called him on March 29 and accused him of "nitpicking shit about this wheel stud." Bowling reported that he hung up on Mayes.

Mayes then called Ball on March 29, 1995. Ball told Mayes he felt like he was getting the run around. Mayes told him he had several trucks without drivers and asked Ball to come to work. Ball said that he would, but he never returned. (II, 487-88). Ball, on the other hand, testified he told Mayes he could not return because of all the cussing and friction the last two days. (I, 147, 181). Mayes called investigator Harris to advise him of the situation.

As a result of the Bowling and Ball complaints, DOT conducted a compliance review of Mayes Trucking between May and July 1995. (Gov. Ex. 7). During this review, DOT cited Mayes Trucking for a May 10, 1995, violation involving the failure of truck driver Colen Kelly, who had worked 12½ hours, to keep a record of duty status. Significantly, there is no evidence that DOT considered Kelly's 12½ hour workday to be a violation of its ten hour driving restriction. Although Mayes Trucking was not cited for any pertinent violation of DOT's Hours of Service limitations, it did recommend that Mayes Trucking establish a system to control drivers' hours of service and it cautioned Mayes Trucking to "not allow drivers to exceed the 10, 15 and 60/70 hour limits" in Part 395 of its regulations.

The Jackson Discrimination Complaint

Walter Jackson was hired by Mountain Top Trucking approximately nine months prior to his discharge on February 17, 1995. Jackson had no prior experience as a truck driver. He was hired by Riley after he drove a test run with Riley from Huff Creek to the processing plant. To gain experience, Riley secured Elmo Mayes' approval to have Jackson drive a ¼ mile route hauling mud from the refuge pile at the tipple to a dump site. After approximately two weeks of hauling mud, Jackson assumed the normal driver's duties hauling coal from Huff Creek.

On the date of his discharge, Jackson began hauling coal at approximately 5:30 a.m. Jackson was driving truck #139. Truck #139 was one of the slower trucks in Mountain Top's fleet. Jackson stated that he had been driving this truck for six or seven months, and that it had previously had a new transmission installed. (III, 69).

At approximately 9:15 p.m., Jackson was in the process of completing his tenth load. Jackson stopped at the top of the mountain on the haulage road and exited the truck to urinate. Jackson returned to the truck and put it in gear. However, all of the trucks' functions were reversed. When Jackson put the truck in first gear it went in reverse. When the truck was placed in reverse gear, it went forward. Jackson noticed blue smoke coming from the passenger side through the headlight beams. Jackson also noticed the truck did not have any oil pressure.

Hank Villadsen, a Mack Truck Service Manager, explained the problem experienced by Jackson. When a loaded haul truck is on a hill, if the driver lets out the clutch and permits the truck to roll backwards in forward gear, or, permits the truck to roll forward in reverse gear, the engine will turn in the opposite direction that it was designed to rotate. Engine oil pressure drops, and the gears and the exhaust system reverse. Consequently, air is taken in through the exhaust system and oil

and smoke are vented through the air filter housing located on the front passenger side of the truck. The phenomenon of the reversed exhaust system accounted for the blue smoke observed by Jackson. Villadsen stated the remedy for "a truck running backwards" is to shut the truck off for a few minutes so that oil pressure can be restored and the oil can drain back into the pan.

Villadsen stated that drivers experiencing this problem frequently "don't know what's happening." (III, 293). He further opined, "its scary. It scared me the first time it ever happened to me." (III, 315).

Jackson observed Riley, who was also hauling coal that evening, pass him on the haulage road. Jackson radioed ahead to Riley and described the problem. Riley responded over the radio advising Jackson to turn off the truck and wait until Riley could return to check it out. Jackson turned the engine off. After a few minutes, Jackson restarted the truck and determined it was operating normally. Jackson informed Riley who instructed him to "ease" the truck down the mountain so that it could be checked out in the truck lot. Jackson interpreted the word "ease" as an instruction by Riley to be careful.

During the time Jackson was talking to Riley, Elmo Mayes was in the scale house with Kelly. Elmo Mayes overheard the radio transmissions between Jackson and Riley. Elmo Mayes became upset and radioed to Riley to determine what the problem was. Kelly told Elmo Mayes that it was cutoff time. Elmo Mayes asked Kelly which driver was due at the scales next. Kelly told Mayes that Mud Puppy was due. Mud Puppy is Jackson's CB handle. Elmo Mayes instructed Kelly to make Mud Puppy the cutoff driver. Elmo Mayes testified that he did not know Mud Puppy was the driver communicating with Riley when he selected him as cutoff.

Upon Jackson's arrival at the scales, Jackson noticed Elmo Mayes' pickup parked outside the scale house. Kelly informed Jackson that Elmo Mayes had designated him as cutoff driver. Jackson told Kelly he was willing to be the cutoff driver. However, Jackson informed Kelly that he was going to drive to the truck lot after dumping his load in order to meet Riley who had agreed to check out his truck.

When he arrived at the truck lot, Jackson shut off his truck and opened the hood. As Riley jumped on the hood, Elmo Mayes pulled up in his pickup and told Riley, "the damn truck had oil in it," and to put Jackson's "ass" back in the truck so that he could go across the hill to get the last load.

Riley did nothing further to check the truck. Elmo Mayes told Jackson he was tired of drivers "pussy footing" around, and that they were going to work when he said they should work or

else he would send them to the house. Jackson told Mayes he would return for the last load as soon as it was determined that the truck was safe. Mayes objected to any further delay and told Jackson if he didn't go back for another load, he was fired. Jackson told Mayes the best thing he could do would be to give him his check. Jackson was given his check and Mayes told him to get his things out of the truck.

Jackson testified that after he left his job, a fellow truck driver, Benny Ray Carver, told him that Tony Mayes said he could have his job back if he apologized. There is no credible evidence that Jackson was ever contacted by Tony Mayes or anyone else from Mountain Top about his return to work.

Jackson filed his discrimination complaint with MSHA on March 14, 1995. Jackson's complaint stated:

> I feel like I was discriminated against due to me being fired for refusing to operate an unsafe truck after being in that truck for 16 hours already, on February 17, 1995. In recourse, I request my job back, with back pay, regulated working hours, and regulated breaks and lunch breaks. (Gov. Ex. 34).

Disposition of Issues

Discriminatory Discharge

The purpose of section 105(c) of the Act is to protect and encourage miners "to play an active part in the enforcement of the Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, 95th Cong., 2d sess. Legislative History of the Federal Mine Safety and Health Act of 1977, at 623 (1978).

A miner alleging to be a victim of prohibited retaliatory conduct bears the burden of proving a *prima facie* case of discrimination under section 105(c) of the Mine Act. In order to establish a *prima facie* case, a miner must establish that he engaged in protected activity, and, that the adverse action complained of, was motivated in some part by that protected activity. See Secretary on behalf of David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980) rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981).

An operator may rebut a *prima facie* case by demonstrating either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. Pasula, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. Id.; Robinette, 3 FMSHRC at 817-18; See also Jim Walter Resources, 920 F.2d at 750, citing with approval Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987).

An operator must carry the burden of establishing an affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935, 1937 (November 1982). However, the ultimate burden of persuasion remains with the complainants in these proceedings.

Protected Activity

It is axiomatic that miners have an absolute right to make good faith safety or health related complaints about mine practices or conditions when the miner believes such circumstances pose hazards. Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). This statutory right is afforded to miners who bring to the attention of mine management conditions or circumstances that pose hazards to fellow employees as well as to themselves. See Secretary on behalf of Cameron v. Consolidation Coal Company, 7 FMSHRC 319 (March 1985).

Communication of potential health or safety hazards, and responses thereto, are the means by which the Act's purposes are achieved. Once a reasonable, good faith concern is expressed by a miner, an operator, usually acting through on-the-scene management personnel, has an obligation to address the perceived danger. Boswell v. National Cement Co., 14 FMSHRC 253, 258 (February 1992); Secretary o.b.o. Pratt v. River Hurricane Coal Company, Inc., 5 FMSHRC 1529, 1534 (September 1983); Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 230 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469 (11th Cir. 1985).

Further Findings and Conclusions

As a threshold matter, I note that whether Jackson, Bowling, or Ball, initially quit or were fired is not material in the resolution of these cases. The February 17, 1995, termination of Jackson and the March 7, 1995, discharges of Bowling and Ball,

were clearly adverse actions resulting from the complainants' work refusals. The issues to be determined are whether these work refusals warrant the statutory protection provided by section 105(c) of the Act.

Although the Act grants miners the right to express safety and health related concerns, it does not expressly grant the right to refuse to work under such circumstances. Nevertheless, the Commission and the Courts have recognized the right to refuse to work in the face of perceived dangers. See Secretary of Labor on behalf of Cooley v. Ottawa Silica Co., 6 FMSHRC 516, 519-21 (March 1984), aff'd mem., 780 F.2d 1022 (6th Cir. 1985); Price v. Monterey Coal Co., 12 FMSHRC 1505, 1514 (August 1990) (citations omitted). In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." Id.; Gilbert v. FMSHRC, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. Robinette, 3 FMSHRC at 807-12; Secretary of Labor on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (June 1983). The purpose of the "good faith" belief requirement is to "remove from the Act's protection work refusals involving frauds or other forms of deception." Robinette, 3 FMSHRC at 810.

For a work refusal to be protected under the Mine Act, a miner should first communicate his safety concerns to some representative of the operator. Secretary of Labor on behalf of Dunmire v. Northern Coal Co., 4 FMSHRC 126, 133 (February 1982). If the miner expresses a reasonable, good faith fear concerning safety, the operator has a duty to address the perceived danger. Metric Constructors, Inc. 6 FMSHRC at 230; Secretary of Labor on behalf of Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529, 1534 (September 1983).

Jackson's February 17, 1995, complaint to Elmo Mayes and Riley concerning his continued use of his backward running truck, particularly over mountainous terrain, evidenced a good faith reasonable belief that a hazard existed. Similarly, Bowling and Ball's March 7, 1995, complaints concerning their fatigue as a consequence of their excessive work hours, communicated to Elmo Mayes and Riley, were also reasonably expressed safety related concerns.

Having communicated these good faith, reasonable concerns about safety, the analysis shifts to an evaluation of whether the respondents addressed these concerns in a way that should have alleviated the complainants' fears. Gilbert, 866 F.2d at 1441; see also Bush, 5 FMSHRC at 997-99; Thurman v. Queen Anne Coal Co., 10 FMSHRC 131, 135 (February 1988), aff'd mem., 866 F.2d 431 (6th Cir. 1989). For a miner's continuing refusal to work may become unreasonable after an operator has taken reasonable steps

to dissipate fears or ensure the safety of the challenged task or condition. Bush, 5 FMSHRC at 998-99.

Elmo Mayes' refusal to permit the inspection of Jackson's truck in the truck lot immediately following the malfunctioning incident on the mountain failed to address Jackson's reasonable concerns for his personal safety. So too, Riley's promise of the resumption of "normal" work hours when the stockpiles were reduced was not responsive to Bowling and Ball's immediate concerns of fatigue. Thus, the respondents provoked the complainants' initial work refusals by taking no meaningful actions to address their fears. The reasonableness of the complainants' work refusals are further discussed below.

Jackson's February 17, 1995, Work Refusal

With respect to Jackson, the reasonableness of his reluctance to resume driving late in the evening on February 17, 1995, is self evident. Jackson was an inexperienced truck driver. Even the respondents' witness Hank Villadsen, a Mack Truck Service Manager, admitted a truck running backwards is "scary." A miner must communicate his safety complaint to an operator. I credit the testimony of Kelly, over Elmo Mayes' denial, that Elmo Mayes was aware of Jackson's troubles when he designated Jackson as cutoff driver on February 17, 1995. In this regard, Kelly provided a statement to MSHA investigators shortly after this incident reflecting that Elmo Mayes selected Jackson as cutoff specifically because he had overheard Jackson complain about the malfunction at the top of the mountain. (I, 713-14). Moreover, Riley was certainly aware of Jackson's concerns, which he acknowledged by instructing Jackson to "ease" the truck down the mountain.

