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

Newmont Gold Company v. Secretary of Labor, MSHA, Docket No. WEST 97-293-RM, (Judge Cetti, December 17, 1997)

There were no cases filed in which review was denied.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 15, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 96-13
EXTRA ENERGY, INC.	:	

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

DECISION

BY: Jordan, Chairman; Marks and Riley, Commissioners

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 Administrative Law Judge Gary Melick properly determined that production-operator Extra Energy, Inc. ("Extra Energy") was liable for a violation of 30 C.F.R. § 77.404(a)[2] by its independent contractor, which

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[1] Commissioner Beatty assumed office after this case had been considered and decided at a decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Beatty has elected not to participate in this matter.

[2] Section 77.404(a) provides:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

30 C.F.R. § 77.404(a).

resulted in a fatal accident, and that Extra Energy violated 30 C.F.R. § 50.10[3] by failing to report the accident. 18 FMSHRC 1489 (August 1996) (ALJ). The Commission granted Extra Energy's petition for discretionary review of the judge's decision. For the reasons that follow, we affirm the judge's determinations.

I.

Factual and Procedural Background

Extra Energy operates the Eckman-Page Strip and Auger Mine, a surface coal mine in McDowell County, West Virginia. 18 FMSHRC at 1489. Melvin Brian Day, Jr. ("Brian"), a security guard with Neal and Associates, Inc. ("Neal"), was assigned to provide security at the mine from 6:00 p.m. to 6:00 a.m. on Friday, Saturday and Sunday nights. *Id.*

On Sunday, April 9, 1995, Brian failed to come home from work at his usual time. *Id.* His father, Melvin Day ("Melvin"), and brother, Jeffrey Shawn Day ("Shawn"), went to the mine looking for Brian. *Id.* at 1489-90. They found Brian's car on a hill near the stockpiles. Tr. 72. The car was running, the windows were rolled up, and the doors were locked. 18 FMSHRC at 1490. Brian was seated in the car in a semi-reclined position. *Id.*; Tr. 57. Melvin and Shawn gained access to the car by breaking the sunroof. 18 FMSHRC at 1490. After trying unsuccessfully to call for help by CB radio, they took Brian's body to a market in a nearby town where they called an ambulance. *Id.*

After the ambulance arrived, Melvin and Shawn were informed that nothing could be done with Brian's body until the police arrived. Tr. 36. The police arrived, released Brian's body to the ambulance crew, and traveled to the accident site with Melvin and Shawn. 18 FMSHRC at 1490. The police examined the car, started the engine and took photographs. Tr. 58. When the engine was started, one of the policemen commented on the odor of the fumes released by the car. Tr. 59. After their examination, the police allowed Shawn to drive the car off mine property. 18 FMSHRC at 1490.

Later that day, James Altizer, Brian's supervisor at Neal, received a telephone call that Brian had died at the mine site. *Id.* Altizer traveled to the mine, picking up another security guard who had a key to the mine, along the way. Tr. 124. When they arrived at the gate, they observed that it was already open. 18 FMSHRC at 1490. After they were unable to find anyone on the premises, they left for the police station. Tr. 125. On the way, they met Judy Neal and Harlis Mitchell, the vice-president and general manager, respectively, of Neal, who confirmed that an accident had occurred. Tr. 126; E. Post-Hr'g Br. at 6. The four then traveled to a local market to make telephone calls. Tr. 127, 131.

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[3] Section 50.10 provides in part that "[i]f an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine." 30 C.F.R. § 50.10.

At around 4:00 or 5:00 p.m. that day, Altizer called Extra Energy Superintendent Steve Haynes to inform him of Brian's death. 18 FMSHRC at 1490; Tr. 133-35. Altizer testified that he told Haynes that it appeared, from information he had received, that one of their security guards had died of carbon monoxide poisoning at the job site. Tr. 134, 153-54. According to Altizer, Haynes responded that "he would take it from there." 18 FMSHRC at 1490. Altizer also informed Haynes that a car window had been broken to remove Brian from the car and that the police had investigated the site. Tr. 153-54, 299.

The next morning on April 10, at approximately 5:30 a.m., Haynes visited the mine to look for broken glass in order to determine where Brian had been found. Tr. 299-300. Haynes was unable to find any glass. Tr. 300.

At approximately 9:00 a.m., while at another mine site, Haynes was contacted by an inspector with the West Virginia Department of Mines, Eddie Miller. Tr. 174, 302-03. Haynes testified that Miller asked him questions about the incident and that Haynes replied that he had just returned from the site and that he had been unable to find any broken glass. Tr. 303. He stated that Miller had replied that they did not know anything either and that he had heard that they had found Brian at the local market, in a nearby town, or near the load-out at the foot of a hill at the mine. Tr. 303.

Later that morning, Haynes called the offices of Neal on two occasions seeking to speak with Judy Neal, who was not present at either time. Tr. 301. The second time he called, Haynes spoke with Neal General Manager Mitchum who offered no further information on the location of the accident. Tr. 301; E. Br. at 22. In addition, someone from Extra Energy's office contacted the police about the incident, but the police refused to release any information. Tr. 303.

At approximately 1:00 p.m. that day, Haynes was contacted by an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), David Radcliff. Tr. 172-73, 300. Inspector Radcliff had been informed about the accident that day by Randolph Richardson, who had provided safety training to security guards employed by Neal. Tr. 230. Haynes was unable to provide Inspector Radcliff with any information. Tr. 301.

At approximately 7:00 p.m. that evening, while driving home, Haynes saw Altizer and Mitchum speaking, their cars parked beside the road. Tr. 305. Haynes joined them and asked whether they knew where Brian had been found. Tr. 305. They replied that they did not. Tr. 305.

On April 11, Inspector Radcliff assigned the accident investigation to William Uhl, an investigator with MSHA. 18 FMSHRC at 1490; Tr. 172-73. Inspector Uhl first contacted the West Virginia Department of Mines and spoke with Miller. 18 FMSHRC at 1490; Tr. 174. Miller informed him of the approximate location where Brian had been found, and that the coroner's report indicated that Brian had died from carbon monoxide poisoning. *Id.*

Later that day, Inspector Uhl contacted Haynes at the mine. Tr. 306. Haynes testified that they traveled the county road adjacent to the mine and examined the gates and that he had shown Inspector Uhl what he had done the preceding day. Tr. 306. Haynes testified that there was still no indication of where Brian's car had been found. Tr. 306.

During the course of his investigation, Inspector Uhl determined that Brian's car had a damaged exhaust system and rusted-out areas that had allowed carbon monoxide to enter the driver's compartment. Tr. 217. He stated that the exhaust leaks were audible, and that there was an odor to the exhaust fumes. Tr. 204, 206. Inspector Uhl stated that a carbon monoxide detector detected 900 parts per million ("ppm") of carbon monoxide in the driver's compartment after the car's motor had run for 15 minutes. 18 FMSHRC at 1491. He stated that 500 ppm of carbon monoxide can cause a fatality over a three-hour period of time. Tr. 207. The car was also missing a valid state inspection sticker. 18 FMSHRC at 1496.

Inspector Uhl issued a citation to Extra Energy alleging a significant and substantial violation of section 77.404(a). Gov't Ex. 20. He designated the level of negligence as low because Brian's car was operated only during non-production hours and was rarely seen by Extra Energy. 18 FMSHRC at 1491. In addition, he issued a citation to Extra Energy alleging a violation of section 50.10. *Id.* at 1493; Gov't Ex. 21. Finally, Inspector Uhl issued two citations to Neal alleging violations of the same standards. Tr. 238; E. Post-Hr'g Br. at 7. The inspector designated a higher level of negligence in the citations issued to Neal. E. Post-Hr'g Br. at 7. Neal did not contest the citations. Tr. 238.

Extra Energy challenged the citations, arguing that it was not properly cited for the violation of section 77.404(a) committed by Neal, and that it did not violate section 50.10. 18 FMSHRC at 1493-96. The matter proceeded to hearing before Judge Melick.

The judge concluded that Extra Energy violated sections 77.404(a) and 50.10. *Id.* at 1496. First, he rejected Extra Energy's argument that the Secretary abused her discretion in citing Extra Energy for violating section 77.404(a). *Id.* at 1495-96. Although he found that MSHA's "Enforcement Policy and Guidelines for Independent Contractors," set forth in its *Program Policy Manual* (Vol. III, Part 45) ("Guidelines") were either meaningless or had not been satisfied, the judge concluded that there were sufficient grounds for citing Extra Energy because it had contracted with Neal for security, and the car had an obviously defective exhaust system and no current inspection sticker. *Id.* In addition, the judge rejected the operator's argument that Brian was a trespasser and not a "miner" within the meaning of section 3(g) of the Mine Act, 30 U.S.C. § 802(g), and that it, therefore, was not responsible for his actions. *Id.* at 1494. He also found Extra Energy strictly liable for the reporting violation because a fatal accident had occurred at the mine and Extra Energy had failed to report it to MSHA. *Id.* at 1496. In addition, the judge credited Altizer's testimony that he had informed Haynes that Brian had died of carbon monoxide poisoning at the mine. *Id.* However, the judge concluded that negligence for both violations was low due to mitigating circumstances. *Id.* Accordingly, the judge affirmed both citations and assessed civil penalties of $500 and $50 for the violations of

sections 77.404(a) and 50.10, respectively. *Id.* at 1497.

The Commission subsequently granted Extra Energy's petition for review of the judge's decision and heard oral argument.

II.

Disposition

A. Equipment Violation

1. Whether the Secretary Abused Her Discretion by Citing Extra Energy

Extra Energy argues that the judge erred in finding it liable for violating section 77.404(a) after he concluded that the Guidelines were either meaningless or had not been satisfied. E. Br. at 6-14. It asserts that the Commission has, in effect, adopted the Secretary's Guidelines, and that none of the criteria had been satisfied. *Id.* at 11-13. The Secretary responds that she has unreviewable discretion to cite production-operators, independent contractors, or both. S. Br. at 10-19. She submits that, even if her decision to cite Extra Energy were reviewable, her decision was within the wide discretion recognized by the Commission. *Id.* at 19-21.

The Commission and various courts have long recognized that, under the Mine Act's scheme of strict liability, an operator, although faultless itself, may be held liable for the acts of its independent contractor. *Bulk Transp. Services, Inc.*, 13 FMSHRC 1354, 1359-60 (September 1991); *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981). In instances of multiple operators, the Secretary has "wide enforcement discretion" and may proceed against an operator, independent contractor, or both. *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249 (February 1997), *aff'd per curiam*, No. 97-1392 (4th Cir. January 8, 1998); *Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (August 1989). The Commission has determined that "its review of the Secretary's action in citing an operator is appropriate to guard against abuse of discretion." *W-P Coal Co.*, 16 FMSHRC 1407, 1411 (July 1994). A litigant seeking to establish an abuse of discretion bears the heavy burden of establishing that there is no evidence to support the Secretary's decision or that the decision is based on an improper understanding of the law. *Mingo Logan*, 19 FMSHRC at 249-50 n.5.

The Commission has considered various factors in determining whether an enforcement action constitutes an abuse of the Secretary's discretion, including the operator's day-to-day involvement in the mine's operations (*Mingo Logan*, 19 FMSHRC at 250; *W-P*, 16 FMSHRC at 1411), whether the operator is in the best position to affect safety (*Bulk*, 13 FMSHRC at 1361) and whether the enforcement action is consistent with the purpose and policies of the Act (*Old Ben Coal Co.*, 1 FMSHRC 1480, 1485 (October 1979)). In addition, the Commission has considered whether any of the criteria of the Secretary's Guidelines for proceeding against an operator have been satisfied. *See, e.g., Bulk*, 13 FMSHRC at 1360; *Mingo Logan*, 19 FMSHRC at 250. While failure to satisfy the criteria is not fatal to an enforcement decision (*Mingo Logan*,

19 FMSHRC at 250), the Commission has relied upon satisfaction of the criteria in concluding that there was no abuse (*e.g., Bulk*, 13 FMSHRC at 1360).[4]

Here, Extra Energy had substantial involvement in the day-to-day operations at the mine. As the production-operator responsible for day-to-day mining activities, Extra Energy contracted with Neal for security services. Tr. 289-91. In obtaining Neal's services, Haynes had described the guard's duties and the areas to be patrolled. Tr. 289-91. Extra Energy also retained some supervision over the security guards in that it was responsible for reviewing reports submitted by the guards describing the area patrolled and whether the area had been secure. Tr. 316-17, 333-34; Gov't Ex. 1.

In addition, contrary to Extra Energy's assertions, there is evidence in the record satisfying the first two criteria of the Secretary's Guidelines.[5] Extra Energy did not provide the guards with a structure to protect them from the elements during their shift, leaving the guards' vehicles as the only available shelter. Tr. 121, 322. Despite the guards' dependence upon their cars, Extra Energy took no measures to ensure that the cars were safe, either by inspecting them itself or by requiring that Neal did so. Tr. 240, 265, 267. As a result, the obvious defects in Brian's car were not discovered. Through its failure to inspect or ensure that the security guards' vehicles were inspected, Extra Energy contributed to the equipment violation and to the continued existence of the violation.

Given Extra Energy's involvement in the mine's day-to-day affairs, and its complete failure to inspect or ensure that the vehicles were inspected, we conclude that Extra Energy has failed to prove that "there is no evidence to support the [Secretary's] decision" to proceed against it. *Mingo Logan*, 19 FMSHRC at 249-50 n.5. Accordingly, we affirm the judge's conclusion that the Secretary did not abuse her discretion in citing Extra Energy for violating section 77.404(a).[6]

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[4] The Commission has repeatedly recognized that the Guidelines are policy statements and are not binding on the Secretary. *Mingo Logan*, 19 FMSHRC at 250; *D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (September 1996), *appeal docketed*, No. 96-70877 (9th Cir. Oct. 21, 1996).

[5] We find improperly speculative the judge's conclusion that the first two criteria are "unworkable and essentially meaningless because it can always be said that a production operator contributed by omission to a violation on its premises by one of its contractors." 18 FMSHRC at 1495.

[6] In light of our conclusion, as in *Mingo Logan*, 19 FMSHRC at 251 n.7, we do not reach the Secretary's argument that she has unreviewable discretion to cite the operator, independent-contractor or both.

2. Whether Brian was a Miner Rather than a Trespasser

Extra Energy argues that substantial evidence[7] does not support the judge's finding that Brian was a "miner" within the meaning of section 3(g) of the Act,[8] rather than a trespasser. E. Br. at 15-18. Extra Energy relies upon Haynes' testimony that he had instructed Altizer and Brian that Neal's guards were to remain outside the mine gates and to conduct their patrols along the adjacent county road. *Id.* at 15-16. It asserts that the judge failed to consider Altizer's testimony that Brian's duties had changed so that he was no longer required to patrol the auger on mine property, and the testimony of Donald Graham, an employee of Extra Energy, that unbroken tracks on the access road to the auger indicated that the auger had not been patrolled. *Id.* at 16-17. The Secretary responds that the judge properly determined that Brian was a miner. S. Br. at 22-25.

In reaching his determination that Brian was a miner, the judge discredited Haynes' testimony that he had instructed Brian that he was not allowed on mine property. 18 FMSHRC at 1494. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (September 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (December 1981).

As the judge found, Haynes' testimony that Brian was not authorized to be on mine property is contradicted by evidence that Brian had been given a key to the mine property in case of emergencies. Tr. 318-19. Haynes admitted that Brian would need the key to remove trespassers from the property. Tr. 337. Haynes also acknowledged that the gates were probably on mine property and that it was part of Brian's duties to ensure that the gates were locked. Tr. 338-40. Haynes conceded that he did not request that Brian return the key, even after he had discovered Brian on mine property on two occasions. Tr. 321.

In addition, Haynes' testimony that Brian was a trespasser is not supported by the reports that Brian submitted detailing the areas he had patrolled and whether they were secure. Tr. 316; Gov't Ex. 1. The reports were reviewed by an employee at another Extra Energy site, who

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[7] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[8] Section 3(g) of the Mine Act defines a miner as "any individual working in a . . . mine." 30 U.S.C. § 802(g).

forwarded them to Haynes, if there were any problems.[9] Tr. 316-17, 333-34. The reports indicated that Brian had been patrolling the stockpiles and auger on the mine property on a daily basis. Tr. 316.

Furthermore, the testimony of Graham and Altizer relied upon by Extra Energy does not necessarily establish that Brian was not allowed on mine property. Altizer did not testify that Brian was not authorized to patrol the auger. Rather, Altizer testified that Brian had stated that his duties had changed in that Brian was supposed to check the auger and, rather than staying there, he could move to a different location, such as the hill between two stockpiles, where he had better CB communications. Tr. 107, 147, 157-58. Moreover, evidence that Brian did not travel the access road to the auger does foreclose the possibility that Brian ensured the security of the auger by another means while on mine property, such as by watching the entrance to the auger access road. *See* Tr. 335.

We do not find the extraordinary circumstances requiring that we overturn the judge's credibility determination. Accordingly, we conclude that the judge's determination that Brian was a miner within the meaning of the Act is supported by substantial evidence. Because Extra Energy did not contest any other basis for the equipment violation,[10] we affirm the judge's finding that Extra Energy violated section 77.404(a).[11]

B. Reporting Violation

Extra Energy argues that the judge's finding of a reporting violation was erroneous as a matter of law and was not supported by substantial evidence. E. Br. at 18-24. It submits that Extra Energy's duty to contact MSHA did not arise until it was aware that a reportable accident

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[9] Although Haynes testified that he had never reviewed the reports prior to the accident, he admitted that it was his responsibility to review the reports if there were problems. Tr. 316-17.

[10] In its petition for discretionary review, Extra Energy contested the violation on the basis that Brian's car was not equipment, but did not address the argument in its brief. PDR at 8-9. The Commission need not address this argument because Extra Energy has abandoned it. *RNS Servs., Inc.*, 18 FMSHRC 523, 526 n.6 (April 1996). We also note that the question was raised for the first time in Extra Energy's petition, and that the judge was not afforded an opportunity to pass upon it. 18 FMSHRC at 1496; 30 U.S.C. § 823(d)(2)(A)(iii).

[11] Given our conclusion, we need not reach the Secretary's arguments that, even if Brian had been outside the gates, he would still be on mine property because a mine includes "private ways and roads appurtenant thereto," (S. Br. at 24-25) and that because the Mine Act is a strict liability statute, an operator is strictly liable for violations that take place at its mine even if it was the victim of an unrelated party's actions (*Id.* at 25, *citing Secretary of Labor v. Miller Mining Co.*, 713 F.2d 487 (9th Cir. 1983)).

had occurred, and that it did not have a reasonable opportunity to ascertain whether the accident had occurred on mine property. *Id.* at 18-21. Extra Energy maintains that, in any event, Haynes' investigative actions upon being informed of the accident were reasonable. *Id.* at 21-25. The Secretary responds that substantial evidence supports the judge's determination that Extra Energy violated section 50.10. S. Br. at 26-27.

Section 50.10 requires operators to report immediately to MSHA the occurrence of certain "accidents," as defined in section 50.2(h). In relevant part, section 50.2(h) includes within the definition of "accident," the "death of an individual at a mine." 30 C.F.R. § 50.2(h)(1). Because section 50.10 contemplates that operators must first determine whether particular events constitute reportable accidents within the meaning of section 50.2(h), section 50.10 "necessarily accords operators a reasonable opportunity for investigation into an event prior to reporting to MSHA." *Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (October 1989). Such "internal investigation . . . must be carried out by operators in good faith without delay and in light of the regulation's command of prompt, vigorous action." *Id.*

The judge failed to analyze the alleged violation against this framework. Rather, the judge affirmed the citation based on his finding that Altizer had informed Haynes that Brian had died of carbon monoxide poisoning at the mine, and on his conclusion that Extra Energy was strictly liable for the violation based on undisputed evidence that an accident had occurred on mine property and Extra Energy had failed to report it. 18 FMSHRC at 1496. Nonetheless, we find substantial evidence in the record to support his holding that Extra Energy violated section 50.10.

In applying the Commission's test, reasonable minds may reach different conclusions as to whether Haynes' actions in waiting until the morning of April 10 to begin an investigation by visiting the mine to look for broken glass amounted to reasonable investigative efforts. Evidence of Haynes' actions after his initial visit to the mine, however, supports only the conclusion that Haynes failed to investigate and report the accident as required by section 50.10.

On the morning of April 10, after he failed to find broken glass at the mine site, Haynes did not vigorously continue his investigative efforts until he discovered the circumstances of Brian's death. Rather, he returned to his work duties, traveling to another mine site. Tr. 300, 302-03. Although he called Neal's offices, when Mitchum informed him that he knew nothing more about the accident than did Haynes, Haynes did not further pursue the basis for Altizer's statement that Brian had died at the mine site. Tr. 301. His next significant contact with Neal personnel occurred only by happenstance, when Haynes noticed Altizer and Mitchum talking on the side of the road that Haynes traveled on his way home. Tr. 305. Haynes did not contact the sheriff's office either in person or by telephone even after the sheriff's office refused to release information to the Extra Energy employee who had placed the call. Tr. 331-32. Haynes did not

attempt to reach Brian's family or the hospital to find out more information about the accident.[12] Tr. 304, 331. In addition, even if the involvement of state and local police led Haynes to believe that the incident had occurred off mine property, as argued by Extra Energy, Haynes should been alerted that it was appropriate to contact MSHA after he discovered that state mine inspectors were investigating the accident on the morning of April 10. Tr. 174, 302-03.

Such actions do not demonstrate an investigation carried out "in good faith without delay and in light of the regulation's command of prompt, vigorous action." *Consolidation*, 11 FMSHRC at 1938. Because the evidence of Haynes' actions after his initial inspection on April 10 supports only the conclusion of violation, remand for reconsideration of the issue by the judge is unnecessary. *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (September 1993) (remand unnecessary where reconsideration of issue by judge would serve no purpose). Accordingly, we affirm in result the judge's determination that Extra Energy violated section 50.10.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determinations that Extra Energy violated sections 77.404(a) and 50.10.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

[12] As noted by Extra Energy, Haynes could not have called Brian's family because they did not have a telephone. E. Br. at 23; Tr. 62. However, Haynes did not attempt to reach Brian's family in person or by CB radio.

Commissioner Verheggen, concurring in part and dissenting in part:

I agree with and join in my colleagues' decision except Sections II.A.1 at n.5 and II.B. I agree with my colleagues' conclusion that the judge properly found "that the Secretary did not abuse her discretion in citing Extra Energy." Slip op. at 6. Although my colleagues state that they "do not reach the Secretary's argument that she has unreviewable discretion to cite the operator, independent-contractor or both" (*id.* at 6 n.5), in effect they *do* reach the issue and reject the Secretary's argument by reviewing her exercise of discretion in this case. In one breath, my colleagues say that "the Secretary did not abuse her discretion" here, and even cite a Commission case that unequivocally holds that Commission "review of the Secretary's action in citing an operator is appropriate to guard against an abuse of discretion." Slip op. at 5 (citing *W-P Coal Co.*, 16 FMSHRC 1407, 1411 (July 1994)). In the very next breath, my colleagues claim that they need not address the Secretary's assertion that her discretion is unreviewable. Slip op. at 6 n.5. The note my colleagues drop from their holding and the holding itself contradict each other. I therefore write separately on this issue to disassociate myself from the note.

Furthermore, I disagree with the Secretary's contention that she "has virtually unreviewable discretion in multiple operator situations to decide which operator to cite for a violation of the Act." S. Br. at 17.[1] I stand by the Commission's prior pronouncements on this subject, and would reaffirm at every opportunity the principle that "review of the Secretary's action in citing an operator is appropriate to guard against an abuse of discretion." *W-P Coal Co.*, 16 FMSHRC at 1411. I believe it is vital for the Commission to faithfully discharge its duty to "'develop a uniform and comprehensive interpretation' of the Mine Act." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994) (citing *Nomination Hearing Before the Senate Comm. on Human Resources*, 95th Cong., 2d Sess. 1 (1978)). Congress explicitly charged the Commission "with the responsibility . . . for reviewing the enforcement activities of the Secretary . . . [to] provide guidance to the Secretary in enforcing the [Mine Act]." *Nomination Hearing, supra*, at 1. Such review is paramount to guard against mischief — or worse — in the Secretary's exercise of her prosecutorial discretion. *Cf. Minerals Exploration Co.*, 8 FMSHRC 477, 486-87 (April 1986).

