

JANUARY 1999

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JANUARY 1999

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

Consolidation Coal Company v. Secretary of Labor, MSHA, Docket No. WEVA 93-77-R.
(Judge Melick, December 2, 1998)

Island Creek Coal Company v. Secretary of Labor, MSHA, Docket No. VA 99-11-R.
(Judge Weisberger, December 22, 1998)

No cases were filed in which review was denied during the month of January:

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 13, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 99-62-M
	:	A.C. No. 03-01753-05504
WOLF CREEK SAND & GRAVEL	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On November 27, 1998, the Commission received from Wolf Creek Sand & Gravel ("Wolf Creek") a request to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Wolf Creek.

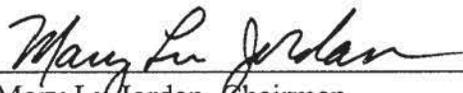
Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is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

Wolf Creek's motion consists of a November 6, 1998 letter to the Department of Labor's Mine Safety and Health Administration ("MSHA") requesting relief from the final orders. Mot. at 1. Attached to the letter are copies of MSHA's November 18 letter to Wolf Creek denying relief, the proposed assessments, and the citations related to the proposed penalties. In the November 6 letter, Syble Harris asserts that she is an employee of Wolf Creek who is responsible for "everything from answering the phone to doing the payroll." *Id.* Harris alleges that Wolf Creek's failure to file a hearing request to contest the proposed penalties for the four alleged

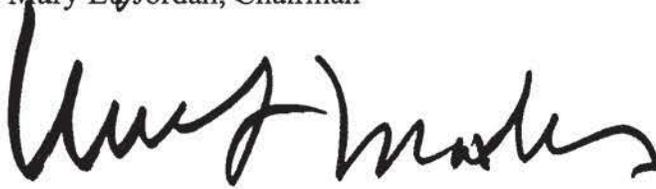
violations was due to the health problems of Ms. Harris's husband. *Id.* She submits that for approximately one month before the November 6 letter to MSHA was written, Ms. Harris and her husband spent "alot [sic] of time at the hospital having numerous tests made." *Id.* As a result, the operator, which assertedly is very small, failed to timely contest the proposed penalties.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g., Del Rio, Inc.*, 19 FMSHRC 467, 468 (Mar. 1997) (remanding final order when operator inadvertently misfiled hearing request card); *RB Coal Co.*, 17 FMSHRC 1110, 1111 (July 1995) (remanding final order when operator misplaced hearing request card); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996).

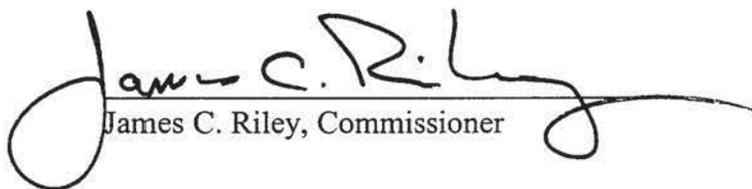
On the basis of the present record, we are unable to evaluate the merits of Wolf Creek's position.¹ In the interest of justice, we remand the matter for assignment to a judge to determine whether Wolf Creek has met the criteria for relief under Rule 60(b). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



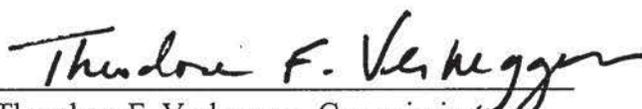
Mary Lu Jordan, Chairman



Marc Lincoln Marks, Commissioner



James C. Riley, Commissioner



Theodore F. Verheggen, Commissioner



Robert H. Beatty, Jr., Commissioner

¹ In view of the fact that the Secretary does not oppose Wolf Creek's motion to reopen this matter, Commissioner Marks concludes that the motion should be granted.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 13, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 99-70-M
	:	A.C. No. 03-01730-05519
BENTON COUNTY STONE, INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

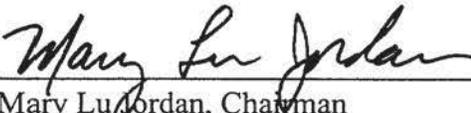
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On December 7, 1998, the Commission received from Benton County Stone, Inc. ("Benton County") a request to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Benton County.

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

In its request, Benton County contends that its failure to timely file a hearing request to contest a proposed penalty was due to a secretary's misfiling of the hearing request form. Mot. at 1. Benton County received the proposed penalty assessments on September 14, 1998. After locating the misfiled proposed penalties, the operator mailed the hearing request on November 16 to the Department of Labor's Mine Safety and Health Administration. By that time, however, the thirty-day deadline for submission of the request had already passed.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g., Essayons, Inc.*, 20 FMSHRC 786, 788 (Aug. 1998) (remanding final order when operator misplaced proposed penalty notification); *Del Rio, Inc.*, 19 FMSHRC 467, 468 (Mar. 1997) (remanding final order when operator inadvertently misfiled hearing request card); *RB Coal Co.*, 17 FMSHRC 1110, 1111 (July 1995) (remanding final order when operator misplaced hearing request card). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996).

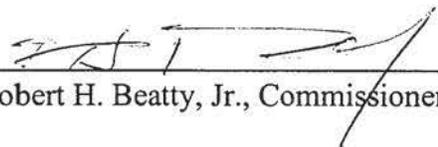
On the basis of the present record, we are unable to evaluate the merits of Benton County's position.¹ In the interest of justice, we remand the matter for assignment to a judge to determine whether Benton County has met the criteria for relief under Rule 60(b). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Mary Lu Jordan, Chairman


Marc Lincoln Marks, Commissioner


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner


Robert H. Beatty, Jr., Commissioner

¹ In view of the fact that the Secretary does not oppose Benton County's motion to reopen this matter, Commissioner Marks concludes that the motion should be granted.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 19, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 99-91-M
	:	A.C. No. 03-01769-05503
TIGUE CONSTRUCTION CO., INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Marks, Riley, Verheggen and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On December 28, 1998, the Commission received from Tigue Construction Company, Inc. ("Tigue") a request to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Tigue.

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

In its request, Tigue asserts that its failure to file a hearing request to contest the proposed penalties was due to the illness of company vice-president Freddy Tigue, who the request alleges "was to answer these charges." Mot. Tigue's request claims that Mr. Tigue felt chest pain and shortness of breath for two weeks prior to December 2, 1998, when he suffered from severe chest pain and was transported to a hospital. *Id.* The following day, Mr. Tigue underwent quadruple bypass surgery. *Id.* On December 17, Donny Teague, Mr. Tigue's son and president of the company, first learned that the hearing request had not been sent. *Id.* By that time, however, the

company, first learned that the hearing request had not been sent. *Id.* By that time, however, the proposed assessments had become final orders of the Commission.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g., Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996).

Here, the record indicates that Tigie intended to contest the proposed penalty assessments in this matter and that, but for the serious illness of its vice-president, it would have timely submitted the hearing request and contested the proposed assessments. In these circumstances, Tigie's failure to timely file a hearing request qualifies as "inadvertence" or "mistake" within the meaning of Rule 60(b)(1). *See Kenamerican Resources, Inc.*, 20 FMSHRC 199, 201 (Mar. 1998) (granting operator's motion to reopen when operator's failure to timely file hearing request was due to the recent surgery performed on its safety director); *Peabody*, 19 FMSHRC at 1614-15 (granting operator's motion to reopen when operator failed to submit request for hearing to contest proposed penalty due to lack of coordination between counsel and personnel at mine).

Accordingly, in the interest of justice, we grant Tigie's unopposed request for relief and reopen these penalty assessments that became final Commission orders. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



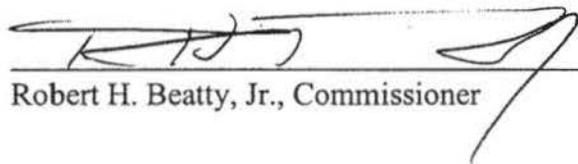
Marc Lincoln Marks, Commissioner



James C. Riley, Commissioner



Theodore F. Verheggen, Commissioner



Robert H. Beatty, Jr., Commissioner

Chairman Jordan, dissenting:

I would remand this case to a judge for the purpose of assessing the reliability of the evidence presented by the operator as to why it did not request a hearing in a timely manner. The operator has presented its explanation to us in the form of a letter. This constitutes hearsay, which admittedly is admissible in Commission proceedings. *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1135 (May 1984). However, the question as to whether hearsay evidence is reliable or probative is a "task . . . reserved to the judge's discretion in the first instance." *REB Enterprises, Inc.*, 20 FMSHRC 203, 206 (Mar. 1998). I am mindful that the operator is pro se, and that the Secretary does not object to its motion. Nonetheless, I would remand to a judge for this initial determination, which is clearly not within the province of a reviewing body.


Mary Lu Jordan, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 27, 1999

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

v.

EAGLE ENERGY, INC.

:
:
:
:
:
:
:

Docket No. WEVA 99-28
A. C. No. 46-07711-03679

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On December 4, 1998, the Commission received from Eagle Energy, Inc. ("Eagle Energy"), a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). While the Secretary of Labor does not oppose Eagle Energy's motion requesting relief under Fed. R. Civ. P. 60(b), the Secretary opposes Eagle Energy's alternative argument that the operator timely filed the notice of contest ("green card").

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

Eagle Energy submits that its failure to timely contest Citation No. 7163791 was due to the operator's reliance on a statement made by an MSHA representative. E. Mot. at 2. Citation No. 7163791 alleged a violation of 30 C.F.R. § 70.101 (regulating the level of respirable dust in underground coal mines when quartz is present) and was issued after a single air sample was collected by the Department of Labor's Mine Safety and Health Administration ("MSHA"). Eagle Energy states that it received the proposed penalty assessment related to Citation No. 7163791 on October 7, 1998. *Id.* It alleges that, on October 13, MSHA District IV Manager Pat

Brady stated at an MSHA "Problem Solving Seminar" that "all citations issued under the single sample collection method would be vacated by MSHA." *Id.* The operator contends that, on November 6, 1998, at a meeting at the MSHA Office in Mt. Hope, West Virginia, Larry Ward, Eagle Energy's vice president, asked Brady why the citation had not been vacated. *Id.* Brady responded that he had "not 'correctly read the memo'" when he made the October 13 statement, and informed Ward that "the citations must be first contested and then MSHA would vacate the citations." *Id.* However, by November 6, the date Eagle Energy learned that it was required to contest the citation before it could be vacated, the proposed penalty had already become a final order of the Commission. Eagle Energy asserts that the Commission may treat its failure to timely contest the proposed penalty as excusable neglect under Rule 60(b)(1). *Id.* at 5.

In the alternative, Eagle Energy submits that its notice of contest was timely filed. *Id.* The operator argues that, because it filed its notice of contest by mail, five days should have been added to the time allowed for it to respond to MSHA's proposed penalty — which was received on October 7 — pursuant to Commission Procedural Rule 8.¹ *Id.* The operator thus requests the Commission to read Procedural Rules 8 and 5(d) — which states that filing is effective upon mailing (29 C.F.R. § 2700.5(d)) — together and consider the November 10 mailing of its notice of contest timely. *Id.* at 6.

The Secretary takes exception to Eagle Energy's alternative grounds for relief. She asserts that, pursuant to section 105(a) of the Mine Act, the citation and proposed penalty became a final order of the Commission on November 6, 30 days after the date Eagle Energy received the proposed penalty. S. Response at 1-2 (citing 30 U.S.C. § 815(a)). The Secretary also requests that, should the Commission grant Eagle Energy's request to reopen, the order be narrowly tailored to affect only Citation No. 7163791 and the related penalty since the operator offers no basis for relief from the two other citations contained in the relevant Proposed Assessment Form. *Id.* at 2.

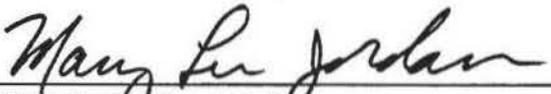
We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We also have observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925

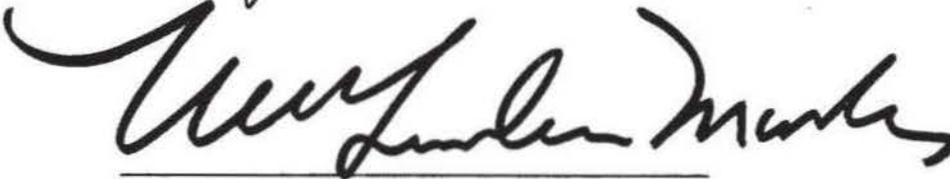
¹ Procedural Rule 8 provides in pertinent part: "When service of a document is by mail, 5 days shall be added to the time allowed by these rules for the filing of a response or other documents." 29 C.F.R. § 2700.8.

(Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

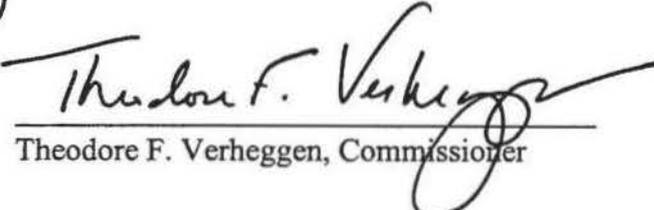
The record indicates that Eagle Energy intended to contest Citation No. 7163791, and that, but for its reliance upon an MSHA representative's assertion, it likely would have contested the proposed penalty. It appears from the green card belatedly filed with MSHA that Eagle Energy did not intend to contest the penalties proposed for two other citations in the same proposed assessment. *See Ex. 4.* In the circumstances presented here, Eagle Energy's late filing of a hearing request may be considered inadvertence or excusable neglect within the meaning of Rule 60(b)(1). *See National Lime & Stone*, 20 FMSHRC at 924-25 (reopening matter when operator's late filing of hearing request was due to mutual misunderstanding between counsel for the operator and counsel for MSHA as to need to challenge penalty assessment prior to judge's approval of parties' settlement); *Stillwater*, 19 FMSHRC at 1022-23 (granting operator's motion to reopen when operator failed to submit request for hearing to contest proposed penalty due to lack of coordination between recipient of assessment at mining facility and its attorneys, after indicating intent to contest related citation).

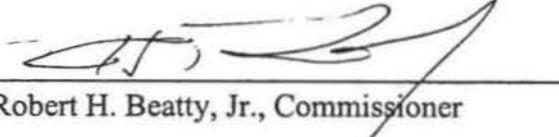
Accordingly, in the interest of justice, we reopen this penalty assessment that became a final order with respect to Citation No. 7163791.² Further, in the interest of expeditious resolution of this matter, we hereby direct the Chief Administrative Law Judge to order the Secretary to show cause within 14 days of the date of his order why Citation No. 7163791 and the related civil penalty should not be vacated. *See Keystone Coal Mining Corp.*, 16 FMSHRC 6, 16 (Jan. 1994); *National Mining Association v. Secretary of Labor*, 153 F.3d 1264, 1269 (11th Cir. 1998).


Mary Lu Jordan, Chairman


Marc Lincoln Marks, Commissioner


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner


Robert H. Beatty, Jr., Commissioner

² Given our disposition, we do not reach Eagle Energy's alternative argument that its November 10, 1998 mailing of its notice of contest was timely.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

January 28, 1999

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

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Jordan, Chairman; Marks, Riley, and Beatty, Commissioners

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). Austin Powder Company ("Austin Powder") and its foreman Bruce Eaton (collectively "Petitioners") seek review of Chief Administrative Law Judge Paul Merlin's decisions holding that Austin Powder violated 30 C.F.R. § 56.15005,¹ that the violation was significant and substantial ("S&S"), that Eaton is liable for the violation under Mine Act section 110(c), 30 U.S.C. § 820(c), and that a penalty assessment of \$6,000 against Austin Powder is warranted. 18 FMSHRC 1878 (Oct. 1996) (ALJ); 18 FMSHRC 2197 (Dec. 1996) (ALJ). For the following reasons, we affirm the judge's decisions.

I.

Factual and Procedural Background

On the morning of July 13, 1994, Austin Powder was conducting drilling and blasting operations at the Lynn Sand and Stone Quarry, a large stone quarry in Lynn, Massachusetts,

¹ Section 56.15005 provides in pertinent part that "[s]afety belts and lines shall be worn when persons work where there is danger of falling"

pursuant to a contract with Bardon Trimount, the quarry operator. 18 FMSHRC at 1882; Tr. 14. Guy Constant, a mine inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), accompanied by Robert Dow, then an inspector trainee, arrived at the quarry to conduct a follow-up inspection. 18 FMSHRC at 1882; Tr. 13, 101. The two inspectors sought out Bardon Trimount miners' representative Douglas Gallant, in order to afford him the opportunity to accompany them. 18 FMSHRC at 1882-83; Tr. 14-15. At the time, Gallant was involved as lead laborer in pumping ground water from bore holes in a level of the quarry, or "bench," prior to blasting.² 18 FMSHRC at 1882; Tr. 15-16.