Simply stated, can anyone seriously question the propriety of Jackson's refusal to continue to drive his truck at 9:00 p.m. on a winter evening, over mountainous terrain, after having worked approximately 16 hours and experiencing this "scary" situation? As noted above, the Mine Act imposes an obligation on operators to reasonably address a miner's fears. Gilbert, 866 F. 2d at 1441. Elmo Mayes' response to Jackson's reasonable concerns was retaliatory in nature and precisely the type of conduct the Act seeks to dissuade.

Accordingly, the respondents' failure to address Jackson's fears is actionable. Thus, Jackson's February 17, 1995, refusal to act as the cutoff driver until his truck was adequately inspected for defects was reasonable, and constitutes protected activity under section 105(c) of the Act. Consequently, Jackson's discrimination complaint shall be granted.

Bowling and Ball's March 7, 1995, Work Refusal

With respect to Bowling and Ball's March 7, 1995, work refusal, it is necessary to determine what constitutes unreasonable work hours that would justify a work refusal protected by section 105(c). As these are discrimination complaints brought pursuant to the Mine Act, whether Mountain Top violated any provision of the DOT regulations governing permissible truck driver working hours is beyond the scope of these proceedings. In fact, MSHA investigator Harris stated that he was not familiar with DOT's regulations and they were not considered during the course of his investigation. (I, 743). Whether Mountain Top violated any other state or federal regulation related to wages and hours is also not the subject of these proceedings. The issues in these proceedings are limited to what relief, if any, is available to Bowling and Ball under the Mine Act.

Thus, in assessing the propriety of Bowling and Ball's March 7, 1995, work refusal, it is necessary to distinguish Mountain Top's "normal" work hours from excessive work hours. The overwhelming evidence, including Bowling and Ball's own testimony, reflects they accepted positions with Mountain Top knowing that the workday consisted of an approximate 5:00 a.m. starting time, with cutoff times varying between 4:00 p.m. and 6:00 p.m.[9] These working hours were out of the control of Mountain Top as they were established by Lone Mountain. These work hours also applied to Hillis Breese, Lone Mountain's other haulage contractor. Consequently, the record reflects that, in resolving the matters in issue, the applicable normal working hours are from 5:00 a.m. until a cutoff time as late as 6:00 p.m.

Using an average cutoff time of 5:00 p.m., it is helpful to quantify the miles driven during a "normal" 12 hour workday. With respect to Mountain Top, assuming an approximate 1¼ hour round trip from Huff Creek and an average of a 5:00 p.m. cutoff time, a truck driver would complete approximately nine round trips.[10] Nine round trips would constitute driving a total of 45 miles over state road 38, and 108 miles over Lone Mountain's haul road. Under these circumstances, Bowling and Ball, having accepted the working conditions and hours of employment, have

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[9] Virtually every Mountain Top driver called in these matters, as well as Lone Mountain scale man Kelly, testified normal cutoff times varied between 4:00 and 6:00 p.m.

[10] Nine round trips during a 12 hour day is consistent with Ball's completion of seven round trips on March 27, 1995, during his ten hour workday. (Resp. Ex. 6).

failed to establish that a 4:00 to 6:00 p.m. cutoff time is unlawful, or otherwise unreasonable.

However, from early February 1995 until Bowling and Ball's March 7, 1995, discharge, the required work hours were considerably longer than the customary 6:00 p.m. cutoff limit. Kelly testified that cutoffs were as late as 9:00 to 10:00 p.m. Even a 9:00 p.m cutoff would require the cutoff driver to work past 10:00 p.m., a 17 hour work day. Moreover, the extended workdays during this period are not in dispute. Tony Mayes has conceded throughout these proceedings that mistakes were made with regard to Mountain Top's insensitivity to the drivers safety related complaints regarding these excessive work hours. (I, 713; II, 295-96, 526; III, 473-74).

Under these conditions, it was reasonable for Bowling and Ball to refuse to continue working on March 7, 1995, past a 6:00 p.m. cutoff because of their belief that their fatigue, caused by working excessive hours, posed a risk to their continued safe operation of their vehicles. The hazards associated with the complainants' fatigue were accentuated by the necessity for them to drive multi-ton haul vehicles over mountainous terrain on narrow and winding roads. Consequently, Bowling and Ball's March 7, 1995, work refusals were protected under section 105(c) of the Act.

Bowling and Ball's Alleged Constructive Discharge

A constructive discharge occurs if the operator attempts to thwart a miner's rights under the Act by retaliating against a miner's protected activity by maintaining intolerable working conditions in order to force the miner to quit. Thus, the doctrine of constructive discharge extends liability to operators that indirectly effect a discharge that is forbidden by the Act if done directly. Nally & Hamilton Enterprises, Inc., 16 FMSHRC 2208, 2210 (November 1994), citing Simpson v. FMSHRC 813 F.2d 639, 642 (4th Cir. 1987). In this regard, section 105(c) of the Act seeks to protect miners from not only common forms of discrimination, such as discharge or demotion, but also more subtle forms of interference such as threats of reprisal or harassment. Elias Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1478 (August 1982) quoting Pasula, 2 FMSHRC at 2790. To this end, the remedial goal of section 105(c) is to "restore the [victim of illegal discrimination] to the situation he would have occupied but for the discrimination." Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 142 (February 1992).

Disposition of a constructive discharge allegation is a delicate issue because of the potential for abuses by operators, as well as complainants, that undermine the Mine Act's

fundamental purpose of encouraging the legitimate free exercise of miners' rights that is so "essential to the achievement of safe and healthful mines". Elias Moses, 4 FMSHRC at 1478. The Mine Act is a remedial statute. It seeks to discourage discriminatory conduct and make victims of discrimination whole through back pay and reinstatement.

In addressing whether a constructive discharge occurred in these cases, I am keenly aware that direct evidence of discriminatory motive is rare and that discriminatory intent may be established through circumstantial evidence. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir 1983). However, in cases such as these, where complainants have been called back to work after a discriminatory discharge, an operator's defense that a constructive discharge claim is disingenuous, because the complainants were not interested in returning to work, must also be established by circumstantial evidence.

In the instant cases, Bowling and Ball contend they were the victims of constructive discharges upon their return to work after Tony Mayes had offered their jobs back on March 22, 1995. Thus, Bowling and Ball have the burden of establishing that they were forced to endure the requisite intolerable working conditions that forced them to quit their jobs on March 29, 1995. An analysis of the circumstantial evidence surrounding the alleged intolerable working conditions during the period in issue follows.

Wednesday, March 22, 1995

Following Bowling and Ball's March 7, 1995, discriminatory discharge, Tony Mayes telephoned both complainants on March 22, 1995. As a result of Tony Mayes' phone calls, Bowling agreed to return to work on Thursday, March 23, 1995.

Mayes stated Ball agreed to return to work on Friday, March 24, 1995. Ball maintains he agreed to return to work on Monday, March 27, 1995, because he did not have money for gas and he had an appointment to upgrade his commercial driver's license.

Both Mayes and Ball agree that Ball did not intend to return to work immediately. I credit Mayes testimony that Ball indicated he would return to work on Friday, March 24, 1995, over Ball's testimony. Mayes' testimony is consistent with the testimony of Bowling and Ball with respect to other details of these conversations. Moreover, contemporaneous notes made by the respondents reflect that Ball was due back to work on March 24. (Resp. Ex 4). Finally, Ball's contention that he could not return to work until the following Monday because he lacked gas

money is unavailing since he routinely rode with Bowling, and, he knew Bowling was scheduled to return to work as of March 23. Ball's failure to return to work immediately undermines his asserted interest in returning to his job.

Thursday, March 23, 1995

Ball did not report to work on March 23, 1995. Bowling reported to work at 5:00 a.m. He refused to drive truck #139 based on "his previous experience with the truck." There is no evidence that he spoke to truck mechanic Bennett about the condition of #139 on March 23, or, that he took any action to secure the repairs he claimed the truck needed. Bowling left the truck lot in the early morning hours of March 23. The respondents claim Bowling left after one hour and that he stated he would wait for the results of MSHA's investigation. I credit Mayes testimony in this regard as it is undisputed that Bowling did not return to work the next day and Bowling has not provided a credible explanation for his absence.

Friday, March 24, 1995

Significantly, neither Bowling nor Ball reported to work on Friday, March 24, 1995. Bowling testified that he "called in sick to the guard shack." There is no corroborating evidence that Bowling called in sick. Nor is there any evidence about the details of his reported illness. Finally, Bowling's purported call reporting his illness to Mountain Top on March 24 is belied by his admission that he called Mayes at approximately 6:00 a.m. on Monday, March 27 to ask if he still had a job.

As noted, Ball also did not report to work on Friday, March 24, 1995. I credit Tony Mayes' testimony that Ball called in on May 24 to state he had no gas money, although Ball maintains he did not agree to return to work until March 27. The failure of both Bowling and Ball to report to work as expected on March 24, without adequate reasons for their absence, further undermines their claims of constructive discharge.

Monday, March 27, 1995

Bowling returned to work on Monday, March 27 after telephoning Mayes earlier that morning to inquire if he still had a job. Bowling still objected to driving #139. He had numerous complaints about #139, including a recap on the front tire that had apparently been on the truck for some time. Mechanic Bennett informed him the lights on the truck had been checked out and that the recap on the front tire was permissible. Bowling refused to drive the truck because of the broken wheel stud. Mayes did not order Bowling to drive #139 before the wheel stud was fixed. Bowling testified that he "concluded my truck was not

going to get fixed that day unless I was to stand there all day long and see to it myself." Bowling was entitled to $6.00 per hour down time while his truck was being fixed. Bowling left work after 1½ and was paid $9.00 down time. Bowling's decision not "to stand around all day," although he was entitled to compensation for down time, further undermines his allegations of a constructive discharge.

Ball reported for work on Monday, March 27, 1995. Mayes gave him the choice to select #139, which Bowling refused to drive, or #134. Ball selected #134 and told Tony Mayes he would only drive ten hours. This remark was made as a non-negotiable ultimatum. It was apparently intended to provoke Mayes as normal cutoff times had routinely been as late as 6:00 p.m. since Ball had worked for Mountain Top. The cutoff time on March 27 was between 5:00 and 6:00 p.m.

Ball drove 7 round trips between 5:45 a.m. and 4:00 p.m. At approximately 4:00 p.m., Riley saw Ball in his car leaving the haul road. Ball testified Riley approached him and asked "where in the hell are you going?" (I, 138). Ball replied he was going home because he was "only required to drive ten hours a day, and that's what I've been told is the safe and legal limit, and that's all I'm going to operate your truck." Id. Thus, Ball left work without the approval of Mountain Top management.

Before leaving Ball reportedly complained to Lee Payne, a truck mechanic who was not called as a witness, about the condition of his truck. Ball alleged the U-joint on #134 was loose and made the truck "wander real bad." Tony Mayes stated the U-joint was checked and it was determined that it was not defective.

Tuesday, March 28, 1995

Bowling and Ball drove to work together on Tuesday, March 28, 1995. Upon arriving at work Ball asked Riley if he was fired "because of the incident yesterday afternoon." Riley told him he had not been fired. Bowling made a similar inquiry the previous morning when he asked Tony Mayes if he was fired. Bowling refused to drive #139 because the wheel stud had not been fixed. Bowling's testimony does not reflect that he made any significant effort to inquire about driving an alternative truck. (I, 444-45, 476). Similarly, Ball refused to drive #134 because of the claimed loose U-joint.