I also dissent from Section II.B of my colleagues' decision affirming in result the judge's conclusion that Extra Energy violated section 50.10. I agree with my colleagues that the judge failed to analyze the alleged violation against the framework established by the Commission in *Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (October 1989), which affords operators "a reasonable opportunity for investigation into an event prior to reporting to MSHA." I disagree, however, with my colleagues' conclusion that the record evidence supports *only* the finding of a violation, thus obviating the need for remand. Slip op. at 9. I believe there is conflicting evidence as to whether Extra Energy violated section 50.10, the resolution of which should be

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[1] The Secretary herself admits that the Commission has the authority to review her enforcement discretion to guard against "invidious and unconstitutional discrimination." S. Br. at 13 n.6.

made by the judge because the "'ALJ has sole power to . . . resolve inconsistencies in the evidence.'" *Wellmore Coal Corp. v. FMSHRC*, No. 97-1280, 1997 WL 794132, at *3 (4th Cir. Dec. 30, 1997) (quoting *Grizzle v. Picklands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993)).

The Commission held in *Consolidation Coal Co.* that "[t]he immediateness of an operator's notification under section 50.10 must be evaluated on a case-by-case basis, taking into account the nature of the accident and all relevant variables affecting reaction and reporting." 11 FMSHRC at 1938. In this case, such "relevant variables" include the fact that Extra Energy Superintendent Haynes was unable to determine whether the accident had occurred on mine property because the vehicle had been removed and he was unable to find any broken glass (Tr. 299-300); that Neal and Associates, the victim's employer, was unable to provide Haynes with any definitive information as to where the accident occurred (Tr. 301); that the victim's family could not be reached by telephone (Tr. 62-63); and that the state police, who first investigated the accident, would not release any information (Tr. 303).[2] These facts, in addition to those raised by my colleagues, should be evaluated by the judge in order to determine whether Haynes' investigation was in fact carried out "in good faith and without delay." 11 FMSHRC at 1938. Accordingly, I would vacate the judge's decision on this issue and remand for further proceedings.

Theodore F. Verheggen

Theodore F. Verheggen, Commissioner

[2] Indeed, the very involvement of the state and local police, which according to MSHA do not have jurisdiction over accidents occurring on mine property (Tr. 246-47), suggests that Haynes' belief that the accident did not occur at the mine may have been reasonable.

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WASHINGTON, D.C. 20006

January 30, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 95-214
ISLAND CREEK COAL COMPANY	:	

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

DECISION

BY: Jordan, Chairman; Marks and Riley, Commissioners

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 the finding of Administrative Law Judge T. Todd Hodgdon that an escape of methane onto a working section from a cut-through core drill hole did not constitute an unplanned inundation of gas, and that therefore Island Creek Coal Company ("Island Creek") did not violate 30 C.F.R. § 50.10, which requires operators to immediately report certain accidents to the Department of Labor's Mine Safety and Health Administration ("MSHA"). 18 FMSHRC 1498 (August 1996) (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 for assessment of an appropriate civil penalty.

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[1] Commissioner Beatty assumed office after this case had been considered and decided at a decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Beatty has elected not to participate in this matter.

I.

Factual and Procedural Background

Island Creek operates the Ohio No. 11 Mine, an underground coal mine with four working sections. 18 FMSHRC at 1500. At around 6:45 p.m. on April 7, 1994, while mining a crosscut between the No. 5 and 6 entries on the 004 section, a continuous miner cut through a core drill hole.[2] *Id.*; Tr. 41. The core drill hole went from the No. 11 seam, where mining was taking place, to the No. 9 seam below it. 18 FMSHRC at 1500. The No. 9 seam had been sealed for years and contained methane gas under pressure. *Id.*; Gatlin Dep. 15-16, 19.[3]

When the cut-through occurred, methane from the No. 9 seam poured onto the 004 section. 18 FMSHRC at 1500. The continuous mining machine shut down when its methane monitor detected 1.5 to 2 % methane. Tr. 25; Gatlin Dep. 12. Eleven miners were at work on the 004 section at the time of the cut-through. Tr. 23.

The second shift foreman, John Cambron, measured 3 to 3.5 % methane in an area adjacent to the crosscut where the core drill hole was cut. 18 FMSHRC at 1500; Tr. 135. Cambron then directed that the ventilation curtain be extended in the No. 5 entry and, after 3 minutes, took a methane reading that showed less than 1 % methane. 18 FMSHRC at 1500; Tr. 135-37. Cambron then sent the crew to the No. 5 section, except for three miners whom he retained to help him deal with the methane. Tr. 137. Next, Cambron had timbers set on the miner itself so that ventilation curtains could be hung to deflect methane away from the immobilized equipment. Tr. 137-40. At about 9:00 p.m., before attempting to move the miner, Cambron called his superior, Tommy Gatlin, General Mine Foreman, to inform him of the

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[2] As the judge explained:

> A "core drill" is "a mechanism designed to rotate and cause an annular-shaped rock cutting bit to penetrate rock formations, produce cylindrical cores of the formations penetrated, and lift such cores to the surface, where they may be collected and examined." Thus, a "core drill hole" is the hole remaining after the core has been removed.

18 FMSHRC at 1500 n.1 (quoting U.S. Dep't of Interior, *Dictionary of Mining, Mineral, and Related Terms* 266 (1968)).

[3] General mine foreman Tommy Gatlin did not attend the April 10, 1996, hearing in this matter. Tr. 26-32. Gatlin was deposed on May 7, 1996, and his deposition was admitted into evidence as Gov't Ex. 3. Tr. 213.

situation.[4] Tr. 138; Gatlin Dep. 4-5, 13; Gov't Ex. 2, at p.1. Cambron told Gatlin that he thought he had hit a "bleeder," and that he would keep him informed. Gatlin Dep. 11. Gatlin understood Cambron to mean that methane was being released from the coal being mined. *Id.*

Cambron then attempted to move the miner, which was being operated by remote control, out of the crosscut. Tr. 139-40. Cambron had power restored to the miner and began backing it out of the crosscut, but after moving it about 10 feet, the timbers holding the ventilation curtain became dislodged, the curtain fell, and the miner shut down due to higher methane concentrations recorded by the miner's methane monitor. Tr. 140. The timbers were then reset and the curtain rehung, the methane level dropped below 1 %, and Cambron again attempted to move the miner out of the crosscut. *Id.* Again, the miner moved about 10 feet before the timbers and curtain fell and the miner shut down. Tr. 140-41. Cambron once again had the timbers and curtain replaced and, on the third attempt, was able to back the miner out of the crosscut. Tr. 141. He then had timbers set and curtains hung to within about 9 feet of the source of the methane. *Id.* The volume of air was also increased from 16,000 cfm to over 29,000 cfm. Tr. 65, 147. Aside from the occasions when the ventilation controls were dislodged, and the 3.5% reading when Cambron initially came onto the section, Cambron did not encounter more than 1 % methane at any point where he tested for methane. Tr. 143.

At about midnight, Cambron called Gatlin to update him on efforts to control the methane. Gatlin Dep. 13-14. He reported that stoppings were being built, and that the source of the methane was a "bore hole."[5] *Id.* Gatlin then proceeded to the mine, arriving at 12:45 a.m. on April 8. *Id.* at 14. When he got to the section, Gatlin could hear the methane blowing out of the core drill hole from 200 feet away. *Id.* at 15. He then realized that the situation was more serious than Cambron had first indicated, because this was not a bleeder, meaning "liberation of methane built up in the coal bed. Instead, it was a core drill[] hole that was drilled below the No. 11 seam, and [Gatlin] wasn't sure how far down it went." *Id.* at 15-16. Cambron testified that, in 25 years of mining, he had never cut into a hole that blew as hard, or for as long, as this one. Tr. 162. Gatlin took several methane readings while on the section. Gatlin Dep. 19. On the return side of the wing curtain, he encountered 1.5 or 1.6 % methane. *Id.* Standing on top of the hole, Gatlin measured 5 % methane, in the explosive range. *Id.* at 19-20. Gatlin then shut off his detector. *Id.* at 19.

Gatlin made several unsuccessful attempts to staunch the flow of methane from the core drill hole. Gatlin Dep. 17-18. First, he tried to plug the hole with a trolley pole. *Id.* at 17. When that proved unsuccessful, he tried to cover the hole with a board and piece of steel pipe. *Id.* That attempt also failed; Gatlin couldn't actually see the hole because the escaping methane blew coal fines, mixed with water that had come from the roof and accumulated on the floor, in Gatlin's face. *Id.* at 17-18, 26-27.

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[4] Gatlin was at home at the time of the incident. Gatlin Dep. 10-11.

[5] Witnesses used the terms "bore hole" and "core drill hole" interchangeably.

At 1:30 a.m. and 5:45 a.m. on April 8, Gatlin telephoned his superior, David Bruce Beaven, Superintendent of the Ohio No. 11 Mine, who was in Mt. Vernon, Illinois, at the time. Gatlin Dep. 24-25; Tr. 169. He related the incident to Beaven, and the two concluded that, because there were no injuries and no hazard to employees, MSHA need not be called. Tr. 181-82; Gatlin Dep. 25. However, Beaven told Gatlin to inform MSHA "as a courtesy" because the incident was a little "out of the usual." Tr. 183-84. Beaven himself reported the incident to Island Creek's Regional Manager and Regional Safety Director. *Id.* at 184, 198.

At around 7:00 a.m. on April 8, Gatlin called the local MSHA office as a "courtesy" to report the incident. 18 FMSHRC at 1500. MSHA Inspector Robert Jaco thereupon issued a verbal withdrawal order under section 103(k) of the Mine Act, 30 U.S.C. § 813(k), and he and MSHA Inspector Archie Coburn proceeded to the mine. *Id.* at 1500-01; Gatlin Dep. 28. When they reached the No. 2 entry on 004 section, they could hear a "roaring sound" coming from the face. Tr. 42. Inspector Coburn took a methane reading in the last open crosscut between the No. 5 and 6 entries and recorded 1 to 1.5 % methane. *Id.* at 65-66. Inspector Jaco measured 2.5 to 2.6 % methane 10 feet from the core drill hole. *Id.* at 80-81, 102. Bottle samples taken in the No. 6 entry between the first two crosscuts, and in the last open crosscut between the No. 5 and 6 entries, showed .62 and .96 % methane, respectively. *Id.* at 118-21.

At 11:30 a.m. on April 8, Coburn issued Citation No. 3859779 to Island Creek under section 104(a) of the Mine Act for a significant and substantial ("S&S") violation of section 50.10. The citation states:

> Mine Management failed to notify MSHA immediately after the mine experienced a non-injury accident on April 7, 1994 at 1845 hrs. A core drill hole was cut through on the 004-0 MMU. MSHA was notified by phone on April 8, 1994 at 0700 a.m.

Jt. Ex. 1.

Island Creek made additional attempts to plug the flow of methane. First, a mortared block-wall seal was built over the hole; however, methane migrated onto the section through the cinder blocks. Tr. 25-26, 191. A second seal was then built in front of the first seal, and the space between them was filled with foam. Tr. 25-26. This attempt was also unsuccessful. Tr. 26. On April 13, 1994, Island Creek succeeded in stemming the flow of methane by drilling a hole to the surface to vent the pressurized gas. 18 FMSHRC at 1501.

The judge concluded that the core drill hole incident did not constitute an "unplanned inundation of a mine" under 30 C.F.R. § 50.2(h)(4), and therefore was not an "accident" that had to be immediately reported to MSHA pursuant to section 50.10. 18 FMSHRC at 1501. The judge determined that a "reasonably prudent person" would not have known that section 50.10 required the reporting of the incident because section 50.2(h)(4), on its face, "speaks of the inundation of a *mine*, not a part, sections, entries or crosscuts of a mine." *Id.* at 1501-02.

Reasoning that "[t]he gases released did not flood the entire mine or even a large section of the workings[,]" the judge concluded that Island Creek did not violate section 50.10 by not immediately reporting the incident. *Id.* at 1502.

II.

Disposition

The Secretary argues that the judge erred in construing "inundation" to refer only to inundation of the entire mine. S. Br. at 6. Urging the Commission to defer to her interpretation of her own regulations, the Secretary notes that section 50.2(h)(4) does not refer to inundation of an "entire" mine. *Id.* at 6-8. The Secretary observes that the inrush of gas in this case is consistent with the dictionary definition of "inundation," and that "mine" is defined in Part 50 to include enumerated portions of an entire mining facility. *Id.* at 9-10. She contends that her interpretation of "inundation" as including an inrush of gas that is less than mine-wide is consistent with the other specifications of "accident" contained in section 50.2, none of which describe mine-wide incidents. *Id.* at 11-12. The Secretary also argues that her interpretation of "inundation" is consistent with the safety-promoting purpose of the regulation. *Id.* at 12-15.

Island Creek responds that the Secretary's interpretation of "inundation" is not entitled to deference because it was not shown to be well established or consistently applied, and "was not conceived until after the decision below had been entered." I.C. Br. at 5-7. Island Creek contends that it never received fair notice of the Secretary's interpretation of "inundation." *Id.* at 7. The operator asserts that, contrary to the Secretary's argument, the judge did not interpret "inundation" to apply only to mine-wide incidents, noting that the judge found that the inrush of gas did not flood "a large section of the workings." *Id.* at 9 (citation omitted). Island Creek argues that, under the Secretary's interpretation, every methane release, no matter how small in magnitude, would constitute a reportable accident. *Id.* at 11.

A. Violation

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

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

Section 50.10 provides that "[i]f an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine." Section 50.2(h) defines "accident" to mean any of 12 events. One of those definitions, set forth in section 50.2(h)(4), states that "accident" means "[a]n unplanned inundation of a mine by a liquid or gas." Before the judge, it was undisputed that the core drill hole incident was not immediately reported to MSHA, and that the cut-through was "unplanned" within the meaning of section 50.2(h)(4). 18 FMSHRC at 1501; Tr. 59. Thus, the main issue below was whether the flow of methane onto the section constituted an "inundation of a mine."

The regulations do not define "inundation." In the absence of an express definition or an indication that the drafters intended a technical usage, the Commission has relied on the ordinary meaning of the word to be construed. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997) (table). "Inundate" and "inundation" are defined as "a rising and spreading of water over land not usu[ally] submerged: FLOOD . . . DELUGE" and "SUBMERGE . . . to overwhelm by great numbers or a superfluity of something: SWAMP[.]" *Webster's Third New Int'l Dictionary (Unabridged)* 1188 (1986). "Flood" is in turn defined, in relevant part, as "an outpouring of considerable extent . . . a great stream of something . . . that flows in a steady course . . . a large quantity widely diffused: SUPERABUNDANCE[.]" *Id.* at 873. "Deluge" is defined as "an irresistible rush of something (as in overwhelming numbers, quantity, or volume) . . . a forceful jet of water (as from a fire hose)[.]" *Id.* at 598.

Because the meaning of the term "inundation" as used in the regulation is open to alternative interpretations, as reflected in the dictionary definitions, we conclude that it is in some respects ambiguous. *See National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418-19 (1992); Norman J. Singer, *Sutherland Statutory Construction* § 45.02, at 6 (5th ed. 1992) ("Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses."). As the Court stated in *Boston & Maine*, "[f]ew phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context." 503 U.S. at 418. Our conclusion that "inundation" is ambiguous as applied to the methane inrush at the Ohio No. 11 Mine requires us to decide whether the Secretary's interpretation of the provision is reasonable. The judge essentially skipped this primary inquiry of whether the Secretary has advanced a permissible interpretation of the regulation, and proceeded directly to analyze the fair notice issue. Our precedent makes clear, however, that these questions are distinct. *See, e.g., Morton Int'l, Inc.*, 18 FMSHRC 533, 538-39 (April 1996).

The Secretary interprets "inundation" to include less than mine-wide methane flows such as occurred in this case. S. Br. at 6. The Secretary argues that the focus of the ordinary meaning of "inundation" is on "the *process* of the water flowing in — not, as the judge's interpretation does, on whether the water has already spread so as to submerge all land not usually submerged." *Id.* at 9. The judge, and Island Creek, rely on the definition of "inundation" contained in the U.S. Dep't of Interior, *Dictionary of Mining, Mineral, and Related Terms* ("*DMMRT*"). 18 FMSHRC at 1502; I.C. Br. at 8 n.5.

The Secretary correctly focuses on the process of inundation, apparently arguing that the relevant fact was the "rising" and "spreading" of the gas that constituted the inundation, not the size of the area where the substance eventually landed. S. Br. at 9. Furthermore, the definition of "deluge" is consistent with the situation on the 004 section on April 7-8, as the core drill hole essentially released a "forceful jet" of methane.

We note that other elements of the definitions include "swamping" or "overwhelming" of the inundated area and the "considerable extent" and "widely diffused" nature of the inrushing material. This last characteristic is featured in the *DMMRT* definition of "inundation."[6] However, the Secretary is not required to cover every aspect of the definitions, as long as her interpretation is consistent with common usage and ordinary meaning.

Thus, although the judge appears to have relied on the *DMMRT* definition of "inundation," the Secretary is not obliged to adopt it in interpreting the regulation. It is true, as the judge stated, that the Commission took note of this definition in *Aluminum Co. of America*, 15 FMSHRC 1821, 1825 n.8. (September 1993). 18 FMSHRC at 1502. As Island Creek concedes, however, that case "did not turn upon the definition of inundation," I.C. Br. at 8 n.5, and, as the Secretary points out, the Commission did not expressly adopt the *DMMRT* reading.[7] S. Br. at 10 n.3. In any case, while the *DMMRT* definition may be plausible, the Commission does not substitute its judgment for the Secretary's so long as the Secretary's interpretation is reasonable. *See, e.g., General Elec.*, 53 F.3d at 1327.

The dissent, relying on several dictionaries and a thesaurus, mistakenly asserts that "inundation" has only been defined to mean the "swamp[ing]" or "overwhelm[ing]" of "generally a large area." Slip op. at 14. While the reference works cited by the dissent contain this reading of "inundation," some also include another sense of the term that supports the Secretary's interpretation. For example, *Webster's* at 1188, the *Random House Dictionary of the English Language (Unabridged)* 1002 (2d ed. 1987) and the *Random House Thesaurus* 393 (College ed. 1984) include the sense of "deluge" which, according to the *Thesaurus*, *id.* at 193, is synonymous

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[6] The *DMMRT* defines "inundation" as an "inrush of water on a large scale which floods the entire mine or a large section of the workings." *DMMRT* at 587.

[7] *See also Local 2333, UMWA v. Ranger Fuel Corp.*, 12 FMSHRC 363, 365-66 (March 1990) (less than mine-wide release of methane due to roof fall described as "inundation.")

with "barrage," "torrent," and "spate." "Torrent" is in turn defined in a sense similar to that of "deluge," i.e., "a stream of water flowing with great rapidity and violence[;] a rushing, violent, or abundant and unceasing stream of anything[.]" *Random House Dictionary* at 1999; *see also Webster's* at 2413 ("a violent stream of a liquid").

This case is thus readily distinguishable from *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994), cited by the dissent (*see* slip op. at 16). *MCI* involved the "rarity" of "a meaning set forth in a single dictionary . . . which not only *supplements* the meaning contained in all other dictionaries, but *contradicts* one of the meanings contained in virtually all other dictionaries." 512 U.S. at 227. Here, the connotation of "inundation" as an inrush of material is present in more than one source. In any case, the alternate definition of "inundation" as a "deluge" and characterized by a "rising" and "spreading" of material does not contradict the sense of "swamping" or "overwhelming" a given area, but rather supplements that aspect of the definition.

We note further that many of the dictionary definitions focus on "inundation" by water or liquid. Being a gas that is lighter than air, methane is not constrained by the physical laws of fluid hydrodynamics. Therefore it need not "swamp" or "overwhelm" a very large area of a mine in order to accumulate in a specific location in sufficient concentration to be dangerously explosive.

Moreover, in determining whether the judge correctly concluded that there was no "inundation of a mine" within the meaning of section 50.2(h)(4), we must also consider related regulatory definitions, keeping in mind that "regulations should be read as a whole, giving comprehensive, harmonious meaning to all provisions." *Morton*, 18 FMSHRC at 536. We therefore turn to the definition of the term "mine." Section 50.2(a), which tracks the definition of the term in section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1), defines "mine" to include

> underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools or other property . . . , on the surface or underground, used in . . . the work of extracting . . . minerals from their natural deposits . . . .

30 C.F.R. § 50.2(a). Interpreting similar language in the Mine Act's predecessor, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) ("Coal Act"), the Fourth Circuit noted: "A single shaft, tunnel, or tipple, and the land on which each of these facilities is located, can constitute a separate coal mine within the [Coal] Act's definition." *Bituminous Coal Operators' Ass'n v. Secretary of Interior*, 547 F.2d 240, 246 (4th Cir. 1977). Citing *Bituminous Coal Operators'*, the Commission recently held that "there can be multiple mines at a single site." *D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 n.9 (September 1996). The crosscut containing the cut core drill hole appears to be a "working[] . . . or other property

. . . underground, used in . . . extracting . . . minerals . . ." under section 50.2(a) and, thus, a "mine" within the meaning of that provision.

In maintaining the position that "there was no 'inundation' of methane as that term is used in the sense of a large volume of gas covering a large area," the dissent remains mum on these key "contextual indications" supporting the Secretary's interpretation to the effect that the inundation need not cover an extensive area. *See MCI*, 512 U.S. at 226. The dissent's silence on the statutory and regulatory definition of "mine" does not alter the import of those provisions. Notably, the dissent does not dispute that the cross-cut containing the core drill hole is a "mine" under the Act and regulations. This area, then, and not the entire mine property, is the proper focus of the analysis of whether the Secretary's interpretation of "inundation" is entitled to deference. Thus, contrary to the dissent, unless extant definitions of "mine" are to be thrown overboard, even a relatively small area constituting a "mine," such as the crosscut at issue here, may be subject to an "inundation" within the meaning of section 50.2(h)(4).[8]

In addition, as the Secretary points out (S. Br. at 11-12), none of the other meanings of "accident" set forth in section 50.2(h) appear to contain a "mine-wide" component. *See, e.g.*, 30 C.F.R. § 50.2(h)(5) ("unplanned ignition or explosion of gas or dust"); 30 C.F.R. § 50.2(h)(6) ("unplanned mine fire not extinguished within 30 minutes of discovery"). Reading the Secretary's regulations as a whole and giving them comprehensive, harmonious meaning, we cannot say that the Secretary's reading of "inundation" to encompass less than mine-wide methane releases is unreasonable.

In construing the Secretary's Part 50 regulations, we are mindful of the well-established maxim that regulations must be interpreted in a manner consonant with the safety-promoting purposes of the Mine Act. *Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (citing *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984). MSHA needs to know immediately about inrushes of methane in order to be able to respond quickly and help prevent explosions and loss of life. Notification is one of the necessary first steps following an accident that enables MSHA to take appropriate action. *See, e.g.*, 30 C.F.R. § 50.11(a) (following notification, MSHA must promptly decide whether to conduct an accident investigation which, if under taken, must commence "within 24 hours of notification."); 58 Fed. Reg. 63,528 (1993) (MSHA toll-free telephone number for accident notification will be staffed by "24-hour answering service [that] will respond to calls.)" Section 103(j) of the Mine Act, 30 U.S.C.

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[8] We are not comforted by the dissent's observation that there was "only a single reading of methane at an explosive concentration . . . ." Slip op. at 16. First, it should not be necessary to point out that methane in the explosive range presents a serious hazard. *Island Creek Coal Co.*, 15 FMSHRC 339, 341 n.3 (March 1993) (citations omitted). Such a hazard could affect miners in other parts of the mine as well. *Cf. Buck Creek Coal Co.*, 17 FMSHRC 8, 14 (January 1995). Moreover, Gatlin eliminated his chances of taking further readings in the explosive range by shutting off his methane detector after the first such reading. Gatlin Dep. 19.

§ 813(j), also requires operators to notify the Secretary of accidents.[9] Congress recognized that the Secretary must have maximum latitude to take protective measures in response to mining accidents. The section of the Senate report dealing with what became section 103 of the Mine Act stated:

> The unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary or his authorized representative be permitted to exercise broad discretion in order to protect the life or to insure the safety of any person. The grant of authority in section [103(j)] to take appropriate actions and in section [103(k)] to issue orders is intended to provide the Secretary with flexibility in responding to accident situations, including the issuance of withdrawal orders.