Both Constant and Dow testified that, upon arriving at the blast site and while still in their car, they observed Gallant, along with Austin Powder foreman Eaton, the certified blaster in charge, and Jeffrey Allard, an Austin Powder laborer, all standing approximately 1-1/2 feet from the edge of the quarry highwall. 18 FMSHRC at 1882-83. At that point the inspectors were approximately 50 feet from the highwall. Tr. 23. Although the highwall edge was approximately 55 feet above the quarry floor, the three miners were not wearing safety belts or lines. 18 FMSHRC at 1881; Tr. 17.³ The inspectors cited Austin Powder for an S&S and unwarrantable violation of section 56.15005. 18 FMSHRC at 1880. The inspectors also issued Austin Powder an imminent danger order, which was not contested, and cited Bardon Trimount for Gallant's participation in the violation. Tr. 48, 54, 97.

At the hearing, Dow testified that Gallant, who he believed was positioning a hose to be used in dewatering the mine, was located between the highwall and a forklift that had been used to transport the pump, straddling a bore hole, with the rear of his body protruding over the highwall edge. 18 FMSHRC at 1882; Tr. 171.⁴ Constant agreed, stating that Gallant was bent over with his back to the highwall, facing the forklift and the dewatering unit. 18 FMSHRC at 1883. Dow testified that Eaton was standing to the right of Gallant, holding the discharge hose with his back to the edge of the highwall. *Id.* at 1882. Constant corroborated Dow's testimony as to Eaton's location. *Id.* at 1883. Dow stated that Allard was a couple of feet from Eaton and further away from Gallant, facing the equipment. *Id.* at 1882-83. Constant testified that Allard was 2 feet away from Eaton. *Id.* at 1883.

² At the Lynn quarry, when there was over 5 feet of water in a blast hole, the water was removed by means of a submersible dewatering pump and a discharge hose. Tr. 21, 172-73, 246.

³ The only safety belt and line at the blast site was in Eaton's vehicle. 18 FMSHRC at 1881. Eaton testified that earlier that morning he wore that belt, with the line tied to a "deadman," while checking the depth of water in the row of holes closest to the highwall edge. Tr. 250-51. A "deadman" is an anchor buried in the ground. American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 146 (2d ed. 1997).

⁴ The bore holes, which were 6 inches in diameter, were in two rows in that area: the first between 1-1/2 and 5 feet from the highwall edge, and the other 11 to 15 feet further back. Tr. 26, 193-94, 251, 271-72, 274.

Both inspectors also testified that, while Constant was parking the car near the back of the bench, Dow, following Constant's instructions, got out of the car, yelled to the miners, and motioned for them to come back from the edge. *Id.* at 1884; Tr. 107-08. According to the inspectors, the miners retreated 25 feet from the edge to talk with the inspectors. 18 FMSHRC at 1884.

Gallant, Eaton, and Allard all disagreed with the inspectors' accounts. According to Gallant, when the inspectors arrived the dewatering process had not yet begun, as he and Eaton had not yet discussed what holes needed dewatering. Tr. 223. However, Eaton stated that by that time they had discussed the matter, that Gallant had decided which hole to dewater first, and that Austin Powder laborer Ron Wilcox was checking the depth of the water in that hole. Tr. 245-47, 263. Allard testified that his back was turned at this time, but that he believed Gallant and Eaton were preparing to submerge the head of the pump in the first hole, and Gallant, who was on the side of the forklift where the controls were, was asking Eaton, who was on the other side, if he was ready. Tr. 171-74, 202.

Gallant testified that he was 10 to 15 feet from the edge, facing the highwall, when the inspectors arrived. 18 FMSHRC at 1883. Eaton estimated his distance from the edge at that time as between 8 and 10 feet, and denied that part of Gallant's body was over the edge. *Id.* Allard testified that, when their work was interrupted by the inspectors, he was facing the edge, holding the dewatering hose that he had unwound from the reel attached to the pump and thrown over the edge of the highwall to discharge the water. *Id.* at 1884; Tr. 196-200. On direct examination Allard estimated he was 12 to 15 feet from the edge (Tr. 180, 182-83), but on cross-examination extended that estimate to 18 feet. Tr. 199-201. He also stated that he, Gallant, and Eaton were the same distance from the edge. Tr. 182.

The miners also differed with the inspectors over what exactly occurred when the inspectors arrived on the scene. While Allard was not in a position to testify regarding the inspectors' actions, Gallant and Eaton stated that it was inspector Constant who first headed toward them, motioning to them, and that he was followed by Dow. 18 FMSHRC at 1884-85. Gallant and Eaton also testified that they were not told by the inspectors that they were too close to the highwall edge. *Id.*

The judge, after finding the two inspectors' testimony to be consistent, and comparing it to the testimony of the three miners, who he found to have "often changed their testimony and contradicted each other," credited the inspectors' account of events. *Id.* at 1883-85. The judge went on to hold that, "[i]n view of the proximity of Gallant and Eaton to the edge, the positions of their bodies with backs to the edge, Gallant's stance astride the hole, and the activities both men were performing, . . . a reasonably prudent person would have recognized the danger of falling," and thus a violation of section 56.15005 was established. *Id.* at 1886.

The judge also found the violation S&S, given the miners' proximity to the edge of the highwall, the nature of the activities in which they were engaged, the danger of falling, and the

likely severity of injuries resulting from such a fall. *Id.* at 1887. Focusing on Eaton's knowledge of the presence of the highwall and of the safety belt requirement, the judge further concluded that negligence and aggravated conduct on Eaton's part had been established and that Eaton's behavior had put the other miners at risk. *Id.* at 1887-88. The judge consequently found an unwarrantable failure under section 104(d)(1) of the Mine Act, and assessed a penalty of \$6,000 against Austin Powder. *Id.* at 1888.

With regard to Eaton's liability under section 110(c), the judge concluded that there could "be no doubt that Mr. Eaton acted in a knowing and intentional manner, because he knew that he and the others were standing dangerously close to the edge and that under such conditions safety belts should have been worn. Clearly, his conduct was aggravated and exceeded ordinary negligence." *Id.* at 1888-89. A penalty of \$400 was assessed against Eaton. *Id.* at 1889.

Austin Powder and Eaton petitioned the Commission for review of the judge's decision. The Commission granted that petition in part, limiting review to "the issue of whether the judge erred by affirming the citation as one issued under section 104(d)(1)." Unpublished Direction for Review, dated December 10, 1996. In a subsequent decision, the Commission noted that, while the citation was originally issued under section 104(d)(1), it had later been modified to delete the unwarrantability allegation and reflect a charge under section 104(a). 18 FMSHRC 2105, 2105 (Dec. 1996). Because the judge did not mention these modifications in his initial decision, the Commission vacated his decision and remanded for a determination of "the appropriate designation for the citation and whether any penalty reassessment is warranted." *Id.* at 2106.

On remand, the judge vacated his finding of unwarrantable failure and affirmed his penalty assessments on the ground that his previous finding of very high negligence remained unchanged. 18 FMSHRC at 2197-98. The Commission subsequently granted Austin Powder and Eaton's PDR challenging both the judge's original decision and his decision on remand.

II.

Disposition

Petitioners contend that the determination of a section 56.15005 violation is flawed by the judge's erroneous credibility finding in favor of the Secretary's witnesses, maintaining that there is only slight or dubious evidence to support that finding. Pet'r Br. at 11-20. They also argue that, if the judge's credibility finding is overturned, so should his S&S determination. *Id.* at 20-21. Petitioners claim that, because the judge was originally mistaken that there was an unwarrantable failure charge, and based Austin Powder's penalty in part on aggravated conduct, he erred in not reducing the penalty on remand. *Id.* at 28-29. Petitioners also maintain that one of the findings on which the judge based the penalty — high negligence — is not supported by substantial evidence. *Id.* at 29. Petitioners further contend that the section 110(c) charge against Eaton cannot stand because there was no corresponding unwarrantable failure charge against the

operator, and that, in any case, the judge's section 110(c) determination is also not supported by substantial evidence. *Id.* at 24-28.

The Secretary responds that the changing nature of the miners' testimony and the contradictions among their versions of events support the judge's decision to credit the inspectors' testimony. S. Br. at 12-24. The Secretary argues that, because Petitioners' challenge to the S&S finding depends on the outcome of their attack on the credibility determination, it too must fail. *Id.* at 24. The Secretary contends that, by not raising the argument before the judge, Petitioners have waived Eaton's assertion that the section 110(c) charge cannot stand in the absence of a corresponding unwarrantable failure charge against the operator. *Id.* at 27. Alternatively, she asserts that an unwarrantable failure finding against an operator is not a prerequisite to holding an individual liable under section 110(c), and that the judge properly determined that Eaton was liable under section 110(c). *Id.* at 27-33. The Secretary also contends that, even without a finding of unwarrantable failure, the penalty the judge assessed against Austin Powder is supported by his finding of high negligence on Eaton's part. *Id.* at 33-35.

A. Violation of Section 56.15005

The question of violation hinges on whether the judge properly credited the inspectors over the miners regarding where the miners were positioned in relation to the highwall when the inspectors arrived at the blast site. On review, the judge's decision to credit the testimony of the inspectors is entitled to great weight and may not be overturned lightly. *See Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). While the Commission will not affirm credibility determinations if they are self-contradictory or if there is no evidence or dubious evidence to support them, it will not reject a judge's credibility choices merely because it would have made different ones if the matter was before it de novo. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878, 1881 n.80 (Nov. 1995), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998) ("*Dust Cases*"); *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989). As an appellate body, the Commission "must be especially reluctant to set aside a finding based on the trial judge's evaluation of conflicting oral testimony." 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2586, at 579 (2d ed. 1995).

We reject Petitioners' request to overturn the judge's decision to credit the inspectors over the miners, as they have failed to offer "compelling reasons to take the 'extraordinary step' of reversing the judge's credibility determination." *See Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1516 (Sept. 1997) (quoting *Hall v. Clinchfield Coal Co.*, 8 FMSHRC 1624, 1629 (Nov. 1986)). The parties disagree over whether the judge erred in finding inconsistencies in Allard's and Eaton's testimony regarding how close to the high wall edge each was, as well as among the three miners' descriptions of how far along in the dewatering process they were when the inspectors arrived. *See* Pet'r Br. at 12-18; Pet'r Reply Br. at 2-9; S. Br. at 12-19. Those, however, are not the only inconsistencies the judge cited as grounds for discrediting the miners;

he found other inconsistencies in “fundamental[]” elements of their account of events. See 18 FMSHRC at 1885. For example, the judge found that the miners could not agree on whether Allard was involved in the dewatering process when the inspectors arrived. *Id.* at 1884. Allard testified that he was, and that he was holding the discharge hose in advance of pumping. *Id.* Gallant, however, testified that Allard was not near the hole they were preparing to dewater, as he had told Allard to stay by the Austin Powder blast truck, which was approximately 60 feet away from the dewatering operation. *Id.*; Tr. 25, 228-29.

Similarly, the judge based his decision to discredit the miners’ accounts in part on their disagreement regarding whether Wilcox was involved in the alleged violation. 18 FMSHRC at 1884. The parties stipulated that Wilcox was on the site, but not involved in the violation, as inspector Dow placed him at the Austin Powder blast truck as well. *Id.* at 1881; Tr. 25. Gallant did not mention Wilcox in his testimony, and Allard could not place him at the hole they were preparing to pump out. 18 FMSHRC at 1884. Yet Eaton testified that Wilcox was at the hole, running a tape down to find its depth. *Id.*

Petitioners do not dispute the judge’s reading of the record on these subjects, but instead characterizes the miners’ disagreements regarding the location of Allard and Wilcox as a “minor fact.” Pet’r Br. at 18. However, because of the judge’s “superior position to appraise and weigh the testimony” (*Federal Practice and Procedure* § 2586, at 579-82), we do not agree that he abused his discretion by discrediting the miners based on their inability to agree on which miners were present when the inspectors arrived. The concept of “[c]redibility . . . comprehends an overall evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence.” *Id.* at 578-79 (emphasis added); see also *Carbo v. United States*, 314 F.2d 718, 749 (9th Cir. 1963). Consequently, while a judge may credit a witness despite minor inconsistencies in his testimony,⁵ a judge does not abuse his discretion in making an adverse credibility finding based on inconsistencies the judge considers central to the issue before him.

Here, the miners’ inability to agree on whether two, three, or four miners were present when the inspectors arrived — a basic element of their account of events — is more than sufficient to support the judge’s decision to discredit their accounts of what was occurring at that time. See *Metric Constructors, Inc.*, 6 FMSHRC 226, 232 (Feb. 1984) (refusing to overturn judge’s credibility determination based upon lack of consistency in testimony), *aff’d*, 766 F.2d 469 (11th Cir. 1985). Accordingly, there is no need to address other inconsistencies found by the judge in the miners’ testimony that Petitioners assert are based upon the judge’s misinterpretation of that testimony.⁶

⁵ See *United States v. Harty*, 930 F.2d 1257, 1266 (7th Cir. 1991) (refusing to reverse credibility determination despite minor inconsistencies in testimony because “[minor] inconsistencies in testimony . . . are inadequate to make it incredible”).

⁶ Petitioners also argue that the inspectors’ account of events was not as consistent as the judge found, contending that the judge failed to consider that the two inspectors’ testimony

In addition, the judge did not credit the inspectors over the miners simply because he found the inspectors' testimony more consistent. He also took the witnesses' demeanor into account in determining credibility. See 18 FMSHRC at 1885 (crediting inspectors over miners "[a]fter observing and listening to the witnesses and upon a review of the entire record"). The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he is ordinarily in the best position to make a credibility determination." *Dust Cases*, 17 FMSHRC at 1878 (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)). Consequently, we reject Petitioners' request to reverse the judge's decision to credit the inspectors over the miners, and affirm the finding of violation.

B. Significant and Substantial

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. See *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

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

Petitioners contend that if the judge's credibility determination is overturned with respect to the question of the miners' proximity to the highwall, so should his S&S determination,

differed on what each could see at various times when they arrived at the site, and citing differences between statements the two inspectors originally gave regarding the actions they took in removing the miners and their subsequent testimony on the subject. Pet'r Br. at 18-19. We agree with the Secretary that the different vantage points of each inspector adequately explains the differences between their testimony, and that the inspectors' brief prior statements are only inconsistent to the extent that the statements were not as specific as the inspectors' later oral testimony. See S. Br. at 19-22.

because there no longer will be support for the judge's finding that there was a danger of falling. Pet'r Br. at 21. The sole S&S issue on review is thus inextricably tied to the finding of violation. Having affirmed the judge's finding of violation, we also affirm the judge's S&S determination.⁷

C. Section 110(c) Liability

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c).

1. Lack of an Accompanying Unwarrantable Failure Charge

Section 113(d)(2)(A)(iii) of the Mine Act provides that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii); accord 29 C.F.R. 2700.70(d). See generally *Shamrock Coal Co.*, 14 FMSHRC 1300, 1304 (Aug. 1992); *Shamrock Coal Co.*, 14 FMSHRC 1306, 1312-14 (Aug. 1992); *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (Aug. 1992). Despite failing to raise the issue before the judge, Petitioners request that we decide whether Eaton can be found individually liable for violating section 56.15005 even though Austin Powder's violation of the standard was not formally adjudicated unwarrantable. Pet'r Br. at 24-26.

In attempting to show the required "good cause," Petitioners make two somewhat contradictory arguments. First, they maintain that we should reach the issue because it is a legal one that can be decided on the record as it presently exists. Pet'r Reply Br. at 11. Even if that were true, however, that does not necessarily establish "good cause." The Commission has consistently held "that parties in Mine Act cases must first present their evidence *and advance their legal theories* before the judge, and not for the first time on appeal." *Shamrock Coal Co.*,

⁷ Commissioner Marks agrees that this violation is S&S. However, for the reasons set forth in his concurring opinions in *United States Steel Mining Co.*, 18 FMSHRC 862, 868-75 (June 1996), and *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 240 (Feb. 1997), he believes that the ambiguous language of the Commission's *Mathies* test, 6 FMSHRC at 3-4, should be replaced with a clear test that is consistent with Congressional intent. On February 5, 1998, MSHA issued a lengthy Interpretative Bulletin, setting forth a new agency interpretation of S&S and announcing that MSHA would challenge the Commission's narrow interpretation of S&S. 63 Fed. Reg. 6012 (1998). However, on April 23, 1998, MSHA suspended that Interpretative Bulletin with little explanation. *Id.* at 20,217. For the past six months, Commissioner Marks has been calling on the Secretary to advise him as to whether she is ever going to pursue her initial attempt to challenge the *Mathies* test and, thus far, the Secretary has refused to comment on the issue. Commissioner Marks again requests that the Secretary advise him on the S&S issue.