Tony Mayes then offered Ball truck #147, the truck Ball had driven prior to his March 7 discharge. Ball said he would only drive the truck after he preshifted it. Tony Mayes accused him of being a "cry-ass" who "wanted to preshift everything in the damn lot." As discussed below, Mayes' remarks, when viewed in

context, do not constitute a constructive discharge. Ball did not preshift #147. Rather, he and Bowling left the truck lot together in Bowling's pickup.

Wednesday, March 29, 1995

Tony Mayes called Bowling and Ball about returning to work. Both Bowling and Ball testified that they declined to return to work because of all the "cussing" that had gone on.

Additional Findings and Conclusions

A review of the above events reflects that Bowling and Ball acted in concert. They both failed to report to work on Friday, March 24 without providing a credible reason. Their absence from work on March 24, coupled with Bowling's statement on March 23 that he would wait for the results of MSHA's investigation, fails to support their contention that they truly desired to return to their jobs. Bowling and Ball's inquiries into whether they had been "fired," when they had not been told they were fired, were manipulative, and are additional indications that they were not interested in returning to work.

With regard to the condition of the trucks in issue, I note these vehicles are haulage trucks used to transport multi-ton loads over unpaved mountain roads. While these trucks must be maintained in safe operating condition, reasonable people may differ over when a component part requires replacement. Although mine operators are subject to civil penalties for unsafe equipment, the Mine Act does not strip operators of their authority to determine when equipment should be repaired, or removed from service. In this regard, the respondents' records for the period March 22 through March 29, 1995, reflect that trucks were frequently removed from service for repair. (Resp. Ex. 4).

Ball's assertion that #134 had a loose U-joint is self-serving and uncorroborated. For example, there is no evidence of similar U-joint complaints by any driver who used #134 immediately prior to Ball. More significantly, Ball operated #134 for 10 hours on March 27, 1995, without removing the truck from service. By his own admission, Ball stopped driving at 4:00 p.m. on March 27 because he was "only required to drive ten hours a day," not because #134 was unsafe to drive. Thus, his refusal to drive the truck the following morning, purportedly for reasons of safety, is inconsistent with his uninterrupted operation of the truck the previous day. Moreover, the respondents' records reflect truck #134 was repaired as recently as Wednesday, March 22, 1995, when the rear end was serviced by replacing the ring gear and pinion, spur shaft, and bullgear with a new axle gear kit. (Resp. Ex. 4).

It is noteworthy that Ball demonstrated little enthusiasm for driving truck #147 on March 28, 1995, although his March 9, 1995, discrimination complaint specifically requested reassignment to #147. Ball's conduct in insisting on preshifting #147, when viewed in context, was provocative and calculated to antagonize. Obviously, preshifts are required. However, Mountain Top's policy called for drivers to mark checkoff sheets throughout the day detailing maintenance problems that occurred as the shift progressed. The checkoff sheets, annotated with maintenance problems, were turned in at the truck lot at the end of the day. Thus, the trucks, in fact, had been preshifted in that the previous driver had evaluated the trucks at the end of the previous day. Moreover, Ball could have taken #147 out of service if he experienced a significant problem before exiting the truck lot.

With respect to Bowling, he repeatedly left work shortly after reporting and made no attempt to stay at work, compensated for down time, to ensure that his truck was repaired, or, to wait for another truck to be assigned. Upon returning to work, Bowling was at work approximately 1½ hours on Thursday, March 23; he did not report to work on Friday, March 24; he was at work 1½ hours on Monday, March 27; he reported to work but did not get out of his pickup on Tuesday, March 28; and he refused to return to work on Wednesday, March 29.

With respect to the condition of truck #139, obviously, being required to drive an unsafe truck is an intolerable condition. While the evidence is equivocal concerning whether one rear broken wheel stud justifies a truck's immediate removal form service, Bowling's refusal to drive #139 with a broken wheel stud is protected activity if it was made in good faith. However, as discussed herein, the credible evidence reflects his complaint was pretextual in nature given Bowling's other provocative conduct and his refusal to work past 3:00 p.m. Moreover, even if Bowling's refusal to drive #139 was protected, there is no evidence that his refusal resulted in his discharge.

Turning to the complainants' truck assignments, the Commission has stated that its jurisdiction is limited to ensuring that miners' rights under the Act are protected. The Commission's function is not to pass on the wisdom or fairness of the asserted business justifications for a particular business decision, but rather, to determine if such justifications are credible, and, if so, whether they would have motivated the operator as claimed. Bradley v. Belva, 4 FMSHRC 982, 993 (June 1982). Here, Tony Mayes expressly asked investigator Harris whether he could assign Bowling and Ball to any truck if he rehired them. Harris replied that Mayes could assign them to any truck as long as it was safe and preshifts were done. (I, 735).

Mayes testified that his inquiry was motivated by his desire to prevent resentment from other truck drivers over truck reassignments. This is a reasonable business concern.

Moreover, even if Mayes' failure to assign Bowling and Ball to their former trucks was motivated by their protected activity, the Mine Act does not sanction work refusals for adverse personnel actions that do not create intolerable conditions. Under such circumstances miners can file discrimination complaints to remedy the adverse personnel action. The fact that #134 or #139 may not have been as desirable as Bowling and Ball's former trucks, because they were older models, does not constitute intolerable working conditions.

Finally, the asserted safety problems as the motivation for Bowling and Ball's refusals to drive #134 or #139, are inconsistent with their predisposition, expressed in their March 9, 1995, MSHA discrimination complaints, to drive only trucks #144 and #147. (Gov. Ex. 9). It is worth noting that it was not uncommon for Bowling and Ball to be assigned trucks other than #144 and #147. For example, Bowling drove #134 on February 11, 1995, and #150 on March 6 and March 7, 1995. (Miner's Ex. 10). Ball drove #134 on February 3, February 6, February 10, and February 13 through 16, 1995, and #138 on February 12, 1995. (Miner's Ex. 9).

Bowling and Ball allegedly refused to return to work because they were offended by the respondents' language. Remarks such as accusing Bowling of "nitpicking shit," or Ball of being a "cry-ass," do not constitute intolerable working conditions under these circumstances. There is no evidence of any personal threats. Passions run high in labor disputes and epithets and accusations, particularly by truck drivers, are not uncommon in such instances. Crown Central Petroleum Corporation v. NLRB, 430 F.2d 724, 731 (5th Cir. 1970).

The Reliance on DOT Regulations

Finally, and most importantly, Bowling and Ball's refusal to work "a minute" more than ten hours per day, although they had routinely worked as long as 12 hour days, was unreasonable. According to Bowling's interpretation of DOT's ten-hour rule, it was "illegal" for him to drive "one minute" past 3:00 p.m. if he began work at the routine 5:00 a.m. starting time. (I, 456-59). Bowling's interpretation of the DOT regulations would require his last load to occur prior to 2:00 p.m. For example, if Bowling last loaded at Huff Creek at 1:50 p.m., he could not complete another 1¼ hour round trip to return to Huff Creek for another load before 3:00 p.m. These work day limitations would destroy Mountain Top's ability to fulfill its contractual obligations with Lone Mountain. Consequently, Bowling and Ball's adherence

to their interpretation of DOT's ten-hour rule, regardless of their sincerity, was unreasonable and provided an independent justification for their termination. 4 FMSHRC at 993.

Ironically, Bowling and Ball took it upon themselves to enforce DOT's "ten-hour rule" even though DOT's investigation failed to confirm Mountain Top's alleged non-compliance. In this regard, the fact that drivers routinely worked from 5:00 a.m. until as late as 6:00 p.m. cutoffs was easily ascertainable and presumably known to DOT investigators. In fact, DOT failed to conclude that Mayes Trucking's Colen Kelly had violated the ten hour rule although it was aware Kelly had worked as a truck driver for a 12½ hour workday. (Gov. Ex 7).

DOT's failure to cite Mayes Trucking for violating the ten hour rule, a rule that is intended to restrict driving hours for long haul interstate trucking, is not surprising given Mountain Top's short truck route. The trip from the Huff Creek facility to the processing plant was approximately 8 miles, consisting of approximately 6 miles on a private haulage road and only 2 miles on state road 38. Moreover, it is difficult to apply the ten hour standard to the facts in these cases because it is difficult to determine how many work hours constitute driving more than ten hours. A total of 40 trucks, including those operated by Hillis Breese, were traveling this 8 mile route. Driving time for the 1¼ hour round trip was diminished by the varying times for waiting in line to load, weigh at the scale house, and unload at the dump site.

Additionally, while there was a disincentive to stop for extended lunch periods because drivers were paid by the load, Geraldine Perkins, who operated a snack shop on state road 38, testified most drivers stopped daily for varying periods of time. (II, 455). For example, she estimated that Bowling and Ball patronized her snack shop two to three times per day. (II, 455).

Even if Bowling and Ball misapplied DOT's ten hour rule, they argue that their work refusal is still protected because it was reasonable and made in good faith. However, as discussed below, the complainants' argument fails because their work refusal lacks the fundamental condition precedent, i.e., fear of a discrete hazard.

Section 105(c) confers on a miner the right to refuse to work if he sincerely believes his working conditions expose him to an identifiable danger. Thus, the right to refuse work is personal to the miner who fears a perceived danger. Although objective proof that an actual hazard existed is not necessary to support a protected work refusal, the miner must demonstrate a reasonable basis for concluding that he was exposed to an actual risk. Secretary of Labor on behalf of Hogan v. Emerald Mines

Corp., 8 FMSHRC 1066, 1074 (July 1996), aff'd mem., 829 F.2d 31 (3rd cir. 1987). In this regard, good faith complaints by Bowling or Ball of personal illness or fatigue posing a discrete safety hazard during a workday, regardless of how many hours they had worked that day, would be protected activity. In other words, it is the actual personal illness or fatigue, not the number of hours worked, that creates the protected, reasonable basis for the perceived hazard.

As an illustration of this concept, it is helpful to contrast two cases previously brought before this Commission. In Walter A. Schulte v. Lizza Industries, Inc., 6 FMSHRC 8 (January 1984), the Commission concluded that a miner's unexcused early departure from work, in a situation where the operator had a policy requiring employees to work overtime each day, was not protected by the Act. In Lizza, there was no showing that Schulte's early departure was necessitated by specific concerns for his personal safety. However, in James Eldridge v. Sunfire Coal Company, 5 FMSHRC 408, 464 (March 1983), Judge Koutras found Eldridge's work refusal was protected when he refused to work beyond his normal shift because of his communicated concerns that he was "too tired and exhausted" to continue working on a pillar section until the entire pillar was extracted.

Thus, the Commission's framework for a protected work refusal requires "a direct nexus between performance of the refusing miner's work assignment and the feared resulting injury to [himself or] another miner." Cameron, 7 FMSHRC at 324. Here, Bowling and Ball's work refusal is predicated on their disinclination to drive more than ten hours as a matter of policy, rather than being motivated by their fear of a discrete safety hazard brought about by their physical condition. Thus, in the final analysis, their refusal to "drive" more than ten hours per day lacked the requisite nexus to any identifiable discrete safety hazard. Consequently, their work refusal, with respect to limiting the hours they were willing to work, is not protected activity under the Act.

The complainants assert that the respondents' actions from March 22 through March 29, 1995, must not be viewed in isolation. Thus, they argue the circumstances surrounding their March 29, 1995, terminations were intimately connected to their earlier protected activities, i.e., their March 7 complaints about long work hours and the filing of their discrimination complaints on March 9. Consequently, it is alleged the respondents had a "predisposition" to get rid of Bowling and Ball whom the company believed were "troublemakers." (Complainants' Findings at 39-40).