S. Rep. No. 181, 95th Cong., 1st Sess. 29 (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 617 (1978).

Moreover, we have previously noted that Congress' concern over the presence of high levels of methane in mines was the basis of provisions in both the Mine Act and its predecessor, the Coal Act. *E.g., Wyoming Fuel Co.*, 13 FMSHRC 1210, 1214 (August 1991) (citing S. Rep. No. 411, 91st Cong.., 1st Sess. 59 (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 185 (1975) ("*Coal Act Legis. Hist.*")); *see also* 30 U.S.C. § 813(i) (spot inspections for mines with excess methane liberation); S. Rep. No. 411, at 25-35, *reprinted in Coal Act Legis. Hist.* at 151-161. In sum, the Secretary's interpretation of this regulation, by requiring immediate notification of less than mine-wide inundations, furthers the protective purposes of the notification requirement and the Mine Act.[10]

We reject Island Creek's argument that the Secretary's interpretation is not entitled to deference because "it was not conceived until after the decision below had been entered." I.C. Br. at 7. First, it has been the Secretary's position throughout the litigation that the inrush of methane at issue was an "inundation of a mine" within the meaning of section 50.2(h)(4). *See, e.g.*, S. Proposed Findings of Fact and Conclusions of Law at 18-20. In addition, the Supreme

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[9] Section 103(j) provides in pertinent part: "In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof . . . ." 30 U.S.C. § 813(j).

[10] Contrary to the suggestion of our dissenting colleague, we have neither sanctioned 6-hour delays in dealing with methane accidents nor held that deadly and silent methane releases do not trigger the requirement of immediate notification of MSHA. The Secretary's interpretation of section 50.2(h)(4) to include less than mine-wide inrushes of methane as inundations does not exclude other types of inundations from the sweep of the provision.

Court has held that the Secretary's first-time articulation of an interpretation of analogous regulations in the course of administrative litigation is, if reasonable, entitled to deference. *Martin v. OSHRC*, 499 U.S. 144, 156-58 (1991).

Thus, reading the ordinary definition of "inundation" together with the regulatory definition of "mine," we conclude that an "inundation of a mine" may include an outpouring of methane affecting a portion of the entire mine. Accordingly, we conclude that the Secretary's interpretation of section 50.2(b)(4) to include an inundation that is less than mine-wide in extent, such as occurred in the present case, is a permissible reading of her regulations. We reverse the judge's implied holding to the contrary.

B. Notice

Where an agency imposes a fine based on its interpretation, a separate inquiry may arise concerning whether the respondent has received "fair notice" of the interpretation it was fined for violating. *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (August 1995). "[D]ue process . . . prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir 1986). An agency's interpretation may be "permissible" but nevertheless fail to provide the notice required under this principle of administrative law to support imposition of a civil sanction. *General Elec.*, 53 F.3d at 1333-34. The Commission has not required that the operator receive actual notice of the Secretary's interpretation. Instead, the Commission uses an objective test, i.e., "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990).

As to the question whether a reasonably prudent person would have understood the applicability of the reporting requirement of section 50.10 to the facts presented, we have already indicated that some of the elements of the definition of "inundation," particularly the extent of the outpouring and the "overwhelming" impact on the affected area, appear to be absent here. After Cambron set timbers, hung curtains and increased the flow of air onto the section, elevated methane levels were restricted to the core drill hole and the area adjacent to it. Moreover, this dilution, if not control, of the escaping methane was accomplished within a short period of time following the incident. However, by the time Gatlin contacted Beaven in Illinois, it should have been apparent to Island Creek that it was dealing with a reportable accident. By then, Gatlin knew that Island Creek, despite its efforts, had been unable to stop the flow of methane onto the section, that methane had continue to flow with great force for over 6 hours, and that methane readings were elevated, on one occasion in the explosive range, albeit in a limited area. These conditions presented a safety hazard that should have alerted Island Creek to the necessity of immediately reporting the incident as an accident to MSHA.[11]

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[11] Commissioner Marks wishes to express his view that, given the nature of this incident — an unexpected, inrush of methane which continued to flow with great force for over 6 hours

Further, the actions and stated views of Island Creek representatives support the notion that Island Creek should have been aware that the core drill hole cut-through was not a routine methane release, but rather an incident that needed to be reported under section 50.10. The incident was serious enough to prompt the second shift mine foreman (Cambron) to notify the general mine foreman (Gatlin) at home, for the general mine foreman to notify the superintendent (Beaven) in another city, for the superintendent to notify his superior, the regional manager, as well as the regional safety director, for these individuals to discuss whether MSHA should be notified, and for the superintendent to order MSHA contacted on the morning of April 8 as a "courtesy." Gatlin testified that the incident was more serious than initially reported to him, and Cambron testified that in 25 years of mining he had never cut into a hole that blew methane as hard and for as long a time as this core drill hole did. In light of these circumstances, the Secretary's interpretation of sections 50.10 and 50.2(h)(4) as requiring the reporting of the incident as an accident does not seem "so far from a reasonable person's understanding of the regulations that they could not have fairly informed [the operator] of the agency's perspective." *See General Elec.*, 53 F.3d at 1330. This is particularly the case in view of the absence of any evidence that MSHA ever construed these regulations in a manner inconsistent with its position in this case. *Cf. General Elec. Co. v. Gilbert*, 429 U.S. 125, 1141-43 (1976).

Island Creek's notice argument is further undercut by the explicit definition of "mine," in section 50.2(a) and Mine Act section 3(h)(1), as a particularized portion of a larger facility. This definition has gained wide recognition since the *Bituminous Coal Operators'* case interpreted similar language under the 1969 Coal Act.

In addition, under the Commission's test, the "reasonably prudent person" is charged with knowledge of the "mining industry and the protective purposes of the standard." *Ideal Cement*, 12 FMSHRC at 2416. Here, the protective purposes of the notification requirement are obvious and important. We therefore conclude based on all the evidence that a person familiar with this purpose would have notified MSHA when faced with the situation at issue here.

Accordingly, we reverse the judge's determination that Island Creek did not have notice that section 50.10 would apply to the incident at issue.

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by the time the superintendent was notified, despite Island Creek's efforts to remedy it — there could be no doubt that the operator should have been on notice that this was the type of "unplanned inundation," as set forth in section 50.2(h)(4), that needed to be reported immediately to MSHA.

III.

Conclusion

For the foregoing reasons, we reverse the judge's determinations that Island Creek did not violate 30 C.F.R. § 50.10 and did not have fair warning of its applicability to Island Creek, and we remand for assessment of an appropriate civil penalty.

Mary Lu Jordan. Chairman

Marc Lincoln Marks, Commissioner

James C. Riley. Commissioner

Commissioner Verheggen, dissenting:

At issue in this case is whether a release of a mixture of air and methane, confined to a small area of Island Creek's Ohio No. 11 Mine, constituted an "inundation" as that term is used in 30 C.F.R. § 50.2. My colleagues believe that the release was such an inundation. I respectfully disagree.

The Commission has long held that "[w]here the language of a statutory or regulatory provision is clear, the terms of that provision must be enforced as they are written. . . ." *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989). The Commission has also held that, in the absence of a regulatory definition or technical usage of a word, the Commission applies the ordinary meaning of the word. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997) (table). I find that the ordinary meaning of the word "inundation" clearly refers to something much more extensive in size and scope than the release of an air/methane mixture at issue in this case.

The majority quotes several definitions which make this point self-evident. "Flood," "deluge," "submerge," "swamp," and "overwhelm," terms cited by the majority to characterize "inundation," all signify an event of considerable magnitude and breadth in which a large volume of water or gas has spread across an area, and generally a large area. The essential element of every definition of the term "inundation" I have found is, in the words of the majority, the "'swamping' or 'overwhelming' of the inundated area" (slip op. at 7). *Webster's Third New International Dictionary* 1188 (1986) ("*Webster's*") (quoted by the majority); *Random House Dictionary of the English Language* 1002 (2d ed. 1987) ("to flood; cover or overspread with water; deluge . . . to overwhelm"); *Black's Law Dictionary* 823 (6th ed. 1990) ("[t]o flood or swamp . . . [t]he overflow of waters by coming out of their natural bed or confines"); *Dictionary of Mining, Mineral, and Related Terms* 284 (2d ed. 1997) ("*DMMRT*") ("inrush of water, on a large scale"); *8 Oxford English Dictionary* 33 (2d ed. 1989) ("*OED*") ("an overflow of water; a flood"); *see also Random House Thesaurus, College Ed.* 393 (1984) ("engulf, overflow, fill with water, overspread, drench, submerge, flood, deluge, drown"). *See Aluminum Company of America,* 15 FMSHRC 1821, 1825 n.8 (September 1993) (citing the *DMMRT* definition of "inundation").[1]

"Inundation" thus refers to a quantity of water (or gas) that has swamped or overwhelmed a given area. This essential meaning of the word is conveyed in *Local 2333, UMWA v. Ranger Fuel Corp.*, 12 FMSHRC 363 (March 1990). In that case, an MSHA inspector discovered explosive methane levels in the tailgate of a longwall section after a large roof fall in a nearby

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[1] This essential element of "inundation" is also reflected in its metaphorical meaning, which the *OED* defines as "[a]n overspreading or overwhelming in superfluous abundance; overflowing, superabundance." *Id.* at 33. The word was used in this sense by President Washington when, in 1798, he wrote: "I was inundated with letters, describing the crisis." *Id.*

gob area. *Id.* at 365. The inspector "believed that the immediate cause of the methane concentration was a sudden inundation resulting from the roof fall." *Id.* Significantly, the inundation *overwhelmed* the mine's bleeder system, which was unable to dissipate the methane, in part because it was partially blocked by water. *Id.*

Another element commonly appearing in definitions of "inundation" is, again in the words of the majority, "the 'considerable extent' and 'widely diffused' nature of the inrushing material" (slip op. at 7).[2] This sense of the word is an essential element of the *DMMRT* definition, which defines "inundation" as "[a]n inrush of water . . . that floods *the entire mine or a large section of the workings*." *Id.* at 284 (emphasis added). In keeping with this sense of the word, Commission Administrative Law Judges have found inundations in the two instances where the meaning of the term as used in section 50.2 was at issue where gases have spread over a wide area. *Silver State Mining Corp.,* 9 FMSHRC 691, 702 (April 1987) (entire interior of mill enveloped in hydrochloric acid fumes); *Helvetia Coal Co.,* 2 FMSHRC 1011, 1030 (April 1980) ("methane . . . covered a large, undefined area of the mine"). I agree, however, with the Secretary's contention that an inundation need not be mine wide to be reportable. S. Br. at 9-10. This issue is, however, a red herring because first there must be an inundation, which here there clearly was not.

Although overwhelming authority establishes that, at the very least, an "inundation" is an event during which water or gas swamps or overwhelms an area, the Secretary argues that "the dictionary definition of 'inundation' focuses on the *process* of the water flowing in — not . . . on whether the water has already spread so as to submerge all land not usually submerged." S. Br. at 9 (emphasis in original). As explained by my colleagues, the Secretary "apparently" means that it "was the 'rising' and 'spreading' of the gas that constituted the inundation." Slip. op. at 7. This "interpretation" is at odds with the one common element found in every definition of the term. An inundation may very well include the gush of water or gas that is its source,[3] but under the universally accepted common usage of the term, it cannot exclude the accumulation of water or gas resulting from the gush. In essence, all the Secretary does is define the *source* of an

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[2] *Webster's*, for example, illustrates this sense of the word in the example "a tidal wave [inundate]s the island." *Id.* at 1188. The *OED* cites usages of the word in this sense dating from as early as 1548 ("The ryver rose so high that yt overflowed all the countrey . . By this inundacion the passages were so closed . . ."). Other usages cited by the *OED* refer to "the period when the Nile inundates Ægypt" (1791), "an annual overflow of the Amazon [that] inundate[s] a great part of Brasil" (1796), and "rivers . . . overflowing their banks and inundating the land" (1898). *Id.* at 33.

[3] In a circuitous semantic argument, the majority uses a variety of terms to characterize this element of the term "inundation," including "torrent," "spate," and "barrage." Slip op. at 7. Notably, none of these terms appear in any of the definitions of "inundation" in the five major dictionaries I have consulted.

inundation and nothing more. Through this peculiar act of deconstruction, the Secretary robs the term "inundation" of its essential character.

Notwithstanding its incoherence, my colleagues defer to the vague and elusive — and wrong — interpretation offered by the Secretary, insisting that the term "is open to alternative interpretations." Slip op. at 6. But her interpretation is owed no deference because it has no basis in the common meaning of "inundation." Moreover, my colleagues err by deferring to the Secretary to ascertain the plain meaning of a word. There is no ambiguity here that gives rise to the issue of deference. *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1028 (June 1997). Instead, there is the plain meaning of "inundation" as established by its common usage versus the Secretary's strained focus on a nuance (the "process" of "the 'rising' and 'spreading' of the gas") that blurs the meaning of the term beyond recognition. Taking my colleagues' approach to its logical conclusion, each word in the English language could be considered ambiguous based on only the slightest shades and nuances of meaning, the *true* meaning of which can only be ascertained by the Secretary in the context of a given case, whether or not the Secretary's meaning comports with common, ordinary meaning.

Determining the ordinary meaning of a word is not a matter of such technical complexity that we must give way to the Secretary's expertise. *See General Electric Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995). Nor is this a case where we could appropriately defer to the Secretary's choice of one alternative dictionary meaning over another within the same definition. *See National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418-20 (1992). Instead, this case is closer to the Supreme Court's decision in *MCI Telecommunications Corp. v. AT&T*, in which the Court rejected a Federal Communications Commission interpretation of the term "modify" based on a dictionary definition which the Court found was contradicted by "virtually all other[]" dictionaries. 512 U.S. 218, 225-28 (1994). In the *MCI* case, ordinary meaning was derived from how "virtually all" dictionaries defined "modify," rather than from an "out-of-step dictionary" containing a definition that robbed the word of any meaning. *Id.* at 226-27. The case thus illustrates the importance of ordinary meaning and warns of the pitfalls of interpreting words in such a way that they have no intrinsic meaning. Here, my colleagues unwisely defer to a deconstructive gloss the Secretary puts on "inundation" — a gloss which robs the word of its essential character and is at odds with the word's ordinary meaning.

The conclusion that the release of methane at issue here was an "inundation" as that term is ordinarily used in the sense of a large volume of gas overwhelming a given area has no support in the record. The air flowing into the 004 Section through the core drill hole contained varying quantities of methane, but at no time did methane concentrations reach sustained excessive levels beyond the immediate vicinity of the hole. Tr. 142-44. Indeed, the record contains credible evidence of only a single reading of methane at an explosive concentration, and that was when a reading was taken directly over the hole. Gatlin Dep. Tr. 19-20. As my colleagues concede, "elevated methane levels were restricted to the core drill hole and the area adjacent to it. . . . dilution, if not control, of the escaping methane was accomplished within a short period of time following the incident." Slip Op. at 11. Throughout the incident, the operator was never unable

to dilute the methane and render it harmless. Tr. 143. Put another way, Island Creek's resources to control the methane contained in the air venting from the core drill hole were never "over-whelmed" or "swamped."

The continuous miner cut through the core drill hole at the end of a cut measuring approximately 30 feet "deep" by 10 feet wide, the first cut made to drive a crosscut between the number 5 and 6 entries. R. Ex. C.; Tr. 81, 159.[4] About half of this first cut was quickly placed within the intake aircourse with a curtain, and was thus isolated from the gases venting from the hole. Tr. 159. This enabled the operator to immediately dilute any methane that might have been coming out of the hole (*see* Tr. 165, testimony of Mr. Cambron that he "deflected [the venting gases] directly to the return"), as evidenced by the fact that at no time were explosive levels of methane detected outby the hole. Tr. 143. As counsel for the Secretary stated at the hearing, "what [Island Creek] did was dilute the harmful gases that might have been coming out," regardless of the rate at which the gases were venting out through the hole. Tr. 164.

The only evidence in the record of elevated levels of methane outside the first cut is restricted to readings in the three to four percent range taken in the number 5 entry approximately 10 feet from the tail end of the continuous miner. Tr. 135. The Secretary introduced no evidence of elevated methane levels in any other area of the mine, including the open crosscut between the number 5 and 6 entries closest to the first cut and the number 6 entry itself. The judge's finding that "only the number five and six entries and the crosscut between them . . . were impacted" (18 FMSHRC at 1502) is thus not supported by substantial evidence; the area actually affected was much smaller. The Secretary's argument that "gas from the hole was coursed throughout all air which ran past the core drill hole, and [thus] affected all areas of the mine in which it was coursed" (S. Br. at 10 n.2) grossly overstates the case. The air that ran past the hole was doing just what it was supposed to be doing: diluting and rendering harmless any methane that was being liberated before that methane had the chance to accumulate *anywhere* beyond the hole itself. I find that the record compels no other conclusion but that there never was *any* area of the mine that could have been characterized as being "inundated" with methane. To conclude otherwise is to turn a deaf ear on the record evidence and to overlook the Secretary's obvious inability to prove that methane accumulated anywhere in the Ohio No. 11 Mine as a result of the breach of the core drill hole.

I therefore dissent from my colleague's departure from the common sense, ordinary meaning of the term "inundation." But I find even more extraordinary their finding that Island Creek was on notice of the Secretary's interpretation of that term. Where an agency imposes a fine based on its interpretation of a regulatory provision, a separate inquiry arises concerning whether the respondent has received "fair notice" of the interpretation it was fined for violating.

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[4] The area affected by the release of air and methane at issue here was minuscule, no more than part of a partially mined crosscut and a small section of the entry off which it was driven. R. Ex. C & D. This area, to give an idea of the mine's size, lies three miles away from the mine fan. Tr. 186-87.

Energy West Mining Co., 17 FMSHRC 1313, 1317-18 (August 1995). Once again, my colleagues cite the correct legal authority, but then fail to apply it. Slip op. at 11. Rather than conduct an inquiry as to whether Island Creek was on notice of the Secretary's interpretation under the Commission's "reasonably prudent person" test, my colleagues instead attempt to provide wholly separate reasons why Island Creek should have known the methane release in this case was a reportable accident.[5] Incredibly, *none* of the reasons provided by my colleagues refer to the Secretary's interpretation of the word "inundation."

First, my colleagues argue that Island Creek was on notice because of the length of time — some six hours — the air/methane mixture flowed out of the core drill hole without being stanched (slip op. at 11 & n.10), notwithstanding the fact that the methane was immediately brought under control through ventilation (Tr. 143).[6] The majority also finds evidence of notice in how news of the breakthrough passed up the ranks of Island Creek management.[7] Slip op. at

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[5] I suspect the reason my colleagues did not conduct the proper inquiry as to whether Island Creek was on notice of the Secretary's interpretation was because the only conclusion they could have reached was that Island Creek had no such notice. Essentially a post hoc rationalization of her enforcement action, this interpretation was never before advanced by the Secretary. In fact, at the hearing, the inspector who cited Island Creek testified that he considered there to be an inundation because "the continuous miner machine cut off." Tr. 60. But even as further refined in the course of these proceedings, the Secretary's interpretation regarding the scope of section 50.10 has never been consistent with the common usage of the word "inundation," much less the usage of the word in the mining industry as found in the *DMMRT*. *Id.* at 284. Whether the Commission has adopted it or not, the *DMMRT* definition is relevant for the purpose of determining what a reasonably prudent person in the mining industry would consider to be an inundation. As such, no reasonably prudent person would have known in advance the Secretary's odd interpretation of the word — such as it is. Indeed, that the incident here could have been an inundation never even crossed the minds of the Island Creek employees involved. Tr. 182.

[6] I find unconvincing the argument that after six hours had passed, Island Creek was required to immediately contact MSHA. *See* slip op. at 11 n.10. I fail to see how the passage of six hours somehow transformed the incident into a reportable accident. Instead, I believe that if at anytime, Island Creek had not been able to dilute and render harmless the methane venting from the core drill hole so that an accumulation of methane spread into a large area of the mine, at that point, under the ordinary meaning of "inundation," a reportable accident would have occurred.

[7] This is hardly probative that Island Creek was on notice to report this incident to MSHA. Certainly, Island Creek cannot be faulted for consulting with its regional safety director and others as to what action should be taken. *See Consolidated Coal Co.*, 11 FMSHRC 1935, 1938 (October 1989). That Island Creek conducted thorough internal discussions only proves, if anything, that it was the judgement of Island Creek's management, based on their collective

11-12. In addition, my colleagues note that the unusual nature the incident should have put Island Creek on notice. *Id.* The Secretary's interpretation of this regulation, however, says nothing about duration, internal discussions, or the unusual nature of events. None of the facts offered by my colleagues show why any reasonable person should have known that an inundation was, in actuality, a "process" of "the 'rising' and 'spreading' of the gas," and that the methane release in this case should therefore have been reported.

In the end, my colleagues suggest that Island Creek should have known the incident was reportable since it is charged with knowledge of the protective purposes of the standard. Slip op. at 12. As to the purpose of that standard, the majority sees it as the importance of MSHA knowing "immediately about inrushes of methane in order to be able to respond quickly and help prevent explosions and loss of life." Slip op. at 9. The majority neglects to cite any authority for this proposition. In fact, the Secretary's regulation setting forth the purpose and scope of her Part 50 regulations contains no such statement of purpose. On the contrary, her stated purpose for Part 50 relates strictly to record keeping and the calculation of injury occurrence and severity rates. 30 C.F.R. § 50.1. Again, this tells Island Creek little about the Secretary's view that an inundation should be viewed as a "process" of "the 'rising' and 'spreading' of [a] gas." I thus consider the majority's insistence on holding Island Creek liable in the absence of any real notice of the conduct expected of it as a violation of the company's due process rights. *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986).

Assuming, however, that the true purpose of the standard (as distinct from its stated purpose) is to provide MSHA with immediate notice of accidents in order for it to take appropriate remedial action, I believe that my colleagues' opinion sends a mixed message. First, given the very limited scope of this methane release, one might conclude after today that any methane release — regardless of the extent of its impact — should now be reported immediately to MSHA. In the alternative, by focusing on the "process" rather than the magnitude of the methane release, one could read the majority's opinion to say that the critical factor in determining whether there has been a gas inundation is the nature by which the gas was released. Under such a reading, forceful jets or gushes of gas would be reportable events, while silent — and far more deadly — methane releases are not. *See, e.g., Helvetia Coal Co.*, 2 FMSHRC at 1030. By focusing on the duration of the event, my colleagues send the message that operators have up to six hours in which to remedy a situation before it need be reported, a result plainly contradicted by the regulation itself, which requires *immediate* notification. 30 C.F.R. § 50.10.

Rather than sow these seeds of confusion — and possibly worse — I would affirm the judges' decision based on the ordinary meaning of the word "inundation." I would also urge the Secretary — insofar as she apparently wishes to deviate from this ordinary meaning — to clarify her views, either formally or informally, so that in the future all parties will be on notice as to

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experience, that the incident did not amount to a reportable "inundation." *Cf.* Tr. 182 ("We hadn't had an ignition, no serious injury and no roof fall, and inundation never crossed our minds.").

what events should be reported to MSHA immediately. *See Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976) ("the Secretary as enforcer of the Act has the responsibility to state with ascertainable certainty what is meant by the standards [she] has promulgated").

Theodore F. Verheggen

Theodore F. Verheggen, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 6 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 93-63
Petitioner	:	A. C. No. 15-17081-03507
v.	:	
	:	Docket No. KENT 93-259
SUNNY RIDGE MINING COMPANY,	:	A. C. No. 15-17081-03511
INC.,	:	
Respondent	:	Docket No. KENT 93-863
	:	A. C. No. 15-17081-03513
	:	
	:	No. 9 Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-453
Petitioner	:	A. C. No. 15-17081-03516 A
v.	:	
	:	No. 9 Mine
MITCH POTTER Employed by	:	
SUNNY RIDGE MINING COMPANY,	:	
INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-454
Petitioner	:	A. C. No. 15-17081-03517 A
v.	:	
	:	No. 9 Mine
TRACY DAMRON Employed by	:	
SUNNY RIDGE MINING COMPANY,	:	
INC.,	:	
Respondent	:	

DECISION ON REMAND

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for Petitioner;
Reed D. Anderson, Esq., Harrison and Anderson, Pikeville, Kentucky, for Respondent.

Before: Judge Weisberger

These consolidated cases are before me based upon the Commission's decision in this matter, 19 FMSHRC 254 (1997), remanding the following issues:

1. the liability of Sunny Ridge Mining Company and Tracy Damron for violating 30 C.F.R § 77.405(b) as alleged in citation number 4020202;

2. the appropriate penalty to be assessed Tracy Damron concerning order numbers 4020210, 4020075, and 4020076; and

3. the appropriate penalty to be assessed against Mitch Potter concerning order number 4020076.[1] Pursuant to notice, a hearing was held on November 5, 1997, to resolve the issues raised by the Commission's remand. On December 15, 1997, Respondents' filed a brief, and on December 18, 1997, the Secretary filed a brief on remand.