14 FMSHRC at 1304 (emphasis added); *Shamrock Coal Co.*, 14 FMSHRC at 1314 (emphasis added); *Beech Fork*, 14 FMSHRC at 1321 (emphasis added).

Petitioners also argue that we should decide the issue because it is “so closely related to and intertwined with [their] constant position throughout this case that” the evidence to support section 110(c) liability is insufficient. Pet’r Reply Br. at 11-12. We disagree. The question whether substantial evidence⁸ supports the judge’s section 110(c) finding is an entirely separate issue from whether Eaton can be held liable under section 110(c) without an accompanying unwarrantable failure charge against Austin Powder. In sum, because it was not raised before the judge, we will not consider Petitioners’ claim that an absence of an unwarrantable failure determination against the operator precludes a finding of section 110(c) liability against an individual.

2. Substantial Evidence

The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff’d on other grounds*, 689 F.2d 632 (6th Cir. 1982); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove only that an individual knew or had reason to know of the violative conditions, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). A knowing violation occurs when an individual “in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition.” *Kenny Richardson*, 3 FMSHRC at 16.

We are not persuaded by Petitioners’ contention that, even if the three miners were momentarily too close to the edge of the highwall, no more than ordinary negligence on supervisor Eaton’s part was established. Pet’r Br. at 27.⁹ The judge found, and Petitioners do

⁸ When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

⁹ Petitioners also contend that Eaton cannot be found liable under section 110(c) because of his testimony disputing the inspectors’ account that the three miners were working close to the edge. *See* Pet’r Br. at 27-28. The judge, however, discredited that testimony, and we have already held that we will not overturn that determination.

not dispute, that Eaton knew that safety belts are required by regulation when miners are working as close to the highwall edge as the judge found the three miners were in this instance. 18 FMSHRC at 1887, 1888.¹⁰ The judge also found that all three miners were dangerously close to the edge when spotted by the inspectors. *Id.* at 1885, 1888. The judge consequently concluded that Eaton knew how close to the edge he and the other miners were working, and that under such conditions safety belts should have been worn. *Id.* at 1887, 1888. Because the judge found Eaton's conduct "aggravated," we reject Petitioners' request to reverse the section 110(c) determination based on the judge's purported reliance on the impermissible criterion of "high negligence" in determining section 110(c) liability. *See* Pet'r Br. at 26 (citing *Freeman*, 108 F.3d at 360, 364 (rejecting finding of "high negligence" as sufficient by itself to support section 110(c) liability)). "[A]ggravated conduct" is the accepted test for section 110(c) liability. *See BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992) (cited approvingly in *Freeman*, 108 F.3d at 364). Accordingly, the judge's rationale contains the necessary elements, allowing us to affirm his determination that Eaton's failure to protect miner safety, despite his knowledge of the existence of a serious hazard, constituted aggravated conduct. *See* 18 FMSHRC at 1887.

D. Penalty Assessment

The Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the six penalty criteria set forth in section 110(i),¹¹ as well as the deterrent purpose of the Act. *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984).

¹⁰ Indeed, as noted above, Eaton admitted that he had worn a safety belt and line earlier that morning while checking the depth of water in the row of holes closest to the highwall edge. Tr. 250-51.

¹¹ Those six criteria are:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

Here, the sole penalty criterion in dispute is Austin Powder's negligence. The operator contends that, because the judge based his penalty assessment, in part, on the finding of aggravated conduct that he made in support of his prior determination that the violation of section 56.15005 was unwarrantable, on remand he should have reduced the penalty to reflect that the violation was no longer considered unwarrantable. Pet'r Br. at 28-29. However, we vacated the unwarrantable determination only because the Secretary had modified the citation to delete the unwarrantable failure charge. 18 FMSHRC at 2105-06. The judge's original findings regarding the conduct leading to the violation remained undisturbed on remand, despite the fact that there was no longer an unwarrantable failure allegation at issue. Consequently, in vacating the unwarrantable failure charge, we did not require the judge to find a lower level of negligence or reduce his earlier penalty assessment.

Petitioners also contend that, because substantial evidence does not support the judge's negligence finding, Austin Powder's penalty should be reduced. Pet'r Br. at 29. Again, Petitioners rely only upon the testimony of the miners that they were farther from the highwall than the inspectors claimed. Because we have found no basis to overturn the judge's decision to discredit that testimony, we affirm the judge's negligence finding and his assessment of a \$6,000 penalty against Austin Powder.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determinations that Austin Powder violated section 56.15005, that the violation was S&S, and that Eaton is liable under Mine Act section 110(c) for the violation, and sustain the \$6,000 penalty assessed against Austin Powder.



Mary Lu Jordan, Chairman



Marc Lincoln Marks, Commissioner



James C. Riley, Commissioner



Robert H. Beatty, Jr., Commissioner

Commissioner Verheggen, concurring:

I agree with all of my colleagues' decision except Part II.C.1. I would reach the issue of whether Eaton can be found liable under section 110(c) in the absence of a finding that his employer's conduct amounted to an unwarrantable failure to comply with section 56.15005. I also write separately to offer my views on the proper bases for a finding of liability under section 110(c), an area of Commission law I find in need of further clarification.

1. Is a Finding of Unwarrantable Failure a Prerequisite to Section 110(c) Liability?

For the first time in these proceedings, Eaton contends in his appeal to the Commission that the section 110(c) charge against him is not valid because there was no corresponding unwarrantable failure charge against the operator. Pet'r Br. at 24-28. Generally, the Commission may not consider any "assignment of error by any party . . . on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii). This general rule is qualified, however, by a "good cause shown" exception. *Id.* The issue is thus whether good cause exists to consider the issue, which I view as the simple question of whether a charge of unwarrantable failure is a condition precedent to a charge being brought against an individual under section 110(c).

I believe good cause exists to consider this question. The parties have fully briefed the issue and should be given an answer to the simple legal question presented — which is, in fact, narrow, easily addressed, and capable of being resolved on the present record. I also believe it is unfortunate that, in failing to answer this question, the cloud of a "technicality" that could be easily resolved now hangs over my colleagues' decision finding Eaton personally liable. Finally, I note that this case has a rather odd procedural history that has resulted in a substantive anomaly. In his original decision, the judge essentially based his finding of section 110(c) liability on his finding of unwarrantable failure. *See* 18 FMSHRC at 1887-88 ("Eaton's . . . unwarrantable failure . . . is attributable to the operator"). But the Commission reversed his finding of unwarrantable failure because the Secretary withdrew this charge early on in the proceedings. 18 FMSHRC at 2105. On remand, the Commission should have directed the judge to revisit his section 110(c) finding — but neglected to do so. Nor did the judge address Eaton's liability in his remand decision. Thus, we are left with a finding of section 110(c) liability that is deficient insofar as it is based on an unwarrantable failure finding that was overturned.¹ Given this procedural and substantive confusion, I believe we should afford the parties every opportunity to raise issues concerning Eaton's liability in the instant appeal. I would thus reach Eaton's contention.

¹ Under different facts, such a deficiency could very well necessitate a remand. But here, I believe the record compels a finding of individual liability, making remand unnecessary. *American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993).

As to whether section 110(c) liability must be predicated upon a finding of unwarrantable failure, I begin with the plain terms of section 110(c). The first inquiry in statutory construction is “whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If a statute is clear and unambiguous, effect must be given to its language. *See id.* at 842-43. Here, section 110(c) provides that “any director, officer, or agent of [a] corporation who knowingly authorized, ordered, or carried out [a Mine Act] violation . . . shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a [corporation].” 30 U.S.C. § 820(c). Since there is no requirement in the Act that the violation upon which individual liability is based be unwarrantable, Eaton’s contention is inconsistent with the Act’s plain language. I would thus reject his argument.

2. The Bases of Section 110(c) Liability

It is well established that section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. Slip op. at 10 (citing *BethEnergy Mines*, 14 FMSHRC at 1245). Similarly, the Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). But the Commission has never distinguished between these two holdings and explained what the term “aggravated conduct” means in the context of section 110(c) — a gap in Commission jurisprudence that I believe needs to be addressed.

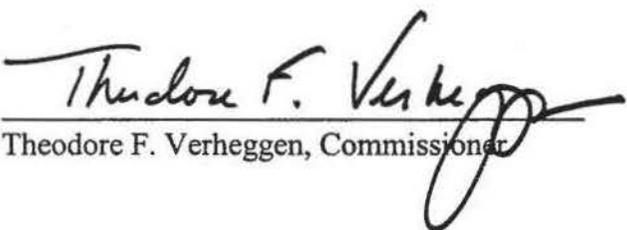
Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the extent of the violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, and the operator’s knowledge of the existence of the violation. *See Cyprus Emerald Resources Corp.*, 20 FMSHRC 790, 813 (Aug. 1998); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). Obviously, these factors need to be viewed in the context of the factual circumstances of a particular case — some factors may be irrelevant to a particular factual scenario. But all of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated — or whether the level of the actor’s negligence should be mitigated.

The judge’s original decision collapses the analysis of Eaton’s liability under section 110(c) and Austin Powder’s purported unwarrantable failure. Had the Secretary not withdrawn her unwarrantable failure allegation, I do not believe that the judge’s approach would necessarily have been inappropriate because I believe that the two inquiries are very similar. It is up to the Secretary to decide how to prosecute “aggravated conduct” in a particular case — either that of an individual alone, or of an operator, or both. But a similar analytic approach should be used to

determine whether an individual or operator has engaged in “aggravated conduct” — in addition to determining whether the individual knew or had reason to know of the violative condition. *See Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997).

I believe that the record in this case compels a finding of aggravated conduct. First, I rely on the judge’s finding that Eaton knew that he and others were working dangerously close to the edge of the highwall under conditions that necessitated the use of safety belts. 18 FMSHRC at 1887, 1888. I agree with my colleagues that this finding is supported by substantial evidence. Slip op. at 9-10. In addition, I find that substantial evidence supports the judge’s findings that the violation was serious and posed a high degree of danger, 18 FMSHRC at 1887 (finding a reasonable likelihood of serious injury); that the nature of ground conditions “enhanced [the] risk of falling,” *id.* at 1886, 1887; and that “Eaton’s behavior put others at risk,” *id.* at 1888. Moreover, I note that the parties stipulated that only one safety belt and line was available to Eaton and his coworkers. *Id.* at 1881. Taken together, all these facts and circumstances compel me to find that Eaton’s conduct was aggravated and that the judge properly found him liable under section 110(c).

Finally, although I believe that the judge provided little by way of an analysis of Eaton’s liability, *see The Anaconda Co.*, 3 FMSHRC 299, 302 (Feb. 1981), given the paucity of Commission guidance on what “aggravated conduct” means under section 110(c), I find it understandable that the judge went no further than he did. This case presents the opportunity to tell our judges not only that we need a bit more, but what that “more” needs to be.²


Theodore F. Verheggen, Commissioner

² I note that in assessing a penalty, the judge made no explicit finding under section 110(i) on the gravity of the violation. He did, however, find the violation S&S, which is essentially a finding of high gravity. I believe that the Commission, in affirming the judge’s penalty assessment (slip op. at 11), should enter such a finding based on the judge’s uncontested S&S finding. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1153 (7th Cir. 1984) (“the Commission’s entering of undisputed record information as findings [is] proper under the [Mine] Act”).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 29, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. WEST 93-336-DM
ADMINISTRATION (MSHA)	:	WEST 93-337-DM
on behalf of JAMES HYLES,	:	WEST 93-338-DM
DOUGLAS MEARS, DERRICK	:	WEST 93-339-DM
SOTO, and GREGORY DENNIS	:	WEST 93-436-DM
	:	WEST 93-437-DM
v.	:	WEST 93-438-DM
	:	WEST 93-439-DM
ALL AMERICAN ASPHALT	:	WEST 94-021-DM

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Jordan, Chairman; Marks, Riley and Beatty, Commissioners

These discrimination proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), are before the Commission for a second time on cross-petitions for discretionary review filed by All American Asphalt ("AAA") and the Secretary of Labor. Both parties seek review of a decision on remand by Administrative Law Judge August Cetti involving two layoffs of miners James Hyles, Douglas Mears, Derrick Soto, and Gregory Dennis. In his first decision in this proceeding, the judge found that a failure to recall the complainants following a 1992 layoff and a subsequent layoff in 1993, after complainants had been reinstated, were discriminatory and violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c). 16 FMSHRC 2232 (Nov. 1994) (ALJ). The Commission granted AAA's petition for discretionary review of the judge's decision, and the Secretary thereafter moved to remand the case to the judge for further findings and conclusions. The Commission issued its decision in which it vacated the judge's decision and remanded the case for further consideration. 18 FMSHRC 2096 (Dec. 1996) ("*All American Asphalt I*"). The judge subsequently issued his second decision, in which he concluded that AAA's failure to recall the complainants following the 1992 layoff was violative; however, he reversed his prior determination that the 1993 layoff violated the Act. 19 FMSHRC 855 (May 1997) (ALJ). The

Commission granted petitions for discretionary review (“PDRs”) of the judge’s remand decision filed by AAA and the Secretary.

For the reasons that follow, we affirm the judge’s determination that AAA’s refusal to recall the complainants following the July 1992 layoff violated section 105(c) of the Mine Act. However, we reverse the judge’s determination that the March 1993 layoff did not violate section 105(c).

I.

Factual and Procedural Background

AAA is a general contractor in Corona, California that operates an asphalt plant, a quarry, and a plant that produces rock-based aggregates for its own use and for sale to other contractors. Tr. 1136-39. In April 1991, AAA was in the process of completing an addition to its rock finishing plant. 16 FMSHRC at 2235. On Thursday, April 18, Hyles, a leadman on AAA’s third (“graveyard”) shift, learned that AAA intended to start running the new plant even though some safety equipment was not in place. *Id.* Hyles voiced his concern about safety conditions in the plant to Mike Ryan, plant supervisor and a vice-president at AAA. Tr. 314-16, 319, 1131, 1231. Hyles also spoke to Patrick McGuire, business representative of Local 12 of the International Union of Operating Engineers (“Operating Engineers”), which represented AAA’s employees. 19 FMSHRC at 856; 16 FMSHRC at 2235; Tr. 175. Thereafter, McGuire visited the plant and observed it running without numerous pieces of safety equipment in place. 16 FMSHRC at 2235; Tr. 177-78.

During the weekend of startup operations, Ryan assigned Hyles to work as leadman on a combined second and third shift. 16 FMSHRC at 2235-36. When Hyles reported to work on Friday, April 19, at 7:00 p.m., he saw equipment lacking guards, ladders, catwalks, decks, handrails, and trip cords. *Id.* Dennis, Mears, and Soto, who worked under Hyles on the temporary combined production shift during the startup weekend, complained to Hyles and Gerald Richter, the other leadman on the combined shift, concerning plant conditions. Tr. 338, 370, 685, 826, 957, 2257. Hyles warned them to be careful. Tr. 339. On the evening of Saturday, April 20, Hyles videotaped the plant in operation and spoke to Dennis, Mears, and Soto, among others, about the conditions at the plant. 16 FMSHRC at 2236; Tr. 339, 365-66. Numerous employees, including leadman Richter, observed Hyles openly videotaping the plant. Tr. 365-66.

On Sunday night, Hyles was involved in a minor accident when he fell through a gap in the decking. Tr. 367-70; Gov’t Ex. 23. Later during the shift, Hyles spoke to Dennis, Mears, and Soto about taking the videotape to the field office of the Department of Labor’s Mine Safety and Health Administration (“MSHA”). They all agreed that the plant’s condition posed dangers to employees and that the tape should be turned in to MSHA. 16 FMSHRC at 2236; Tr. 370. On Monday morning, after his shift ended, Hyles went to the MSHA field office and turned in the

videotape. 16 FMSHRC at 2236; Gov't Ex. 54; Tr. 370, 373. After viewing the videotape, MSHA inspectors went to the AAA plant and saw it in operation. 16 FMSHRC at 2236. Subsequently, MSHA issued numerous citations, including 29 citations alleging unwarrantable failure, and shut down the plant for nearly a week. *Id.*; Tr. 55, 375, 1187. Later that day, Ryan called Hyles at home and told him not to report to work that evening because someone had reported the condition of the plant to MSHA. 16 FMSHRC at 2236.

On April 27, the day the plant reopened, Ryan asked Hyles and leadman Gerry White "if they had any idea who 'turned him in' and . . . told them he wanted to find out who it was and that he would make it so miserable for them, they would be happy to go work someplace else." 19 FMSHRC at 856-57, 862; *see* Tr. 375. While AAA president William Sisemore was in the plant office, Hyles heard him say he would like to "find out who was causing him all the problems and that he would make it worth their while to seek employment elsewhere." 19 FMSHRC at 862. While operating the plant, AAA miner William Smillie overheard Ryan and Sisemore say that they "would like to know who filed the hazard complaint so they could make it worthwhile for them to leave." *Id.*; Tr. 504.