The Complainants miss the point. The March 7 complaints concerning excessive work hours, and the filing of their

discrimination complaints based on those long workdays, were protected activities that serve as the basis for their March 7 protected work refusal. However, the complainants' expressed refusals to "drive" more than 10 hours per day after they were called back to work by Tony Mayes constituted unprotected and potentially disruptive activity. The Mine Act does not confer on miners the unilateral authority to determine their own work hours. Their work refusals provide an independent basis for their discharge. "Unreasonable, irrational or completely unfounded work refusals do not commend themselves as candidates for statutory protection...." Robinette, 3 FMSHRC at 811.

Ultimate Findings and Conclusions

It is undisputed that Bowling and Ball refused Tony Mayes' March 29, 1995, telephone offer to return to work. The complainants have the burden of demonstrating that their refusal to return to work was reasonable, and protected activity under the constructive discharge doctrine. However, Bowling and Ball have not demonstrated that they were forced to endure intolerable working conditions that forced them to refuse to return to work. Rather, their actions during the period March 22 through March 29, 1995, were provocative in nature and evidenced attempts to provoke their discharge for the apparent purpose of preserving their pending discrimination complaints. But cf. Hogan, 8 FMSHRC at 1072 (two miners' work refusals were protected where each miner "acted individually, without knowledge of the intentions of the other," and there was no evidence "suggesting a likelihood of pretext or ulterior motive for their actions").

Moreover, their refusals to work more than ten hour days, conditions they had previously accepted, provided an independent and unprotected basis for their termination. Consequently, the discrimination complaints of Bowling and Ball only entitle them to the protections and relief available under section 105(c) from March 8, 1995, the day following their discriminatory discharges, through March 22, 1995, the day they were offered reinstatement.

Liability

Successorship Liability

The related temporary reinstatement decision in these matters established that Mayes Trucking is liable in these discrimination proceedings as the successor corporation of Mountain Top. That decision noted the Commission's successorship standard in discrimination cases is well settled. Secretary on behalf of James Corbin et al. v. Sugartree Corp., Terco, Inc., and Randal Lawson, 9 FMSHRC 394, 397-399 (March 1987), aff'd sub nom. Terco Inc. v. FMSHRC, 839 F.2d 236, 239 (6th Cir. 1987).

See also Secretary on behalf of Keene v. Mullins, 888 F.2d 1448, 1453 (D.C. Cir. 1989). Under this standard, the successor operator may be found liable for, and responsible for remedying, it's predecessor's discriminatory conduct. The indicia of successorship are:

> (1) whether the purported successor company had notice of the underlying charge of possible discrimination; (2) the ability of the purported successor to provide relief; (3) whether there has been a substantial continuity of business operations; (4) whether the purported successor uses the same plant; (5) whether the purported successor employs the same work force; (6) whether the purported successor uses the same supervisory personnel; (7) whether the same job exists under substantially the same working conditions; (8) whether the purported successor uses the same machinery, equipment and methods of production; and (9) whether the purported successor produces the same product. See Terco, 839 F.2d at 239; Mullins, 888 F.2d at 1454.

The temporary reinstatement decision noted "compelling evidence" of successorship. 17 FMSHRC at 1708-09. With regard to notice, Tony Mayes, President of Mayes Trucking, clearly had knowledge of the alleged discriminatory conduct. Turning to the other criteria of successorship, the temporary reinstatement decision noted:

> (1) Mayes Trucking employs Riley, the same truck foreman; (2) to supervise the same drivers; (3) to drive the same trucks; (4) to haul coal from the same mine site to the same processing plant; (5) over the same route; precisely as Mountain Top had done. 17 FMSHRC at 1709.

Thus, Mayes Trucking was determined to be the successor to Mountain Top. Consequently, Mayes Trucking and Mountain Top are jointly and severally liable for the relief awarded in these proceedings.

Personal Liability

In addition to Mayes Trucking's liability as a successor of Mountain Top, the complainants assert that David Riley, Elmo Mayes and Tony Mayes are personally liable under section 105(c). Section 105(c)(1) provides, in pertinent part, that "no person shall discharge or in any manner discriminate against ...any miner...[who] has filed or made [a safety related] complaint under or related to this Act...." (Emphasis added).

Section 3(d) of the Act, 30 U.S.C. § 802(d), defines "operator" as "any ...person who operates, controls, or supervises a coal or other mine or any independent contractor performing services ...at such mine." (Emphasis added).

Section 3(f) of the Act, 30 U.S.C. § 802(f), defines "person" as "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization." (Emphasis added). Significantly, section 3(f) does not include "agents" of these business entities within the meaning of "person."[11] Rather, liability as a 105(c) "person" generally only attaches if there is a proprietary interest.

Thus, the term "person" under section 105(c), when read in conjunction with sections 3(d) and 3(f) of the Act, includes any business entity, regardless of its structure, that operates a mine, or that performs independent contractor services at a mine. Although operators can be held accountable for violations of section 105(c) committed by "agents," such agents are not individually liable under section 105(c) of the Act, for only operators are capable of providing the back pay and reinstatement relief contemplated under section 105(c). To make an agent jointly and severally liable with an operator under section 105(c) is to elevate an agent to the status of a principal.

There may be instances where an individual, without a cognizable proprietary interest, exercises complete de facto control. In such instances, 105(c) liability may be predicated on this individual's status as an "operator" given his total control of the mine. For example, in Glenn Munsey v. Smitty Baker Coal Co., 2 FMSHRC 3463 (December 1980), relied upon by the complainants, Ralph Baker, the manager who was responsible for the day to day operations of the Smitty Coal Company mine, was ordered to reinstate the complainant, Munsey, after Baker had incorporated a new company, Mason Coal Company, and refused to rehire him. However, in addition to being the mine manager, Ralph Baker, along with Smitty Baker, apparently was also a principal in the corporate respondent. See Glenn Munsey v. Smitty Baker Coal Co., Inc., Ralph Baker, Smitty Baker, and P&P Coal Company, 8 IBMA 43 (June 30, 1977).

The conclusion that only "operators" are liable under 105(c) is consistent with Commission precedent. In Robert Simpson v. Kenta Energy, Inc., & Roy Dan Jackson, 11 FMSHRC 770 (May 1989) the Commission determined that Jackson, Kenta's President, was

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[11] The term "agent" as defined in section 3(e), 30 U.S.C. § 802(e), includes "any person charged with...the supervision" of miners.

personally liable for back pay and reinstatement under section 105(c) because:

> Jackson was the real "operator," the real "person" in control of the personnel actions at the mine. The point of this approach was to show that Jackson should not be permitted to "hide" behind the corporate veil. 11 FMSHRC at 780.

By contrast, Riley was not a corporate officer of Mountain Top or Mayes Trucking. Rather, Riley was an "agent" who answered to, and sought the approval of, Elmo and Tony Mayes. The notion that ordinary supervisors, such as Riley, can be held jointly or severally liable with their employers in discrimination cases under 105(c) for back pay and reinstatement is lacking in foundation. After all, a condition precedent to liability under 105(c) is the ability to provide the requested relief, i.e., the relief required to make victims of discrimination whole. 2 FMSHRC at 3466. Rank-and-file supervisors are not capable of providing such relief.

Although agents are not personally liable under 105(c), a corporate agent "who knowingly authorized, ordered, or carried out . . . [a] violation" committed by a corporate operator may be subject to individual liability for civil penalties under section 110(c) of the Mine Act, 30 U.S.C. § 820(c). The proper legal standard for the purpose of determining 110(c) liability is whether the corporate agent "knew or had reason to know" of a violative condition. See Beth Energy Mines, Inc., 14 FMSHRC 1232, 1245 (August 1992) citing Secretary v. Roy Glenn, 6 FMSHRC 1583, 1586 (July 1984) and Kenny Richardson, 3 FMSHRC 8, 16 (January 1981). The Commission has consistently held that a "knowing" violation under section 110(c) involves aggravated conduct, not ordinary negligence. Id., citing Emery Mining Corporation, 9 FMSHRC 1997, 2003-04 (December 1987).

Although Riley, as a truck foreman, is not personally liable as an "agent" under 105(c), he may be subject to the civil penalty provisions of section 110(c) for acts committed in violation of any provision of the Act. However, the Secretary has not brought a 110(c) civil penalty proceeding alleging that Riley "knowingly" violated section 105(c).

Even if the Secretary had brought a 110(c) case against Riley, whether the Secretary could prevail on the "knowingly" violated standard in section 110(c) is uncertain. With respect to Jackson, it was Elmo Mayes, not Riley, that created the circumstances behind Jackson's protected work refusal. With regard to Bowling and Ball, Riley's conduct demonstrated no disparate treatment. Riley was requiring Bowling and Ball to work the extra hours required of all Mountain Top and Hillis

Breese truck drivers. While Bowling and Ball's initial work refusal was protected, the issue of whether Riley "knowingly" violated section 105(c) on March 7, 1995, remains in doubt.

Accordingly, the discrimination complaints filed pursuant to section 105(c) of the Act against David Riley shall be dismissed. Similarly, the Secretary's amended discrimination complaints seeking to impose civil penalties on Riley under section 105(c), filed on September 15, 1995, shall also be dismissed.[12]

Liability under section 105(c) with respect to Elmo and/or Tony Mayes is based on whether the complainants have demonstrated they were the "real operators" in that they were the "real persons" in control of the personnel decisions at the mine. 11 FMSHRC at 780. Resolution of this issue hinges upon whether they exercised the requisite "control" over the haulage operations at Huff Creek.

There is ample evidence demonstrating that Elmo Mayes' relationship with Mountain Top was not an arms length equipment leasing arrangement. Elmo Mayes received ten percent of Mountain Top's net profits from its hauling operations. Mountain Top operated under a Fuel Tax License issued by the State of Kentucky to Elmo Mayes, d/b/a E&T trucking. In addition to owning Mountain Top's trucks, Helen Mayes, Elmo's wife, signed and issued the pay checks for Mountain Top's drivers. Elmo Mayes brought the payroll checks to the job site and sometimes distributed them to Mountain Top's drivers.

Riley had previously worked for Elmo Mayes as an E&T truck driver for nine years. Kip Bays was also previously employed by Elmo Mayes. Elmo Mayes had a two-way radio in his home that he used to communicate with Riley in his truck. Bays and Riley deferred to Elmo Mayes' management decisions. For example, it was Elmo Mayes who selected Jackson as the cutoff truck on February 17, 1995, without any concurrence from Riley or Bays.

Riley kept Elmo Mayes informed of the number of loads hauled and the number of trucks running. Sometimes Elmo Mayes was on the job site three or four days a week if there were problems. Elmo Mayes occasionally rode with drivers on the haul route to

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[12] The Secretary's September 15, 1995, amended discrimination complaints seeking to impose civil penalties against Elmo and Tony Mayes uunder section 105(c) are consistent with Commission Rule 44, 29 C.F.R. § 2700.44. Rule 44 authorizes the Secretary to seek civil penalties against parties in a 105(c) proceeding that are consistent with the penalty criteria in section 110(i), 30 U.S.C. § 820(i). Riley, however, is not a proper party in this matter.

check on the condition of trucks. He retained the authority to remove a truck from service.

Elmo Mayes had an input in job assignments and he had the authority to fire Mountain Top employees. In this regard, Elmo Mayes approved Jackson's mud haulage assignment so that Jackson could acquire experience as a truck driver. When Jackson asked Riley for time off to attend a computer class, Riley sought approval from Elmo Mayes. Elmo Mayes unilaterally fired Jackson on February 17, 1995, and Bowling and Ball on March 7, 1995. In fact, Kip Bays was unaware of the circumstances surrounding Bowling and Ball's March 7 terminations, and he was not familiar with the facts concerning their subsequent return to work.