I. The violation by Respondents of 30 C.F.R. § 77.405(b) as alleged in Citation No. 4020202.

The parties entered into an agreement, based on the evidence presented at the original hearing and the Commission's decision, 17 FMSHRC *supra,* to modify the original violation from a Section 104(d) citation assessed at $3,000 to a Citation 104(a) significant and substantial violation of moderate negligence with a penalty of $431. The parties also agreed to vacate the Section 110(c) violation against Damron. Considering the representations of the parties, the evidence presented at the initial hearing, and the Commission's decision, 17 FMSHRC *supra*, I conclude that the settlement is appropriate under the terms of the Federal Mine Safety and Health Act of 1977 ("the Act").

II. The penalty to be assessed against Mitch Potter concerning order number 2020076.

The parties stipulated that Potter has no previous or pending 110(c) violations, and that, in light of his income and family support obligations and the effects of the penalty, he has the ability to pay a penalty of $6,000. With regard to Potter's responsibilities and duties of the mine the record indicates that he was the president of the company, was present at the mine site on the

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[1]These cases were initially remanded to Judge William Fauver who presided at the initial hearing and issued the initial decision, but were subsequently reassigned to the undersigned.

date the order was issued, and was familiar with the conditions of the highwalls and the spoilbank at issue. Based on all these factors, and considering the criteria set forth in Section 110(i) of the Act, as interpreted by the Commission in its decision, 17 FMSHRC *supra,* I find that a penalty of $6,000 is appropriate.

III. The penalty to be assessed Tracy Damron concerning order numbers 4020210, 4020075, and 4020076.

Damron was in charge of making preshift inspections, was responsible for making sure equipment was repaired, and was responsible for scheduling and job assignments of employees. Both Damron and his wife testified regarding his income and family and support obligations. Taking into account his income, and family and support obligations as testified to at the hearing, and his not having had any history of previous or pending Section 110(c) violations, and considering the other factors set forth in Section 110(i) of the Act as established at the initial hearing, I find that the following penalties are appropriate for the violations established in the following orders: 4020210 - $300, 4020075 - $400 and 4020076-$500.

ORDER

It is ordered as follows:

1. The Section 110(c) Petition against Damron for a violation of Section 110(c) relating to citation number 4020202 shall be dismissed;
2. Respondent Sunny Ridge Mining shall pay a civil penalty of $431 within 30 days of this Decision;
3. Respondent Potter shall, within 30 day of this decision, pay a civil penalty of $6,000; and
4. Respondent Damron shall, within 90 days of this decision, pay a total civil penalty of $1,200.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 7, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. DOYAL MORGAN, EMPLOYED BY ASARCO INCORPORATED, Respondent	:	CIVIL PENALTY PROCEEDING Docket No. SE 97-251-M A. C. No. 40-00168-05574 A Young Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. WAYNE LARKINS, EMPLOYED BY ASARCO INCORPORATED, Respondent	:	CIVIL PENALTY PROCEEDING Docket No. SE 97-252-M A. C. No. 40-00168-05573 A Young Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. STEVEN RAMSEY, EMPLOYED BY ASARCO INCORPORATED, Respondent	:	CIVIL PENALTY PROCEEDING Docket No. SE 98-1-M A. C. No. 40-00168-05575 A Young Mine

ORDER OF DISMISSAL

Before: Judge Merlin

These cases are three petitions for the assessment of civil penalties filed by the Secretary of Labor against the respondents named above under section 110(c) of the Federal Mine Safety and Health Act of 1977, hereafter referred to as the "Act". Respondents have filed motions seeking to have the petitions dismissed on the grounds that the Secretary failed to act in a timely manner.

On October 30, 1995, a citation was issued to respondents' employer, Asarco Incorporated, under section 104 (d) of the Act, 30 U.S.C. § 814 (d), for an alleged violation of section 57.3200 of the Secretary's regulations. 30 C.F.R. § 57.3200. The citation was issued, as a result of an accident that occurred the previous day. The accident report of the Mine Safety and Health Administration, hereafter referred to as "MSHA", was completed and dated November 9, 1995. The citation was terminated on November 13, 1995.

The following events occurred with respect to the case against the operator: on April 15, 1996, a proposed penalty assessment was issued against the operator; on April 25, 1996, the operator requested a hearing; on June 3, 1996, the Regional Solicitor filed a penalty petition with the Commission; on June 10, 1996, the operator filed an answer; and by order dated June 21, the case was assigned to a Commission judge.

Thereafter, on July 5, 1996, the Regional Solicitor filed a motion to stay the case against the operator on the ground that an investigation was under way to determine whether individual penalties should be proposed under section 110(c). By response filed July 12, the operator opposed the stay. On August 1 the Regional Solicitor renewed the motion for stay stating, inter alia, that on July 30, the special 110(c) investigators advised that their investigation and report were complete, that the report had been forwarded to senior reviewing officials, and that a decision on whether to proceed would be made within 30 days. Once again, the operator opposed a stay, but on August 8, an order of stay was issued.

By letter dated January 6, 1997, the MSHA district manager advised the respondents that assessment of civil penalties against them individually was warranted and that they could request a conference. Respondents requested a conference which was held on February 4, 1997.

On February 10, 1997, the case involving the operator was reassigned to me and on that day I issued an order requiring the Regional Solicitor to advise on the status of the 110(c) investigation. On March 10, she responded that MSHA had completed its investigation, that an informal conference was held on February 4 with the parties and their representatives, and that MSHA had forwarded its recommendation on individual liability to the national office. According to the Regional Solicitor, consideration by the national office was expected to be completed by the end of March. Not having heard from the Regional Solicitor, my law clerk telephoned her on May 21 at which time she stated that she would check and send something out by the end of the week. However, no report was sent and on July 1 my law clerk again telephoned her. By letter dated July 8, the Regional Solicitor represented that the case was under active consideration and a decision would be made by the end of the month.

Finally, on September 2, 1997, proposed assessments were issued against the individual respondents under section 110(c). Between September 8 and September 17, respondents requested hearings before the Commission and their requests were given the Commission docket numbers captioned as above. Subsequently, on October 28, the Regional Solicitor filed penalty petitions and on November 3 she filed a motion to lift the stay in the case against the operator and consolidate it with these 110 (c) cases. On November 13, respondents filed a motion opposing consolidation and requesting that these cases be dismissed because of the delay in bringing them and because respondents had been prejudiced by the delay. The parties subsequently filed additional motions which are considered herein.

At the outset I consider the motion filed by the Arlington Solicitor to strike respondents' motion to dismiss these cases on the ground that their motion filed by fax was different from the motion filed the following day by express mail. The Arlington Solicitor's motion cannot be granted. The transmittal letter accompanying the mailed motion advised that the wrong version had been faxed on the preceding day and requested that the faxed copy be replaced with the mailed version.

The Arlington Solicitor further complains that affidavits completed by respondents as well as their mailed motion contain the misrepresentation that in March 1996, the Regional

Solicitor told counsel that the 110(c) actions would be dropped.[1] Respondents' reply brief admitted that the statement was incorrect. I find that the misstatement is not a sufficient basis upon which to reject respondents' motion. However, respondents' counsel should realize that erroneous statements, particularly in sworn affidavits, reflect poorly upon his efforts as well as upon respondents themselves.

I have reviewed the allegations of respondents that the Regional Solicitor made material misrepresentations in her status reports. I reject these allegations and find that she furnished information to the best of her knowledge in accordance with what she had been told. Wherever the responsibility for the elapsed times in these cases may lie, it is not with the Regional Solicitor.

It is further noted that respondents' recitation of the chronology of these cases is flawed. In both its initial motion (p. 5) and its reply (p. 3) respondents through their counsel complain of the 14 months between completion of the special investigation and the proposed notices of assessments. As respondents well know and acknowledge elsewhere in their briefs, an informal conference was held at their request in February 1997, in the midst of this period. Whether the elapsed time was reasonable must be determined in light of relevant circumstances. But a presentation which omits relevant facts damages respondents by making it more difficult to accurately evaluate their claims.

In any event, respondents are entitled to have their claims evaluated on the basis of what actually happened and in accordance with applicable law. Section 110(a) provides that a citation be issued to an operator within a reasonable time. The legislative history speaks in terms of reasonable promptness for the issuance of such citations. S. Rep. No. 181, 95th Cong., 1st Sess. 30 (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 618 (1978). No such requirement specifically applies under section 110(c), but elemental fairness requires application of this condition to 110(c) cases. Relevant to the meaning of this requirement is the legislative history which specifically recognizes that there may be instances where issuance of a citation will be delayed because of the complexity of the issues raised, a protracted accident investigation or other legitimate reason. S. Rep. No. 181, supra at 30, Legislative History, supra at 618.

The tests by which delayed proposed penalty assessments under 110(c) are judged are the same as those for delayed penalty petitions and proposed penalty assessments under section 110(a). Steele Branch Mining, 18 FMSHRC 6, 14 (January 1996).[2] The Commission has permitted late filing of penalty petitions where the Secretary demonstrates adequate cause and where respondent fails to show prejudice from the delay. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981). The Secretary must establish adequate cause for the delay in filing, apart from any consideration of whether the operator was prejudiced by the delay. If the Secretary fails to demonstrate adequate cause, the case may be subject to dismissal. Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (October 1993), aff'd, 57 F.3d 982 (10 Cir. 1995).

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[1]Even if true, respondents' argument which amounts to a claim of estoppel would be without merit. Estoppel does not lie against the government. King Knob Coal Company, 3 FMSHRC 1417 (June 1981).

[2] This holding was set forth in the decision of the Commission. The Commission tied 2 to 2 on the merits.

I reject, as contrary to Commission precedent, the Arlington Solicitor's contention that respondents must show both unreasonable delay and prejudice. Such an approach also would be contrary to sound public policy because the Secretary could prevail despite endless procrastination as long as targeted individuals could not sustain their burden of proving prejudice. [3]

As already set forth, the special investigation was completed and the report forwarded to senior officials on July 30, 1996, ten months after the citations were issued. Five months later, on January 6, 1997, the District Manager wrote respondents that penalties would be assessed against them. The requested conference was held on February 4, and on March 10 the Regional Solicitor informed me that additional investigation had been completed and recommendations were forwarded to the national office. Almost six months later, on September 2, proposed penalty assessments were issued. It took a total of 22 months after the citations were issued for MSHA to issue the notices of proposed assessments.

I have held that a prolonged or complicated investigation may justify a long delay. In James Lee Hancock, 17 FMSHRC 1671 (September 1995), I denied a motion to dismiss where the delay was seventeen months, but the Solicitor explained in detail what transpired during the investigative phase. In Hancock, the investigation was prolonged because two additional citations were issued during its course and the investigative file consisted of more than 400 pages. Although I found adequate cause for the time taken in that case, I cautioned that such delays were troubling. See also Wharf Resources USA Incorporated, 14 FMSHRC 1964 (November 1992). In the instant cases there has been no allegation that the investigation was prolonged or complicated.

Delay has also been allowed where there have been special circumstances such as a government shutdown. Roger Christensen, 18 FMSHRC 1693 (September 1996). No such circumstances are present here. A high number of 110 (c) investigations and a rise in the number of 110(c) contests are factors to be considered in allowing late filed penalty petitions. See Hancock, supra, at 1674. This consideration also does not obtain here since Commission records show that the number of 110 (c) cases filed with the Commission dropped from 196 in FY 1995 to 56 in FY 1996 to 70 in FY 1997.

The Arlington Solicitor advances a number of arguments in his sur-reply brief which must be addressed. He states that the Secretary was handicapped because respondents refused to furnish written or oral evidence to MSHA investigators. According to the Solicitor, the refusal complicated review. This argument is rejected. Respondents are under no obligation to give evidence, particularly since criminal investigation and prosecution are possible. The Arlington Solicitor next argues that MSHA would have completed action on January 6, if respondents had not requested the informal conference which was held on February 4. In his view, to penalize MSHA for the additional time taken after the conference, would have a chilling effect on the agency in carrying out its functions and result in meaningless conferences. This argument is also rejected. It places responsibility for the time taken by MSHA upon respondents because they

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[3]Respondents claim prejudice because an eyewitness to the accident who has retired for psychological reasons is not available to testify. In addition, they state that a second witness who has retired because of age is unavailable due to age. The Regional Solicitor's argument that the testimony of these individuals can be had in written form is unpersuasive, because cross examination as well as examination from the bench would not be possible. Even if prejudice were a consideration, respondents would be entitled to offer further support for their allegations on this issue and a determination about going forward on the merits could not be made until that was done.

requested a conference. The chilling effect would be upon individuals who would be forced to choose either not to have a conference or have one and be held responsible for elapsed times over which they have no control. The suggestion that the conferences would become meaningless if MSHA were held accountable for the time it took to reach a decision is disapproved as demonstrating a lack of confidence in MSHA's abilities. Finally, the Arlington Solicitor's unsupported reference to July 30, 1997, as the date MSHA ultimately decided to proceed, is unfounded. Even assuming some internal decision was made on that date, it has no significance for respondents who did not learn of MSHA's position until the notices of proposed assessments dated September 2, 1997. Use of July 30 is a rather artless attempt to shorten the time MSHA used to decide whether or not to proceed.

The Arlington Solicitor does not allege any complications with respect to the investigation and offers no specific information with respect to what transpired during the 22 months it took to issue the notices of proposed assessments. He merely states the evidence was very seriously considered at the local and national levels of MSHA and by the Solicitor's office. But beyond those generalities there is nothing to explain what took 22 months. The Solicitor attempts to justify various time frames within the 22 months. However, the task here is not to evaluate the time it took to complete each phase from investigation to review to decision. A determination must be made based on the total time. Because the record indicates no difficulties in either investigation or evaluation and because no acceptable reason has been given to explain the delay, I find that adequate cause does not exist to justify the 22 months MSHA and the Office of the Solicitor took to complete action and issue the notices of proposed assessments. This is not to say that 22 months would be too long in every case. The determination of timeliness must be made on a case by case basis.

These cases are similar to Raymond P. Ernst, 18 FMSHRC 1674 (September 1996) where late filed penalty petitions were dismissed. In that case I held as follows:

> The reasons offered by the Solicitor in these cases to justify the late filings fall short of what is required for a showing of adequate cause. The Solicitor makes the briefest of responses which contains only general statements about events which allegedly caused the untimeliness. The specific circumstances are not addressed. The Solicitor refers to many hours of review, but the actual times spent and the chronology of those times are undisclosed. He mentions many meetings between interested parties, but does not say who the parties were or when the meetings took place. Finally, the Solicitor fails to sufficiently answer respondents' allegations because he does not distinguish between the delay in filing the penalty petition and the delay in the investigation phase. Because the Solicitor's explanation is general and vague, it could apply to any 110(c) case where timeliness becomes an issue.

Id. at 1676. The holding in Ernst applies to these cases.

In light of the foregoing, it is **ORDERED** that respondents' motion to dismiss is **GRANTED**.

It is further **ORDERED** that these cases are **DISMISSED**.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JAN 15 1998

SECRETARY OF LABOR,	: DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:
ADMINISTRATION (MSHA)	: Docket No. KENT 97-257-D
on behalf of RONALD MAXEY,	: BARB CD 97-07
Complainant	:
v.	:
	: Mine No. 68
LEECO, INCORPORATED,	: Mine ID No. 15-17497
Respondent	:

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Tony Oppegard, Esq., Mine Safety Project of the Appalachian Research and Defense Fund of Kentucky, Inc., Lexington, Kentucky, on behalf of Ronald Maxey;
Marco Rajkovich, Jr., Esq. and Julie O. McClellan, Esq., Wyatt, Tarrant & Combs, Lexington, Kentucky, on behalf of Leeco, Incorporated.

Before: Judge Melick

This case is before me upon the Complaint filed by the Secretary of Labor, pursuant to Section 105(c)(2) of the Federal Mine Safety Health Act of 1997, 30 U.S.C. § 801 et. seq., the "Act," alleging that Ronald Maxey was discharged by Leeco, Incorporated (Leeco), in violation of Section 105(c)(1) of the Act.[1]

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[1] Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act, because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to the Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such

In her Complaint, the Secretary alleges as follows:

> On or about February 11, 1997, Maxey was discharged by respondent because he had exercised rights under the Act by complaining to representatives of the Mine Safety and Health Administration about unsafe working conditions at the No. 68 mine. These conditions included no brakes or lights on the railrunners and the "white tub" mantrip, railrunners sticking on point, no track communication, sanders not functioning on railrunners due to water on the track, no jacks or bars on the railrunners, overcrowded mantrips, switches installed incorrectly on the track and railrunners colliding with each other because of no lights or brakes.

At hearings on the Secretary's Application for Temporary Reinstatement, held July 2, 1997, Senior Special Investigator for the Mine Safety and Health Administration (MSHA) Ronnie Brock, testified that on February 5, 1997, he talked to Maxey by telephone.[2] Maxey was then in another MSHA office with Special Investigator Maurice Mullins. Brock testified that Maxey claimed he had been suspended because he made safety complaints to the operator. Brock then explained to Maxey his right to file a "105(c)" complaint. Maxey declined, stating that he would wait. Brock told Maxey that he was nevertheless obligated to send an inspector to the mine based upon Maxey's allegations of safety hazards. Brock documented the conversation and told Mullins to obtain details of the allegations from Maxey.

Don Baker, a regular MSHA inspector at the Leeco No. 68 Mine, who was familiar with Maxey, received a telephone call from Maxey on the evening of February 4. Maxey reported that he was having trouble with the company and needed to talk. Baker met with Maxey the next day at the MSHA office and referred Maxey to Special Investigator Mullins, who was also then present in the office. On February 6, Baker's supervisor gave him a checklist of items to be inspected at the No. 68 Mine (Gov't Exh. 5).

Early in the morning of February 7, Baker and MSHA engineer Scott Whitaker proceeded to the No. 68 Mine to conduct the inspection. Meeting initially with second shift mine foreman Ricky Campbell, Baker stated that he was continuing his regular inspection and would be looking at, among other things, the escapeway. Baker did not immediately inspect the rail equipment, the

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proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

[2] By agreement of the parties, the July 2, 1997, record of the Temporary Reinstatement Proceedings is incorporated herein by reference. The transcript of those proceedings is designated as "Tr. I" and the transcript of proceedings on the merits held September 30, 1997, is designated as "Tr. II." It should be noted that the decision ordering temporary reinstatement dated July 8, 1997, was issued without benefit of the completed record now available. Final credibility determinations have now been made based on this completed record.

subject of Maxey's complaints, but proceeded first to the escapeway. He then proceeded to the track entry to deal with the issues in Maxey's complaint. As a result of his inspection on February 7, Baker issued one citation and four notices-to-provide-safeguards relating to the rail equipment. (Gov't Exh. 6 and 7). Baker had never previously issued this many safeguards at one time and, indeed, had only once before issued a safeguard at the mine. Baker returned to the mine on February 9, and issued two additional citations for violations on the rail equipment. Baker testified that he did not give Leeco the list of safety problems furnished by Maxey nor did he tell anyone that he was present because of Maxey's complaint.

Maxey testified that he had worked for Leeco for sixteen years prior to his suspension and had been a railrunner for the previous ten years. He had been a railrunner at the subject mine for one and one half years. He explained that it is an underground mine with three sections. His job was to haul supplies to the head drives and to the working sections. He worked the 6:00 a.m. to 3:00 p.m. day shift, primarily in the 003 Section. At the time of his discharge, Vic Lewis was his supervisor.

According to Maxey, on February 4, 1997, he arrived at work around 6:00 a.m. and met with Lewis. Maxey acknowledged that on the previous day he was supposed to have taken "eight-by-eight's" to the section to be used for track support. Maxey reportedly told Lewis that he had not done so, claiming he had not had time because he and Lewis had built a cement-block wall the day before. According to Maxey, Lewis then responded, "then you need to go to 004 section . . . so you'll know what coal mining is about" (Tr. I. 76). Maxey refused to go to the section and Lewis then told him to report to mine superintendents Amon Tracey or Everett Kelly. When Tracey later arrived, Maxey reported that Lewis had sent him to meet with him. Tracey conferred with Lewis and returned saying, "it sounds like to me that you quit," and told Maxey to get off mine property (Tr. I. 77).

Maxey denied to Tracey that he quit but, as he was leaving the mine property, he ran into Talmadge Mosley, Leeco's President. Mosley intervened with Tracey and, 20 or 30 minutes later, Maxey was called back and told that, rather than be fired he would only be suspended for five days. According to Maxey, Tracey then told him to return on February 11, to operate the "Lo-Lo," maintaining cables and shoveling loose coal at the belt. Tracey then asked Maxey if he had any written warnings and Maxey purportedly responded that he "didn't think so" (Tr. I. 81).

That same day Maxey called MSHA Inspector Baker and followed up with a visit to the MSHA office the next day. He reportedly told Baker that he was suspended because of complaints he made to mine officials regarding the condition of the hoist and the railrunners. He subsequently met with Special Investigator Mullins and provided him with a checklist of items (Gov't Exh. 5).

Maxey thereafter returned to work on February 11, at about 5:40 a.m. No one from Leeco had contacted him after his February 4 suspension. As he was dressing for work, Lewis told him to see Tracey. According to Maxey, Tracey told him that, after reviewing his records and, in light of his refusal to work, he had decided to terminate him. Maxey maintains that he was shown three written warnings, one each in 1984, 1985 and 1987, and that he told Tracey that

these were ten years old. Tracey purportedly did not respond. Maxey testified that, on February 4th, he did not recall that he had received these earlier warnings, although he did remember when shown them on February 11.

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) rev'd on grounds, sub nom. *Consolidation Coal Co. v. Marshall*, 663 F2d 1211 (3rd Cir.1981); and *Secretary on behalf of Robinette v. United Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra; Robinette, supra.* See also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction 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). *Cf. NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

It is undisputed in this case that Maxey engaged in protected activity by reporting safety complaints to MSHA on February 4 and 5, 1997, and that he subsequently suffered adverse action (discharge). As noted, the second element of a *prima facie* case of discrimination is a showing that the adverse action was motivated in any part by the protected activity. As this Commission observed in *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981) "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." The Commission considered in that case the following circumstantial indicia of discriminatory intent: knowledge of protected activity; hostility towards protected activity; coincidence of time between the protected activity and the adverse action; and disparate treatment. In examining these indicia the Commission noted that the operator's knowledge of the miner's protected activity is "probably the single most important aspect of the circumstantial case."

Leeco maintains in this case that it had no knowledge of Maxey's protected activity at the time of his discharge and, therefore, it was not, and could not have been, motivated in any part by such protected activity. More specifically, Leeco maintains that Mine Superintendent Amon Tracey made the decision to discharge Maxey on February 6, 1997, when Tracey purportedly confirmed that Maxey had six prior warnings in his personnel file and therefore believed that Maxey had lied to him on February 5 in denying that he had any prior warnings. If Tracey did in fact make the decision to discharge Maxey on February 6, 1997, then it is apparent that the discharge was not motivated by Maxey's protected activity and that the discharge was therefore

not in violation of the Act.[3] The Complainant maintains, on the other hand, that Tracey did not in fact decide to discharge him on February 6, but rather made that decision only after the MSHA inspections on February 7 and 9. The Complainant argues that it may reasonably be inferred from the circumstantial evidence that Tracey knew of these inspections, that he believed that Maxey had triggered such inspections and that Tracey did not actually decide to discharge Maxey until sometime after those inspections.

Leeco's case depends on the testimony of its Superintendent, Amon Tracey. Tracey testified that he first learned of a problem with Maxey around 7:30 on the morning of February 4th when he called mine foreman Victor Lewis. Lewis, who was Maxey's supervisor, reported that Maxey had failed to take some "eight by eight's" into the mine and that he was going to send Maxey to the 4 Section in the belief that he needed closer supervision. When Tracey later arrived at the mine around 9 a.m., Maxey reported to him that there had been a mix-up and that he was told by Vic Lewis to see him. Tracey then conferred with Lewis who reported that Maxey had twice refused to go to the 4 Section. Tracey concluded that Maxey had quit by refusing a direct work order. Tracey then asked Maxey if he had any other disciplinary slips and Maxey said, "No." Tracey directed Maxey to leave mine property on the basis of his belief that Maxey had quit or had been fired for disobeying a direct work order.

At that time Leeco's President, Talmadge Mosley, pulled up and conversed with Maxey. A few minutes later, Mosley asked Tracey about Maxey's status and intervened on his behalf. Mosley indicated that Maxey he had been with the company a long time and suggested that the punishment may have been too harsh. He asked Tracey to reconsider. Tracey then recalled Maxey and gave him a five day suspension. Maxey was to return on February 11th, reporting to the 4 Section as a belt man or scoop man.