In June 1991, during a subsequent MSHA investigation, Hyles, Dennis, Mears, and Soto, in addition to other employees, were interviewed in an investigation into Ryan's conduct under section 110(c), 30 U.S.C. § 820(c).¹ 16 FMSHRC at 2237; Gov't Exs. 2-5.

In October 1991, Hyles was demoted from his position of leadman to that of loader operator. 16 FMSHRC at 2237; Tr. 130-31. When he asked Ryan why he was being demoted, Ryan responded that they "didn't see eye to eye anymore." Tr. 394.

On or about July 8, 1992, due to an equipment move, AAA laid off 16 of its 27 employees, including Hyles, Dennis, Mears, and Soto. *See* Gov't Exs. 14, 15; Tr. 403, 704. On July 24, MSHA issued its proposed penalty assessment, which was addressed to Ryan, with fines in excess of \$45,000. Gov't Ex. 53; Tr. 1600. Sometime after the initial layoff, Ryan purportedly decided that he needed to cut back the workforce for economic reasons. Tr. 1295-96. By the end of August, AAA had recalled every employee but the four complainants. 16 FMSHRC at 2238. In addition, some employees worked overtime during the period the complainants were on layoff.² *Id.* When Hyles and Soto went to the plant and saw less senior

¹ Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c).

² There was initially a fifth employee, Martin Hodgeman, referred to in the arbitrator's decision, who was not called back. Gov't Ex. 15; Gov't Ex. 51 at 4. However, Ryan allowed Hodgeman, who was classified as a loader operator and was junior to Hyles, Dennis, and Mears,

employees working, all four complainants filed grievances under the collective bargaining agreement between AAA and the Operating Engineers. *Id.* The complainants contended that AAA failed to comply with the contract requirement that it conduct a “bumping” meeting prior to layoffs, where employees could bid on jobs held by less senior employees and bump those employees out of jobs for which a more senior employee was qualified. *Id.* at 2238-39. The grievances went to arbitration, and, in December, the arbitrator found that AAA had violated the contract by laying off employees without conducting a bumping meeting. *Id.* at 2238. However, the arbitrator concluded that only Hyles possessed the qualifications to bump a less senior employee, and only granted relief to Hyles. *Id.*; Gov’t Ex. 51 at 11-14.

In September 1992, while the grievances were being processed, Hyles, Dennis, Mears, and Soto filed discrimination complaints with MSHA. 16 FMSHRC at 2239; Gov’t Exs. 20, 33, 38, 43. Following the institution of temporary reinstatement proceedings, AAA reinstated the four complainants on February 11, 1993. 16 FMSHRC at 2239-40. Upon their reinstatement, the complainants were assigned to perform production work on the day shift. *Id.* at 2240. In early March 1993, AAA reestablished a third shift as a result of decreased production due to wetness of material that was being processed through the plant. *Id.* AAA temporarily assigned four of its most senior plant repairmen to perform production work, while paying them at the higher rate of pay they had received as repairmen. 19 FMSHRC at 858. AAA then moved the primary production shift to the day shift, and moved the maintenance shift to the night shift. *See* Tr. 990. Three weeks later, on March 23, AAA discontinued the third shift and announced a layoff. 16 FMSHRC at 2240. Rather than reassigning the four repairmen to their prior positions, AAA required the repairmen to participate in a bumping meeting. *Id.* Instead of bumping into repair positions, they bumped each of the complainants, selecting the production positions held by Hyles, Dennis, Mears, and Soto. *Id.* at 2240-41. AAA subsequently hired new employees to fill the vacant repairman positions. *Id.* at 2242; Tr. 457, 480-81, 1693.

The following day, the four complainants were called into a layoff meeting and told that each of them had been bumped by a more senior employee and that they would be permitted to bid on jobs held by less senior employees. 16 FMSHRC at 2241. They were reluctant to exercise their bumping rights at the meeting for fear that Ryan would treat them as unqualified and refuse to allow them to bump into other jobs. *Id.* Hyles and Soto requested that they be given time to consult with counsel from the Solicitor’s office because of the pendency of their discrimination complaints. *Id.* They were permitted to speak with counsel, but were not informed that, by delaying the exercise of their bumping rights, they had forfeited those contractually protected rights. *See id.* Shortly after the meeting, Operating Engineers business agent McGuire called Ryan to inform him that Hyles had decided to bump into the plant operator

to change his classification to dozer operator and bump a more junior employee, Greg Melvin. *See* Gov’t Exs. 14, 15. Melvin, who was junior to all the complainants, subsequently was hired at the asphalt plant owned by AAA, while the complainants remained on layoff. Gov’t Exs. 13, 14; Tr. 1956, 1965, 2014.

position. *Id.* Ryan refused the request, stating that it was untimely. *Id.* AAA refused to accept any of the complainants' subsequent written requests to bump for the same reason. *Id.*

Following the second layoff, Hyles, Dennis, Mears, and Soto each filed a second discrimination complaint. *Id.* at 2242; Gov't Exs. 21, 34, 39, 44. On April 26, 1993, after MSHA had initiated temporary reinstatement proceedings, the complainants were reinstated by agreement of the parties; however, after their reinstatement, management frequently gave the complainants reduced working hours. 16 FMSHRC at 2242. In April 1993, AAA began hiring ten new employees and increased its output of finished material. *Id.* In August 1993, AAA posted a seniority list indicating that Dennis, Mears, and Soto had seniority dates of January 1993. *Id.* When Mears asked why the seniority list did not reflect his original hire date, Ryan responded that Mears had no seniority. *Id.* This was the first time the complainants were told that AAA had removed their seniority.

A. Judge's Decision

The Secretary issued four complaints for each of the two layoffs, and an eight-day hearing was held. At the close of the hearing, the judge issued a bench decision granting the complainants temporary reinstatement, and a written decision followed. 16 FMSHRC 31 (Jan. 1994) (ALJ). Thereafter, the judge issued his decision on the merits of the complaints. Initially, the judge dismissed several procedural defenses raised by AAA, including its argument that the complainants' discrimination claims were time barred under the Mine Act and that the discrimination complaints were preempted by the National Labor Relations Act, 29 U.S.C. § 141 et seq. (1994). 16 FMSHRC at 2233-35.

The judge then addressed Hyles' October 1991 demotion from his leadman position to a journeyman loader position. *Id.* at 2247. The judge found that, at the time of the demotion, AAA had no knowledge that Hyles had "turned in" Ryan and AAA to MSHA, but that Ryan "had received credible substantiation of the rumors of Hyles' on the job misconduct," including "sleeping on the job and possible time card fraud." *Id.* Accordingly, the judge determined that AAA did not violate section 105(c) when it demoted Hyles from his leadman position. *Id.*

With regard to AAA's July 1992 layoff and its subsequent recall of the entire workforce except the four complainants, the judge found that sometime prior to the layoff, AAA became aware of the complainants' protected activity. *Id.* He also found that AAA's failure to recall the complainants constituted adverse action, and he concluded that AAA's refusal to recall the complainants was "to obscure its discriminatory animosity towards the Complainants." *Id.*

Finally, the judge considered the circumstances surrounding AAA's unusual post-reinstatement manipulation of job shift assignments which culminated in the bumping of the complainants from their positions in March 1993. *Id.* at 2248. The judge found that "this convoluted series of work assignments was contrived by Respondent to terminate the Complainants, while appearing to comply with the contractual requirement of holding a meeting

with the union.” *Id.* The judge concluded that, based upon reasonable inferences drawn from the record, AAA discriminated against the complainants in March 1993 in violation of section 105(c) of the Mine Act. *Id.* at 2249. AAA petitioned the Commission for review of the judge’s decision.

B. All American Asphalt I

The Commission remanded the judge’s decision and ordered him to address specified issues and evidence not considered or enunciated in his initial decision. *All American Asphalt I*, 18 FMSHRC 2096. We instructed the judge to explain the extent to which he relied on the arbitration decision to reach his determinations concerning the first set of layoffs and AAA’s failure to recall the complainants. *Id.* at 2101. We also instructed the judge to apply the Commission’s *Pasula-Robinette* discrimination framework: whether the complainants established a prima facie case, and whether AAA rebutted or affirmatively defended against the prima facie case. *Id.* at 2102. We called upon the judge to make findings regarding the nature of the complainants’ protected activity preceding each of the layoffs, and to state whether there was a nexus between the protected activity and the layoffs. *Id.* We directed him to reconcile his finding that AAA was unaware of Hyles’ protected activity prior to his October 1991 demotion with his finding that AAA was aware of the protected activity of all four complainants prior to the July 1992 layoff. *Id.* We further ordered the judge to address, with regard to both the 1992 and the 1993 layoffs, AAA’s asserted defenses and any related evidence to determine whether the defenses were valid or merely pretextual. *Id.* Finally, we ordered the judge to render credibility determinations related to “alleged statements and inquiries of AAA officials concerning miners’ protected activities, AAA’s asserted economic and contractual defenses, and the complainants’ qualifications for available jobs.” *Id.* at 2102-03.

C. Judge’s Remand Decision

On remand, the judge addressed the existence of protected activity, whether the operator was aware of the protected activity, and whether there was a nexus between the protected activity and the subsequent layoff. 19 FMSHRC at 855. With regard to the July 1992 layoff, the judge concluded that the protected activity consisted of Hyles’ videotaping of the plant conditions; the safety complaints of Soto, Mears, and Dennis to Hyles and leadman Richter; and Soto, Mears, and Dennis agreeing that Hyles should turn the videotape in to MSHA. *Id.* at 860, 864. The judge found that AAA was aware of the complainants’ protected activity. *Id.* at 860. He also determined that the threats of retaliation directed towards the individuals whose complaints led to the citations against AAA, coupled with the layoffs of the four complainants, constituted the nexus required to support a finding of a 105(c) violation. *Id.* at 860, 863, 865. He further concluded that AAA’s claim that it did not call back the complainants to work because they were

not qualified was pretextual. *Id.* at 866. Because he found that the initial layoff was discriminatory, he held that it did not affect the complainants' seniority. *Id.* at 865.³

In addressing the propriety of the March 1993 layoffs, the judge described the complainants' protected activity as "taking an active part in the Section 110(c) investigation of the plant supervisor, Ryan," as well as their "April 1991 protected activity." *Id.* at 861. He found that AAA was aware of this protected activity. *Id.* He concluded that the second set of layoffs was not motivated by the complainants' involvement in the section 110(c) investigation or filing their *second* set of discrimination complaints. *Id.*⁴ He concluded instead that it was motivated by the protected activity which led to the first set of layoffs. *Id.* Because the judge concluded that there was no nexus between the second set of layoffs and the complainants' role in the 110(c) investigation, he found no discrimination and dismissed the complaints. *Id.*

In a separate section of his decision, the judge addressed credibility. *Id.* at 861-62. He broadly credited miner Smillie's testimony, specifically finding that Smillie heard AAA president Sisemore and vice-president Ryan discuss their desire to find out who turned them in so that they "could make it worthwhile for [those responsible] to leave" AAA. *Id.* at 862. The judge credited Hyles' testimony that both Ryan and Sisemore threatened to make the working conditions more difficult for the individuals who notified MSHA of safety violations at the plant. *Id.* The judge credited the testimony of all four complainants, including their testimony as to their respective qualifications for available positions, and discredited Ryan's testimony regarding the complainants' qualifications. *Id.* The judge also broadly credited the testimony of McGuire and Martin Collins, the business representatives for the Operating Engineers. *Id.*

Finally, the judge addressed the arbitrator's decision and indicated that he accorded it no weight. *Id.* at 863. Accordingly, he did not consider the arbitrator's findings on the issue of the complainants' qualifications for available positions. *Id.*

³ Attached to the judge's May 1997 decision is a stipulation between the parties, in which they agree on back pay and interest due each complainant through the December 1993 hearing. 19 FMSHRC at 870-71 (Ex. A). Assuming liability on the part of AAA, the parties agreed that a civil penalty of \$3,500 would be appropriate for each of the eight alleged discrimination violations. *Id.* at 871-72. The judge accepted this amount for the set of dockets in which he found AAA liable under section 105(c). *Id.* at 861.

⁴ We note that the second set of layoffs could not possibly have been motivated by the complainants' filing their second set of discrimination complaints since those complaints were filed in response to the second set of layoffs. Furthermore, the judge erroneously stated that the "second set of dockets . . . arose out of the second set of discrimination complaints that the four complainants filed . . . in September 1992." *Id.* In fact, the *first* set of discrimination complaints (relating to the July 1992 layoffs) were filed in September 1992.

II.

Disposition

A. Parties' Arguments

The Secretary appeals from the judge's dismissal of the complaints relating to the March 1993 layoffs. S. PDR at 1-2.⁵ The Secretary submits that the Commission should, as a matter of law, reverse the judge's finding that the 1993 layoff did not violate section 105(c). *Id.* at 10-11. The Secretary notes that the judge specifically found that AAA manipulated the seniority list in March 1993 for the purpose of terminating the complainants in retaliation for their protected activities that resulted in the plant shutdown, the 29 unwarrantable failure citations, and the subsequent section 110(c) investigation against Ryan. *Id.* at 7. Further, the Secretary argues that, because she never alleged that the March 1993 layoff was motivated solely by the complainants' participation in the section 110(c) investigation, the judge incorrectly relied on the lack of a causal nexus between that participation and the layoff in dismissing the second set of dockets. *Id.* at 9.

In its petition for discretionary review,⁶ AAA contends that the judge did not comply with the Commission's remand instructions by failing to make key factual findings and by failing to explain the basis for his credibility resolutions. A. PDR at 7-13. The operator further asserts that the Secretary failed to show that AAA knew of Hyles' protected activity. *Id.* at 6-7. AAA also alleges that the complaints of Dennis, Soto, and Mears to leadmen Hyles and Richter do not constitute protected activity because leadmen are not supervisors or members of management. *Id.* AAA argues that the fact that every other employee was interviewed by MSHA investigator Mesa without suffering retaliation weighs against a finding that AAA retaliated against the complainants. *Id.* at 24. In addition, AAA asserts that the judge failed to reconcile his finding of discrimination related to the July 1992 layoff with the arbitration decision under the collective bargaining agreement. *Id.* at 27-29, 47-48, 67, 69. Finally, AAA objects to the civil penalties ordered by the judge. *Id.* at 73-74.

In response, the Secretary argues that leadmen Hyles and Richter were agents of the operator within the meaning of section 105(c), and that the concerns voiced by complainants Mears, Soto, and Dennis to the leadmen constitute protected Mine Act activity. S. Resp. Br. at 15-18 & n.6. The Secretary submits that analysis of the circumstances surrounding both layoffs

⁵ The Secretary designated her petition for discretionary review as her opening brief.

⁶ AAA submitted a 95-page PDR challenging the judge's initial decision, after which we admonished AAA that Commission Procedural Rule 70(d), 29 C.F.R. § 2700(d) requires that "each issue [in a PDR] shall be . . . plainly and concisely stated." In apparent disregard of this warning, AAA's present PDR spans 75 pages.

establishes that the bumping procedure of March 1993 violated section 105(c). *Id.* at 19-22. The Secretary asserts that, while AAA's defenses should be rejected, the judge's failure to analyze AAA's affirmative defenses warrants a remand for further analysis. *Id.* at 22-24 & nn.7-8. The Secretary also contends that the judge's failure to address the complainants' qualifications for available positions requires a remand to analyze this issue. *Id.* at 24-25. Further, the Secretary argues that, while AAA's economic defense is unconvincing, the Commission should remand this question to the judge with instructions to make specific findings on this issue. *Id.* at 25-26. Finally, the Secretary requests a remand to allow the judge to explain the bases for his credibility determinations. *Id.* at 26-27.

AAA replies that the Secretary has failed to rebut AAA's evidence of inconsistencies in the complainants' hearing testimony. A. Reply Br. at 1-2, 14-15. AAA also claims that the 15-month delay between the alleged protected activity in April 1991 and the alleged adverse action against the complainants in July 1992 is too long a period to establish the nexus required for a finding of discrimination. *Id.* at 10-11 & n.7. AAA submits that the ALJ's finding that it "manipulated the shift and job assignments in March of 1993" to terminate the complainants is "based upon nothing more than supposition and speculation" and contradicts his prior finding that the March 1993 discharge was not in retaliation for the complainants filing discrimination complaints. *Id.* at 12-13. AAA contends that, even assuming the Secretary is able to establish a prima facie case of discrimination, the complainants declined to exercise their bumping rights and were unqualified to fill the open positions. *Id.* at 13. Finally, AAA argues that the Secretary failed to rebut AAA's economic justification for the March 1993 layoff. *Id.* at 14 & n.10.

B. Discrimination

1. Governing Principles

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. See *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. See *Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. See *id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; see also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987) (applying *Pasula-Robinette* test).