Significantly, numerous non-party witnesses testified regarding the control exercised by Elmo and Tony Mayes over virtually every aspect of Mountain Top's operations. For example, Billy Jack Lefevers, Mountain Top's loader operator, stated that he considered Tony his boss. When he asked Riley for a raise he was told "you need to talk to Tony or Elmo." (I, 389). In response to his inquiry Elmo told Lefevers, "let me run the numbers, see how things work out." (I, 390). Kelly, Lone Mountain's scale man, testified drivers respected and obeyed Elmo Mayes when he designated them as cutoff driver. As a further reflection of the commonality of interests between Elmo Mayes, Tony Mayes and Mayes Trucking, Billy Joe Earl, a former Mountain Top driver, testified he was given farm work by Elmo Mayes for approximately six months beginning in June 1995, although he continued to receive his paycheck from Mayes Trucking, after he was suspended by Lone Mountain for passing a truck on its haulage road.

Finally, Elmo Mayes was aware that drivers were working extremely long hours during the winter of 1995. He opined that "a man is human" and that the amount of work hours that could be tolerated safely "depends on the driver." (II, 293). In this regard Elmo Mayes explained, "I never asked a man to do anything I wouldn't do myself." (II, 291). Thus, Elmo Mayes supported the extended working hours in the winter of 1995 that gave rise to the discrimination complaints in these proceedings.

Thus, the evidence, when viewed in its entirety, reflects Elmo Mayes exercised unfettered control of Mountain Top's haulage operations. His total control, without any need for approval from Bays, Tony Mayes or Riley, provides an adequate basis for concluding that he was an "operator" as contemplated by section 3(d) of the Act at the time of the subject discriminatory acts in February and March 1995. As such, Elmo Mayes is a responsible party liable under section 105(c) of the Act.

The evidence establishing operator status for Tony Mayes is equally convincing. Tony Mayes was at the Huff Creek site since October 1994. Kip Bays testified he transferred all control of operations to Tony Mayes in February 1995 so that Bays could tend to his ailing mother. This testimony alone supports the conclusion that Tony Mayes was a person in control.

Tony Mayes control was demonstrated by his assignment of drivers to trucks. Truck mechanics needed his approval for repairs. The record reflects Tony Mayes also supervised foreman Riley. Significantly, Tony Mayes represented Mountain Top in its dealings with MSHA investigator Harris. Finally, it was Tony Mayes who recalled Bowling and Ball to work. It was also Tony Mayes who told Carver, a Mountain Top truck driver, that Jackson could have his job back if he apologized, although their is no credible evidence that Jackson was ever offered re-employment. Thus, Tony Mayes is also a proper party in these proceedings.

ORDER

Accordingly, the Secretary's request to withdraw the discrimination complaint filed by David Fagan in Docket No. KENT 95-615-D **IS GRANTED**. Consequently, Docket No. KENT 95-615-D **IS DISMISSED** with prejudice. In addition, as discussed herein, William David Riley is not a proper party to these 105(c) proceedings. Therefore, the discrimination complaints in these matters as they pertain to Riley **ARE DISMISSED**.

For the reasons set forth above, Walter Jackson's February 17, 1995, work refusal was reasonable, and therefore protected activity under section 105(c) of the Act. Accordingly, Jackson's discrimination complaint **IS GRANTED**. Similarly, the initial March 7, 1995, work refusals of Lonnie Bowling and Everett Darrell Ball were also reasonable, and therefore entitled to statutory protection under the provisions of section 105(c). Therefore, Bowling and Ball's March 9, 1995, discrimination complaints **ARE GRANTED IN PART**.

However, Bowling and Ball have failed to establish they were the victims of a constructive discharge after they were offered reinstatement on March 22, 1995. Moreover, their refusal, upon their return to work, to accept cutoff times as late as 6:00 p.m., which was the cutoff time required of all other drivers, and, which was the cutoff time they had originally accepted upon being hired, was unreasonable and unprotected by the Act. Consequently, their refusal to work the hours required of them provided an independent and unprotected basis for the termination of their employment. Therefore, Bowling and Ball's discrimination complaints with respect to their refusals to return to work on March 29, 1995, **ARE DENIED**.

The period for which relief awarded to Jackson under section 105(c) shall be calculated from February 18, 1995, the day following his protected work refusal, to the present time. The period for which relief under section 105(c) shall be awarded to Bowling and Ball is from March 8, 1995, the day following their protected initial work refusals, through March 22, 1995, the day they were offered reinstatement.

For the reasons discussed above, **IT IS ORDERED** that Mountain Top Trucking, Inc., Mayes Trucking, Inc., Anthony Curtis Mayes and Elmo Mayes, are jointly and severally liable for the relief that shall be awarded to Jackson, Bowling and Ball in these discrimination matters.

Consequently, **IT IS FURTHER ORDERED** that:

1. Within 21 days of the date of this decision, the parties shall confer in person or by telephone for the purposes of:

(a) with respect to Bowling and Ball, stipulating to the amount of back pay and interest computed from March 8, 1995, through March 22, 1995, less earnings from other employment, if any, during this period;

(b) with respect to Bowling and Ball, stipulating to any other reasonable and related economic losses or relevant litigation costs incurred as a result their March 7, 1995, termination;

(c) with respect to Jackson, stipulating to a suitable position and salary, if any, to which Jackson should be reinstated as an employee of any of the named respondents who are liable in these proceedings, or, in the alternative, agreeing on economic reinstatement terms (i.e., a lump sum agreed upon payment in lieu of reinstatement);

(d) with respect to Jackson, stipulating to the amount of back pay and interest computed from February 18, 1995, to the present, less deductions for earnings from other employment, or deductions for periods when Jackson was not available for employment, if any;

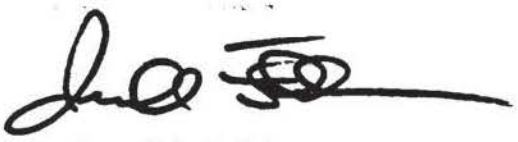
(e) stipulating to any other reasonable and related economic losses or relevant litigation costs incurred as a result of Jackson's February 17, 1995, discharge.

2. If the parties are able to stipulate to the appropriate relief, they shall file with the judge, within 30 days of the date of this decision, a Proposed Order for Relief. The respondents' stipulation of any matter regarding relief shall not waive or lessen their right to seek review of this decision on liability or relief.

3. If the parties are unable to stipulate to the relief, the complainants shall file with the judge and serve on opposing counsel, within 30 days of the date of this decision, Proposed Orders for Relief. The complainants' proposed orders must be supported by documentation such as check stubs from prior or current employment, if any, tax returns and W-2 forms, and bills and receipts to support any other losses or expenses claimed. In addition, Jackson's Proposed Order for Relief should explain why he withdrew his application for temporary reinstatement in this matter.

4. If the complainants file Proposed Orders for Relief, the respondents shall have 14 days to reply. If issues on relief are raised, a separate hearing on relief will be scheduled.

5. This decision shall not constitute the judge's final decision in this matter until a final Decision on Relief is entered. The final Decision will address the issue of what civil penalties, if any, should be imposed in these matters.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 29 1997

COSTAIN COAL INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. KENT 96-178-R
	:	Order No. 4277266; 2/6/96
SECRETARY OF LABOR,	:	
Mine Safety and Health	:	Docket No. KENT 96-179-R
Administration (MSHA),	:	Citation No. 4277267; 2/6/96
Respondent	:	
	:	Baker Mine
	:	Mine ID No. 15-14492
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
Mine Safety and Health	:	
Administration, (MSHA),	:	Docket No. KENT 96-191
Petitioner	:	A. C. No. 15-14492-03708
v.	:	
	:	Docket No. KENT 96-213
COSTAIN COAL INC.,	:	A. C. No. 15-14492-03709
Respondent	:	
	:	Docket No. KENT 96-234
	:	A. C. No. 15-14492-03710
	:	
	:	Docket No. KENT 96-235
	:	A. C. No. 15-14492-03712
	:	
	:	Docket No. KENT 96-275
	:	A. C. No. 15-14492-03713
	:	
	:	Baker Mine
	:	
	:	
	:	Docket No. KENT 96-311
	:	A. C. No. 15-16020-03514
	:	
	:	Smith Underground #1 Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Carl B. Boyd, Jr., Esq., Henderson, Kentucky, for the Respondent.

Before: Judge Feldman

These consolidated contest and civil penalty proceedings concern petitions for assessment of civil penalties filed by the Secretary of Labor against the respondent corporation pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). The petitions seek to impose total civil penalties of $43,258 for alleged violations of mandatory safety standards in Parts 70 and 75 of the regulations, 30 C.F.R. Part 70 & 75.

These matters were called for hearing on December 3, 1996, in Owensboro, Kentucky. At the commencement of the hearing, the parties advised that they had reached a comprehensive settlement with regard to all of the citations and orders in issue. Consequently, the respondent moved to withdraw its Notices of Contest in Docket Nos. KENT 96-178-R AND KENT 96-179-R. (Tr. 16-17). The settlement terms, which were presented and approved on the record, result in a reduction in the total proposed penalty from $43,258 to $32,001. The $32,001 settlement amount consists of the respondent's agreement to pay civil penalties of: $2,360 in Docket No. KENT 96-191; $4,606 in Docket No. KENT 96-213; $4,350 in Docket No. KENT 96-234; $13,250 in Docket No. KENT 96-235; $5,235 in Docket No. KENT 96-275;[1] and $2,200 in Docket No. KENT 96-311.

The settlement terms include vacating Citation No. 4068884 in Docket No. KENT 96-191; modifying 104(d)(1) Order No. 4068883 to a 104(a) citation in Docket No. KENT 96-235 to reflect that the cited violation was not attributable to the respondent's unwarrantable failure; and modifying 104(d)(1) Citation No. 4276772 and 104(d)(1) Order No. 4276775 in Docket No. KENT 96-311 to 104(a) citations, thus removing the unwarrantable failure charges.

I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 820(i). **WHEREFORE**, the motion for approval of settlement **IS GRANTED.**

Accordingly, the respondent's motion to withdraw its contests in these matters **IS GRANTED** and **IT IS ORDERED** that the contest proceedings in Docket NOS. KENT 99-178-R and KENT 96-179-R **ARE DISMISSED. IT IS FURTHER ORDERED** that the

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[1] The record was left open in order to allow the parties to finalize their settlement agreement in Docket No. KENT 96-275. The parties subsequently advised me they had agreed upon a reduction in the proposed penalty from $8,235 to $5,235, based on a reduction in the gravity associated with Citation No. 9898360.

respondent pay a total civil penalty of $32,001 in satisfaction of the citations in issue within 30 days of this order, and, upon receipt of timely payment, Docket Nos. KENT 96-191, KENT 96-213, KENT 96-234, KENT 96-235, KENT 96-275 and KENT 96-311 **ARE DISMISSED.**

Jerold Feldman
Administrative Law Judge

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Carl Boyd, Esq., Box 88, Tropic, Utah 84776[2] (Certified Mail)

Kevin Vaughn, Loss Prevention Advisor, Costain Coal, Inc., P.O. Box 289, Sturgis, Kentucky 42459-0298 (Certified Mail)

\mca

[2] At the time of the hearing Mr. Boyd's mailing address was 120 N. Ingram St., Henderson, KY 42420. However, Mr. Boyd's current address is Box 88, Tropic, Utah 84776. (Tr. 3).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., 6TH FLOOR

WASHINGTON, D. C. 20006-3868

January 31, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 96-112
Petitioner	:	A.C. No. 34-01787-03504
	:	
v.	:	Docket No. CENT 96-160
H M I a.k.a. HEATHERLY	:	A. C. No. 34-01787-03505
MINING, INCORPORATED,	:	
Respondent	:	Docket No. CENT 96-161
	:	A. C. No. 34-01787-03507
	:	
	:	Docket No. CENT 96-165
	:	A. C. No. 34-01787-03506
	:	
	:	Docket No. CENT 96-166
	:	A. C. No. 34-01787-03508
	:	
	:	Pollyanna #8
	:	
	:	Docket No. CENT 96-167
	:	A. C. No. 34-01633-03601
	:	
	:	Pollyanna #4
	:	
	:	Docket No. CENT 96-168
	:	A. C. No. 34-01746-03520
	:	
	:	Pollyanna #7

ORDER OF DISMISSAL

Before: Judge Merlin

On November 26, 1996, I issued an order directing the operator to provide additional information to support its motions to dismiss the above-captioned cases.