According to Tracey, that evening or the following day, February 5, he told mine foremen Everett Kelly and Victor Lewis about Maxey's problem and both reported having issued Maxey prior verbal warnings. Based on this information, Tracey called the company personnel office located in London, Kentucky, to check on Maxey's past discipline. According to Tracey, Maxey's prior warnings were read over the phone by "personnel man" A.B. Foreman. Tracey testified that Fred Shannon, Leeco's safety director, brought the disciplinary slips from the London office on February 6, and after looking them over, commented to Shannon that he was going to fire him because he lied (Tr. I. 22). Tracey maintains that he was then unaware of Maxey's visit to the MSHA offices.

Tracey maintains that he thereafter talked to Talmadge Mosley on the telephone about Maxey's prior disciplinary slips and received Mosley's approval to fire Maxey. Tracey maintained that he did not then call Maxey because he did not have his correct telephone number and did not "feel like going up and knocking on the man's door" even though he lived only three

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[3] There is no allegation or evidence that, prior to the February 7, MSHA inspection, any Leeco personnel knew or had reason to know of Maxey's confidential complaints to MSHA on February 4 and 5.

quarters of a mile away (Tr. I. 274). When Maxey returned to work on February 11th, Tracey showed him the six disciplinary slips, told him that he had lied and discharged him. These copies had been sent from the London office by facsimile on February 10th. Tracey maintains that he did not complete the discharge notice until February 11th, although he had previously decided to discharge him on February 6th. Tracey testified that he told Vic Lewis, Talmadge Mosley, Fred Shannon and possibly Everett Kelly, prior to February 11th, that he was going to fire Maxey.

Fred Shannon testified that Maxey told him on February 4th that he "messed up bad, thought that he'd fooled around and lost his job" (Tr. I. 304). Maxey admitted to Shannon that he had refused to report to the No. 4 Section as he was told. Shannon claims that he became aware of Maxey's six warning slips on February 5. He purportedly picked up the original warning slips that same evening from the company's London office and delivered them to Tracey the following day, Thursday, February 6. According to Shannon, Tracey looked at the warning slips in his presence and then stated that he had decided to terminate Maxey. Shannon explained that the warning notices he hand-delivered to Tracey on February 6, were returned to Maxey's personnel file and that copies of the notices were subsequently faxed on February 10, upon Tracey's request.

At hearings on the merits, Shannon explained that on February 5th, he overheard the telephone conversation between A.B. Foreman and Tracey. From what he was able to hear, Tracey was discussing the warning slips and said that he needed copies. "A.B." apparently then put them in an envelope for Shannon to pick up, and Shannon did in fact pick them up at the London office that evening. On February 6, the following morning, Shannon brought the envelope to Tracey's office and it was opened in his presence. Tracey said that there were six warning slips and that Maxey had lied to him. Later that day Shannon returned the slips to Maxey's file in the London office.

On Monday, February 10, the next time he talked to Tracey, Tracey purportedly asked to see the Maxey file again. Shannon thought that he had told Tracey the file was back in London, but said that he would have the reports faxed to him. Shannon explained that the disciplinary files for company employees are kept in the personnel files maintained at the London offices. Shannon was present when the warning slips were faxed to Tracey in his office.

Shannon testified that he was not aware on February 7th, that inspector Baker was at the mine. He subsequently learned either on Saturday, February 8th, or the following Monday that Baker had been at the mine. Shannon testified, however, that it did not surprise him that Baker was inspecting on a Friday and Sunday, as this was not unusual. He also observed that during January 1997, the mine had twenty inspection days and had fourteen in February. He also noted that the mine had been inspected on a Friday only the week before the hearings.

James Everett Kelly is now a mine superintendent at Leeco's No. 68 Mine. He was an assistant to Tracey during relevant times. Vic Lewis told Kelly on February 4th that he wanted to transfer Maxey to the 4 Section. Kelly agreed. Kelly later learned that Maxey had refused to go to the 4 Section and that disciplinary action had been instituted. Kelly maintains that he told

Tracey that he thought Maxey should have been terminated for refusing to work. According to Kelly, one or two days following the February 4th suspension of Maxey, Tracey told him that he was going to terminate Maxey because he had lied about his disciplinary record.

Kelly became aware on February 9th, while working at another mine, that inspector Baker was at the No. 68 Mine. Kelly was not, however, surprised that Baker inspected on a Sunday and did not find it unusual for Baker to be at the mine on a weekend. He was unaware that Maxey had visited the MSHA offices on February 9th. On cross-examination Kelly explained that he had seen the prior warning slips when Tracey showed them to him some two or three days after February 4th, i.e., either on the 6th or 7th. He was certain that it was not after the weekend. At that time Tracey said that he was going to terminate Maxey.

A.B. Foreman is Leeco's worker's compensation coordinator. His office was located in London, Kentucky, where the personnel files are kept. He recalled that Tracey had called and asked if Maxey had any warning slips in his personnel file. According to Foreman, Tracey held on the phone line while he searched for the warning slips and then reported them over the phone to Tracey. Tracey then allegedly told Foreman that he would have Shannon pick them up and Shannon in fact picked them up later that afternoon. Foreman recalled that it was a few days later when Tracey again called and said he needed more copies of the warning slips, and needed them right away. Foreman then faxed those copies to Tracey on February 10th as noted on the top of the warning slips in evidence as Government Exhibit 3.

Talmadge Mosley, Leeco's President, recalled meeting with Maxey on February 4, 1997, right after he had initially been fired. Maxey told Mosley "they fired me and I don't know why" (Tr. II. 201). Mosley then intervened with Tracey on Maxey's behalf arguing that Maxey had been with the mine a long time and that discharging him may have been "a little too harsh" (Tr. II. 203). Maxey purportedly also told Mosley that he had no other disciplinary actions. On Thursday, February 6th, Mosley purportedly talked to Tracey by telephone. Tracey claims that he told Mosley that Maxey had lied to him and that in fact he had six warning slips in his file. According to Mosley, Tracey said that he was therefore going to fire Maxey and he approved (Tr. II. 205).

Evaluation of the Evidence

While the testimony of the operator's witnesses might superficially appear to support its claims that it in fact discharged Complainant on February 6, 1997, prior to the MSHA inspections, upon closer scrutiny and upon evaluation of the documentary evidence (and lack thereof), I find that its claims fail the test of credibility. It is the combination of a number of inconsistencies that leads to this conclusion. In particular the credibility of two key witnesses, general mine superintendent Amon Tracey and safety inspector Fred Shannon, must be viewed in light of inconsistent statements and testimony. For example, at the unemployment insurance hearing held on June 24, 1997, prior to the temporary reinstatement hearing, Tracey testified on three separate occasions that "the engineers" from Leeco's London, Kentucky office, which is located approximately 70 miles from Tracey's office at Jeff, delivered the written warnings to him on February 6th.

In addition, when asked why copies of the written warnings were faxed from Leeco's London office to Tracey's office on February 10th, the day before Maxey's discharge, Tracey testified that he "couldn't find" the copies that had been personally delivered to him on the 6th, so he called A.B. Foreman at the London office on the 10th and asked Foreman to fax him another set of copies.

Tracey also testified, however, that he subsequently found the copies that had been delivered to him on the 6th and those copies, not the fax copies, were the ones he purportedly showed Maxey when he discharged him on February 11th. More specifically, Tracey testified at the unemployment insurance hearings that "I later recovered my copies. I have them now, the originals, that Ronnie Maxey looked at" (Jt. Exh. 1). In contrast, Tracey testified at the temporary reinstatement hearing that Fred Shannon, who he identified at trial as "our safety man" (and who had been safety director for two years and whose office was located next to Tracey's) and not the engineers from the London office, had hand-delivered the packet of written warnings to him on February 6th (Tr. I. 271, 291). While Respondent notes that Shannon previously worked in the engineering department the record shows that that had been 4 ½ years earlier. Tracey himself never explained this inconsistency.

Fred Shannon's explanation of what happened to the warning slips that he supposedly hand-delivered to Tracey on February 6th also contradicted Tracey's testimony at the unemployment insurance hearing. Shannon testified that on the afternoon of February 6th (after he had delivered the envelope of warning slips to Tracey) Tracey gave the written warnings back to him and told him to keep them for him (Tr. II. 92-93, 103-105). Shannon claimed that he then unwittingly placed the warning notices in Maxey's training file, and took the training file to the London office where he put it in Leeco's "safety department filing cabinet" (Tr. II. 106-109, 93-95).

According to Shannon, four days later, on February 10th, Tracey came to his office and said he needed the warning slips back to show to Maxey the next morning (when he was going to discharge Maxey). At that point, Shannon allegedly remembered that he had accidentally put the warning slips in the training file, and put the training file in the safety department file in London (Tr. II. 95-96, 109-110). Because the warning slips were back in the London office, and Tracey needed them the following morning, Tracey said he would just have A.B. Foreman fax him another set of the notices (Tr. II. 96, 123).

As already noted, however, Tracey testified at the unemployment hearing that on February 11th he had shown Maxey the same written warnings that had been personally delivered to him on February 6th and not the copies that were faxed to him on the 10th. Indeed, if Shannon's version of events was true, Tracey could not have shown Maxey the hand-delivered copies on the 11th because they supposedly were sitting in a file cabinet 70 miles away.

Shannon's testimony about how he came to pick up and personally deliver the warning slips to Tracey on February 6th also contradicts Tracey's testimony at the unemployment insurance hearing. At the hearing on the merits of this case, Shannon testified that he went into Tracey's office on February 5th and overheard Tracey talking to Foreman on the telephone

"about some warning slips, and he needed a copy of them, that he needed to see them" (Tr. II. 90). Shannon said that Tracey "was still on the phone when I told him if he [Foreman] would put it in an envelope . . . I could pick them up for him" (Tr. II. 90-91).[4]

Shannon alleged that when he personally delivered the packet of warning slips to Tracey on February 6th, Tracey opened up the envelope in his presence, looked at the written warnings, and declared that the "was going to fire him [Maxey]" (Tr. II. 91-92 and 123-124, Tr. I. 311). However, at the unemployment hearing, Tracey testified that he did not talk about Maxey on February 6th with anyone other than Talmadge Mosley and Everett Kelly (UI 141, Q42). Indeed, although Shannon purportedly played a prominent role in support of Leeco's cases, Tracey never mentioned Shannon during his testimony in the unemployment hearing (Jt. Exh. 1, pp. 126-185).

In addition to the inconsistencies between the testimony of Tracey and Shannon, it is also noteworthy that in his statement to MSHA, Shannon did not mention supposedly picking up the warning slips and delivering them to Tracey. In fact, on March 12th, the date of Shannon's statement, the extent of his purported knowledge about Maxey's discharge was as follows:

> On Thursday, February 6, 1997, Amon Tracey told me that he had followed up on Ronnie Maxey's file & found out that he had been wrote up 6 times. He also said that Everett had verbally warned him [Maxey] & so had Vic. He told me he was going to call Talmadge & tell him that he was going to fire Ronnie Maxey after finding he had lied to him (Gov. Exh. 8, p.3).

As Complainant observes in his brief, it defies common sense that Tracey would have told Shannon that he had checked on Maxey's personnel file and learned about the written warnings if, as Shannon testified, he (Shannon) had personally delivered the warnings to Tracey on February 6th, and watched Tracey read the warning slips in his presence.[5]

Leeco's claim that the written warnings were personally delivered on February 6th to Tracey, whose office was located 70 miles from the company's London office, rather than simply faxed to him in the first instance, is also suspect. In this regard, it is undisputed that Leeco regularly faxed from the London office to Tracey's office at the No. 68 mine its daily reports regarding MSHA citations issued to the company (Tr. I. 288-290). In light of the contradictory testimony of Tracey and Shannon, and Shannon's inconsistent accounts of how he came to volunteer to pick up the warning slips in the first place, Leeco's assertion that the written warnings were hand-delivered to Tracey on February 6th is indeed not credible.

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[4] Shannon thereby also contradicted his own testimony at the temporary reinstatement hearing, wherein he stated that he had talked to Tracey about picking up the warning slips sometime after Tracey had talked to Foreman, i.e., he did not claim to have walked in on Tracey's phone conversation with Foreman (Tr. I. 310).

[5] It should also be noted that Tracey, in his statement to MSHA, likewise did not allege that Shannon had delivered the warning slips to him. See Joint Exhibit 2.

As Complainant further notes in his brief, Leeco's version of events requires that one ignore both its contradictory testimony and common sense while the Complainant, on the other hand, has proof that copies of the written warnings were faxed to Tracey on February 10th, one day after MSHA had completed its second inspection at the No. 68 mine, and one day before Maxey was discharged. (Gov't Exh. 3).

The reason advanced by Leeco as to why Tracey purportedly decided to check Maxey's personnel file in the first place, i.e., his suspicion that Maxey had lied about his disciplinary history, is also suspect. Tracey testified that when Vic Lewis and Everett Kelly both told him shortly after he had suspended Maxey on February 4th that they had previously given verbal warnings to Maxey, "that kind of rung a bit of a bell with me" (Tr. I. 269, 294). In light of Tracey's testimony that he asked Maxey on February 4th whether he had ever received any "disciplinary slips" (i.e., written warnings) it strains credulity that thereafter learning about verbal warnings would have prompted Tracey to investigate Maxey's work history. Indeed, in his MSHA statement, Tracey claimed that he had held the opinion that Maxey "was not a very good worker" for 6-12 months before he fired Maxey. If that was true, it is highly unlikely that Tracey would have been surprised to hear that Maxey had previously been given verbal warnings.

Moreover, at the unemployment hearing, Tracey admitted that he had known about Vic Lewis' purported verbal warning to Maxey for several months before the suspension of Maxey. Thus, the only verbal warnings that Tracey could have learned about after suspending Maxey were those purportedly given by Everett Kelly. It is also noted that when he was questioned at his deposition in this proceeding, Kelly did not say that he had told Tracey about verbally warning Maxey (Tr. II. 163-166). Kelly likewise in his statement to MSHA, did not mention any disciplinary problems he had had with Maxey (Tr. II. 166-167). While Kelly could have inadvertently omitted this information in his deposition and statement to MSHA, it is nevertheless another factor to consider in evaluating the credibility of Kelly's trial testimony that he had informed Tracey of having given verbal warnings to Maxey. It is significant moreover, that even if Kelly had told Tracey about alleged verbal warnings he had given Maxey, Kelly himself admitted that such warnings would not have been considered by Leeco in disciplining its miners (Tr. II. 168).

The documentary evidence, and lack thereof, also fails to support Leeco's claims. As previously noted, Leeco has produced no documentary evidence establishing that Tracey's decision to discharge Maxey was made on February 6th. Indeed, the documentary evidence, i.e., the written warnings that were faxed to Tracey on February 10th (Gov't Exh. 3) and the discharge notice dated February 11th (Gov't Exh. No. 2), suggests otherwise. In addition, the absence of telephone records to corroborate the alleged February 6th telephone conversation between Tracey and Leeco President Talmadge Mosley is significant. Mosley testified that on Thursday, February 6th, while he was in Pennsylvania on company business, he called Tracey. According to Mosley, Tracey told him during that conversation that he was going to fire Maxey because Maxey had lied about his disciplinary history (Tr. II. 204). This testimony mirrored Tracey's testimony at the temporary reinstatement and unemployment insurance hearings (Tr. I. 273).

However, when Mosley gave his statement to MSHA on March 12th, in the presence of Tracey and Marco Rajkovich, Leeco's attorney, he stated that Tracey had called him on the morning of February 6th. This inconsistency is significant in light of the fact that Tracey likewise told MSHA on March 12th, just 5 weeks after the alleged phone conversation of February 6th, that he had called Mosley. Thus, both Tracey and Mosley told MSHA that Tracey had initiated the phone call on February 6th, yet both testified inconsistently at the discrimination and unemployment hearings that Mosley had made the call.

This inconsistency may be significant because if Tracey had initiated the telephone call from Leeco's offices it would be a simple matter to prove such a call by the production of Leeco's own telephone records. It may reasonably be inferred under all the circumstances that after it was realized that such a call could not be corroborated by Leeco's records, since there was in fact no such call, both Mosley and Tracey's testimony was modified to reflect this problem. Thus, their testimony was subsequently changed to suggest that Mosley had initiated the call.

As Complainant also observes in his brief, the inference that Leeco's defense was fabricated may also be derived from two other compelling circumstances. First, the evidence suggests that Maxey was indeed not fired for allegedly lying, thereby supporting the conclusion that the decision to fire Maxey was not made on February 6th. In this regard it is undisputed that Tracey made the decision to discharge Maxey, and that he wrote the discharge notice himself on February 11th (Tr. I. 280-281). The notice states as follows:

> After numerous times of written warning Ronnie Maxey's work is still unsatisfactory. Also disobeyed a direct order. (Gov't Exh. No. 2).

If, in fact, Tracey had decided on February 6th to discharge Maxey on the grounds that he lied about his disciplinary history, it is inconsistent and therefore suspect that Tracey did not indicate on the discharge notice that lying was in fact the basis for the discharge. Instead, Tracey stated that Maxey's work was unsatisfactory because he had refused a work order (which was the basis for his previous 5 day suspension) after having previously received "numerous" written warnings. Moreover, Tracey did not offer any justification or explanation at either the discrimination or unemployment hearings for his failure to state on the discharge notice that Maxey was being fired for lying or dishonesty.

The second circumstance is based on the actions of Shirley Grant, Leeco's assistant human resources coordinator, in filing Leeco's responses to Maxey's unemployment claim. This evidence also circumstantially leads to the inference that Maxey was not fired for alleged lying. Grant testified that it was her responsibility to respond to unemployment claims against Leeco (Tr. II. 67). When a worker from the local unemployment office called Grant, sometime after February 20th, to get the company's position as to why Leeco had discharged Maxey, Grant responded that Maxey had been fired for refusing two direct work orders. At trial, Grant attempted to explain this inconsistency by testifying only that the unemployment office "wanted a reply very, very shortly," and she therefore could only talk with Vic Lewis, Maxey's immediate foreman, and not with Tracey, who had discharged Maxey (Tr. II 80-82).

In addition, Leeco's appeal of the initial unemployment insurance determination (in Maxey's favor) further suggests that Leeco's claim that Maxey was fired for lying was pretextual. In this regard, the following colloquy ensued at the unemployment hearings regarding Grant's testimony:

Attorney: And who instructed you to appeal?

Grant: It came from Amon [Tracey], from the job, from the superintendent. I can't remember if it was exactly from Amon to me. It might have went from Amon to my supervisor to me . . .

Q: And who - did someone instruct you to state what your reason was for appealing?

A: Yes, insubordination, yes. I mean, that's what we said all along is that he failed to follow two orders.

Q: Okay, but what I'm asking you is, that's not something that you wrote on your own. You were told that that was the reason; that's what you should put in your appeal notice?

A: Yeah, we discussed that. I mean, that was the reason, misconduct.

Q: Who was "we?"

A: With Amon and - yeah, I can't remember if Everett [Kelly] was there. I don't remember that.

Q: So, as best you remember, Mr. Tracey and perhaps Mr. Kelly told you to appeal, and the basis for appealing was insubordination or the reason for discharge was insubordination.

A: Insubordination, yes (Tr. II. 71-72).

No mention is made that Maxey had been fired for lying or dishonesty. Grant indicated that the company's position "all along" was that Maxey had been discharged for "insubordination" - i.e., for "fail[ling] to follow two orders."

Subsequently however, when Grant testified at the instant discrimination hearing, she initially claimed that Tracey had told her to appeal the unemployment claim because Maxey had been fired for refusing to follow work orders and for lying (Tr. II. 70). She explained, only after she was presented with her prior testimony from the unemployment hearing, that she "should have" mentioned lying as a basis for the discharge during that earlier testimony (Tr. II. 73). This explanation, given all of the other inconsistencies in Leeco's case, does not ring credible.

In sum, all of the documentary evidence in this proceeding (i.e., the written warnings that were faxed to Tracey on February 10th, the discharge notice of February 11th, and Leeco's unemployment appeal notice of March 5th (Gov't Exhibit 11) support the Complainant's contention that the decision to discharge him was made only after Tracey's receipt of the warning slips on February 10th, and that he was not fired for lying as Leeco now claims. At the same time there is no documentary evidence that supports Leeco's claim that Tracey decided to fire Maxey on February 6th for lying.

Finally, the fact that Leeco made no attempt to contact Maxey prior to February 11th, regarding his purported discharge, supports the conclusion that the discharge decision was not made until after the London office faxed the warning slips to Tracey on February 10th. Tracey claims that when he saw a "598" prefix listed for Maxey's phone number, he knew it wasn't the right number. He therefore did not call the number, for example, to try to contact someone who could then get in touch with Maxey - because Maxey "was the man [he] wanted to see" (Tr. I. 285).

It is undisputed that Tracey knew that Maxey lived within a mile of the No. 68 mine (Tr. I. 300) and no doubt also knew that he lived on property owned by Leeco (Tr. II. 124-125). Nonetheless, Tracey admits that during the 5 day period between Tracey's purported decision to fire Maxey and Maxey's return to the mine on February 11th, he made no effort to contact Maxey other than supposedly checking a list of employee telephone numbers on his office wall (Tr. II. 283-286). Specifically, Tracey did not attempt to send Maxey a discharge notice in the mail (Tr. II. 285), did not go to his home, and did not make any effort to determine Maxey's phone number despite his admission that immediately contacting a discharged employee is the proper thing to do. In this regard, the following colloquy occurred at the instant hearings:

Tracey: I was going to call [Maxey] and tell him that he was discharged.

Attorney: Why?

A: Well, you know, I felt like that I should. If indeed he has a five-day suspension and thinks that he's coming back to work . . . only to come back to be discharged, the man might go somewhere else and get him a job and start to work. That would save him being . . . without pay for those few days. I try to be very honest and square with my people.

Q: So, in other words, you thought it was the fair and right thing to do when you discharged somebody . . . to notify them right away.

A: Yes, sir. I even phone people at home. Even if they quit my job. I call them at home (Tr. I. 283-284).

In conclusion, considering all of the evidence and circumstances, I do not find Leeco's claim that it made the decision to discharge Maxey on February 6, 1997, to be credible. Moreover, I find that the operator's efforts to create a fictional account to support such a claim is,

in itself, compelling evidence and, in conjunction with the coincidence in timing, it is clear that the decision to discharge Maxey on February 10th or 11th was motivated by the knowledge or suspicion that Maxey had made safety complaints to MSHA resulting in the inspection of the No. 68 mine on February 7 and 9, and the issuance by MSHA of citations and notices-to-provide-safeguards in that mine. Accordingly, I find that Maxey's discharge was motivated by his protected activity

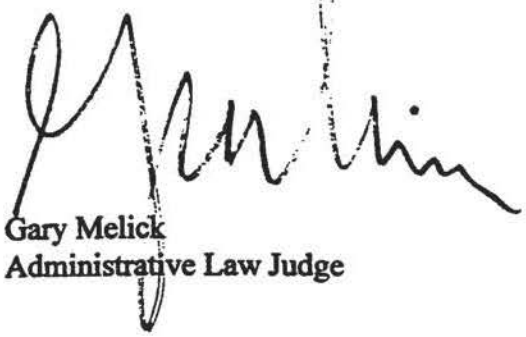
In its posthearing brief Leeco raised, for the first time, the alternative argument that, "Amon Tracey would have terminated Maxey whether or not he had knowledge of Maxey's complaint to MSHA, due to Maxey's inadequate job performance, failure to follow the direct orders of his supervisor, Vic Lewis, and directly lying to Amon Tracey when confronted with his failure to follow Mr. Lewis' instructions." (Respondent's Brief p.2).

It is not explained and therefore it is not clear what Respondent is referencing in its statement that Maxey was "directly lying to Amon Tracey when confronted with his failure to follow Mr. Lewis' instructions." It presumably is its claim, disputed by Complainant, that Complainant lied about his prior disciplinary record. Considering, however, the damage Leeco has brought upon its credibility in this case I can give but little weight to its version of this disputed event. Accordingly, I reject its apparent affirmative defense that, even if it had knowledge of Maxey's protected activity (which it vehemently denies), it would have discharged him in any event, based on his unprotected activity alone. Under all the circumstances I find that Maxey was discharged in violation of section 105(c)(1) of the Act.

ORDER

Discrimination Complaint Docket No. KENT 97-257-D, **IS GRANTED**. The Secretary is directed to file a brief on or before February 3, 1998, addressing each of the criteria under section 110(i) of the Act, citing supportive evidence in the record and arguing how that evidence supports her proposed penalty in this case. The Respondent may also file a brief on this issue on or before the same date.

The parties are further directed to confer with the objective of reaching agreement on issues relating to costs and damages, and to report the results to the undersigned on or before February 3, 1998. This decision is accordingly not yet final and will not be final until such time as all remaining issues as to costs, damages and a civil penalty are resolved.



Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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January 27, 1998

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 97-96-DM
on behalf of CLAY BAIER	:	
Complainant	:	J & J Pit
	:	
v.	:	Mine I.D. 05-04517
	:	
DURANGO GRAVEL,	:	
Respondent	:	

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Petitioner;
Jim Helmericks, owner, Durango Gravel, Durango, Colorado, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by the Secretary of Labor on behalf of Clay Baier against Durango Gravel under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c) (the "Mine Act"). The complaint alleges that Durango Gravel terminated Mr. Baier from his employment in violation of section 105(c). A hearing in this case was held in Durango, Colorado.

I. FINDINGS OF FACT

Durango Gravel owns and operates a sand and gravel pit in La Plata County, Colorado. Durango Gravel is a sole proprietorship owned by James Helmericks. The mine consists of a pit and a crusher. It is a small operation that generally employs two individuals in addition to Mr. Helmericks. The mine is not very profitable. The crusher is old and breaks down frequently. Mr. Baier testified that the crusher operated only about eight hours per week. (Tr. 69). He stated that the crusher would work for about two hours and then it would break down. *Id.* He also testified that it was broken down about 99 percent of the time. *Id.* Mr. Helmericks testified that the crusher is "old and slow" and cannot crush very much rock in a given month. (Tr. 313-14).

Clay Baier started working for Durango Gravel as a truck driver in April 1996. All employees perform a wide variety of tasks as directed by Mr. Helmericks. Mr. Baier would frequently operate the loader, repair equipment including the crusher, and perform other tasks. Mr. Helmericks terminated Mr. Baier from his employment on August 1, 1996.

On May 20, 1993, MSHA Inspector Dennis Tobin issued an imminent danger order to Durango Gravel because he observed an employee using a loader to dig at the toe of a highwall. The order charged a violation of 30 C.F.R. § 56.3131 because the inspector was concerned that the highwall could fail and injure or kill the equipment operator. (Ex. P-3). In April 1996, MSHA received a complaint from a miner concerning hazardous conditions at the mine. (Ex. P-1). One of the hazards mentioned in the complaint was that the operator was undercutting the wall at the face to remove the gravel. (*Id.* at 2).

In July 1996, MSHA Inspectors Royal Williams and George Renton inspected the mine in response to the complaint. (Tr.212). The inspectors talked to Mr. Helmericks and his employees about mining under the toe of the highwall. Inspector Williams testified that there was an area along the highwall where an overhang existed and that it is his belief that miners were removing material from the toe of the highwall at that location. (Tr. 213). Inspector Williams told Mr. Baier not to dig into the face of the highwall because the highwall could fail and seriously injure or kill him. He advised Mr. Baier that if rock was needed to feed the crusher, material should be pushed down from the top of the highwall and scooped up with the loader. Mr. Baier told the inspector that he had been digging into the toe of the highwall. (Tr. 215). Because neither inspector observed anyone digging into the highwall, no citations were issued.

The facts surrounding Mr. Baier's discharge are seriously disputed by the parties. Mr. Baier testified that he started pushing material down from the top of the highwall with the loader in the weeks that followed the MSHA inspection but that Mr. Helmericks told him not to go on top of the highwall. He further testified that on August 1, 1996, he arrived at work at about 7:00 a.m. He stated that Mr. Helmericks and his son, Jim Helmericks, Jr., ("Jim, Jr.") arrived soon after. Baier stated that Helmericks fired him immediately after he arrived on the property. Baier testified that Helmericks told him that he did not belong at the mine and that he verbally threatened him. Baier testified that he was fired because he insisted on pushing material from the top of the highwall rather than digging at the toe of the highwall. Baier testified that on the Monday before he was terminated, Helmericks observed him pushing material off the top of the highwall and Helmericks "jumped all over me again." (Tr. 33). He stated that Helmericks did not give a reason for his termination and that Durango Gravel did not pay him for his final week and one-half of work.

Mr. Helmericks testified that on the day that Mr. Baier was terminated the crusher was down for repairs. He stated that upon his arrival at the mine, he assigned his two employees, Mr. Baier and Jim, Jr., the task of repairing the crusher. Mr. Helmericks then left the mine to get parts in Farmington, New Mexico. Helmericks testified that when he returned to the mine later that day, Baier was up on the highwall with a loader pushing material down from the top of the highwall. He stated that he terminated Baier for not doing his assigned task, repairing the

crusher. He testified that he did not want Baier up on the highwall because: (1) the crusher needed to be repaired; (2) the mine had enough loose rock to feed the crusher once it was repaired without pushing any more material down; and (3) he believed that pushing material down with a loader was not safe. Helmericks testified that if the mine needed additional loose material to feed the crusher, he would push material down from the top of the highwall using a track-mounted bulldozer. He stated that he did not want any employee other than himself pushing material over the edge of the highwall and that he did not want loaders used for that purpose. Helmericks stated that he did not terminate Baier because he refused to dig into the toe of the highwall, but because he did not follow his direction to assist Jim, Jr., in the repair of the crusher and to not push material from the top of the highwall.

I find that cutting into the highwall at Durango Gravel with a loader is very hazardous. Such a procedure is likely to decrease the stability of the wall. It is highly likely that material will fall from the highwall and injure or kill the loader operator if such a procedure is used.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

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

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 mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

A. Did Clay Baier Engage in Protected Activity?

1. Baier's Discussions with MSHA Inspectors

For the reasons set forth below, I find that Mr. Baier engaged in activity that is protected by section 105(c) of the Mine Act when he spoke with MSHA inspectors during their inspection in July 1996. He asked whether he should cut into the toe of the highwall when getting rock to run through the crusher. The record makes it clear that Mr. Helmericks was upset that the inspectors talked to Mr. Baier. Mr. Helmericks was not at the mine at the time of the inspection and he believed that the inspectors should have obtained any information about mining practices from Jim, Jr., who was "in charge" whenever Helmericks was absent from the mine. As I explained at the hearing, MSHA inspectors are authorized to speak with miners during their inspections without the approval of the mine operator. Indeed, inspectors often spend more time talking with miners than with representatives of the operator. Mr. Baier's conversation with the inspectors about safety issues was protected activity.

2. Baier's Refusal to Dig into the Toe of the Highwall

Section 105(c) also protects "a miner's right to refuse to work under conditions that he reasonably and in good faith believes to be hazardous." *John A. Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir 1989)(citations omitted). The "perception of a hazard must be viewed from the miner's perspective at the time of the work refusal." *Id.* Such a work refusal is protected under section 105(c).

It is clear that after discussing the issue with Inspector Williams, Mr. Baier reasonably and in good faith believed that digging material from the toe of the highwall created a significant risk to his safety. Accordingly, if Mr. Baier were ordered or otherwise required to dig material from the highwall and he refused to do so, his refusal would constitute protected activity. I discuss this issue in considerable detail below because this dispute is central to the case.

Mr. Baier testified that he was told by Mr. Helmericks to dig material from the toe of the highwall on many occasions. (Tr. 15-16). He stated that he did not know that this practice was dangerous until the MSHA inspectors told him in July that he should get "product from the top and push it down." (Tr. 17). Mr. Baier testified that whenever he attempted to follow the procedures recommended by the MSHA inspectors, Mr. Helmericks would become angry and say that the inspectors "don't know what they are talking about." (17-19). Baier also testified that Helmericks told him to tell the inspectors that he was pushing material down from the top rather than digging at the toe of the highwall. *Id.*

Baier testified that on August 1, Helmericks cursed at him, said "you don't belong here," and terminated him. (Tr. 22-23). He stated that Helmericks did not give him a reason for the termination. (Tr. 22-24). Baier stated that Helmericks terminated him in the morning after Baier had started all of the equipment in preparation for operations. He testified that the crusher was not down for repairs that morning. Baier stated that on the Monday before his termination, he

was pushing material off the highwall when Helmericks "jumped all over me again." (Tr. 33). Baier believes that on August 1, Helmericks was still angry at him for his refusal to dig into the highwall on the previous Monday. (Tr. 39). He stated that he does not know why Helmericks terminated him three days after his work refusal rather than at the time of the altercation on Monday.

Mr. Helmericks testified that he had instructed loader operators to dig into the highwall in previous years because he "didn't know any better." (Tr. 266). He stated that once he received the citation in 1993, he stopped that practice. *Id.* Helmericks testified that, since that time, he has instructed employees to obtain easily available material. He explained that the highwall itself is hard near the bottom, but that material naturally falls from the top and is deposited near the base of the highwall. (Tr. 265, 325-27). He testified that these deposits are easy to scoop up and that removing them does not endanger the loader operator. (Tr. 264-66). He also testified that he had stripped off the top 10 feet of the highwall in preceding years with a bulldozer. (Tr. 328-29). He stated that in the weeks before Baier's termination, he instructed him to get this "easy, available material" when he needed feed for the crusher. (Tr. 262). Helmericks stated that these deposits are illustrated in the photographs in Exhibits R-8 and J-1. He testified that although these photographs were taken the week before the trial, the conditions at the mine had not changed because mining had not progressed significantly since August 1, 1996. (Tr. 263; 287). Inspector Williams testified that he observed loose material in front of the highwall at the time of his inspection in July 1996. (Tr. 217-18). He also testified that scooping up material along the outer edge of this loose material would not present a hazard. (Tr. 235).

Mr. Helmericks testified that on August 1 the crusher was down because the tail roller "had a bad bearing and the belt had received some damage." (Tr. 249). He stated that he instructed Baier and Jim, Jr., to start repairing the belt and tail roller. Mr. Helmericks testified that he went to Farmington to get parts needed at the mine. When he returned at about 11:00 that morning, Jim, Jr., was working on the crusher, but Baier was on top of the highwall in a loader pushing material off the edge. (Tr. 250-51). Helmericks testified that he drove to the top of the highwall and asked Baier why he was up on the highwall. He stated that Baier replied that the MSHA inspectors told him to mine from the top of the highwall. (Tr. 251-52). Helmericks told Baier that he had previously warned Baier not to go up on the highwall with the loader anymore. *Id.* Helmericks then told Baier that he was fired. An altercation followed concerning pay that Baier claimed was due him.

Helmericks testified that he fired Mr. Baier because he had been assigned to work on the crusher and he had taken it upon himself to push material off the highwall with the loader. (Tr. 266-67). Helmericks further testified that there was no need for Baier to be up on the highwall at that time because the crusher was down and there was plenty of loose material around the pit to feed the crusher once it was repaired in any event. (Tr. 258-59; 264, 283-85, 313). Helmericks testified that he only wanted himself working on top of the highwall because he preferred to use a bulldozer to push down material. (Tr. 264, 267, 313) He stated that when the scoop of a loader is full of material, the balance point is at the front tires. (Tr. 268-69). He further testified that the top of the highwall is angled towards the edge. (Tr. 268-69, 303-04; Ex. J-1). He believes that

pushing or dumping material off the edge of the highwall with the loader at the J & J Pit is dangerous. *Id.*

Mr. Helmericks denies that he terminated Mr. Baier early in the morning of August 1 after Baier had started all of the equipment, including the crusher. He stated that the crusher was out of order that day and that he terminated Baier around 11:00 a.m. for failing to help his son repair the crusher as directed. Helmericks testified that he did not want Baier pushing material from the top of the highwall and Baier believed that Inspector Williams authorized him to do so. (Tr. 274-76, 331-32). The testimony of Jim, Jr., is consistent with Mr. Helmericks' testimony in this regard. (Tr. 375-82, 394-98).

The Secretary takes the position that Mr. Helmericks continued to require Baier to dig into the toe of the highwall to get material for the crusher and that when Baier attempted to get the material by pushing it down from the top, he was terminated from his employment. Baier testified that the mine had no material for the crusher "unless I was digging under the toe." (Tr. 449). Durango Gravel takes the position that the crusher was not operating on the day of his termination and that the mine had plenty of material to feed the crusher without the necessity of digging into the toe or going on top of the highwall. Helmericks testified that he did not fire Baier for refusing to dig into the toe, but for taking it upon himself to push material off the top of the highwall with a loader despite repeated instructions not to do so.

There is evidence in the record to support each party. On the one hand, Baier's testimony is supported by the testimony of William Elvidge. Mr. Elvidge was employed at the J & J Pit for a period of time up to April 1996. (Tr. 164-65). He testified that he was required to dig at the toe of the highwall when he was employed by Durango Gravel because there was not enough material available from the "safe side" to feed the crusher. (Tr. 167). He stated that Mr. Helmericks showed him how to dig at the toe of the highwall. *Id.* Elvidge stated that whenever he asked Mr. Helmericks to push material from the top of the highwall, his response was that he would do it later. (Tr. 168, 181). Mr. Elvidge is the miner who filed the safety complaint with MSHA that prompted the July inspection. (Tr. 169; Ex. P-1).

Baier's testimony is also supported by Mr. Helmericks' attitude towards work refusals related to safety, as exhibited at the hearing. For example, he stated that a miner must always follow the orders of his supervisor and that he "has the opportunity to quit if he feels he has been in danger." (Tr. 79). Although it is well within Mr. Helmericks' right to demand that employees strictly comply with his orders at the pit, he cannot make such demands if a miner raises legitimate safety concerns. While Mr. Helmericks may believe that he should have that right, the Mine Act provides otherwise.

The testimony of Inspector Williams also supports a finding that employees had been required to dig at the toe of the highwall. He stated that, although he did not observe anyone digging at the toe, he believes that miners were cutting into the toe of the highwall at one location. (Tr. 213-14). He reached this conclusion based on the shape of the wall. Mr. Baier told him he had been digging at the toe. (Tr. 215).

On the other hand, Mr. Helmericks' testimony is supported by the testimony of Jim, Jr., and to a lesser extent, the testimony of Inspector Williams and the photographs. Mr. Williams and the photographs indicate that there was a considerable amount of loose, easily available material at the pit. (Tr. 217-18; Exs. J-1, R-8). It is not controverted that the crusher was old and slow and could not process much material at any one time. Thus, this evidence would indicate that it was not necessary for anyone to dig into the toe to get material for the crusher.

Based on my review of the record, I find that miners were cutting into the toe to obtain material for the crusher in the weeks prior to Mr. Baier's termination. I also find that even if Mr. Helmericks did not directly order his employees to obtain material from the toe, he was aware of their actions and did not stop them. The record makes clear that the material at the pit was not all the same and that it was not uncommon to mix loose rock with other material, such as clay-bearing material or sandy material, to obtain feed for the crusher to meet customer specifications. (Tr. 276-78).

With respect to the events that took place on August 1, 1996, I find Mr. Helmericks' testimony to be more credible. After observing Helmericks' conduct during the course of this hearing, I do not believe that he would have fired Mr. Baier in the manner described in Baier's testimony. Instead, Helmericks would have fired Baier at the time he observed Baier using the loader on the highwall. He would not have waited two or three days. Mr. Helmericks is a volatile individual with strong beliefs as to how a pit should be operated. He prides himself on running a tight ship. If he observed Baier using the loader to push material off the highwall, after warning him not to do so, he would not wait three days to take action. Accordingly, I find that it is highly likely that Mr. Baier was using the loader to push material down from the highwall on August 1. The issue of whether Mr. Helmericks had ordered Baier to help Jim, Jr., repair the crusher is discussed in more detail below.

I find that Baier's refusal to dig into the toe of the highwall was protected activity, but that his decision to push material from the top of the highwall was not protected. Baier had the legal right under the Mine Act to refuse to perform an unsafe act, but he did not have the right to take a loader to the top of the highwall to obtain material. A miner cannot refuse to work because of a difference of opinion over the proper way to perform a particular task if the refusal is not safety related. *Sammons v. Mine Service Co.*, 6 FMSHRC 1391, 1398 (June 1984). Mr. Helmericks, as the owner/operator of the J&J Pit, has the right to direct his workforce and decide who is going to do what job. Helmericks decided that he would be the only individual who would push material off the highwall and that he would use a bulldozer. He apparently communicated this information to Baier prior to the incidents that gave rise to this proceeding. Mr. Baier's refusal to follow Helmericks' direction not to go up on the highwall with the loader is not, by itself, protected under the Mine Act.

B. <u>Was Clay Baier's Termination Motivated in any Part by the Protected Activity?</u>

In determining whether a mine operator's adverse action was motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely

encountered; more typically, the only available evidence is indirect." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). Based on the evidence presented at the hearing, I find that Clay Baier's termination was motivated at least in part by his protected activity.

A mine operator's knowledge of the protected activity is one factor to evaluate when determining whether an adverse action was motivated by protected activity. Mr. Helmericks knew that Clay Baier had discussed safety issues with MSHA inspectors and that the inspectors had advised Mr. Baier not to cut into the highwall with the loader. Mr. Helmericks also knew that when Mr. Baier went to the top of the highwall to push material over the edge of the highwall, he did so on the advice of Inspector Williams. Baier put Helmericks on notice that he did not believe that it was safe to dig at the toe of the highwall.

Another factor is the mine operator's hostility towards the protected activity, often referred to as "animus." It is clear that Mr. Helmericks was extremely hostile towards MSHA in general, as well as Mr. Baier's conversation with Inspector Williams about safety issues at the mine. Mr. Helmericks contends that the inspectors should not have talked with Baier but should have talked only with Jim, Jr. Mr. Helmericks considered Mr. Williams' advice to Mr. Baier to be a direct threat to his supervisory authority. Helmericks did not approve of Baier's discussion of safety issues with MSHA. Helmericks also demonstrated animus towards Baier's actions in response to Mr. Williams' advice.

Finally, the termination of Mr. Baier occurred shortly after the July 1996 MSHA inspection. The termination also occurred immediately after Helmericks observed Baier pushing material off the highwall. While this activity was not protected, as discussed above, it was related to the safety concerns Baier raised with Inspector Williams. This proximity in time is another factor that indicates that the termination was motivated in part by the protected activity.

Based on the above, I find that the Secretary established a *prima facie* case that Mr. Baier engaged in protected activity and that his termination from employment was motivated at least in part by that activity.

C. <u>Durango Gravel's Case</u>

As stated above, a mine operator may rebut the Secretary's *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. I find that Durango Gravel did not rebut the Secretary's case in this manner. The preponderance of the evidence presented at the hearing shows that Mr. Baier engaged in protected activity and that his termination was motivated, at least in part, by that activity. I find that Mr. Helmericks decided to terminate Mr. Baier, in part, because Baier had discussed safety issues with Inspector Williams in July 1996. The record shows that Helmericks resented the fact that Baier raised these issues with the inspector.

The evidence concerning Baier's alleged work refusal merits further analysis. When evaluating a miner's allegation that he refused to perform work because he reasonably and good faith believed that the work was not safe, a judge must consider whether the miner communicated his concerns to the mine operator. "When reasonably possible, a miner refusing to work should ordinarily communicate or at least attempt to communicate, to some representative of the operator, his belief in the safety or health hazard at issue." *Secretary of Labor on behalf of Dunmire and Estle v. Northern Coal Co.*, 4 FMSHRC 126, 133 (February 1982). I find that Baier attempted to communicate his concerns about digging into the highwall to Mr. Helmericks. Whether Helmericks fully understood that Baier traveled to the top of the highwall because of his own personal safety concerns is not entirely clear. Nevertheless, I find that Helmericks understood that Baier would not dig into the highwall because of his safety concerns.

Another consideration is whether, after he learned of Baier's concerns, Helmericks took steps to address the perceived danger. A mine operator has an obligation to explain why the work area is safe or explain that any problems have been corrected. To put it another way, a miner's work refusal is not protected if the operator addresses his safety concerns "in a way that his fears reasonably should have been quelled." *Gilbert*, 866 F.2d at 1441.

Mr. Helmericks' testimony concerning his prior discussions with Baier about going up on the highwall center around issues of authority. Helmericks testified that Baier told him that he pushed down material from the top of the highwall because Inspector Williams told him to do so to get material for the crusher. (Tr. 274-75). Helmericks testified that Baier was "a little mixed up about who really had authority to give directives at the pit." (Tr. 275). Although Helmericks recognized that Inspector Williams "was responsible for pointing out safety issues," he told Baier that the inspector had no authority to tell Baier to go up on the highwall. *Id.* When Baier repeated what the inspector had told him, Helmericks replied that "you are not going to do it [Inspector Williams' way] because it is unsafe and I told you not to do it." *Id.*

The credible evidence in the record demonstrates that Mr. Helmericks did not attempt to explain that he and Inspector Williams were in agreement that miners should not dig into the toe of the highwall. Helmericks could have easily attempted to allay Baier's fears by explaining that he should not dig into the toe of the highwall and that if more material was needed to feed the crusher he should wait until Helmericks was able to push material down from the highwall using the bulldozer. As stated above, the protected activity was Baier's refusal to dig into the toe of the highwall, not his actions in pushing down material from the top with a loader. Even though there was some loose material around the pit, Baier still reasonably believed that he was required to dig into the highwall to get material.[1] Helmericks did not allay his fears by explaining to Baier

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[1] It was also reasonable for Baier to be concerned about digging into loose material that was immediately adjacent to the base of the highwall. Removing such material may weaken a highwall, especially if the material has been present for a considerable length of time. In addition, a loader operator could inadvertently cut into the highwall while trying to remove such material.

that he would no longer be required to do that. Instead, he treated Baier's actions as a threat to his supervisory authority.

Thus, Helmericks was angry that Baier continued to follow the inspector's advice, but Helmericks did not attempt to tell Baier why the hazard did not exist or how it would be eliminated. I find that the evidence demonstrates that the actions Baier took in response to his safety concerns were a factor in Mr. Helmericks decision to terminate Mr. Baier.

If the mine operator cannot directly rebut the Secretary's case, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. This issue requires further analysis.

The Commission described this defense in *Pasula*, as follows.

> The employer may affirmatively defend ... by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he *would* have taken adverse action against the miner in any event for the unprotected activities alone.... It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving discipline for engaging in the unprotected activity alone and that he *would* have disciplined him in any event.

2 FMSHRC at 2799-800 (emphasis in original). In *Bradley v. Belva Coal Co.*, the Commission further refined this analysis, as follows:

> Ordinarily, an operator can attempt to demonstrate [that it would have terminated the miner for the unprotected activity alone] by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

4 FMSHRC 982, 993 (June 1982). *See also Chacon*, 3 FMSHRC at 2516-17.

Durango Gravel bears the burden of proof on this issue. Mr. Helmericks proceeded in this case without the benefit of counsel. Accordingly, I granted Durango Gravel wide latitude in presenting evidence at the hearing and attempted to provide as much guidance to Mr. Helmericks as I reasonably could about the legal issues involved and the evidence he would need to present to defend against a discrimination complaint. For the reasons set forth below, I find that he did not establish that he would have terminated Mr. Baier for his unprotected activities alone.

As stated above, Mr. Baier's actions in taking it upon himself to push material down from the top of the highwall with a loader were not protected. Mr. Helmericks was also motivated to terminate Mr. Baier because of this unprotected activity. I find that Mr. Helmericks did not establish that he would have terminated Baier for these actions alone. For purposes of this discussion, I assume that the events that took place on August 1, 1996, were as Mr. Helmericks described. That is, Helmericks terminated Baier after he returned from Farmington and observed Baier pushing material from the top of the highwall rather than repairing the crusher as he had instructed.

I find that Baier's actions were directly related to his refusal to dig into the highwall. The only reason presented in the record for Baier's decision to push material off the highwall was to avoid having to dig into the highwall. He took these actions because of advice he received from Inspector Williams. Although this "self-help" measure was not protected, it arose out of Baier's safety concerns and, as discussed above, Helmericks did little to attempt to allay Baier's fear that he could be seriously injured while working under the highwall. Thus, if Baier were terminated solely for being up on the highwall, the termination was too closely related to his protected work refusal, given that Mr. Helmericks did not reasonably allay his fears, to conclude that such a termination was for his unprotected activity alone.

More importantly, I believe that the evidence establishes that Helmericks' animosity towards MSHA played a significant role in his decision. If Baier had not raised safety issues with MSHA during their July inspection and Williams had not provided guidance to Baier concerning how to safely mine the highwall, it is unlikely that Helmericks would have terminated Baier for being up on the highwall on August 1. It is more likely that Helmericks would simply have chewed him out. As stated above, Helmericks saw Baier's actions in conjunction with Inspector Williams' July inspection as a direct threat to his supervisory authority. Durango Gravel did not establish that it would have terminated Baier for being on top of the highwall on August 1 if his activities did not spring from his safety complaints to MSHA.

At the hearing, Durango Gravel presented evidence that it terminated Mr. Baier for a number of other reasons related to his work performance. For example, Mr. Helmericks testified that Baier was an unsafe equipment operator. Helmericks pointed to the fact that Baier damaged a loader when he backed into the stacker. (Tr. 27, 267). This accident occurred about 10 days prior to his termination. (Tr. 312). There is conflicting testimony as to whether Helmericks was concerned about the accident at the time. The evidence establishes that there was no left side mirror on the loader at the time of the accident. (Tr.28). Mr. Helmericks also stated that Baier

damaged his welding trailer with the loader on another occasion. Mr. Helmericks did not terminate Baier at the time of either of these accidents.