Under the Mine Act, an administrative law judge's findings of fact are to be affirmed if they are supported by substantial evidence. 30 U.S.C. § 823(d)(2)(A)(ii)(I); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 14 FMSHRC 1549, 1555 (Sept. 1992).⁷ In addition, the Commission has held that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1138 (May 1984). The "possibility of drawing either of two inconsistent inferences from the evidence [does] not prevent [the judge] from drawing one of them." *NLRB v. Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106 (1942). The Commission has emphasized that inferences drawn by the judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent*, 6 FMSHRC at 1138.

2. July 1992 Layoff

a. Prima Facie Case

The judge found that the complainants engaged in protected activity, that AAA learned of the complainants' protected acts and that AAA expressed hostility to this activity before failing to recall them in July or August 1992, and concluded that a nexus existed between the protected activity and AAA's failure to recall. 19 FMSHRC at 860-65. However, he did not frame his analysis in a manner consistent with the Commission's *Pasula-Robinette* analytical framework. Previously, we have excused a judge's failure to apply our discrimination framework, provided the judge's analysis was consistent with this framework. *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 130 n.11 (Feb. 1982) (holding that, because judge's analysis was consistent with the Commission's discrimination framework, his failure to organize his analysis within that framework did not require a remand for express application of that analysis).⁸ Although the judge's analysis in his remand decision was not formulated within our *Pasula-Robinette* framework, he has provided us with findings sufficient to render a remand unnecessary.

⁷ "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

⁸ In addressing a similar situation, the National Labor Relations Board affirmed a judge's decision where the judge's findings satisfied the analytical objectives of its discrimination framework expressed in *Wright Line, A Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980), enforced sub nom. *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d 899 (1st Cir. 1981). *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enforced sub nom. *NLRB v. Limestone Apparel Corp.*, 705 F.2d 799 (6th Cir. 1982).

In July 1992, AAA laid off sixteen employees due to an equipment move. 16 FMSHRC at 2238. Over the course of the next several weeks, AAA recalled all of the laid-off workers except the complainants. *Id.* Thus, what started as a temporary layoff for AAA's employees became, in effect, a permanent layoff of Hyles, Mears, Dennis, and Soto. *See All American Asphalt I*, 18 FMSHRC at 2098. It is undisputed that the four suffered an adverse employment action. The main issue on review is whether that employment action was linked to protected activity under the Mine Act.

Based on our review of the credited record evidence, substantial evidence supports the judge's conclusion that each of the complainants engaged in protected activity. Initially, Hyles, while assigned to work as a leadman for a combined production shift during the weekend of the plant startup operation, complained to Ryan about plant conditions he perceived as dangerous. Tr. 316, 319. He also discussed the plant conditions with Richter. Tr. 338. The record further shows that he openly videotaped the plant startup in the presence of numerous other employees, turned in the tape to MSHA, and complained to MSHA about the hazards the plant conditions posed to himself and others. Gov't Exs. 1, 54. Thus, Hyles instigated the events that led to the plant shutdown by MSHA and the issuance of \$45,000 in penalties in July 1992. Later, Hyles cooperated as a witness during MSHA's section 110(c) investigation of Ryan. Gov't Ex. 2.

Similarly, the actions of complainants Dennis, Mears, and Soto constitute protected activity under the Act. Dennis, Mears, and Soto were on Hyles' crew, working under his supervision in the finishing plant during the startup weekend. 16 FMSHRC at 2236. Each of them conferred with Hyles and supported his efforts to complain to MSHA about unsafe plant conditions. Tr. 338, 366, 370. Furthermore, each of them complained directly to leadman Richter regarding the plant conditions. Tr. 685, 826, 957, 2257. In Hyles' initial statement to MSHA, he identified, *inter alia*, Dennis, Mears, and Soto as witnesses.⁹ Gov't Ex. 2 at 1. Finally, these three complainants, along with other AAA employees, gave statements to the MSHA investigator when he came to interview miners at AAA's facility. 16 FMSHRC at 2237; Gov't Exs. 2-5. In short, substantial evidence supports the judge's finding that the four complainants engaged in activities protected under section 105(c) of the Mine Act. *See* 30 U.S.C. § 815(c)(1).

AAA's assertion that the complaints of Dennis, Mears, and Soto to leadmen Richter and Hyles do not constitute protected activity because leadmen are not supervisors or members of management conflicts with our precedent. In determining whether a miner is an operator's agent, we have examined such factors as whether the miner was exercising managerial or supervisory responsibilities at the time the allegedly violative conduct occurred (*U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995)) and whether the miner to whom a safety complaint was made

⁹ Of the six witnesses Hyles identified to MSHA, the three witnesses other than Dennis, Mears, and Soto had been laid off prior to MSHA's section 110(c) investigation of Ryan. *See* Gov't Ex. 2 at 1.

was in a position to affect mining operations and, hence, safety. *Secretary of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 n.5 (May 1997). Here, Hyles described the duties of leadmen as including being “responsible for the . . . shift . . . and in charge of the employees to see that they did their assigned jobs.” Tr. 278-79. As leadmen, Richter and Hyles acted in a supervisory capacity and were in a position to affect safety, and, therefore, were “agents” of the operator to whom employees would logically voice their complaints. Thus, the safety complaints of Mears, Dennis, and Soto to Hyles and Richter were protected activity under the Act. *See Knotts*, 19 FMSHRC at 837 n.5.

We also find that substantial evidence supports the judge’s finding that AAA’s failure to recall the complainants was in retaliation for their protected acts. As the judge noted, “[d]irect evidence of actual discriminatory motive is rare.” 19 FMSHRC at 860. “[M]ore typically, the only available evidence is indirect. . . . ‘Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.’” *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981) (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)), *cited in* 19 FMSHRC at 860; *see also Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 992 (June 1982) (“[C]ircumstantial evidence . . . and reasonable inferences drawn therefrom may be used to sustain a prima facie case of discrimination.”).

Against the backdrop of AAA’s pronounced hostility to employees’ protected acts (19 FMSHRC at 862-63), the record fully supports the judge’s inference that AAA ascertained the complainants’ identities. *See id.* at 864. Many of Hyles’ protected acts, including his complaints to Ryan and his videotaping of the plant were open and highly visible to AAA. Indeed, Hyles did not try and hide his videotaping, and conversed with leadman Richter, inter alia, as he videotaped. *See Gov’t Ex. 54*. In this regard, leadman White, who testified on behalf of AAA at the hearing, stated that it was generally known that Hyles had turned in his videotape to MSHA. Tr. 2077-79. In addition, Richter, another one of AAA’s witnesses, testified that he told Ryan that Hyles had a video camera present at the plant during startup weekend. Tr. 2163. Even more significantly, Ryan testified that he knew that Hyles had videotaped the plant and that he suspected that Hyles had turned in the tape to MSHA. Tr. 1535, 1539. Moreover, given the small size of the AAA plant, and management’s desire to discover the identities of those who turned AAA in, it is reasonable to infer that the operator knew about Hyles’ role in turning in the videotape and complaining to MSHA. *See Chauffeurs, Teamsters and Helpers, Local 633 v. NLRB*, 509 F.2d 490, 497 (D.C. Cir. 1974) (holding that existence of only six employees in bargaining unit is circumstantial evidence that protected activities would come to the attention of

management).¹⁰ In sum, credited record evidence supports the judge's inference that AAA knew of Hyles' protected activity under the Mine Act by the time of the July 1992 layoff.¹¹

It was also reasonable for the judge to infer that AAA knew of the protected activity of Dennis, Mears, and Soto. *Id.* Each had worked under Hyles in the finishing plant during the weekend before MSHA shut down the plant on the morning of April 22. 19 FMSHRC at 864-65. Each had complained about plant conditions to Richter. Tr. 685, 826, 957, 2257. Indeed, by the time of the investigation, they, along with leadman Richter, were the only employees still employed at AAA who had worked with Hyles during the start-up operations in the finishing plant. *See* Tr. 337, 379, 548, 2248-54. Richter, to whom they had voiced their complaints, testified on behalf of AAA at the hearing. Tr. 2118-88. Further, there is nothing in the record indicating that any AAA employees other than Dennis, Mears, Soto, and Hyles complained to Richter about the plant conditions during the startup weekend. Finally, Ryan's knowledge of the pivotal role that statements from the three played in the MSHA investigation is borne out by the fact that Ryan solicited Dennis to write a letter to MSHA, while he was on layoff in May 1991, that would support Ryan's claim that no employees were exposed to unguarded equipment during the startup weekend.¹² Tr. 841-44. In view of these facts, we find that it was reasonable for the judge to infer that AAA had determined that, in addition to Hyles, complainants Dennis, Mears, and Soto had engaged in the protected activity that caused it so much trouble. 19 FMSHRC at 865; *see Teamsters v. NLRB*, 509 F.2d at 497.

¹⁰ The Commission occasionally has looked for guidance to case law interpreting similar provisions of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (1994) ("NLRA") in resolving questions arising under the Mine Act. *See, e.g., Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2542-45 (Dec. 1990) (deciding discrimination case in part through reference to NLRA case law).

¹¹ AAA may well have known of Hyles' protected activity by the time of his demotion in October 1991. Indeed, the arguably discriminatory circumstances surrounding his demotion presented a close case. In addition to AAA's knowledge of and hostility towards the protected activity, the record shows that Ryan told Hyles that he and Hyles no longer saw "eye-to-eye," that Ryan did not rely on the reasons that he subsequently gave to MSHA at the time he demoted Hyles, and that the major misconduct on which Ryan purportedly relied in demoting Hyles — sleeping during work hours — was long condoned both for Hyles and other AAA employees. Tr. 64, 394, 402, 1568, 1574-75, 1584-85, 2153. While the demotion is consistent with a pattern of recrimination towards the complainants because of their protected activities, the Secretary did not challenge the judge's finding of no discrimination in the demotion, and the issue, therefore, has not been preserved for review.

¹² Shortly after Dennis wrote the letter, he was recalled from temporary layoff. Tr. 841-42.

We reject AAA's argument that the lapse of time between the April 1991 complaint to MSHA and the July 1992 layoff undercuts any finding that its failure to recall the complainants was in response to protected activity. A. Reply Br. at 10-11 & n.7. We "appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time." *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991). Significantly, in reviewing the record in response to this argument, we note an element of timing on which the judge did not rely in making his determination of discrimination.¹³ On July 24, 1992, four days after AAA began recalling employees it had laid off (see Gov't Ex. 15), MSHA issued a proposed penalty of \$45,000 against AAA in an assessment addressed to Ryan.¹⁴ Gov't Ex. 53. By August 3, 1992, Ryan had signed a notice of contest that was returned to MSHA. Gov't Ex. 57. These penalties provide the proverbial "straw that broke the camel's back," and coincide in time with the transformation of a temporary layoff for an equipment move to a layoff of unlimited duration for only the complainants. As we noted in *Chacon*, "[a]dverse action under circumstances of suspicious timing taken against the employee who is [a] figure in protected activity casts doubt on the legality of the employer's motive" 3 FMSHRC at 2511.

In sum, substantial evidence supports the judge's finding that the complainants engaged in protected activity, that AAA knew of this activity prior to the July 1992 layoff, and that this layoff was implemented in response to the complainants' protected activity. The judge's ultimate finding of discrimination necessarily implied a finding that the Secretary established a prima facie case of discrimination. See *Boswell v. National Cement Co.*, 14 FMSHRC 253, 259-60 (Feb. 1992) (recognizing from judge's conclusion of discrimination an implicit finding that complainant's disqualification constituted adverse action). Accordingly, we find that substantial evidence supports the judge's implicit finding that the Secretary established a prima facie case of

¹³ In other circumstances, we have considered record evidence upon which a judge has not expressly relied. *Sellersburg Stone Co.*, 5 FMSHRC 287, 293-95 & n.9 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984) (finding that evidence upon which the judge did not expressly rely supported his imposition of penalty). Here, while the judge did not expressly consider the coincidence in time between Ryan's receipt of MSHA's proposed penalty and the adverse action taken against the complainants, we find it appropriate to consider this uncontroverted evidence in light of its probative value.

¹⁴ On cross-examination, Ryan testified that he did not recall when he reviewed the penalty assessments, but he did not deny having received them around the time they were issued. Tr. 1597-1602. Ultimately, the dockets involving the citations against AAA and Ryan were settled, and the judge ordered Ryan to pay \$7,600 in satisfaction of his section 110(c) liability and ordered AAA to pay \$36,000 in penalties. Order Approving Settlement, dated February 22, 1994.

discrimination regarding AAA's failure to recall the complainants. See *Dunmire*, 4 FMSHRC at 130 n.11.

b. Affirmative Defense

AAA argues that it did not recall the complainants — effectively terminating their employment — because they were not qualified for any positions held by less senior employees.¹⁵ The judge rejected this defense and concluded that AAA's refusal to recall the complainants violated section 105(c). 19 FMSHRC at 860-61. Substantial evidence supports the judge's conclusion.

“[P]retext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator's normal business practices.” *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990) (citing *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1937-38 (Nov. 1982)). As we stated in *Price*, “[u]ltimately, the operator must show that the justification is credible and would have legitimately moved it to take the adverse action in question.” *Id.*

It is undisputed that each of the complainants contacted AAA on numerous occasions regarding the duration of and reasons for the layoff. Tr. 403, 706-07, 848, 976-77. It is also undisputed that AAA never told any of the complainants at the time of the layoff that lack of qualification prevented any of them from being recalled. Tr. 407, 708, 849, 978, 1600-03. In fact, the record does not indicate that AAA's management ever told the complainants that they were disqualified from available positions. See Tr. 1601, 2085 (testimony of Ryan and White that they never told complainants that they had been disqualified from available positions).¹⁶ Further, as the judge found (19 FMSHRC at 863), in implementing the July 1992 layoff, AAA violated its collective bargaining agreement and thereby avoided holding a contractually mandated bumping meeting where AAA would have been required to address the complainants' qualifications. AAA's consistent failure to tell the complainants, upon repeated inquiry by each of them during the July-August 1992 layoff period, that they were unqualified for available work supports the judge's conclusion (*id.* at 866) that lack of qualification was not the real reason for AAA's refusal to recall them, but rather a pretext. See *Price*, 12 FMSHRC at 1534.

¹⁵ AAA's refusal to recall the complainants — until they were voluntarily reinstated in February 1993 — resulted in the complainants' loss of seniority under the collective bargaining agreement. 16 FMSHRC at 2239-40, 2247.

¹⁶ The first record evidence of AAA offering lack of qualification as its motivation for not recalling the complainants appears in the arbitration decision, which was litigated beginning on December 16, 1992 — over three months after AAA's recall of all laid off employees except the complainants. See Gov't Ex. 51.

Substantial record evidence also supports the judge's finding that the complainants were, in fact, qualified for available positions. First, each of the complainants testified that he had completed the union's apprenticeship training program and had performed a variety of operations at AAA. *See* Tr. 280-92, 658-60, 796-801, 934-45;¹⁷ *see also* Tr. 199-201, 236-38 (McGuire testifying that the complainants had performed numerous other tasks at AAA and were qualified to perform tasks outside their respective classifications). Second, in refusing to recall the complainants, AAA inexplicably deviated from its routine practice of allowing its employees to become qualified for various job classifications through on-the-job training. *See, e.g.*, Tr. 299, 500, 662, 799-800, 946-47, 1656-59 (discussing AAA's practice of training employees on the job to qualify for various positions). *Compare* Tr. 1649 (Ryan denying that dozer operators learned on the job at AAA), *with* Tr. 2262-64 (Hyles testifying that miner Bob Christenson, after bumping into miner Melvin's dozer operator position after the plant shutdown, learned to operate the dozer on the job "to some extent").¹⁸ Third, the judge credited each of the complainants' testimony as to their respective qualifications to operate various types of equipment.¹⁹ 19

¹⁷ Union business representative McGuire testified that "[g]enerally, after completion of an apprenticeship program, [a miner] should be able to perform any duties at the mine." Tr. 196.

¹⁸ Given the extent of the credited evidence of the complainants' qualifications, it is apparent that Hyles, Mears, and Soto were each eligible to bump into the dozer position occupied by Melvin, who was junior to all the complainants, and subsequently occupied by miner Hodgeman, who was junior to all the complainants except Soto. *See* Gov't Exs. 14, 15. Furthermore, Dennis and Mears were eligible to bump into the shovel positions occupied by Sean and Barry Laycock and Danny Stinson, all of whom were junior to the complainants. *See* Gov't Exs. 14, 15.