The operator had filed identical motions to dismiss in these cases stating that it had paid $75,000 pursuant to a settlement agreement with MSHA for all violations issued to the operator on or before June 30, 1996. The operator attached a copy of the settlement agreement which contained a list identifying the matters involved in the settlement. The violations in these cases were issued before June 30, 1996, but the instant cases did not appear on that list.

In a letter to operator's counsel dated January 16, 1997, a copy of which was sent to the Commission, the Solicitor lists all current civil penalty assessments pending against Heatherly Mining Company, HMI, and/or P&K. The instant cases are included on this list. The Solicitor states that the Secretary has deemed these cases uncollectible. The Solicitor further states that all civil penalties assessed against the aforementioned companies for citations issued after August 1, 1996, will be reassessed in the name of George Colliers, Incorporated.

In light of the foregoing, it is clear that the Secretary no longer intends to prosecute these civil penalties against this operator. Therefore, these matters can be dismissed.

Accordingly, it is ORDERED that these cases be DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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Robert A. Goldberg, Esq., Jack F. Ostrander, Esq., Office of the Solicitor, U. S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202

Thomas H. Stringer, Jr., Esq., Heatherly Mining, Inc., 502 W. Broadway, Henryetta, OK 74437

Ned Zamarripa, Conference and Litigation Representative, U. S. Department of Labor, MSHA, P. O. Box 25367, Denver, CO 80225

Mr. Matt Richardson, HMI, Post Office Box 550, Henryetta, OK 74437

/gl

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

January 7, 19967

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 95-104
	:	A.C. No. 05-02820-03729
	:	
	:	Docket No. WEST 95-494
	:	A.C. No. 05-02820-03766
v.	:	
	:	Docket No. WEST 96-22
	:	A.C. No. 05-02820-03769
	:	
BASIN RESOURCES INCORPORATED, Respondent	:	Docket No. WEST 96-23
	:	A.C. No. 05-02820-03770
	:	
	:	Docket No. WEST 96-24
	:	A.C. No. 05-02820-03771
	:	
	:	Docket No. WEST 96-36
	:	A.C. No. 05-02820-03773
	:	
	:	Docket No. WEST 96-128
	:	A.C. No. 05-02820-03781
	:	
	:	Golden Eagle Mine

ORDER DENYING SECRETARY'S MOTION FOR SUMMARY DECISION ON ABILITY TO CONTINUE IN BUSINESS CRITERION

A hearing in these cases was held on October 29, 1996, through October 31, 1996. At the hearing the parties presented evidence on the merits of the citations and orders and also addressed issues concerning the application of the ability to continue in business criterion. At the conclusion of the hearing, the parties requested that I rule on this issue by separate order. Basin Resources, Inc. ("Basin Resources") takes the position that the penalties proposed in these cases should be substantially reduced because it is no longer in business. The Secretary contends that the ability to continue in business criterion is not applicable if Basin Resources is not in business and, in any event, Basin Resources failed to offer sufficient evidence to show that the proposed penalties will adversely affect its ability to continue in business. He argues that the penalties should not be reduced based on this criterion. As discussed below, I find that Basin Resources established that the penalties should be reduced as a result of the application of the ability to continue in business criterion.

I. APPLICATION OF THE CRITERION

The civil penalty criteria are contained in section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(i) ("Mine Act"). Section 110(i) states that the Commission shall have the authority to assess all civil penalties set forth in the Mine Act. It further states that in assessing civil penalties, the Commission shall consider six criteria including "the effect [that the penalty would have] on the operator's ability to continue in business."

The civil penalty provision is discussed in the legislative history, as follows:

> The purpose of ... civil penalties, of course, is not to raise revenues for the federal treasury.... [T]he purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards.
>
> * * * * * * * * *
>
> To be successful in the objective of [inducing] effective and meaningful compliance, a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance.

S. Rep. No. 181, 95th Cong., 1st Sess. 40-41 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 628-29 (1978).

The assessment of a penalty is mandatory whenever a citation or order is affirmed. *Tazco, Inc.*, 3 FMSHRC 1895 (August 1981). I hold, however, that if a mine operator establishes that it is no longer in the mining business and does not intend to reopen its mines or otherwise return to the mining business, this fact should be taken under consideration when assessing appropriate penalties under section 110(i). I disagree with the Secretary's contention that the fact that a mine operator is out of business means that the ability to continue in business criterion should not be considered when assessing a penalty. As the legislative history makes clear, civil penalties are remedial not punitive. Civil penalties are assessed to induce "effective and meaningful" compliance with safety and health standards. *Id.* If an operator is out of business, that fact should be taken into consideration under the ability to continue in business criterion.

The Commission has not ruled on this issue. In *Spurlock Mining Co., Inc.*, 16 FMSHRC 697 (April 1994), the operator was not mining at the time the penalties were proposed but planned to reopen its mines if it could secure adequate financing. It argued that the size of the proposed penalties would make it difficult to secure such financing. The Commission held that the operator did not submit sufficient evidence to show that the proposed penalties would adversely affect its ability to resume operations and to continue in business. *Id.* at 700. The Commission stated that it did not reach the issue of "whether the criterion of the effect of a penalty on an operator's ability to continue in business applies to an operator who is out of business...." *Id.*

If an operator is no longer in the mining business, penalties do not have a deterrent effect on future compliance with the Mine Act and the Secretary's safety and health standards. If an operator closes a mine or otherwise leaves the mining business for economic reasons, the application of the ability to continue in business criterion would generally call for a reduction in the penalty. When penalties are proposed by the Secretary, the Secretary assumes that the penalties will not have an adverse effect on the operator's ability to continue in business. 30 C.F.R. § 100.3(h). The Commission also presumes that a penalty will not have an adverse effect on the ability of an operator to continue in business. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (March 1983) *aff'd* 736 F.2d 1147, 1153 (7th Cir. 1984). Thus, if a mine operator is forced to close its mines for economic reasons, it stands to reason that the Secretary's proposed penalties could have an adverse effect on its ability to continue in business.

I do not agree with Basin Resources that penalties should be reduced to "nominal amounts" whenever an operator is no longer in the mining business. Rather, I believe that the judge should consider all of the evidence and balance the statutory criteria including, but not limited to, the ability to continue in business when assessing an appropriate civil penalty. *See Faith Coal Company*, 17 FMSHRC 1146, 1208 (July 1995)(Judge Barbour). The ability to continue in business criteria is but one of the six criteria set forth in section 110(i). The other criteria must also be considered. A nominal penalty would not be appropriate, for example, in the case of a serious violation in which the operator unwarrantably failed to comply with a safety standard. Thus, I cannot rule that penalties should be reduced by a set percentage whenever an operator establishes that it is permanently out of the mining business.

II. EVIDENCE TO SHOW ADVERSE EFFECT

I find that Basin Resources presented sufficient evidence to show that it is no longer in the mining business. The Golden Eagle Mine is not operating, the mine is sealed, and there are no

plans to reopen it. All stockpiles of coal have been sold. The Golden Eagle Mine is the only mine owned or operated by Basin Resources and the mine stopped producing coal in December 1995. Reclamation of the land has commenced and only three employees remain at the mine. Basin Resources has attempted to sell the mine but has only received "negative offers." That is, potential bidders have offered to take the mine property in exchange for payment from Basin Resources.

Financial records presented by Basin Resources show that Basin Resources incurred a loss of over $13 million from operations in 1995 and that it had a negative net worth of $23 million as of April 1996. The proposed penalties in these cases are about $86,000 and the total proposed penalties for all of the Basin Resources' cases currently pending before me are about $500,000.[1] Basin Resources contends that this potential liability had hindered its efforts to sell the mine.

Based on the evidence presented by Basin Resources, I find that it established that the penalties should be reduced based on the ability to continue in business criterion.[2] I reject the Secretary's contention that Basin Resources failed to offer sufficient evidence to show that the proposed penalties will adversely affect its ability to continue in business. I further hold that the penalties should be reduced by a significant amount but, as discussed above, I do not hold that Basin Resources should be assessed a nominal penalty for each violation. The particular penalty assessed in each instance will depend on the application of all six penalty criteria.

III. CONSIDERATION OF PARENT COMPANY

A few days before the hearing, the Secretary filed a motion to amend each petition for civil penalty. The Secretary sought to name Entech, Incorporated ("Entech") as an additional respondent in each case. The Secretary alleges that Entech is the parent or alter-ego corporation of Basin Resources. He alleges that Entech exercised complete control over Basin Resources and

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[1] My order in these cases is also applicable to the other Basin Resources cases currently pending before me. These other cases are: WEST 96-21, -25, -79, -80, -123, -124, -125, -126, -127, -134, -158, -179, -180, -195, -241, -248, -249, -250, -251, -271, -272, and -285.

[2] I have also considered the record in *Basin Resources, Inc.*, 18 FMSHRC 1846 (October 1996)(Docket Nos. WEST 95-254 and WEST 95-255). In those cases, Basin Resources argued that the penalties should be reduced for the same reasons and presented similar evidence. I did not decide the issue in that decision because I vacated most of the citations and orders.

that, as a consequence, Entech was an operator of the Golden Eagle Mine. The Secretary contends that the assets and operations of Entech should be taken into consideration when assessing civil penalties in these cases.

The parties asked me to defer ruling on this issue. They requested that I consider only the operating and financial condition of Basin Resources when ruling on the Secretary's motion for partial summary decision. As a consequence, I have not considered the operations, assets, or liabilities of Entech in this order.

At the hearing, counsel for each party agreed that if I ruled that the penalties should not be reduced when applying the ability to continue in business criterion to Basin Resources, the issue of Entech's liability would be moot. Because I have ruled that the penalties should be reduced, the issue of Entech's liability remains at issue. In accordance with the parties' agreement, Basin Resources has not filed a response to the Secretary's motion. The hearing in the next group of Basin Resources cases is scheduled to commence on January 14, 1997. At that hearing, the parties should be prepared to discuss the Entech issue and I will establish a briefing schedule.

IV. ORDER

The Secretary filed a motion for partial summary decision asking that I reject Respondent's argument and evidence that the proposed penalties should be reduced upon consideration of the ability to continue in business criterion. For the reasons set forth above, the Secretary's motion for partial summary decision is **DENIED**.

Richard W. Manning
Administrative Law Judge

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January 17, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 95-434-M A.C. No. 26-00500-05542
v.	:	Docket No. WEST 95-467-M A.C. No. 26-00500-05543
NEWMONT GOLD COMPANY, Respondent	:	South Area - Gold Quarry

ORDER GRANTING, IN PART, PETITIONER'S MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS

The Secretary of Labor filed a motion to compel Newmont Gold Company ("Newmont") to produce certain documents. The documents in question are (1) three reports prepared by Dr. Morton Corn for the Becton-Dickinson Company and (2) a paper on mercury prepared by Dr. Jonathan Borak. Newmont opposed the motion on the basis that the reports are irrelevant to these proceedings and are proprietary. Dr. Corn and Dr. Borak will be testifying at the hearing on behalf of Newmont. I ordered Newmont to provide a copy of the documents for my *in camera* review. I have reviewed the documents and enter the following order.