Mr. Helmericks also testified that Baier did not respect his authority or his property at the pit. Helmericks referred to a number of instances in which Baier was openly disrespectful towards him and caused damage to his property. For example, on one occasion Baier taunted Helmericks in front of Sharon Helmericks, his wife, by stating that she was cute and would leave him someday. (Tr. 160-62, 246-47). Helmericks referred to a number of instances where Baier caused damage to property, such as when his dog wrecked a welder while chasing a chipmunk. (Tr. 134-35). Helmericks testified that he had previously warned Baier not to bring his dog to the pit. Until Baier raised safety concerns following MSHA's inspection, however, none of the alleged insubordinate and disrespectful actions Helmericks refers to caused him to terminate Baier's employment with Durango Gravel.

Durango Gravel spent a significant time at the hearing attempting to discredit the testimony of Mr. Baier and his witnesses. Much of this effort was devoted to calling Baier and his witnesses liars and criminals. Name-calling does not establish the truth of the allegation. Throughout this proceeding, Mr. Helmericks sought to introduce evidence of Baier's alleged criminal activity. In evaluating this issue, I relied upon Rule 609 of the Federal Rules of Evidence. That rule provides that evidence that a witness was convicted of a crime shall be admitted if the crime was punishable by imprisonment in excess of one year, if the crime involved dishonesty or false statement, or if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect. Baier admitted that he was convicted of a misdemeanor charge in Arizona in 1986 or 1987. (Tr. 454). He paid a monetary penalty but was not incarcerated. I find that this conviction does not relate to Baier's veracity at the hearing.[2]

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[2] At the hearing and in its brief, Durango Gravel raised issues as to the honesty and integrity of Kristi Floyd, counsel for the Secretary. Mr. Helmericks believes that Ms. Floyd participated in a conspiracy to withhold information about Mr. Baier's criminal activity and dishonest actions. (Tr. 350-52, 453-54). He stated that he intends to take steps to have her disbarred. In his brief, Mr. Helmericks referred to Ms. Floyd as a "bully." (D.Gr. Br. 6). During discovery, Mr. Helmericks sought information from the Secretary about Baier's criminal record and employment history. After reviewing the record, I find that there is no evidence that Ms. Floyd engaged in any unethical conduct in this case or that she attempted to withhold evidence or information from Mr. Helmericks.

As to the criminal record, Ms. Floyd represented in answers to discovery that Baier did not have a felony conviction. In a supplemental response, Ms. Floyd stated that Baier had never been in prison and did not have a criminal record. At the hearing, Ms. Floyd represented that she had no knowledge of the misdemeanor conviction until the day before the hearing. Once she learned about it, she provided such information to the judge. When Mr. Helmericks continued to raise questions about it, she voluntarily revealed it in open court. I determined that information about this conviction would not be admissible under Rule 609.

(continued...)

Mr. Helmericks also maintains that Baier stole tools owned by him. The record reveals that the tools were in the trunk of Baier's car on the day he was terminated. They had been put in his car by Jim, Jr., because he often car pooled to work with Baier. Jim, Jr., forgot that they were in the car on the day of Baier's termination. Baier sought to keep the tools until Helmericks paid him the wages he believed he was owed for his last week and one-half of work. I find that Baier did not steal Helmericks' tools and his action in using the tools as leverage to get his final pay check does not show that his testimony is not credible.

Helmericks also attempted to show that Baier's testimony was not credible because of discrepancies in his time cards. Each employee was responsible for reporting the number of hours he worked every day to Mr. Helmericks. After Baier was terminated, Helmericks discovered that Baier reported more hours worked than Jim, Jr., on days that they car pooled to work. It must be noted that Helmericks did not discover this fact until after Baier was terminated and it could not have been a reason for his termination. Such false reporting of time can be the basis for the termination of an employee and does bear on a witness's credibility. I have taken Mr. Helmericks' testimony into consideration in assessing credibility in this case.

Finally, Mr. Helmericks also contends that the testimony of Baier and his witnesses contained numerous conflicts and contradictions. I have reviewed their testimony and cannot find any significant contradictions. Mr. Baier's testimony is also reasonably consistent with his interview with the MSHA special investigator taken on August 26, 1996. More importantly, for purposes of analyzing whether Durango Gravel would have terminated Baier for his unprotected conduct alone, I accepted Mr. Helmericks description of the essential facts that transpired in the week before Baier's termination.

In conclusion, I find that the Secretary established a *prima facie* case of discrimination and Durango Gravel did not rebut the Secretary's case by showing that it did not fire Baier for his protected activity or showing that it would have terminated for his unprotected activity alone. The Secretary seeks the following remedy: (1) Mr. Baier's pay for the week and three days that he worked for Durango Gravel but was not paid, that is, any time he worked July 21 through July 31, 1996; (2) two weeks of back pay; and (3) a civil penalty of $2,500. Durango Gravel contends that it does not owe Mr. Baier any back pay because he caused extensive damage to equipment at the pit. It seeks to offset any back pay award with the cost of repairing damaged equipment. As stated above, Durango Gravel did not establish that it would have terminated Baier for damaging equipment at the mine. The evidence shows that Baier damaged the door of the loader when he

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[2] (...continued).

The record reveals that Baier was employed by a large number of companies prior to his employment by Durango Gravel. Baier worked for some of these employers for only a few weeks. In her response to interrogatories and her supplemental response, Ms. Floyd provided a list of his prior employers. At the hearing, Baier revealed that he worked for a few employers that were not provided on Ms. Floyd's lists. He stated that he had forgotten about them. I credit his testimony in this regard.

struck the stacker, but that it was accidental. Mr. Helmericks did not require Baier to pay for the damage at the time of the accident. Durango Gravel did not repair the damage until the week before the trial in this case. Accordingly, I hold that Durango Gravel is not entitled to withhold the cost of repairing equipment from any back pay award under the Mine Act.

III. ORDER

Counsel for the Secretary is ordered to file a brief, on or before, February 16, 1998, setting forth the amount of back pay she contends Durango Gravel owes Mr. Baier. The brief shall include any supporting documentation. The brief shall show the calculations the Secretary used to arrive at a the proposed back pay award. For the period prior to Baier's termination, the brief shall show the hours of work on a daily basis. The Secretary's brief shall also address each of the criteria under section 110(i) of the Mine Act and cite evidence in the record to support her proposed penalty in this case.

Durango Gravel shall have ten days after it receives the Secretary's brief to file a response. In the response, Durango Gravel shall cite evidence to refute the Secretary's calculation of back pay and civil penalty. This decision is not final until I enter a final order awarding a specific amount of back pay and assess an appropriate civil penalty.

Richard W. Manning
Administrative Law Judge

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Mr. Jim Helmericks, Durango Gravel, 995 Highway 3, Durango, CO 81301

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 29 1998

SECRETARY OF LABOR,	: CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:
ADMINISTRATION (MSHA),	: Docket No. KENT 97-197
Petitioner	: A.C. No. 15-04670-03842
v.	:
	: No. 37 Mine
ARCH OF KENTUCKY,	:
Respondent	:

DECISION

Appearances: Mary Sue Taylor, Esq., U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Frenchette C. Potter, Esq., Arch Mineral Corp. St. Louis, Missouri for Respondent.

Before: Judge Weisberger

This case is before me based upon a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary") alleging violations by Arch of Kentucky ("Arch") of various mandatory safety standards set forth in Title 30 of the Code of Federal Regulations. Subsequent to notice, the case was heard in Kingsport, Tennessee on October 14, 1997. At the hearing, the parties indicated that three of the four citations at issue had been settled.[1] An evidentiary hearing was held concerning the remaining citation, number 4581310. On December 19, 1997, Respondent's Brief was filed. On December 23, 1997, Petitioner's Brief was filed.

I. Citation No. 4581310

A. Violation of 30 C.F.R. § 75.1403-6(b)(3)

[1] On January 21, 1998, a Joint Motion to Approve Settlement regarding these citations was filed. The Motion is disposed of *infra*, (II).

1. Factual Background

Arch of Kentucky operates the No. 37 mine, an underground coal mine in Lynch, Kentucky. A diesel propelled track-mounted mantrip is used to transport eight miners and an operator to and from the L-15 section. The outby and inby ends of the mantrip are each equipped with two sanders located over, and in front of a steel wheel on opposite sides of the mantrip. The sanders are operated by a lever located in front of the operator who sits in the middle of the mantrip. When activated, the sanders release sand through a two-inch diameter opening on the bottom of the sanders. The sand falls in front of the front wheels in order to provide traction to slow the mantrip, keep it from sliding over wet rails, and allow it to climb up grades.

On February 4, 1997, a mantrip operated by Tony Cox, left the L-15 section at approximately midnight at the end of the second shift. The following miners were passengers on the mantrip: W. William Carter, Kenneth Russell, Kenneth Bolling, Jr., Vass Mellon, Bill Tolliver, Billy Boggs, Otis Halcomb, and Charlie Walker. As the mantrip traveled outby, it entered a dip under an overcast, but was unable to climb out of the dip even though Cox activated the sanders. Cox reversed the mantrip and, by increasing the speed, was able to drive the mantrip up the grade and out of the dip. The mantrip continued to travel outby over the tracks which were wet and slippery. As the mantrip continued it started to slide. Russell observed Cox operating the sander, but did not sense any "effect" (Tr. 40). According to Bolling, someone yelled out for Cox to hit the brakes, and Cox responded " I am, I am, I am" (Tr. 59). Carter indicated that after the mantrip started to slide, he heard a "metal against metal" (Tr. 27, 28) sound which indicated to him that the lever had been pulled to operate the sanders. However, the mantrip did not slow down. According to all witnesses, after the mantrip started to slide, a light was observed from an oncoming battery locomotive. Approximately five seconds after this was observed, the locomotive hit the mantrip causing injuries to Russell, Bolling and Carter resulting in their being hospitalized.

Shelby Brewer, an MSHA inspector, who was in another mantrip traveling outby behind the one at issue, came upon the accident scene, and then rode outby to the portal in the mantrip at issue approximately 1,000 feet to the portal. According to Brewer, once the mantrip was on the surface, approximately 20 minutes after the accident, he observed Bob Anderson, the third shift miner's representative, working the sand levers but "no sand came out" (Tr. 108). Brewer testified that he checked inside the boxes of the sanders. He said that the boxes were only half full with sand, and the sand, was "just tight" (Tr. 108). According to Brewer, in order for the sander to operate properly, the

sand must be loose, as it has to exit through a two-inch hole in order to fall on the track and provide traction.

On February 4, at approximately 10:00 a.m., William Johnson, an MSHA inspector, inspected one outby sander and one inby sander, and each sander box was half full with sand. He indicated that the sand "seemed to be compacted . . . because I worked one of the levers and nothing came out" (Tr. 124). According to Johnson, the lever operating the inby sanders had a fresh weld connecting the lever with the sander plunger. The lever on the outby side did not move. According to Johnson, he worked one lever, and no sand came out. Johnson issued a citation alleging a violation of 30 C.F.R. Section 75.1403-6(b)(3) which provides, as pertinent, that self-propelled personnel carriers should "[b]e equipped with properly installed, and well-maintained sanding devices. . . ."

2. Discussion

The purpose of the sanders at issue is to apply traction to aid in slowing and stopping the mantrip. For the reasons that follow, I conclude that the record establishes that the sanders were not adequately maintained to achieve this purpose.

An examination of the sanders approximately 10 hours after the collision at issue indicated that the sand in the sander box was compact. This condition would hinder and impede the flow of sand from the sander to the tracks through a release hole with only a two-inch diameter. Arch asserts that the mantrips are thoroughly inspected before they are placed in operation, and that if no problems are found then the inspection forms are not provided to the safety department. However, no evidence was adduced from anyone having personal knowledge relating to a specific examination of the sanders at issue at a specific point in time prior to the collision. There is thus no direct proof of the condition of the sanders prior to the collision. However, it might be reasonably inferred that their condition, when observed 10 hours after the collision, is probative of their condition prior to the collision. I reject, as being too speculative, Arch's argument that water could have gotten into the sanders causing the sand to compact if it was raining when the mantrip was inspected on the surface after the collision; or that water from the water hole at the portal could have compacted the sand when the mantrip was taken out of the mine to be inspected.

James Vicini, Arch's safety manager, presented hearsay testimony that Cox told him and MSHA personnel that when he "came out of the dip" he "laid down sand", and that he knew that the sanders were working as he heard a "squeal" that they make when "it takes traction" (Tr. 168,169). I do not assign much weight to this hearsay testimony

of Vicini. I note that Arch did not call Cox to testify on its behalf. Nor did it indicate that Cox was not available to testify.

On the other hand, all eyewitnesses who testified agreed that the mantrip was unable to ascend out of the dip prior to the accident in spite of the application of the sanders whose operation is designed to provide traction in such circumstances by placing sand in front of the front wheels. Since all eyewitnesses who testified were in agreement, I accept their testimony. Accordingly it might reasonably be inferred that the sanders were not functioning properly[2].

Vicini presented hearsay testimony that Cox said, in essence, that the track was slick prior to the collision, and that when he saw the oncoming vehicle he couldn't stop the mantrip. Vicini indicated that he had interviewed the following miners who were passengers in the mantrip at issue, and that none of them told him that the sanders did not operate: Tolliver, Halcomb, Walker, and Cox. They told him that the track was slick. However, Arch did not proffer the testimony of any of these miners, nor did it indicate that any of them were not available. I thus do not accord much weight to this hearsay testimony of Vicini. On the other hand, I observed the demeanor of Carter, Bolling, and Russell and found their testimony credible that they either observed or heard Cox operate the sander lever, and heard him acknowledge that he was operating the sander. The eyewitnesses' direct testimony appears to support a conclusion that the sanders, although activated, were not operational in that sufficient sand was not released to slow the mantrip or provide traction. Arch did not offer any eyewitness testimony to contradict these witnesses. Therefore, I accept their testimony.

For all the above reasons, I find that it has been established that when cited, the sanders were not "well-maintained". I thus find that it has been established that the operator violated Section 75.1403-6(b)(3) *supra.*[3]

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[2]/ I note that the mantrip carrying Brewer which followed the mantrip at issue experienced a similar difficulty ascending the dip, but Brewer did not cite this mantrip for not having a well-maintained sanding device. However, I find this insufficient to rebut an inference that the sanders in the mantrip at issue were not maintained properly to provide sufficient flow of sand to allow the mantrip to ascend out of the dip.

[3]/According to Vicini, even if the sanders were not working properly the accident at issue still would have occurred as the track was extremely wet and the conditions overall were extremely wet. This testimony is probative of the cause of the accident. However, the issue before me is not the cause of the accident, but rather whether the sanders were well-maintained.

B. Significant and Substantial

According to inspector Johnson, the violation at issue should be characterized as significant and substantial.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significant and substantially contribute 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 significant and substantial, "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

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

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

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

> We have explained further that the third element of the Mathies formula required that the Secretary establish 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 continuation of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1754-75 (July 1984).

As set forth above, the evidence of record establishes a violation of a mandatory safety standard i.e., Section 75.1403-6(b)(3) *supra.* Further, it is clear that, as a consequence of the failure to maintain the sanders properly by allowing the sand inside to compact and impede its flow down to the track so that adequate traction may not have been provided, the hazard of a collision was contributed to. Hence, the first two elements set forth in Mathies *supra* have been met, leaving the third and fourth elements to be resolved. In this connection, I note Vicini's hearsay testimony that Cox stated that once he became aware of the hazard of a collision he applied the brakes, but that there was no time to operate the sanders. I also note his opinion that the accident that occurred might have occurred even if the sanders were working properly. Hence, it might be inferred that the violative condition did not cause the accident that occurred. However, the focus of the analysis is whether, given continued normal operations, it was reasonably likely that the violative condition would have contributed to the hazard of a collision. Taking into account the fact that the track over which the mantrip travels contains downgrades and curves, and considering the fact that the mantrip traverses the track at least twice daily, I find that, within the context of these factors, it has been established that there was indeed a reasonable likelihood of a collision. Further, since at least three miners were hospitalized as a consequence of such a collision, I find that the fourth element set forth in Mathies *supra* has been met. I thus find that it has been established that the violation was significant and substantial (See, Mathies *supra*).

C. Penalty

Since the violation herein could have led to serious injuries, I find that the level of gravity was relatively high. The sanders are inspected in preshift examinations. Such an examination would have revealed that the sand in the sander boxes was compacted as this condition was easily observable once the cover of the sander boxes was removed. I thus find that the negligence of the operator was moderate. I find that a penalty of $1,019 is appropriate.

II. Citation Nos. 4581267, 4582658, and 4071531

Subsequent to the hearing a joint motion to approve settlement agreement regarding these citations was filed. A reduction in penalty from $801 to $367 is proposed. I have considered the representations and documentation submitted in the motion, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Therefore, the motion for approval of settlement is granted.

ORDER

It is ordered that, within 30 days of the date of this decision, Arch shall pay a total civil penalty of $1,386.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 29 1998

TILDEN MINING COMPANY, L.C., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. LAKE 97-42-RM
	:	Citation No. 4537230; 2/19/97
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 97-43-RM
	:	Citation No. 4537231; 2/19/97
	:	Tilden Mine
	:	Mine ID No. 20-00422
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. LAKE 97-60-M
	:	A. C. No. 20-00422-05670
v.	:	
	:	Docket No. LAKE 97-92-M
TILDEN MINING COMPANY, L.C., Respondent	:	A.C. No. 20-00422-05680
	:	Docket No. LAKE 97-94-M
	:	A.C. NO. 20-00422-05681
	:	Tilden Mine

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Notices of Contest and Petitions for Assessment of Civil Penalty filed by Tilden Mining Company, L.C., against the Secretary of Labor, and by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Tilden, respectively, pursuant to section 105 of the Federal Mine Safety and

Health Act of 1977, 30 U.S.C. § 815.[1] The company contests the issuance to it of a combined order and citation and a citation. The petitions allege four violations of the Secretary's mandatory health and safety standards and seek penalties of $8,618.00. For the reasons set forth below, I approve the parties settlement agreement with respect to Docket No. LAKE 97-60-M, vacate the order and modify and affirm the citation in Docket Nos. LAKE 97-42-RM and LAKE 97-92-M, vacate the citation in Docket Nos. LAKE 97-43-RM and LAKE 97-94-M, and assess penalties of $559.00.

A hearing was held on September 24, 1997, in Marquette, Michigan. The parties also submitted post-hearing briefs on the contested violations.

Settled Docket

At the beginning of the hearing, counsel for the Secretary announced that the parties had settled Docket No. LAKE 97-60-M. The agreement provided that Citation No. 4536738 would be vacated and that Citation No. 4536737 would be modified to allege a violation of section 56.1101, 30 C.F.R. § 56.1101, rather than section 56.15005, 30 C.F.R. § 56.15005, and to have the description of the condition or practice read: "A safe means of access was not provided on the bed of a flat bed truck being used to transport the new crusher into the secondary crusher building. Three employees were on the truck and the bed of the truck and the timbers on the bed were covered with snow. One employee was standing on wet and slippery tires which provided insufficient footing." The penalty for the modified citation would remain as originally assessed, $309.00.

After considering the parties' representations, I concluded that the settlement was appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i), and informed the parties that I would approve the agreement. (Tr. 9-12.) The provisions of the agreement will be carried out in the order at the end of this decision.

Contested Matters

Background

Ore at the Tilden iron mine is hauled from the ore pit to a primary crusher to be reduced in size. The primary crusher is located in a building at the bottom of a 20-foot deep crusher pit. Trucks back up to the east and west sides of the building and dump ore into the pit. A bumper, 2 feet high and 6 feet wide, prevents trucks from backing into the pit. On the south side of the pit is a control room and on the north side is a repair bay.

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[1] Docket No. LAKE 97-94-M, a civil penalty proceeding concerning Citation No. 4537231, which was contested in Docket No. LAKE 97-43-RM, had not been filed at the time of the hearing. The parties agreed, however, that when the civil penalty was filed it could be consolidated with these matters and adjudicated without a further hearing. (Tr. 14.) It was filed on September 29, 1997, and consolidated with the rest of the cases on October 30, 1997.

Ore is fed by gravity into the crusher bowl located in the center of the pit. The crusher bowl is 10 feet wide at the top and its walls slope inward so that it is 9 feet, 1 inch wide at the bottom. Inside the bowl is a cone-shaped mantle, narrow at the top and wider at the bottom. It is held in place by a "spider" bushing which is connected to opposite sides of the bowl and which rises several feet above floor level. The mantle moves back and forth concentrically, crushing the ore, so that at the narrowest point of the bowl and the widest point of the mantel there are 8 to 9 inches on the closed side and 11 to 12 inches on the open side. The crusher bowl is about 7 or 8 feet deep.

On February 17, 1997, the crusher bowl became clogged by ore and would not operate. Normal methods of unstopping it were unsuccessful and on February 18 the company decided to attempt to drill through the material to unclog it. Ore material on the east side of the pit had to be removed by a backhoe before an air track drill could be placed in the northeast corner of the pit. Drilling on February 18 failed to achieve a breakthrough.

The company began removing material with the backhoe from the west side of the pit on February 19 so that the drill could be moved if necessary. In the meantime, drilling on the northeast side continued. At about 10:00 a.m. that day Inspector Stephen W. Field, who was conducting a regular inspection of the mine, left the secondary crusher building to go to the primary crusher building. On his way to the building he observed Terry Kainulainen, a Tilden employee, on the west side of the primary crusher building. He believed that Kainulainen was within 2 feet of the pit and that he was not wearing a safety line.

The inspector followed Kainulainen into the repair bay on the north side of the building. From the repair bay he observed the drill operator and his assistant drilling the material in the crusher bowl. They appeared to be standing on the edge of the bowl. Neither had on a safety line. Inspector Field observed a hole in the material in the bowl where they were working which he estimated to be 8 feet long, 44 inches wide and 7 feet deep. Based on this observation, he informed the company representative that he was issuing a verbal 107(a) order, 30 U.S.C. § 817(a), to remove the two employees from the area of the crusher bowl until safety lines were furnished to them.

From the repair bay, the inspector went to the control room where he interviewed the two employees and their supervisors. Safety lines were set up, and the drilling continued. It turned out that a steel shank and tooth from the bucket of shovel, used to mine the ore, had become lodged between the mantle and the crusher bowl wall. It was necessary to cut the shank and tooth into pieces with "oxygen lanes"[2] to remove it.

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[2] "Oxygen lanes" are "magnesium rods that are 10 feet long and they're hooked up to high pressure oxygen." A rod is "lit with a torch. . . . once it gets hot enough, it will start burning on its own." (Tr. 198.)

On February 21, Inspector Field issued Order and Citation No. 4537230 and Citation No. 4537231 to the company. Both alleged violations of section 56.15005 of the regulations, 30 C.F.R. § 56.15005.[3] Order and Citation No. 4537230 stated:

> A verbal imminent danger withdrawal order was issued to Scott Perry, coord. on February 19, 1997 at 10:05 am. Two employees were standing on the metal rim of the primary crusher bowl while attempting to unplug the crusher. Safety belts and lines were not being used to prevent them from falling into the opening, approximately 8' in length by 7' in depth, between the crusher mantle and bowl. One employee was leaning over the very edge of the bowl while working the boom controls of the R-61 Gardner Denver Air Track drill. The other employee was standing on the edge of the bowl while loosening material directly below him with a water hose. Mine management failed to insure that fall protection was used, constituting more than ordinary negligence.

(Govt. Ex. 1.) Citation No. 4537231 declared:

> A means was not provided to prevent persons from falling, approximately 20' into the primary crusher cavity from the east and west sides dump ramps. Both ramps had been filled to the top of the bumper blocks with shot rock to allow the backhoe to clean out the cavity. An employee was standing within 2' of the edge on the west side while directing the backhoe and the lead coordinator was standing with 3' of the edge on the east side. A person falling onto the shot rock on the bottom of the crusher cavity would most likely sustain fatal injuries. The lead coordinator involved was previously issued two citations during this inspection for violation of this standard. The lead coordinator engaged in aggravated conduct constituting more than ordinary negligence in that this condition was allowed to exist. This is an unwarrantable failure.

(Govt. Ex. 3.)