¹⁹ Hyles stated at the hearing that he is qualified to run a dozer and that he considers himself "qualified to be a plant repairman." Tr. 286, 299. Hyles further testified that he could run the new plant if he was afforded the same training opportunities as those given to AAA employees White, Bobby Crowell, and Rick McLane for that position. Tr. 296-97. It perplexes us that Ryan allowed Hyles, as leadman, to train other employees, yet did not consider him a candidate for on-the-job training for any available position. Dennis testified that he had received three weeks of training on a shovel and that, if afforded the same duration of shovel training as Allen Richter, he could have become as proficient as Richter on the shovel. Tr. 807-08. Dennis also testified that he was qualified to be a plant operator and could run the new plant if trained. Tr. 800-01. Mears testified that he was capable of operating a dozer and a shovel. Tr. 671. He also stated that if he was allowed the opportunity to train on the job, he could perform any plant repairman duty. Tr. 777. In fact, through on-the-job training, Mears became qualified to operate a crusher and a loader and to perform plant operation and repair. Tr. 660, 1654. Soto stated that he could perform the same dozer work as dozer operators Christenson, Hodgeman, and Melvin. Tr. 945. Soto also indicated that in May 1991, Ryan offered to allow him to bump into a dozer position. Tr. 966. Soto testified that he could learn to be a plant repairman if given the same on-

FMSHRC at 862. In light of “Ryan’s blatant hostility to the-[complainants’] protect[ed] activity,” the judge also discredited Ryan’s testimony that the complainants were unqualified. *Id.* Despite the very general nature of the judge’s credibility determinations, the judge nonetheless complied with our remand instruction to render appropriate credibility determinations. *All American Asphalt I*, 18 FMSHRC at 2102-03. We also note that the judge was in the best position to make credibility determinations, and that abundant evidence in the record supports these determinations. In short, we see no basis for reversing the judge’s credibility findings. *See In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995).

Furthermore, the judge did not err in his remand decision by according no weight to the arbitration decision and the credibility determinations made therein. The Commission’s holding in *Pasula* firmly places the decision whether to defer to an arbitrator’s decision in the sound discretion of the judge. *Pasula*, 2 FMSHRC at 2795. As we held in *Pasula*, “[a]rbitral findings, even those addressing issues perfectly congruent with those before the judge, are not controlling upon the judge.” *Id.*, citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). In the instant matter, the judge made different credibility determinations than the arbitrator, discrediting Ryan (19 FMSHRC at 862-63), whose testimony the arbitrator credited. Gov’t Ex. 51 at 12, 14 n.6. In addition, the arbitrator did not consider Ryan’s expressed hostility to the complainants’ protected activity. *See id.* at 1-14. Finally, the arbitrator was not asked or permitted under the collective bargaining agreement to consider whether AAA’s claim that the complainants lacked necessary qualifications was a pretext to keep the complainants on layoff because of their protected activities under the Mine Act. *See Resp. Ex.* at 23-24. We see no reason to disturb the judge’s exercise of discretion in declining to accord weight to the arbitrator’s decision.

There is additional record evidence supporting the judge’s rejection of lack of qualifications as a defense to AAA’s refusal to recall the complainants. By the end of August 1992, in addition to the four complainants, one other employee, Hodgeman, was on layoff. Gov’t Ex. 15; Gov’t Ex. 51 at 4. Hodgeman, who was classified as a loader operator, as were Hyles and Soto, was allowed to bump a junior employee, Melvin, who was classified as a dozer operator. 16 FMSHRC at 2238; Gov’t Ex. 14; Tr. 1889-90. Although Ryan allowed Hodgeman to bump, he did not afford any of the complainants the same opportunity. Tr. 423-25, 1316-18. Despite Melvin’s layoff after he was bumped by Hodgeman, he was later rehired to work at AAA’s asphalt plant, which adjoined the rock finishing plant but was under a separate collective bargaining agreement. Tr. 1955-57, 1965, 2013-14. Thus, even though Melvin was initially bumped out of a job, unlike the complainants, he did not remain out of work.

the-job training as AAA gave to Richter and McLane. Tr. 946, 948. Ryan testified that he did not “know of any reason that [Soto] couldn’t” learn on the job to perform reclamation, grade work or pioneering on the dozer (Tr. 1653), and didn’t know of any reason that Mears could not learn other equipment on the job as well. Tr. 1655.

AAA's disparate treatment of these complainants with respect to employee classifications and bumping further supports the judge's conclusion that the operator's failure to recall the complainants in July and August 1992 was not based upon their alleged lack of qualifications. In short, substantial evidence supports the judge's finding that the complainants' purported lack of qualifications for available work was pretextual. 19 FMSHRC at 862, 865, 866; *see Price*, 12 FMSHRC at 1534.

AAA also argues that it had a valid economic reason for the cutback in its operations that resulted in the permanent layoff of the four complainants. A. PDR at 25-26, 32-33, 66. In light of the judge's rejection of AAA's assertion that the complainants were not qualified for positions held by less senior employees, he did not reach the issue of whether AAA's economic justification for the initial layoff was proper. We agree with the judge's approach. Thus, the issue presented by the July 1992 layoff and failure to recall is not whether there was a valid economic need for a layoff, but rather whether AAA improperly failed to recall the four complainants while recalling all other employees, including employees less senior than the complainants. Accordingly, our rejection of AAA's qualifications argument does not require us to reach AAA's economic defense.²⁰

Accordingly, we find that substantial evidence supports the judge's determination that AAA violated section 105(c) by refusing to recall the complainants, while recalling every other employee laid off because of the July 1992 equipment move.

3. March 1993 Layoff

In his remand decision, the judge limited his analysis of the complainants' second layoff to a determination of whether the layoff was connected to the complainants' participation in

²⁰ Nonetheless, based on facts found by the judge and other evidence from AAA's own witnesses, we believe that AAA's economic defense is suspect. AAA expert witness Dr. Michael Phillips' admission that production increased in July and August 1992, severely undermines the relevance of his assessment that declining economic conditions in California's construction industry as a whole in 1992 necessitated AAA's economic layoff. Resp. Ex. 40A; Tr. 1750-51; *see Gov't Exs. 25, 50; Resp. Ex. 38A-G; Tr. 1604, 1753, 1760.* Moreover, Dr. Phillips had neither been to AAA's facility, nor had he advised AAA concerning the advisability of an economic layoff in 1992. Tr. 1760, 1768, 1771. Also, several employees worked overtime hours outside their classifications while the complainants were on layoff. Gov't Ex. 25; Tr. 1605, 1717-20. While Phillips testified that employers often utilize existing employees to work overtime to save costs, (Tr. 1760), he admitted that he had not reviewed the wage and benefit package in AAA's collective bargaining agreement, so as to know whether that was the situation at AAA. Tr. 1796. In sum, testimony that an economic layoff became necessary at some unspecified date after the temporary layoff is at odds with the testimony of AAA's own witnesses and documentary evidence in the record.

MSHA's section 110(c) investigation of Ryan. 19 FMSHRC at 861. Because the judge concluded that there was no nexus between the second set of layoffs and the complainants' role in the section 110(c) investigation, he found no discrimination and dismissed the second set of complaints. *Id.*

We find that the judge erred in limiting his analysis to the complainants' participation in the section 110(c) investigation. The Secretary did not base her claims of discrimination regarding the second set of layoffs solely upon this participation.²¹ See Compl. dated June 2, 1993. Therefore, the judge erred in failing to consider the complainants' other protected activities in analyzing the legality of the March 1993 layoff. See *Carmichael v. Jim Walter Resources, Inc.*, 20 FMSHRC 479, 486-87 (May 1998) (vacating judge's determination that operator did not violate section 105(c) based on judge's error in construing argument asserted by complainant). Further, his conclusion that there was no nexus between the layoffs and the complainants' involvement in MSHA's section 110(c) investigation is contrary to his own findings. See 19 FMSHRC at 866 (finding that AAA manipulated shift and job assignments in March 1993 for the specific planned purpose of terminating the complainants in retaliation for, inter alia, their participation in the section 110(c) investigation of Ryan).

Although both AAA and the Secretary assert that a remand would be appropriate on certain issues related to the March 1993 layoff, the judge has made sufficient factual findings upon which we can decide this issue without remanding to the judge. In our view, the record viewed as a whole compels only one conclusion: that the March 1993 layoff of the complainants violated section 105(c). Accordingly, we need not remand this issue to the judge. See *American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (citing *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984) (remand would serve no purpose because evidence could justify only one conclusion)).

a. Prima Facie Case

As the judge found, by the time of the July 1992 layoff, AAA's management had learned the identity of those employees who participated in the protected activity that it so deeply resented.²² 19 FMSHRC at 865. The judge also concluded that, in March 1993, AAA "manipulated the shift and job assignments" to terminate the complainants in retaliation for their protected activity "that resulted in the shutdown of the plant, the 29 unwarrantable failure

²¹ In the second discrimination complaint, the Secretary alleges that AAA discriminated against the complainants for "their protected safety activity, including the filing [of] their initial complaints of discrimination with MSHA." Compl. dated June 2, 1993 at 5.

²² Ryan admitted that, by the time of the second layoff, he knew that it was Hyles who had gone to MSHA prior to the inspection that led to the plant shutdown. Tr. 1690.

citations and the 110(c) investigation of Ryan” *Id.* at 866. Thus, the judge explicitly found a nexus between the March 1993 layoffs and the complainants’ protected activity.

The judge’s finding of a nexus between the complainants’ 1991 protected activity and the 1993 layoff finds abundant support in the record. First, when the events occurring between July 1992 and March 1993 are reviewed, a continuing pattern of discrimination is evident. AAA’s conversion of a temporary layoff to a permanent layoff with respect to only the four complainants occurred about the same time Ryan signed and dated the notice of contest regarding MSHA’s July 1992 issuance of over \$45,000 in proposed penalties stemming from the plant conditions leading to the shutdown.²³ *See* Gov’t Ex. 57. The complainants remained on layoff until their reinstatement in February 1993. 16 FMSHRC at 2240. Less than one month after their reinstatement, the complainants were again laid off. 19 FMSHRC at 858.

Second, the circumstances surrounding the March 1993 bumping meetings compel a finding that the complainants established a prima facie case. In early March — less than one month after the complainants were reinstated — Ryan reestablished a new graveyard shift for production — purportedly because of the extra time needed to mine wet materials from the pit²⁴ — and unilaterally assigned four of AAA’s most senior repairmen to staff the new shift despite Ryan’s prior acknowledgment that placing repairmen on the production shift would decrease production. Tr. 382, 1390-97; *see* Resp. Ex. 9 at 7-8. The graveyard shift is generally considered the least desirable shift; employees with highest seniority normally choose the day shift when bidding on jobs. 16 FMSHRC at 2240; Tr. 447. Soon after Ryan’s assignment of the senior repairmen to the third shift, AAA moved the primary production shift to the day shift, and moved the maintenance shift to the night shift, an arrangement not present at AAA for at least three years. *See* Gov’t Ex. 15; Tr. 990. Just prior to the March 1993 layoff, Ryan remarked to union business representative McGuire that he had “four operators too many” and that he had “four problem children.”²⁵ Tr. 203-04. McGuire understood Ryan’s comments to refer to the

²³ We also note that the \$9,500 proposed assessment for Ryan’s alleged 110(c) violations is dated October 22, 1992. Ryan’s notice of contest is dated October 30, 1992. *See* WEST 93-65-M.

²⁴ We assume the need for an additional shift because of the increased production time required to process the wet material in the pit. Thus, our disposition of the March 1993 layoff does not require us to reach the issue of the need for the shift or its rapid elimination.

²⁵ The complainants testified that, following their reinstatement in February 1993, they were subjected to discriminatory working conditions, including increased scrutiny by management and verbal harassment. Tr. 444-45, 468-70, 714 (Mears’ testimony that Ryan kept closer tabs on the complainants after the February 1993 reinstatement), 987-90 (testimony of Soto that he was given reduced working hours and that Ryan purposely caused Soto to miss his ride with Hyles). However, the judge made no findings in this area.

complainants. Tr. 204. On March 24, only three weeks after the creation of the third shift, Ryan eliminated that shift, announced a layoff, and allowed the repairmen to exercise their bumping rights.²⁶ 16 FMSHRC at 2240. Notwithstanding that there were repair positions available, each of the repairmen bumped one of the complainants and was eventually reclassified as a production worker. Gov't Ex. 16; Tr. 211-17.

AAA's inversion of the production and maintenance shifts so that production would be performed on the more desirable day shift for the first time in at least three years; Ryan's assignment to the temporary graveyard shift of four senior repairmen accustomed to working the day shift; and AAA's subsequent elimination of the temporary shift created a situation in which the four repairmen almost certainly would bump into the day shift when given the opportunity. *See* Tr. 1946 (testimony of senior repairman assigned by Ryan to the temporary third shift that he wanted to return to working the day shift). In fact, prior to the meeting, Ryan admitted that he knew that the senior repairmen would bump into day jobs (Tr. 1687-90) even though they had performed primarily repair work for many years and had not worked production during Hyles' tenure at AAA. Tr. 447.

At the subsequent bumping meeting, Hyles and Soto each requested that he be allowed to consult with the Solicitor's office because of their recent temporary reinstatement and the pendency of their discrimination complaints. 19 FMSHRC at 858; Tr. 452, 995-96. All the complainants believed that Ryan would disqualify them for any position into which they attempted to bump.²⁷ 19 FMSHRC at 858. In fact, at the December 1992 arbitration, Ryan argued that the complainants were not qualified to perform any available duties at AAA. Gov't Ex. 51 at 10 (arbitrator indicating that Ryan believed that the complainants were unable to perform available work); *see* Tr. 453. Ryan's testimony also leaves no doubt that he was the sole arbiter of an employee's qualification for a given position. *See* Tr. 1420, 1459, 1613 ("I am the judge [of whether an employee is qualified]"). As the judge found, animus tainted Ryan's judgment as to the complainants' qualifications. 19 FMSHRC at 863. These facts lend credence to the complainants' belief that Ryan would have summarily rejected any attempt by them to exercise their bumping rights at the March 1993 bumping meeting. *See* Tr. 452-53, 721, 857, 996 (testimony of complainants that they did not attempt to bump because Ryan would have

²⁶ Although Ryan testified that the Operating Engineers and the contract forced him to have a bumping meeting when he eliminated the temporary third shift (Tr. 1396-97), the contract exempts temporary jobs from the bidding and bumping procedures. *See* Resp. Ex. 9 at 19-20; Tr. 241.

²⁷ Moreover, the Operating Engineers filed grievances against AAA on behalf of Soto and Dennis, as a result of the March 1993 layoff, assertedly because Ryan violated the contractual provision regarding layoff of Operating Engineers' stewards. Tr. 258, 1420-22. The grievances were withdrawn when Soto and Dennis were temporarily reinstated by agreement of the parties. 16 FMSHRC at 2242; Tr. 258.

disqualified them to prevent the bump). When all of the complainants sought to exercise their bumping rights after consulting with the Secretary's counsel, Ryan refused to consider them for any position. 19 FMSHRC at 858. The complainants were the only employees left without a job after the March 1993 bumping process was completed, and AAA subsequently hired new employees to fill the vacant repairman positions. 16 FMSHRC at 2240-41; Tr. 481, 1429, 1693.

Evidence supporting AAA's knowledge of the complainants' protected activities, the timing and circumstances surrounding the bumping of the complainants, and AAA's subsequent refusal to permit the complainants to bump junior employees persuades us that substantial evidence supports the judge's finding that AAA "manipulated the shift and job assignments . . . for the specific planned purpose of terminating the [complainants] . . ." 19 FMSHRC at 866. Accordingly, we conclude that the record compels a finding that the complainants established a prima facie case that their March 1993 layoff was discriminatorily motivated.

b. Affirmative Defense

AAA asserts that the March 1993 layoff was not discriminatory because the complainants chose not to avail themselves of the bumping procedure after they were bumped by the senior employees. A. Reply Br. at 12-13. AAA also alleges that the judge failed to find that permitting the complainants to bump after job assignments already had been rearranged would cause "commotion" and the filing of grievances by the bumped employees. A. PDR at 45.

In finding that AAA used the March 1993 bumping procedure to retaliate against the complainants for their protected activity, the judge implicitly rejected AAA's argument that the complainants' attempts to bump were untimely. We agree that ample record evidence supports rejection of AAA's argument. Bumping requests were made by three of the complainants approximately one week after the bumping meeting, and the remaining complainant three weeks after the meeting. See Gov't Exs. 21, 45, 52; Tr. 721, 857. Nothing in the collective bargaining agreement dictates a deadline by which bumping rights must be exercised. Tr. 1699-701. Even Ryan admitted that nothing in the bargaining agreement requires that a miner must bump at the bumping meeting or immediately thereafter. Tr. 1700. Furthermore, nobody from AAA objected to Hyles' or Soto's request to consult with their attorney before deciding whether to bump, nor did anyone inform the complainants that by taking the time to consult an attorney, they were forfeiting their bumping rights under the bargaining agreement. Tr. 218, 244-45, 452. The complainants' decision to bump only after considering the repercussions of doing so was reasonable in light of their unanimous belief that Ryan would disqualify them from any position into which they sought to bump, and their uncertainty regarding whether attempting to bump would jeopardize their previous reinstatement. Thus, we reject AAA's defense that the complainants' bumping requests were untimely.