I. Reports of Dr. Corn

Dr. Corn prepared three reports relating to the control of mercury vapor for Becton-Dickinson Company ("B-D"). These reports were prepared for B-D's General Counsel's Office. Although the reports were prepared by Dr. Corn, they are the property of B-D.

The reports were prepared following Dr. Corn's inspection of B-D's facility in Puerto Rico in 1967 and 1981, and its facility in Brazil in 1987. These facilities were thermometer plants and used large amounts of mercury. In the reports, Dr. Corn reviewed the ventilation controls and housekeeping procedures at the facilities and made recommendations. Dr. Corn used the Threshold Limit Value ("TLV") adopted by the American Conference of Government Industrial Hygienists ("ACGIH") as the standard. The facilities met this standard in most areas. In the two earlier reports the standard was .1 mg/m^3, although he also referenced the B-D goal of .05 mg/m^3. The TLV was .05 mg/m^3 at the time the Brazil report was prepared. The reports do not discuss lunchrooms or other eating areas and do not consider whether a cleaner environment should be provided in offices and lunchrooms.

I hold that, in reviewing whether proprietary material should be produced during discovery, I should balance the interest in keeping the material confidential against the litigant's need for the material to prepare for trial. Because Dr. Corn will be testifying at the hearing about mercury vapor, the Secretary has an interest in Dr. Corn's prior work on mercury vapor. Such information may be useful in cross-examination.

In balancing the competing interests, however, I find that the Secretary's need for the documents does not outweigh the interest in keeping the documents confidential. First, the documents do not contain information that is particularly relevant to the instant proceedings. They describe B-D's thermometer plants, the ventilation in the plants and methods for keeping the mercury vapor levels below the TLV. In the instant case, the mercury vapors in the cited areas were below the TLV. The documents are too specific to the plants in question to provide useful information. The documents are also ten years old and older and would be of marginal use in cross-examination.

The documents are the property of B-D. Without B-D's written consent, I am unwilling to require the production of the documents absent a showing of a compelling need for them. After reviewing the documents, I find that they do not contain information that would be particularly useful in these cases. The Secretary has not shown that his need for the documents outweighs Dr. Corn's interest in keeping them confidential. Accordingly, the Secretary's motion to compel the production of these documents is **DENIED**.

II. Paper on Mercury by Dr. Borak

Dr. Borak prepared a paper entitled "TEMIS: MERCURY and its INORGANIC COMPOUNDS 1.4." This paper is supported by an extensive bibliography. At the bottom of the first page is printed: "©1995 by Jonathan Borak & Company, Inc." Newmont states that this document, which it calls a "toxicological profile for mercury" is a "work in progress and does not constitute Dr. Borak's ... final views." (Newmont's response at 2). Newmont further states that this document is proprietary and has not been relied upon by Dr. Borak in the preparation of his testimony in these cases. It states that this document is not relevant to these cases and Dr. Borak has "strong objections" to its release.

I find that the Secretary's need for this document in preparing for his examination of Dr. Borak outweighs any proprietary interest of Dr. Borak. The document contains a summary of the toxicological properties of mercury, recommendations concerning management and treatment of mercury poisoning, and recommendations concerning monitoring and surveillance of

mercury. It uses the OSHA PEL of .05 mg/m^3 and the "ACGIH TLV-TWA for inorganic mercury and mercury vapor of .025 mg/m^3." (Document at 12). Although it does not contain specific recommendations for lunchrooms or offices, I believe that it does have some relevance to these proceedings. It provides information that may be useful to the Secretary in cross-examination. The scope of discovery is broad.

Dr. Borak prepared this document to provide information to his clients. Although this document may not be his final version, the information contained therein would be available to those who use him as a consultant. It is proprietary because it is apparently protected by a copyright. With sufficient precautions, Dr. Borak's proprietary interest in the document can be protected while allowing the Secretary to review it for this litigation.

Accordingly, the Secretary's motion to compel production of this document is **GRANTED**, with the following protective order.

It is **ORDERED** that:

1. On or before January 22, 1997, counsel for Newmont shall provide one copy of the document to Mark R. Malecki, of the U.S. Department of Labor Solicitor's Office;

2. Mr. Malecki shall not make any copies of this document and no employee of the U.S. Department of Labor or its agents shall make a copy;

3. Mr. Malecki shall keep the document in a secure area where it cannot be obtained or viewed by any other individual;

4. Mr. Malecki shall not show the document to any other individual, except Jeanne Colby and one other employee of the Secretary, such as an expert;

5. The Department of Labor shall treat the document as a privileged and confidential document exempt from disclosure under 5 U.S.C. § 552(b)(4); and

6. The Secretary shall not use the document at trial without the prior approval of the judge.

Richard W. Manning
Administrative Law Judge

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January 22, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 95-339-M A.C. No. 05-00860-05537
v.	:	
	:	Specification Aggregates
MOBILE PREMIX SAND & GRAVEL COMPANY, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	
DON DEWILD, employed by MOBILE PREMIX SAND & GRAVEL COMPANY, Respondent	:	Docket No. WEST 96-223-M A.C. No. 05-00860-05540 A
KEITH BUESCHER, employed by MOBILE PREMIX SAND & GRAVEL COMPANY, Respondent	:	Docket No. WEST 96-224-M A.C. No. 05-00860-05541 A
	:	Specification Aggregates

ORDER DENYING, IN PART, MOTION TO COMPEL

Respondents filed a motion to compel the Secretary to respond to certain interrogatories and requests for the production of documents. The Secretary filed a motion for a protective order on the basis that the requested information is protected by the informant's privilege and the deliberative process privilege. For the reasons set forth below, Respondents' motion to compel is granted, in part, and denied, in part.

These cases concern a section 104(d)(1) citation that was issued to Mobile Premix Sand and Gravel Co. ("Mobile Premix") and

section 110(c) proceedings that were brought against Messrs. DeWild and Buescher for the same alleged violation. The requested information and the Secretary's response is as follows:

1. Respondents requested the name, address, employer, title, and telephone number of each person the Secretary intends to call as a witness at the hearing. The Secretary stated that it may call miner witnesses and will provide the requested information for such witnesses two days before the hearing, as provided in 29 C.F.R. § 2700.62.

2. Respondents requested the Secretary to describe the facts he will rely upon to establish that the alleged violation was the result of an unwarrantable failure. The Secretary stated that he would rely, in part, upon the statements of employees interviewed by the MSHA special investigator and that these statements are protected by the informant's privilege.

3. Respondents requested all documents concerning MSHA's investigation of the conditions described in the citation. In response, the Secretary stated that he would not provide the special investigation report because it was protected by the deliberative process and informant's privileges.

Respondents maintain that they are entitled to the requested information. First, they state that many, if not all, of the witnesses for whom the Secretary claims protection are no longer employed by Mobile Premix and are not protected by the informant's privilege or Commission Rule 62. Second, they state that the special investigation report is not protected by the deliberative process privilege or, at a minimum, the deliberative portions of the reports should be redacted and any factual material provided. Finally, even if some of the information requested is protected by a privilege, Respondents argue that the Secretary's interest in maintaining the privileges should yield to Respondents' demonstrated need for the information to defend themselves against the Secretary's allegations.

The Secretary contends that the information that he withheld clearly fits within the two asserted privileges. He states that whether informants are currently employed by Mobile Premix is irrelevant. In addition, the Secretary argues that the information contained in the statements given to the special investigator can be easily obtained by the Respondents from other sources, including interviewing or deposing those people who have knowledge of the events that gave rise to the citation. The Secretary contends that the special investigation report contains summaries of the miner statements, which are protected by the informant's privilege, and the recommendations and conclusions of the special investigator, which are protected by the deliberative process privilege.

I. Names of Miner Witnesses

Commission Rule 62 is designed to protect the identity of miners who will be testifying at a hearing until two days before the trial. The protection is deemed necessary because the miner may be an informant. The Commission has stressed the importance of the informant's privilege under the Mine Act. *Bright Coal Co.*, 6 FMSHRC 2520 (November 1984). The Commission held that this privilege is applicable to the furnishing of information to government officials concerning violations of the Mine Act. 6 FMSHRC at 2524. It is the name of the informant, not the contents of his statements, that is protected, unless disclosure of the contents would tend to reveal the identity of an informant. *Asarco*, 12 FMSHRC 2548, 2554 (December 1990), *citing Roviaro v. United States*, 353 U.S. 53, 60 (1957). The Secretary bears the burden of proving facts necessary to support the existence of the privilege. *Asarco*, 12 FMSHRC at 2553. In the case of miner witnesses, the Commission's rule prohibits the disclosure and the Secretary's burden is minimal.

It appears that some of the Secretary's miner witnesses in these cases are no longer employed by Mobile Premix. The Commission held that the purpose of the informant's privilege is "to protect the public interest by maintaining the free flow of information to the government concerning possible violations of the law and to protect persons supplying such information from retaliation." *Bright*, 6 FMSHRC at 2522-23 (citations omitted). The Commission went on to state that "the public interest in protecting persons who discuss alleged Mine Act violations with government officials is served regardless of the relationship of the informer to the alleged violator, *i.e.*, whether the informer is an employee of the respondent or a non-employee." *Id.* at 2524. Thus, the informant's privilege applies to individuals who were miners at the time the citation was issued, even if they are not currently employed by Mobile Premix or any other mine operator. *See Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303, 306 (5th Cir. 1072). The Secretary established that the requested information should not be provided under Commission Rule 62.

II. Statements of Miners

For the reasons set forth above, the informant's privilege generally applies to written statements provided by miners during an MSHA special investigation, to the extent that providing the statement would tend to reveal the identity of the individual who made the statement or the identity of other informants. The privilege applies even if the individual is no longer employed by Mobile Premix. As stated above, it is the name of the informant, not the contents of his statements to the government, that is protected by the privilege, unless disclosure of the contents

would tend to reveal the identity of an informant. Thus, if portions of a statement can be provided without revealing the identity of an informant, such portions are not protected.

Even if a statement or portion thereof is protected by the informant's privilege, that does not end the inquiry because the privilege is a qualified one. I must perform a balancing test to determine if Mobile Premix's need for the statements is greater than the Secretary's need to maintain the privilege to protect the public interest. *Bright*, 6 FMSHRC at 2526. The burden is on Mobile Premix to prove facts necessary to show that disclosure of the statements is necessary to a fair determination of the issues. *Id.* Factors to be considered in conducting this balancing test include whether the Secretary is in sole control of the requested information and whether Mobile Premix has other avenues available from which to obtain the substantial equivalent of the requested information. *Id.* In performing the balancing test in this case, the issue is whether Mobile Premix can get substantially the same information by deposing those miners who have knowledge of the events leading up to the citation. *Asarco*, 14 FMSHRC 1323, 1331 (August 1992).

The Secretary states that the information contained in the statements can be obtained by Respondents from other sources. The Secretary maintains that Respondents have identified those individuals who have knowledge of the events surrounding the alleged violation. Thus, the Secretary believes that counsel for Respondents could interview or depose these individuals and obtain substantially the same information. I find Mobile Premix has not established that disclosure of the statements is necessary for the fair determination of the issues in these cases. *See Hodgson* at 307.