Order/Citation No. 4537230, Docket Nos. LAKE 97-42-RM and LAKE 97-92-M

Order/Citation No. 4537230 was issued as a combined 107(a) Order and 104(a) citation. Tilden argues that both the order and the citation should be vacated. The Secretary contends that

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[3] Section 56.15005 requires, in pertinent part, that: "Safety belts and life lines shall be worn when persons work where there is a danger of falling . . . ."

both should be affirmed. I find that the order cannot be sustained, but that the Secretary has established a 104(a) violation.

Imminent Danger Order

Tilden maintains that because the imminent danger order was issued verbally, and not reduced to writing and served on the operator until 2 days after the alleged imminent danger, it was not issued in conformance with Section 107 of the Act. While it appears to be the company's position that an imminent danger order must always be issued in writing and can never be issued verbally and then reduced to writing, I find that based on the facts in this case, the order was improperly issued.

Section 107 of the Act states, in pertinent part:

> (a) If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.
>
> . . . .
>
> (c) Orders issued pursuant to subsection (a) shall contain a detailed description of the conditions or practices which cause and constitute an imminent danger and a description of the area of the coal or other mine from which persons must be withdrawn and prohibited from entering.
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> (d) Each finding made and order issued under this section shall be given promptly to the operator of the coal or other mine to which it pertains by the person making such finding or order, and all such findings and orders shall be in writing . . . .

Clearly, the plain meaning of the Act is that an imminent danger order must be in "writing" and given "promptly" to the operator. Does this mean that if an imminent danger order is given verbally and then reduced to writing it is invalid? I think not. Although it has never directly addressed this question, the Commission in denying a claim for compensation under section 111 of the Act, 30 U.S.C. § 821, based on a verbal imminent danger order, said the following:

> The mandate of section 107(d) that an imminent danger order be written is explicit. It reflects congressional concern that an operator be adequately advised of the imminent danger so that corrective action may be taken. In so doing it offers protection to an operator's property and to a miner's life and limb. Moreover, it offers all parties procedural protection in any subsequent litigation by placing them on notice as to the conditions which constitute the alleged imminent danger and the conditions under which the order arose. Presumably this eliminates much of the speculation and dispute an oral order would almost surely engender. This is not to say that a claim for compensation may never be based upon an oral finding of imminent danger. There may well be extraordinary circumstances wherein an inspector who makes such a finding fails in or is prevented by subsequent events from confirming it in a written order of withdrawal. However, no such special circumstances were pleaded by the union. The mere assertion that an inspector's statements are tantamount to an oral order without assertions that he intended to issue an imminent danger order and as to why the inspector was prevented from reducing it to writing will not support a claim.

Williamson Shafi Constructing Co., 3 FMSHRC 32, 33 (January 1981) (footnote omitted).

Williamson implies that imminent danger orders can be issued orally and then reduced to writing. That makes sense. To take Tilden's argument to its logical extreme, if an inspector saw a rock about to fall on a miner, it would be ridiculous to expect him to remain silent until he issued a written order telling the miner to move. Consequently, I conclude that an imminent danger order may be issued verbally and then reduced to writing.

The next question then is, how soon does it have to be reduced to writing? Since the written order has be given promptly to the operator, it follows that the order must be reduced to writing promptly. The dictionary defines "promptly" as "in a prompt manner : at once : immediately, quickly." *Webster's Third New International Dictionary (Unabridged)* 1816 (1986). *Black's Law Dictionary* 1214 (6th Ed. 1990) states: "To do something 'promptly' is to do it without delay and with reasonable speed." In determining what similar words, "forthwith" and "expedite," mean in section 107(e), 30 U.S.C. § 817(e), the Commission decided: "We conclude that sections 107(e)(1) & (2) require the Commission to provide an opportunity for a hearing on an imminent danger order with dispatch and without undue delay but, nevertheless, within a period of time reasonable under the circumstances of each case. The terminology requires promptness, but does not require immediacy under all circumstances." *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1287 (August 1992).

Based on the dictionary definitions and the Commission's language, I conclude that section 107(d) requires that an imminent danger order be reduced to writing and given to the

operator "without undue delay but, nevertheless, within a period of time reasonable under the circumstances of each case." Turning to the circumstances of this case, I find that the order was not promptly reduced to writing and given to the operator.

It is undisputed that Inspector Field observed what he believed to be an imminent danger from the north bay, issued the verbal order and then proceeded to go to the control where he interviewed witnesses and made notes. However, the written order was not given to Tilden until 2 days later. No reason was provided for this delay. Indeed, no reason was offered as to why the order could not have been reduced to writing when the inspector was in the control room. The act requires a written "detailed description of the conditions or practices which cause and constitute an imminent danger and a description of the area . . . from which persons must be withdrawn " so that an operator can be adequately advised of the imminent danger. Tilden did not receive such a description until 2 days later. Such delay, without adequate reasons, renders the requirements of the Act meaningless. Therefore, I will vacate the 107(a) order.

Crusher Bowl Citation

There is no dispute that when Inspector Field observed the drill operator and his assistant working at the crusher bowl they were not wearing life lines. There is, however, disagreement as to exactly where they were standing and the size of the hole in the material clogging the crusher. The inspector, who was standing in the north bay and had his view partially obstructed by the spider head and parts connecting it to the crusher, testified that they were right on the edge of the lip and that the hole was 7 feet deep, 8 feet long and 44 inches wide.[4] The drill operator and his assistant testified that only the operator was on the edge of the crusher bowl and that the hole that had been opened was only 3 feet long and 25 inches wide.

Based on this, Tilden argues that until a hole large enough to fall into was developed fall protection was not necessary. Nevertheless, the company did recognize that at some time fall protection would be needed for the drill operator and his assistant. In fact, at the time that the inspector made his observations, Clem Anderson and Donald Powrozek, the company supervisors in the area, had already ordered that safety lines be brought in for the drillers. Powrozek said that this was done because they realized that as the hole developed there could be a fall hazard.

I find the Respondent's attempt to distinguish between what had developed and what could develop too contrived. The company had no way of knowing how fast a hole might progress once a breakthrough occurred. Thus, it was possible, both at the time the decision was made not to have the drillers wear safety lines and at the time safety lines were ordered, that they would arrive too late. The essence of the Act and the regulations is that operators should err on

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[4] Given the dimensions of the crusher bowl and the fact that it was effectively cut in half by the spider, this estimate seems to be excessive. If the hole had been that large, the job of unplugging would have been almost done.

the side of safety. *See, e.g., Cleveland Cliffs Iron Co., Inc.*, 3 FMSHRC 291, 293-94 (February 1981). Consequently, I find that the drillers should have already had safety lines attached at the time the inspector observed them and that, therefore, the company violated section 56.15005 of the regulations.

Significant and Substantial

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

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

While I have found that a fall was possible in this instance, I do not view such a happening as being reasonably likely. The problem had existed for 2 days. None of the usual methods of unclogging the bowl had been even minimally successful. Drilling had commenced the day before and had not produced significant results. In fact, because the regular methods were tried again the night before the inspection, what little progress had been made by drilling was reversed and the problem was worse than ever. With this history, it was not likely that an immediate hole posing a fall hazard would develop. Accordingly, I find that the third criterion of the *Mathies* test, that there was a reasonable likelihood that the hazard contributed to would result in an injury, was not present. Therefore, I conclude that the violation was not "significant and substantial."

Negligence

The inspector characterized the negligence of this violation as "high" because he believed that the hazard was obvious, supervisors were present during the drilling and he had previously issued citations to the company for violations of the same standard. The evidence does not support a finding that the hazard was obvious. The fact that Powrozek and Anderson believed that a hazard could develop, and took steps to deal with it, indicates that they were aware of the necessity for safety lines and were not just oblivious to the situation. Furthermore, their

experience with this specific problem was that nothing was working. Drilling had not produced any breakthroughs. Since there was little likelihood of a fall hazard developing, based on past experience with this situation, their failure to require the use of safety lines from the start was not "highly" negligent. Accordingly, I conclude, based on these extenuating and mitigating factors, that the level of negligence involved in this violation was "low" and will modify the citation to reflect that conclusion.

Citation No. 4537231, Docket Nos. LAKE 97-43-RM and LAKE 97-94-M

This citation includes two alleged violations of section 56.15005. The first instance involves a Tilden employee who was assisting the backhoe operator to clean shot rock out of the pit. The second involves a supervisor looking into the pit to see how work was progressing. I find that the Secretary has not proved either of them.

Turning to the easier one first, the inspector testified that Clem Anderson came to within 3 feet of the edge of the pit, stood there for about 15 seconds and then walked away. Anderson had a tough time recalling this incident because the inspector did not question him about it when it happened,[5] but he speculated that it occurred when he was checking to see that the safety lines were being installed.

This allegation reduces the regulation to an impractical extreme. In the first place, I find that there was no danger of falling when Anderson stood 3 feet from the edge for 15 seconds to make sure the safety lines were being installed. In the second place, it makes no sense to require a supervisor to put on a harness and safety line, an act which apparently takes far longer than 15 seconds, to do no more than observe what is going on in the pit unless there is a real danger of falling. Therefore, I conclude that this instance did not violate the regulation.

Nor did the Secretary prove that the first instance violated the regulation. The inspector testified that: "Upon accessing the crusher, we observed an employee on the west side standing within 2 feet of the edge of the west dump ramp. Upon --- as we progressed toward the crusher, this employee left the west side dump ramp and traveled to the north side dump ramp." (Tr. 48.) The inspector stated that the employee was not "wearing a safety belt line." (Tr. 52.) He related that he made this observation when he was between 125 and 150 feet away from the employee. He further testified that while they were still approaching, when they were about 75 feet away, the employee moved from where he was and went into the north repair bay of the crusher building.

The citation was issued based solely in the inspector's observations set out above. The inspector never discussed the incident with John Lusardi or Scott Perry, who were accompanying him during the inspection. He never discussed it with Terry Kainulainen, the employee who allegedly committed the violation. And he never questioned anyone at the scene, including

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[5] The company was not served with the citation until 2 days later.

Anderson and Powrozek, as to whether Kainulainen was wearing a safety line or if he was not, why he was not. Therefore, he did not know that Kainulainen had been wearing a safety line, that he just taken it off because his spotting on the west side had been completed and he was going inside where a safety line was not needed.

Six witnesses testified at the hearing that Kainulainen was wearing a safety line. The inspector had not questioned any of the six prior to the hearing. Powrozek testified that he instructed Kainulainen to wear a harness and safety line that morning and that sometime later he observed Kainulainen working with the harness and safety line on. Kainulainen testified that he had trouble getting the harness on and had to get help from another employee to do it. He further testified that he wore the harness and safety line while serving as a spotter on the west wall for the backhoe operator. His testimony was corroborated by Ed Schultz, the backhoe operator. Anderson and Dennis Van Buren and Wesley Nordeen, the drill operators, also testified that they saw Kainulainen working with a safety line attached.

None of this testimony is inconsistent with the inspector's observations. While neither Kainulainen nor Schultz noticed the inspection team and, therefore, could not specifically say what was occurring when the inspector arrived at the crusher building, they did testify that there came a point in time when Kainulainen could no longer spot by looking over the west wall and that he then went into the north repair bay to spot from the north wall. Since there was a waist high wall on the north side, a safety line was not needed, and Kainulainen had taken off the safety harness. From the totality of the evidence, I find that this is what happened as the inspector was approaching the crusher building.

On the other hand, it appears that the inspector observed Kainulainen and then assumed that he had been working all morning without a safety line. Further investigation at the time may have verified this assumption or it may have convinced the inspector that no violation had occurred. Instead, no additional facts or statements were obtained. Consequently, all that the Secretary has presented is the inspector's assumption, which was overwhelmingly rebutted by the testimony of six apparently credible witnesses. This falls far short of proving the violation. Accordingly, I conclude that neither Anderson nor Kainulainen violated section 56.15005 and will vacate the citation.

Civil Penalty Assessment

The Secretary has proposed a civil penalty of $4,000.00 for Citation No. 4537230 and the parties have agreed on a penalty of $309.00 for the settled citation. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act. *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the parties stipulated that the Tilden Mine worked 1,731,443 man-hours from June 3, 1996 to June 3, 1997, that payment of civil penalties would not affect Tilden's ability to continue in business, that Tilden had been cited for 322 violations in

the 24-months preceding June 3, 1997, and that those violations had been issued during 255 inspection days. Based on this, I find that Tilden is a large company and that its history of prior violations is average for a company of its size. I have already found that the violation in Citation No. 4537230 was not "significant and substantial." In accord with that finding, I find that the gravity of the violation was not serious. I have also found that the degree of negligence for the violation was "low."

Taking all of this into consideration, I conclude that $250.00 is an appropriate civil penalty for Citation No. 4537230 in Docket No. LAKE 97-92. I further conclude that $309.00 is an appropriate penalty for Citation No. 4536737 in Docket No. LAKE 97-60, as agreed to by the parties.

ORDER

Accordingly, Citation No. 4536737 is **MODIFIED** to allege a violation of section 56.11001, instead of section 56.15005, and is **AFFIRMED** as modified, and Citation No. 4536738 is **VACATED** in Docket No. LAKE 97-60-M; 107(a) Order No. 4537230 is **VACATED** and Citation No. 4537230 is **MODIFIED** by deleting the "significant and substantial" designation and reducing the level of negligence from "high" to "low" and **AFFIRMED** as modified in Docket Nos. LAKE 97-42-RM and LAKE 97-92-M; and Citation No. 4537231 is **VACATED** in Docket Nos. LAKE 97-43-RM and LAKE 97-94-M.

Tilden Mining Company, LC, is **ORDERED TO PAY** civil penalties of **$559.00** within 30 days of the date of this decision. On receipt of payment, these cases are **DISMISSED**.

T. Todd Hodgden
Administrative Law Judge

Distribution:

R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219 (Certified Mail)

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

JAN 29 1998

TOM SPERRY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 97-248-DM
v.	:	
	:	Whitehill Sand & Gravel Pit
GRANITE CONSTRUCTION,	:	
Respondent	:	Mine I.D. 42-00381

DECISION

Appearances: Tom Sperry, pro se, Magna, Utah, for Complainant;
Roy Vlaovich, Jr., Gibbons & Reed Company, Salt Lake City, Utah, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Mr. Tom Sperry against Granite Construction under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). The complaint alleges that Granite Construction terminated Mr. Sperry from his employment in violation of section 105(c). A hearing in this case was held in Salt Lake City, Utah. For the reasons set forth below, the complaint of discrimination is dismissed.

I. FINDINGS OF FACT

Granite Construction purchased Gibbons and Reed Company about three years ago. Granite Construction generally does business as Gibbons and Reed in the Salt Lake City area. Granite Construction operates a number of facilities in Utah, including the Whitehill Sand and Gravel Pit, on a seasonal basis. Mr. Sperry first worked for Gibbons and Reed in the summer of 1992. He worked for either Gibbons and Reed or Granite Construction every working season between 1992 and 1997. Mr. Sperry started working at the Whitehill Pit on May 6, 1997, as a scraper operator. When he arrived at the pit, he believed that there was no drinking water at the mine. He asked his foreman, Bruce Noel, if potable water could be provided at the pit. Later in his shift, he again asked Mr. Noel about drinking water. Sperry testified that Noel told him that pit superintendent Dan Bunnell was not sure if water could be provided. (Tr. 9). That evening,

Mr. Sperry contacted his union business agent about the problem. Mr. Sperry stated that Granite Construction provided water at the pit the next day.

Mr. Sperry testified that "[f]rom that point on, I felt pressures, pressures from the job and from outside pressures, to comply with the mine owner in the demands to forfeit my rights as a miner and a United States citizen." (Tr. 9-10). He stated that he "was under constant pressure to not drink the water that was provided." (Tr. 10). When asked to describe these pressures, Mr. Sperry responded that these pressures were the result of "outside influence" and stated that they were "probably government controlled pressures." (Tr. 12). He also felt that the company should have provided water at the job site without being asked. He believes that most miners brought their own water in plastic bottles.

Mr. Sperry also testified that in 1993 he worked at another Gibbons and Reed project where water and toilet facilities were not initially provided. (Tr. 17-18). He also stated that the service brakes on his scraper were not always properly adjusted by the maintenance personnel. He stated that in 1995, at another Gibbons and Reed project, the operator of another piece of equipment rammed his scraper and that management did nothing to protect him. (Tr. 19-20). Finally, he testified that he had to request drinking water at a project in 1996. (Tr. 21).

Mr. Sperry testified that on May 15, 1997, he was given two paychecks. (Tr. 15). When he asked Mr. Noel why he received two checks, Noel replied that the company was letting him go because it was not satisfied with his work. (Tr. 16). He then filed the present discrimination complaint.

Mr. Bunnell testified that Granite Construction provided drinking water at the Whitehill Pit prior to the date Mr. Sperry started working there. (Tr. 42-43). He stated that the mine office has a water faucet and equipment operators typically fill a half-gallon plastic container of water at the office upon their arrival at the pit and carry the water in the cab of their equipment. (Tr. 43, 50-51). The cabs are air-conditioned. (Ex. C-4). The mine office was about 2,000 feet from the area of the pit where the scrapers generally operated. (Tr. 47). Mr. Bunnell testified that after Mr. Sperry complained about the lack of water, potable water was provided in a "ten-gallon igloo type cooler" in an area that was closer to the scraper operations. (Tr. 46-47). He testified that there was a one-day delay in providing this cooler after Sperry's request because the cooler needed to be sanitized and cups and other supplies needed to be purchased.

Bunnell testified that the work being performed at the Whitehill Pit required more highly skilled scraper operators than most of the company's other projects. Each scraper operator was required to work in conjunction with the other scraper operators to keep the dump area safe and the stockpiles in proper order. (Tr. 47; Ex. C-4). He stated that he decided to terminate Mr. Sperry because his skill level was not high enough for this particular job. (Tr.45, 57-58; Ex. R-2). He testified that he would hire him again at other projects, but not at the Whitehill Pit. (Tr. 45). Finally, Mr. Bunnell stated that Mr. Noel advised Mr. Sperry on prior occasions that his operating skills were not sufficient for the job. (Tr. 48). Mr. Sperry denied that he was given any prior warnings.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

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

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 mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

A. Did Tom Sperry Engage in Protected Activity?

Sand and gravel operators are required to provide potable water at all active working areas. 30 C.F.R. §56.20002. The failure of a mine operator to provide potable water can affect the health of miners, particularly in hot weather. Miners can become seriously dehydrated and suffer other health effects. For purposes of this decision, I hold that Mr. Sperry's complaint about the lack of potable water was protected activity under section 105(c) of the Mine Act.

B. Was Mr. Sperry's Termination Motivated in any Part by the Protected Activity?

In determining whether a mine operator's adverse action was motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). Based on the evidence presented at the hearing, I find that Tom Sperry's termination was not motivated in any part by his protected activity. In making this finding I credit the testimony of Dan Bunnell, the pit superintendent.

A mine operator's knowledge of the protected activity is one factor to evaluate when determining whether an adverse action was motivated by protected activity. Mr. Bunnell had knowledge of Mr. Sperry's request for water. I credit Bunnell's testimony that potable water was available at the pit in the office. In addition, Granite Construction provided water closer to Sperry's work site the day after Sperry made his complaint.

Another factor is the mine operator's hostility towards the protected activity, often referred to as "animus." There has been no showing that Granite Construction or Bunnell exhibited any hostility towards Sperry's protected activity. Mr. Sperry referred to "pressures" he felt after he made his complaint, but he was not able to articulate any specific examples. He attributed these pressures to "outside" influences and stated that such pressures were "probably government controlled." Although he testified that he was pressured not to drink the water that was provided, he could not describe how this pressure manifested itself.

I find and conclude that Mr. Sperry's request for drinking water was not a factor in Granite Construction's decision to terminate his employment with the company. I credit the testimony of Mr. Bunnell that the company was not satisfied with his performance at the Whitehill Pit. In addition, the company did not take any adverse action against him when he complained about the lack of water at other Gibbons and Reed operations. There has been no showing that the adverse action was motivated in any part by the protected activity. Finally, I find that even if Sperry's complaint about the lack of potable water was taken into consideration when Respondent decided to terminate him, Respondent would have terminated him for his unsatisfactory work performance alone. That is, Granite Construction would have terminated Mr. Sperry for his work performance even if he had not complained about the lack of water.

III. ORDER

For the reasons set forth above, the complaint filed by Tom Sperry against Granite Construction under section 105(c) of the Mine Act in this case is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Mr. Tom Sperry, 3852 Miriam Circle, Magna UT 84044-2615 (Certified Mail)

Mr. Roy Vlaovich, Jr., Gibbons and Reed Company, P.O. Box 30429, Salt Lake City, Utah 84130-0429 (Certified Mail)

ADMINISTRATIVE LAW JUDGE ORDERS

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

January 8, 1998

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 98-11
Petitioner	:	A. C. No. 34-01787-03530
	:	
v.	:	Pollyanna No. 8 Mine
GEORGES COLLIERS INCORPORATED,	:	
Respondent	:	

ORDER TO SHOW CAUSE

This case is before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 815(d).

On December 29, 1997, the Conference and Litigation Representative (CLR) filed the penalty petition with an enclosed exhibit for this case. However, the exhibit does not include a copy of MSHA's assessment sheet identifying the violations contested. Commission rule 2700.28(b), 29 C.F.R. § 2700.28(b), requires that the petition list the alleged violations and the proposed penalties, identify each violation by the number and date of the citation or order and the section of the Act or regulations alleged to be violated. Therefore, the petition is incomplete and the CLR must provide the requisite information before this case can proceed.

On November 18, 1997, I issued an order to show cause, copy enclosed, in Quapaw Company, 19 FMSHRC 1927, (Dec. 1997) pointing out that there were an increasing number of recent cases where the Secretary's representatives failed to attach required exhibits to penalty petitions. On November 21, 1997, the Associate Solicitor, for Mine Safety and Health wrote Solicitors and CLRs regarding insufficient penalty petitions.

It is **ORDERED** that within 21 days the CLR file the necessary information for his penalty petition to fulfill the requirements set forth in the Commission rules or show cause why this case should not be dismissed for inadequate filing.

Paul Merlin
Chief Administrative Law Judge

Enclosure

Distribution: (Certified Mail)

Ned Zamarripa, Conference and Litigation Representative, U. S. Department of Labor, MSHA, CMS&H, P. O. Box 25367, Denver, CO 80225

Mr. G. Matt Richardson, President, George Colliers Inc., Route 3, Box 696, Henryetta, OK 74437

/gl

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

November 18, 1997

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 97-198-M
Petitioner	:	A. C. No. 34-01273-05531
	:	
v.	:	
	:	Drumright Quarry
QUAPAW COMPANY,	:	
Respondent	:	

ORDER TO PETITIONER TO SHOW CAUSE
ORDER TO SUBMIT INFORMATION

This case is before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 815(d).

On September 11, 1997, the Secretary received the operator's notice of contest of civil penalties, a copy of which was filed with the Commission on September 18, 1997, and assigned the above-captioned docket number.

On November 6, 1997, the Solicitor on behalf of the Secretary mailed a petition for assessment of penalty for this case which was received at the Commission on November 10, 1997. There were no attached exhibits to the Solicitor's petition.

Commission rule 2700.28(a), 29 C.F.R. § 2700.28(a), requires the Secretary to file a penalty petition within 45 days of receipt of a contest of a penalty. Filing is effective upon mailing. 29 C.F.R. § 2700.5(d). The petition in this case should have been filed on October 27, 1997. Therefore, it is 10 days late and the Solicitor must explain why his petition was untimely.

Furthermore, Commission rule 2700.28(b) and (c), 29 C.F.R. § 2700.28(b) and (c), requires that the petition list the alleged violations and the proposed penalties, identify each violation by the number and date of the citation or order and the section of the Act or regulations alleged to be violated, and that a legible copy of each citation contested be attached. The penalty petition filed by the Solicitor does not contain this information. Therefore, the petition is incomplete and the Solicitor must provide the requisite information before this case can proceed.

This case is one of an increasing number of recent cases where the Secretary's representatives fail to attach required exhibits to the penalty petitions. These cases involve both Solicitors and CLRs. The Commission's filing requirements are easily understood and well known to the Secretary's representatives. However, the Commission's docket office is spending a great deal of time telephoning the Secretary's representatives to obtain the necessary documents. It is not the Commission's responsibility to continually remind the Secretary's representatives to furnish documentation necessary to perfect filing so that the cases can proceed. Henceforth, show cause orders will be issued in these cases.

In light of the foregoing, it is **ORDERED** that within 21 days the Solicitor show cause why this case should not be dismissed for untimely filing.

It is further **ORDERED** that within 21 days the Solicitor file the necessary information for his penalty petition to fulfill the requirements set forth in the Commission rules or show cause why this case should not be dismissed for inadequate filing.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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Mr. Robert L. Childress, President, Quapaw Company, P. O. Box 609, Stillwater, OK 74076

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