AAA further defends on the ground that the complainants did not seek to bid on a plant operator job that was posted on March 24, 1993 — the same day as the bumping meeting. A. PDR at 38. After assertedly being laid off on March 24, Crowell, the employee who successfully

bid on the job, was temporarily placed in the job on the same day by Ryan. The job was posted on the afternoon of the day the complainants were laid off, and, not surprisingly, Crowell was the only employee to bid on the job. Resp. Ex. 18A; Tr. 1400-06. AAA's claim that the complainants' failure to bid on the job filled by Crowell indicates their lack of interest in bumping into an available position was presented to the judge (A. Br. at 77 n.67) who nonetheless found that the bumping procedure violated section 105(c). The judge's implicit rejection of AAA's argument is reasonable. There is no evidence in the record that the complainants were even aware of the posting, because, unlike Crowell, when they were bumped on March 24, they were not placed in another job.²⁸ Accordingly, we find that AAA's arguments fail to establish an affirmative defense to the Secretary's prima facie case.

In sum, the record compels a finding of discrimination regarding the second set of layoffs in March 1993. Ryan was able to manipulate the seniority/job classification so that the complainants were the only employees laid off. In addition to the judge's pertinent findings in his remand decision, he made strong factual findings of discrimination in his initial decision. 16 FMSHRC at 2248-49. Moreover, when the two layoffs and the circumstances surrounding them are viewed together, a clear pattern of discrimination by Ryan and AAA to retaliate against Hyles, Mears, Dennis, and Soto for their protected activity under the Mine Act emerges. We conclude that the credited record evidence compels the conclusion that AAA discriminatorily laid off the complainants in violation of section 105(c).

Accordingly, we reverse the judge's determination that the March 1993 layoffs were not discriminatorily motivated.

C. Penalties

In the judge's initial decision, in which he found both layoffs unlawful, he did not reach the issues of backpay or penalties. 16 FMSHRC at 2249. In a subsequent decision, the judge accepted a stipulation submitted by the parties, referred to previously (slip op. at 7 n.3), on the amount of backpay due the complainants, while AAA continued to argue against a finding of liability. 17 FMSHRC 799, 800 (May 1995) (ALJ). The parties also stipulated that the penalties should be levied in the amount of \$3,500 per individual violation. *Id.* at 800-01. AAA now objects to the judge's imposition of \$14,000 in penalties as contrary to the stipulation. AAA PDR at 73.

²⁸ Further, Ryan's actions in placing Crowell in the job before it was even posted — and thus before the complainants had an opportunity to bid on it — indicates that any efforts by them to bid on the job and be reclassified would have been futile.

supporting stipulation of the parties, which the judge attached to his decision, does not address the penalty criteria or offer any supporting rationale for the agreed upon penalty of \$3,500 per violation. *Id.* at 803-08 (Ex. A). In the judge's remand decision, he cited to the parties' earlier stipulation on penalties and stated that, "after consideration of the relevant statutory criteria," a penalty of \$14,000 (\$3,500 per violation for each of the four discrimination violations he found) was appropriate. 19 FMSHRC at 861. The judge did not specifically analyze any of the penalty criteria or offer any supporting reasons for the penalty in accordance with statutory requirements. *See Sellersburg Stone*, 5 FMSHRC at 290-94. Accordingly, we vacate the penalties imposed for the two layoffs and remand to the judge solely for the narrow purpose of reassessment of penalties through application of the section 110(i) penalty criteria. *See Secretary of Labor on behalf of Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1539 (Sept. 1997).

notification of a violation.

30 U.S.C. § 820(i).

III.

Conclusions

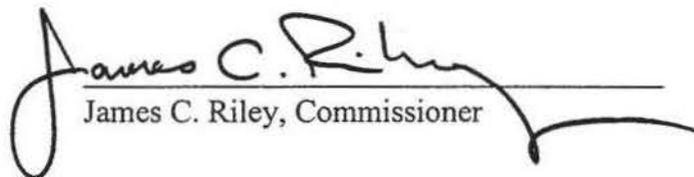
For the foregoing reasons, we affirm the judge's determination that the July 1992 layoff and failure to recall complainants was violative of section 105(c). We reverse the judge's determination that the March 1993 layoff was not discriminatorily motivated, and conclude that the record compels a determination that the March 1993 layoff violated section 105(c). Finally, we remand to the judge for the limited purposes of reinstating his backpay order, 17 FMSHRC at 801, (which adopted the parties' stipulation regarding backpay owed) and direct him to add the interest due on the backpay amounts accruing from the date referred to in the parties' stipulation, pursuant to the Commission's decision in *Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2051-53 (Dec. 1983), *modified, Local 2274, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493, 1504-06 (Nov. 1988). We also order the judge to reassess the penalties, reviewing the parties' stipulation, and applying the section 110(i) criteria. *See Energy West Mining Co.*, 16 FMSHRC 4, 4 (Jan. 1994) (considering section 110(i) criteria and approving penalty to which parties stipulated).



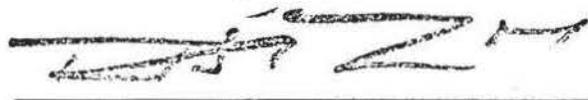
Mary Lu Jordan, Chairman



Marc Lincoln Marks, Commissioner



James C. Riley, Commissioner

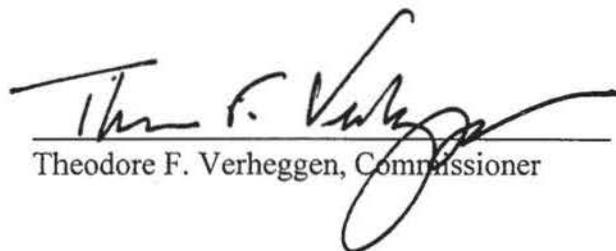


Robert H. Beatty, Jr., Commissioner

Commissioner Verheggen, dissenting:

I dissent from the majority decision because I believe that, in light of the judge's disregard of the instructions set forth in the Commission's original remand order (*see* 18 FMSHRC at 2101-03), his decision must be vacated and the matter remanded. For example, the judge failed to "frame his analysis in a manner consistent with the Commission's *Pasula-Robinette* analytical framework" (slip op. at 10), after the Commission directed him to do so (18 FMSHRC at 2102). Nor did the judge "reach the issue of whether AAA's economic justification for the initial layoff was proper" (slip op. at 18) as directed by the Commission (18 FMSHRC at 2102).

I also believe that a remand is necessary in light of what is in some respects an internally contradictory decision. As my colleagues point out, the judge's "conclusion that there was no nexus between the [March 1993] layoffs and the complainants' involvement in MSHA's section 110(c) investigation is contrary to his own findings." Slip op. at 19. I am not prepared to resolve such issues at this appellate level, issues which I believe must be resolved by the judge in the first instance. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993) ("[T]he ALJ has sole power to . . . resolve inconsistencies in the evidence.") (citations omitted).¹



Theodore F. Verheggen, Commissioner

¹ I would also vacate and remand the judge's penalty assessment and backpay awards with the instruction to reconsider them in light of any new findings made pursuant to my remand instructions on the merits. I agree with my colleagues that the judge must follow *Sellersburg Stone Co.*, 5 FMSHRC at 290-94, in reassessing any penalty. Slip op. at 24. On remand, the judge thus must enter findings on each of the section 110(i) penalty criteria and assess an appropriate penalty based on his findings. *See* 5 FMSHRC at 292-93.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 8, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 98-204
Petitioner	:	A.C. No. 15-13936-03552
v.	:	
	:	Star Fire Mining
STAR FIRE MINING,	:	
Respondent	:	

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

This case is before me based upon a Petition for Assessment of a Civil Penalty filed by the Secretary of Labor ("Secretary") alleging a violation by Star Fire Mining ("Star Fire") of 30 C.F.R. § 77.1303 (pp). Pursuant to notice, the case was heard in Kingsport, Tennessee, on December 15, 1998.

Star Fire operates a surface bituminous Coal Mine in Perry County, Kentucky. As part of its operation Star Fire drills 80 foot deep blast holes that are filled with an explosive and subsequently blasted. On February 13, 1998, an unplanned explosion of a misfired drill hole occurred while Larry Ellison was operating an electrical shovel in the area, causing him to suffer a fractured skull and an injury to his right hand. Jim Thornsberry who was operating a rock truck in the area was also injured. After conducting an investigation, the Secretary issued a Citation alleging that Star Fire violated 30 C.F.R. § 77.1303 (pp) which provides as follows: "[b]lasted areas shall be examined for undetonated explosives after each blast and undetonated explosives found shall be disposed of safely."

The Secretary offered the testimony of two inspectors, John Dishner and Elmer Hall, Jr. Dishner testified that he conducted an investigation of the accident. He identified the *Report of Blasting Operations* (Government Exhibit 1), which sets forth that 17 holes had been blasted on February 6, 1998.

Dishner indicated, based upon his investigation, that it appeared that the explosion at

issue that occurred on February 13, 1998, resulted when the bucket of an electrical shovel operating in the area that had been blasted on February 6, struck an unfired detonation, and it exploded. Dishner admitted on cross-examination that when he examined the area in question on February 13, the terrain was not in the same condition as it had been prior to the explosion. He indicated that he did not see anything that evidenced undetonated explosive.

Hall, who was the lead accident investigator, indicated that on February 13, 1998, an anonymous telephone caller asserted that there was another failed hole in the area at issue. Hall testified that he was subsequently informed by Star Fire that an undetonated hole had been found and shot.

Hall opined that on February 6, 1998, a post blast inspection did not detect undetonated holes. He said that the area should have been undisturbed if it had not been shot. Hall testified regarding the basis for his opinion as follows: “[i]f a quality inspection had been done, that since there should have been a blast for an experienced blaster to observe and figure that there was something wrong with this shot (sic)” (Tr. 88). He said he also based his opinion upon his 30 years experience in both underground and surface coal mines, and 3 years experience as an investigator.

Hall said that he spoke with Daniel Brock, a Star Fire employee who was in charge of the blasters, Tom Singleton, Star Fire’s Superintendent, and Kyle Biales, who all assured him that a post blasting inspection had been done. However, Hall did not examine any records.

On cross-examination, Hall conceded that prior to the instant investigation, he had investigated blasting accidents, but had never investigated a misfire. He indicated that he had been told that after the accident at issue, Star Fire had to cut down 20 to 25 feet below the surface before another undetonated blasting line was found. Hall was not present when this unblasted hole was discovered. He conceded that at the time of his inspection on February 13, 1998, he did not see any evidence of a second unblasted hole; that he did not talk to the Star Fire employee who had made the post blasting examination; that all blasting lines that he found on the surface had been detonated; that a post blast examiner would not have been able to see the condition of lines in the blasting hole; that he did not know the kind of examination conducted after the initial blast; that he did not know what the surface that had been blasted looked like; and that he did not know if there was any evidence of undetonated holes when the examination was made. After the Secretary presented the testimony of Dishner and Hall, and introduced seven exhibits, the Secretary rested.

At the conclusion of the Secretary’s case, Star Fire made a motion to dismiss. After listening to argument from counsel for both parties on the motion to dismiss, the motion was granted. The bench decision granting the motion is set forth below with minor changes not relating to matters of substance.

The standard at issue, 30 C.F.R. § 77.1303 (pp) requires that blasted areas shall be examined for undetonated explosives after each blast and undetonated explosives found shall be

The standard at issue, 30 C.F.R. § 77.1303 (pp) requires that blasted areas shall be examined for undetonated explosives after each blast and undetonated explosives found shall be disposed of safely. The Secretary has the burden of proving by credible evidence that there had not been an examination, or that an examination had been performed but such an examination was not adequate.

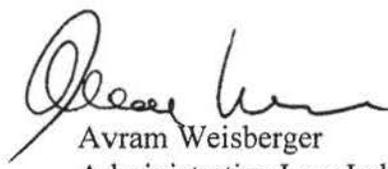
I find the Secretary has not presented a prima facie case in this matter. There is no evidence that has been presented as to the type of examination that was performed. There is no evidence as to how the surface appeared at the time of the examination. There is no specific evidence as to what the examiner did. There is no evidence as to what a reasonable examination should have entailed. There is no evidence relating to the appearance of the ground surface at the time of the examination.

Counsel for the Secretary indicated that she was not able to ascertain any authority that stands for the proposition that the mere fact that there subsequently is found undetonated explosives raises a presumption that an area was not examined, or it was not examined properly. I have not been able to locate such authority.

So for these reasons, I find that the Secretary has not established a prima facie case, and the motion to dismiss is **GRANTED**.

ORDER

It is ordered that this case be **DISMISSED**.


Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 11, 1999

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 98-108
Petitioner	:	A. C. No. 36-07416-03743
v.	:	
	:	Enlow Fork Mine
CONSOL PENNSYLVANIA COAL	:	
COMPANY,	:	
Respondent	:	

DECISION

Appearances: Anthony G. O'Malley, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Petitioner;
Elizabeth S. Chamberlin, Esq., CONSOL Inc., Pittsburgh, Pennsylvania, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a petition for civil penalty filed by the Secretary of Labor against Consol Pennsylvania Coal Company (Consol) pursuant to section 105(d) of the Federal Mine Safety and Health of 1977, 30 U.S.C. § 801, *et seq.*, the "Act," alleging two violations of mandatory standards and seeking a civil penalty of \$540 for those violations. The general issue before me is whether Consol committed the violations as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under section 110(i) of the Act.

At hearing the parties agreed to settle Citation No. 3674196 by deleting the "significant and substantial" findings and reducing the civil penalty to \$200. The proffered settlement is acceptable under the criteria set forth in section 110(i) of the Act and an order directing payment of that amount will be incorporated in this decision.

The citation remaining at issue, No. 7066284, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.1725(a) and charges as follows:

The B-14 belt conveyor at the transfer area is not being maintained in a safe operating condition. The belt scraper, installed on the underside of the bottom belt, was observed positioned in a manner which permitted the belt splice areas of the belt to come into contact with one of the right inby side support chains, 3/8" chain link, creating undue stress on the installation. One of the support chains on

the left inby side had already broken creating this hazardous condition. Management removed the belt from service immediately upon determining this condition to be hazardous.

The cited standard, 30 C.F.R. § 75.1725(a), provides that “[m]obile 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.”

Edward Lewetag, an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) with significant industry experience, was inspecting the Enlow Fork Mine on February 9, 1998, accompanied by another MSHA inspector and two Consol employees, Safety Director Robert Gross and Safety Inspector Daniel Clark. Near the transfer area of the B-14 belt Lewetag heard a loud banging noise. While standing in the right inby travelway Lewetag then observed that the noise came from the belt scraper. The belt scraper is used to clean debris from the belt after dumping. The 2-foot-wide and 5-foot-long scraper had a metal framework with rubberized material drawn up against the bottom belt. The belt at this location was 52 inches wide. Lewetag observed that the 3/8 inch guide chain suspended from the roof had come loose thereby forcing the right hand portion of the scraper to fall out of alignment in an inby direction toward the inby left walkway. The failure of the guide chain also had the effect of permitting the splices on the conveyor belt to come in contact with the right inby support chains and come-along cables of the scraper assembly. This contact between the belt splices and the scraper assembly chains and come-along cables caused the scraper and the scraper assembly to bounce about.

According to Lewetag, the scraper assembly could thereby become detached from its “J”-hooks and the scraper could then be ejected into the left side walkway. He further noted that if a miner happened to be standing in the left inby walkway and the belt scraper ejected to that side, body contact would likely be at waist level or below. He concluded that it would be “reasonable” for these events to occur and if the scraper contacted a person it would cause injury. According to Lewetag, the pre-shift and on-shift examiners on each of the 3 shifts, the belt foreman and miners performing belt cleaning were likely to be exposed to the hazard.

As noted, Robert Gross, the Enlow Fork Mine Safety Supervisor, accompanied Lewetag on this inspection. Gross acknowledged that the subject scraper had indeed come loose because of the loose alignment chain and that each time a splice in the belt caught the mounting bracket the scraper would jerk. Gross disagreed however with Lewetag's assessment of a hazard. Gross opined that if the scraper became disconnected it would likely fall onto the drip pan below and strike the mounting bracket. According to Gross, the scraper would therefore be restrained and could not be projected into the walkway. Gross observed that other scrapers had come loose before and had always been found in the drip pan. Gross also thought that, in any event, there was no probability of the scraper coming loose. Consol Safety Inspector Daniel Clark also observed the cited condition. The scraper was admittedly out of alignment and splices on the bottom belt were catching and causing the scraper to jump. Clark nevertheless concluded that this did not constitute an unsafe condition.