I find that the statement of Michael Waggy is not protected by the privilege, however. During his deposition, Mr. Waggy testified that he provided a written statement to MSHA. He further stated that he gave Respondents the same information during his deposition as he provided MSHA in his statement. Thus, the identity of the informant has already been revealed. As stated above, it is the identity of the informant not the substance of his statement that is protected. Nevertheless, some courts draw a distinction between informants and those who merely provide a statement to the government. *Hodgson* at 306 (informant's privilege upheld even though employer knew which employees had given statements to the government). Accordingly, the Secretary should send me a copy of Mr. Waggy's statement for my *in camera* determination on this issue. On or before January 31, 1997, the Secretary should provide me with two copies of Mr. Waggy's statement. One copy should be redacted to delete the names of other informants and, to the extent necessary, those portions of the statement that would tend to reveal the identity of other informants.

The Secretary should also review the statements provided by other miners to determine whether portions of these statements could be provided without revealing the identity of an informant. On or before January 31, 1997, counsel for the Secretary should provide me with a copy of each statement for my *in camera* review along with her designation of those portions of any statement that she believes could be provided without revealing the identity of an informant.

III. Special Investigation Report

The reports of an MSHA special investigator contains a summary of miners' statements, an analysis of the issues, and the recommendations and conclusions of the special investigator. The summaries of the statements of miners are protected by the informant's privilege, as set forth above. The Secretary asserts the deliberative process privilege for the remainder of the report. This privilege protects communications between subordinates and supervisors within the government that are "antecedent to the adoption of an agency policy." *Contests of Respirable Dust Sample Alternation Citations*, 14 FMSHRC 987, 992 (June 1992), *quoting Jordan v. Dept. of Justice*, 591 F.2d 753 (D.C. Cir. 1978). The communications must be "related to the process by which policies are formulated." *Id.* The sections of the report in which the special investigator analyzes the issues and makes recommendations and conclusions are protected by the deliberative process privilege. This portion of the report is not the final agency decision, but is deliberative.

I also conclude that Mobile Premix's need for the recommendation section does not outweigh the Secretary's interest in keeping it confidential. It is simply the investigator's opinion and, since this proceeding is *de novo*, it will carry no weight. The Secretary's interest in keeping its decision-making process confidential far outweighs Mobile Premix's need for this section of the report.

Counsel for the Secretary should review the special investigator's report to determine whether portions of the report could be provided without revealing the identity of an informant or the Secretary's deliberative process. On or before January 31, 1997, counsel for the Secretary should provide me with a copy of the report for my *in camera* review along with her designation of those portions of the report that she believes could be provided without revealing the identity of an informant or the Secretary's deliberative process.

ORDER

Accordingly, Respondents' motion to compel is **DENIED**, except as set forth above. The Secretary's motion for a protective order is also **DENIED**. On or before January 31, 1997, counsel for the Secretary shall provide me with a copy of the following documents for my *in camera* review, as specified in more detail above: (1) the statements provided by miners to the special investigator, and (2) the special investigator's report.

Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 2 4 1997

SECRETARY OF LABOR, Mine Safety and Health Administration (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 94-550 A. C. No. 01-01401-04023
v.	:	No. 7 Mine
JIM WALTER RESOURCES, INC., Respondent	:	
SECRETARY OF LABOR, Mine Safety and Health Administration (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. SE 96-276 A. C. No. 01-01401-04044 A
v.	:	
LARRY MORGAN,	:	Docket No. SE 96-277 A. C. No. 01-01401-04045 A
DAVID GABLE,	:	
PAUL PHILLIPS,	:	Docket No. SE 96-278
WILLIAM WIGGINS,	:	A. C. No. 01-01401-04046 A
DARRELL KEY,	:	
WILLIAM TRAMWELL, and	:	Docket No. SE 96-279
MICHAEL WELCH,	:	A. C. No. 01-01401-04047-A
employed by	:	
JIM WALTER RESOURCES, INC., Respondents	:	Docket No. SE 96-280 A. C. No. 01-01401-02048 A
	:	
	:	Docket No. SE 96-281
	:	A. C. No. 01-01401-04049 A
	:	
	:	Docket No. SE 96-282
	:	A. C. No. 01-01401-04050
	:	
	:	No. 7 Mine

ORDER GRANTING IN PART AND DENYING IN PART SECRETARY'S MOTION FOR PROTECTIVE ORDER

Before me for consideration is the Secretary's January 23, 1997, motion to preclude the respondents from deposing Mine Safety and Health Administration (MSHA) District 7 Manager Joseph W. Pavlovich, who is assigned to Barbourville, Kentucky. In opposition, the respondents have filed a motion to compel Pavlovich's deposition testimony. On January 24, 1997, I had a

conference call to further explore the parties' arguments in support of their motions. This Order formalizes the decision I rendered on the parties' motions at the culmination of telephone conference.

Ordinarily, where an agency has, or is willing, to respond by answering written interrogatories, furnishing documents and making lower-level officials available for depositions, there is no justification for requiring the testimony of an agency head or high-level agency official. Sweeney v. Bond, 669 F.2d at 546; Kyle Engineering Co. v. Kleppe, 600 F.2d 226 (9th Cir 1979); Wirtz v. Local 30, 34 F.R.D. at 14. However, executive department officials may be required to give oral testimony by deposition or at trial in extraordinary circumstances. Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575 (D.C. Cir. 1985); Wirtz v. Local 30, International U. v. Northside Realty Associates, 324 F. Supp. 287 (N.D. Ga. 1971). Extraordinary circumstances may be established where the executive sought to be deposed has relevant information not available from any other source. Sweeny v. Bond, 669 F.2d 542 (8th Cir. 1982), Cert. denied, 459 U.S. 878 (1982); Community Fed. Sav. & Loan v. Fed. Home Loan Bank Bd., 96 F.R.D. 619 (D.D.C. 1983); Amer. Broadcasting Companies v. U.S. Info. Agency, 599 F. Supp. 765 (D.D.C. 1984).

Here, the respondents seek to depose Pavlovich to determine if he has "knowledge relating to the delays, failure to prosecute and now prosecution of the 110(c) cases, which are set for trial over 3 years after the underlying Orders were issued and over 2 years after the initial 110(c) assessments were withdrawn." (Resp. Motion to Compel, p.2.). Thus, the respondents aver that the focus of their inquiry is Pavlovich's knowledge, if any, concerning the reasons for MSHA's November 23, 1994, withdrawal of the 110(c) assessments initially proposed in these matters, and MSHA's reissuance of the proposed 110(c) assessments in April 1996.

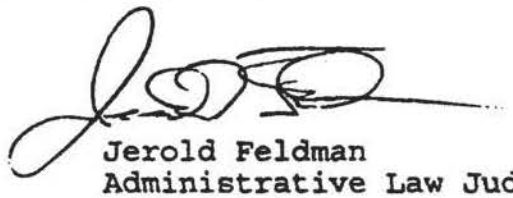
It does not appear that any of the individuals who previously have been made available to the respondents during discovery have personal knowledge with respect to this issue. Commission Rule 56(b), 29 C.F.R. § 2700.56(b), which sets forth the scope of discovery, provides that parties "may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." The reasons for the withdrawal of the 110(c) assessments initially proposed in these cases is relevant and may lead to the discovery of admissible evidence. Consequently, the respondents may depose Pavlovich for the limited purpose of posing questions that are directly related to this issue.

The respondents are not entitled to probe the administrative enforcement process as it pertains to prosecutorial discretion as this activity is protected by the deliberative process privilege. Nixon v. Sirica, 487 F.2d 700, 763-64 (D.C. Cir 1973). Thus, the Secretary's motion for a protective order with respect to any questions pertaining to Pavlovich's official duties as a supervisor or policy making official shall be granted. Consequently, Pavlovich may not be deposed concerning matters on which he lacks personal first-hand knowledge.

As discussed during the telephone conference, for the convenience of the parties and to minimize expense, Pavlovich's deposition is to be taken by telephone, on or before Wednesday, January 29, 1997.

ORDER

ACCORDINGLY, the Secretary's Motion for a Protective Order **IS GRANTED IN PART** and **DENIED IN PART. CONSEQUENTLY, IT IS ORDERED** that Pavlovich be made available for telephone deposition on or before January 29, 1997. The scope of deposition testimony shall be limited to the issues discussed above.



Jerold Feldman
Administrative Law Judge

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\mca

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JAN 2 9 1997

MEDUSA CEMENT COMPANY Contestant, v.	:	CONTEST PROCEEDINGS Docket No. PENN 97-20-RM Citation No. 4431561; 8/1/96
SECRETARY OF LABOR, Mine Safety and Health Administration (MSHA), Respondent	:	Docket No. PENN 97-21-RM Citation No. 4431562; 8/1/96 Docket No. PENN 97-22-RM Citation No. 4431563; 8/1/96 Docket No. PENN 97-23-RM Citation No. 4431564; 8/1/96 Docket No. PENN 97-24-RM Citation No. 4432408; 8/1/96 Docket No. PENN 97-25-RM Citation No. 4432409; 8/1/96

ORDER GRANTING CONTESTANT'S MOTION FOR CERTIFICATION FOR INTERLOCUTORY REVIEW

At the request of the parties, these contest proceedings were stayed on December 2, 1996, to enable the parties to pursue settlement of the matters in issue. A telephone conference is scheduled for February 18, 1997, to discuss the status of the parties' settlement efforts. The recusal issue discussed below is unrelated to the stay that is currently in effect.

On January 28, 1997, counsel for the contestant filed a motion, pursuant to Commission Rule 76, 29 C.F.R. § 2700.76, for certification of my December 2, 1996, interlocutory ruling that denied the contestant's November 15, 1996, Motion to Recuse.[1]

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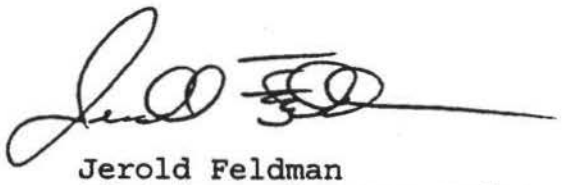
[1] A party has 30 days to file with the Commission a petition for interlocutory review of a judge's decision to deny the party's certification motion. 29 C.F.R. § 2700.76(a)(1)(ii). Counsel's November 15, 1996, Motion to Recuse contained an alternative request for certification in the event the motion was denied. I construed the December 2, 1996, Order denying counsel's motion as a denial of his alternative request for certification. However, counsel's January 28, 1997, motion for certification should not be viewed as untimely as his initial request for certification was not explicitly denied in the December 2, 1996, Order.

The contestant's November 15, 1996, recusal motion was opposed by the Secretary.

The recusal request was based on my alleged "personal bias" towards counsel in an unrelated civil penalty proceeding that is currently on appeal before the Commission. Rock of Ages Corporation, 17 FMSHRC 1925 (November 1995), petition for rev. granted December 13, 1995. The recusal motion was denied because regulating the course of the hearing, and making bench rulings on evidentiary matters, are fundamental duties of a presiding judge that do not support a claim of judicial bias. Commission Rule 55, 29 C.F.R. § 2700.55.

Interlocutory review by the Commission under Rule 76 is not a matter of right, but is committed to the sound discretion of the Commission. To support such a request the moving party must identify controlling questions that are novel or otherwise unresolved. While I am reluctant to certify this matter to the Commission because it is well settled that judicial rulings do not provide a colorable basis for claims of bias, I also respect counsel's right to assert such claims. Although it would have been preferable for counsel to directly petition the Commission for interlocutory review of the Order denying recusal, I am certifying this issue to the Commission for appropriate disposition.

Accordingly, the Contestant's January 28, 1997, motion **SHALL BE GRANTED**. Consequently, the December 2, 1996, Order in the above captioned contest proceedings denying the motion to recuse **IS HEREBY CERTIFIED FOR INTERLOCUTORY REVIEW.**



Jerold Feldman
Administrative Law Judge

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