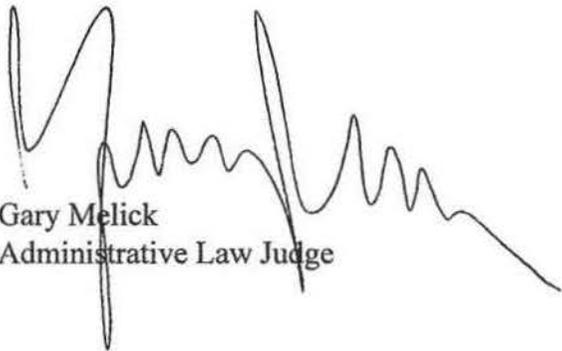
In *Alabama By-Products Corp.*, 4 FMSHRC 2128 (December 1982), the Commission addressed the standard to be applied when determining the validity of alleged violations of the mandatory standard at issue and stated that "in deciding whether equipment or machinery is in safe or unsafe operating condition we conclude that the alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation."

I have absolutely no doubt that Inspector Lewetag acted and testified in good faith. However, based on the credible testimony of Consol's Safety Supervisor, Robert Gross, and Safety Inspector Daniel Clark, corroborated by photographs showing the configuration of the subject scraper assembly and its relationship to the mounting chain for the drip pan and the belt structure, I do not believe the inspector was adequately informed of all of the factual circumstances sufficient to meet the *Alabama By-Products* standard. Thus the Secretary's only proffered theory of a hazard (that the scraper assembly would be projected into a miner passing along the walkway) cannot be supported.

Under all the circumstances I do not find that the Secretary has met her burden of proving the violation charged in Citation No. 7066284.

ORDER

Citation No. 7066284 is hereby **VACATED**. Citation No. 3674196 is hereby **AFFIRMED**, but without "significant and substantial" findings and Consol Pennsylvania Coal Company is hereby directed to pay a civil penalty of \$200 for the violation charged therein within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

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January 12, 1999

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION, (MSHA), : Docket No. KENT 96-254
Petitioner : A.C. No. 15-07201-03681
v. : Docket No. KENT 96-320
: A.C. No. 15-07201-03683
HARLAN CUMBERLAND COAL CO., : Docket No. KENT 96-321
Respondent : A.C. No. 15-07201-03684
: Docket No. KENT 96-322
: A.C. No. 15-07201-03685
: Docket No. KENT 96-333
: A.C. No. 15-07201-03686
: C-2 Mine

DECISION ON REMAND

Before: Judge Barbour

The Commission has remanded this matter (Harland Cumberland Coal Co., 20 FMSHRC ___, Docket No. KENT 96-254, etc. (December 10, 1998)) and directed me to reassess a civil penalty for a violation of section 30 C.F.R. § 75.1106-3(a) (2), a mandatory safety standard for underground coal mines requiring in part that "[l]iquified and non liquified compressed gas cylinders stored in an underground coal mine . . . be . . . [p]laced securely in storage areas designated by the operator for such purpose, and where the height of the coal bed permits in an upright position, preferably in specially designated racks, or otherwise secured against being accidently tipped over."

The violation was one of several that I found occurred at Harlan Cumberland's C-2 Mine, an underground coal mine located in Harlan County, Kentucky (19 FMSHRC 911 (May 1997)). The violation was cited by MSHA Inspector Robert Clay when he observed two compressed gas tanks, one for oxygen and one for acetylene, leaning against the rib of a coal pillar, in an active roadway. The roadway was used by large equipment, such as scoops and personnel carriers. The inspector explained that the scoops and personnel carriers provided their operators with very limited visibility (Tr. 103), and that tracks on the mine floor indicated the equipment had come

within 12 inches of the tanks (Tr 105). Because the tanks were not stored securely in an upright position, the inspector cited Harlan Cumberland for a violation of the standard. In addition, he found the condition was a significant and substantial contribution to a mine safety hazard (S&S).

The inspector testified that if either tank had been hit and punctured, either could have exploded violently (Tr. 101, 102), and that if both tanks had been hit and the oxygen and acetylene had mixed, the resulting explosion could have been even more violent (Tr. 103). Clay believed the violation subjected miners in the active roadway, including those operating or riding on the equipment, to the danger of severe burns or death. Clay described an incident in which a tank similar to those cited had been punctured and “[A] miner was literally blown to bits” (Tr. 103). Clay candidly admitted, however, that he did not know if the tanks contained gas (Tr. 104).

In ruling on the merits of the violation I found that section 75.1106-3(a)(2) makes no distinction between full or empty cylinders, and I concluded the standard had been violated. I also found, based upon Clay’s testimony — including the fact that mining equipment driven by operators whose vision was restricted, passed within one foot of the tanks — that it was reasonably likely as mining continued that the tanks would have been hit and punctured and that a resulting explosion and fire would have injured seriously one or more miners. Therefore, I concluded the violation was S&S (19 FMSHRC at 925-926).

Further, I found the violation was serious. I noted what could have happened if the tanks were ruptured. I stated, “The inspector compellingly testified ... [that] if the unsecured tanks were knocked over and punctured[,] [t]he explosion and fire ... could have been catastrophic to those in the immediate vicinity of the tanks” (19 FMSHRC at 926 (transcript citation omitted)). In addition, I found the violation was the result of Harlan Cumberland’s negligence (19 FMSHRC at 926). The Secretary and Harlan Cumberland stipulated to all other applicable civil penalty criteria (Tr. 912), and based upon my findings regarding gravity and negligence and upon the stipulations, I assessed a civil penalty of \$288 for the violation.

Harlan Cumberland sought and was granted review. It argued the violation was not S&S since the Secretary produced no proof that the tanks contained gas. The Commission agreed that the presence of fuel in the tanks was a prerequisite for a S&S finding and that the burden was on the Secretary to prove the tanks contained oxygen and/or acetylene. Because the inspector did not know what the tanks contained, because the Secretary produced no evidence regarding the contents of the tanks, and because a reasonable inference could not be drawn regarding their contents, the Commission held that “the Secretary failed to carry her burden of proof as to the critical element of a fuel source, [and that] substantial evidence [did] not support the . . . S&S determination” (Harlan Cumberland, slip op. 10). Accordingly, the Commission reversed the S&S finding and remanded the matter for reassessment of the civil penalty.

The essential question on remand is how the Commission’s reversal of the S&S finding affects the gravity of the violation. The focus of the civil penalty gravity criterion is not

necessarily on the reasonable likelihood of serious injury, but rather on the effect of the hazard if it occurs (Consolidation Coal Company, 18 FMSHRC 1541, 1550 (September 1996); citing to Quinland Coals, Inc., 9 FMSHRC 1614, 1622 n.11 (September 1987) ("gravity" penalty criterion and special finding of S&S not identical although frequently based on same or similar factual circumstances)). Nevertheless, I read the Commission's decision as implying that the lack of any evidence regarding fuel in the tanks (or regarding the likelihood of residual explosive fuel vapors) makes it impossible to assess the presence of a hazard. Therefore, I find the violation was not serious, and considering all of the other civil penalty criteria set forth previously, reassess a civil penalty of \$50.

Accordingly, within 30 days of this remand decision Harlan Cumberland is **ORDERED** to pay the reassessed penalty of \$50 for the violation of section 75.1106-3(a)(2) as alleged in Citation No. 4243726 (Docket No. KENT 96-254).

In addition, the company is **ORDERED** to pay all penalties previously assessed or modified by the Commission (see 19 FMSHRC at 956; Harland Cumberland, slip op.17). Finally, within the same 30 days the Secretary is **ORDERED** modify and vacate all relevant citations as previously instructed (see 19 FMSHRC at 956).

Upon payment of the penalties and modification and vacation of the citations, these proceedings are **DISMISSED**.


David Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041

January 21, 1999

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 98-243
Petitioner : A. C. No. 48-00992-03502 LLO
v. :
 : Cordero Mine
L & T FABRICATION & :
CONSTRUCTION, INC., :
Respondent :

DECISION

Appearances: Mark W. Nelson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
David M. Arnolds, Esq., Jackson & Kelly, Denver, Colorado, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against L & T Fabrication & Construction, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges a violation of the Secretary's mandatory health and safety standards and seeks a penalty of \$40,000.00. A hearing was held in Gillette, Wyoming. For the reasons set forth below, I affirm the citation and assess a penalty of \$20,000.00.

Background

Production Industry Corporation (PICOR) entered into a contract to remove all of the old silo load-put facilities at the Cordero Mine, located in Campbell County, Wyoming, and to install a new batch weigh system. The Respondent, L & T Fabrication & Construction, Inc., contracted with PICOR to do the structural portion of the project. Edward Loren and Catherine C. Crain own 100 percent of the shares in L & T.

On the morning of August 6, 1997, L & T employees were working in silo number 2 at the mine installing a deck in the north half of the silo. The deck was approximately 18 and one half feet above the floor. After the deck plates had been placed and hot-tacked, Glen Belt, the

foreman, decided to begin installing a handrail on the deck while the deck was being welded. Belt carried a five foot long by four foot high section of the handrail up to the deck. The section weighed between 60 and 90 pounds. Shayne DeGaugh, who had worked for the company for three weeks, went to get bolts for the handrail.

Belt set the handrail over the barricade at the top of the stairs. As he was crossing the barricade himself, the piece of handrail slid on the deck and went over the edge. At the same time, DeGaugh was returning with the bolts, walking directly under the deck. The handrail hit DeGaugh in the head. As a result, his neck was broken and he is permanently paralyzed from the neck down.

After an MSHA investigation of the accident, Citation No. 7608502, alleging a violation of section 77.203, 30 C.F.R. § 77.203, was issued.¹ The citation stated that: "Adequate protection was not provided in silo number 2 where people were working on an elevated walkway 18.5 feet above the concrete floor. A section of handrail measuring 5.5 feet long by 4 feet high fell and struck a person walking underneath the elevated platform." (Govt. Ex. 1.) The inspector found the violation to be "significant and substantial" and to have resulted from high negligence and an "unwarrantable failure" on the part of the operator.²

Findings of Fact and Conclusions of Law

At the hearing, the parties stipulated that the violation occurred as alleged in the citation, that it was "significant and substantial" and resulted from high negligence and the operator's "unwarrantable failure" to comply with the regulation.³ (Tr. 12, 19, 25-26.) Accordingly, I affirm the citation.

Civil Penalty Assessment

¹ Section 77.203 provides: "Where overhead repairs are being made at surface installations and equipment or material is taken into such overhead work areas, adequate protection shall be provided for all persons working or passing below the overhead work areas in which such equipment or material is being used."

² The "significant and substantial" and "unwarrantable failure" language is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard" and which was "caused by an unwarrantable failure . . . to comply with . . . mandatory health or safety standards . . ."

³ The operator had been cited for the same violation on May 21, 1997. (Govt. Ex. 2.)

The only issue contested at the hearing was the amount of civil penalty to be assessed for this violation. The Secretary has proposed a penalty of \$40,000.00. 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, 30 U.S.C. § 820(i).⁴ *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

The parties have stipulated that the operator demonstrated good faith in abating the violation, that L & T worked 32,933 man-hours on the mine site in 1997, and, as previously noted, that the violation was "significant and substantial" and occurred because of the operator's high negligence and "unwarrantable failure" to conform to the regulation. (Tr. 25-26.) The evidence further indicates that L & T had received only two citations in the two years preceding the violation in this case, those being the May 21, 1997, citation and the one at issue in this case, that the company had only been cited six times in its 18 year history, and that three of those were subsequently vacated. (Tr. 71, 79.)

To show that the proposed \$40,000.00 penalty will adversely affect its ability to continue in business, L & T has submitted its fiscal year 1996 and 1997 financial statements,⁵ its tax returns for 1995 and 1996 and a current, as of October 31, 1998, balance sheet and income statement. (Resp. Exs. B, C, D, E and F.) The financial statements are accompanied by an "Independent Accountants Report on the Financial Statements" stating:

We have reviewed the accompanying balance sheets of **L & T Fabrication & Construction, Inc.** as of November 30, 1997 and 1996, and the related statements of income, retained earnings and cash flows for the years then ended, in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants. All of the information included in these financial statements is the representation of the management of **L & T Fabrication & Construction, Inc.**

A review consists principally of inquiries of Company personnel and analytical procedures applied to financial data. It is

⁴ The section 110(i) penalty criteria are: "[T]he operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation."

⁵ L & T's fiscal year ends on November 30 of the year being reported.

substantially less in scope than an audit conducted in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we do not express such an opinion.

Based on our reviews, we are not aware of any material modifications that should be made to the accompanying financial statements in order for them to be in conformity with generally accepted accounting principles.

(Resp. Ex. B.)

It is apparent from this letter that the financial statements are not reliable information on which to determine whether the civil penalty will adversely affect L & T's ability to remain in business. The statements are unaudited; everything in them is the representation of the company. There is no way to know whether that information is complete, true and correct. Indeed, the accountants specifically declined to express an opinion regarding the financial statements taken as a whole. The burden is on the operator to show that the penalty will adversely affect its ability to remain in business. *Sellersburg* at n.14. Unaudited financial statements are not sufficient to do so. See *Spurlock Mining Co, Inc.*, 16 FMSHRC 697, 700 (April 1994).

Furthermore, the submitted documents do not establish that L & T's ability to continue in business will be adversely affected if it has to pay the full \$40,000.00. The company's balance sheet indicates that the company's current assets increased from \$396,038.00 in 1996 to \$438,431.00 in 1997, while its current liabilities decreased from \$347,489.00 in 1996 to \$214,958.00 in 1997. (Resp. Ex. B.) More significantly, the most recent balance sheet, as of October 31, 1998, shows current assets had increased to \$549,327.05, with current liabilities of \$181,681.72. (Resp. Ex. E.) Thus, it appears that the company has the capacity to absorb the penalty and still remain in business, just as it absorbed a loss of \$85,000.00 on a project in 1996 and still remained in business. (Resp. Ex. B, n.9; Tr. 97.)

Although L & T has not shown that the proposed penalty will adversely affect its ability to remain in business, I do not agree with the penalty proposed by the Secretary. I find that the gravity of this violation was extremely serious. It resulted in a young man being permanently paralyzed from the neck down and could easily have been a fatality. The company was highly negligent in failing to barricade the area below the deck after having been cited for the same violation some three months before. Without more, these factors would justify the proposed \$40,000.00 penalty. However, I find that the company's very good history of prior violations, its small size and the fact that it rapidly abated the violation mitigate the penalty. Accordingly, taking all of the penalty criteria into consideration, I conclude that a penalty of \$20,000.00 should be assessed.

Order

Citation No. 7608502 is **AFFIRMED**. L & T Fabrication & Construction, Inc., is **ORDERED TO PAY** a civil penalty of **\$20,000.00** within 30 days of the date of this decision.



T. Todd Hodgdon
Administrative Law Judge
(703) 756-6213

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

January 25, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 98-156-M
Petitioner	:	A. C. No. 09-00075-05529
	:	
v.	:	
MARTIN MARIETTA AGGREGATES,	:	Camak Quarry
Respondent	:	

DECISION

Appearances: Leslie John Rodriguez, Esq., Fran Schleicher, Esq.,
Office of the Solicitor, U. S. Department of Labor,
Atlanta, Georgia, for Petitioner;
Henry Chajet, Esq., Patton Boggs, Washington, D.C.,
for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the Secretary of Labor against Martin Marietta Aggregates under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820.

This case contains three violations one of which the operator has agreed to withdraw its contest and pay the proposed penalty in full (Stip. 4).

On October 28, 1998, a hearing was held with respect to the remaining two violations. The transcript has been received and the parties have filed post hearing briefs.

The parties agreed to the following stipulations (Tr. 7-11) which are as follows:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this matter because the product produced by respondent enters and affects interstate commerce.
2. The citations and order were issued by an authorized representative of the Secretary and properly served on respondent.
3. Martin Marietta Aggregates, Camak Quarry, employs approximately 40 people and produces approximately 1.4 million tons per year.

4. Respondent agrees to withdraw its notice of contest of citation 4551643 and pay the proposed penalty of \$267. Petitioner agrees that the conditions cited in said citation are not in any way related to the accident that resulted in the other two citations at issue and did not affect the braking ability of the locomotive involved. The parties further agree that, except for the purposes of setting future penalties under the Act by inclusion in respondent's history of violations, the payment of the penalty and the settlement of the citation is not an admission by respondent of any fact or violation and not usable by petitioner for any other purpose other than the calculation of future penalties.

5. Respondent demonstrated good faith in promptly correcting the conditions alleged.

6. Prior to the accident which gave rise to this case, respondent Camak Quarry had a 0.0 injury frequency rate compared to a rate of 6.06 for the industry.

7. The proposed penalties would not affect respondent's business viability.

8. Prior to the accident which gave rise to the citations at issue in this case, respondent had initiated and conducted a training program that met the requirements of 30 C.F.R. Part 48, despite the fact that respondent's operations are exempt from enforcement of said training regulations by congressional statute.

9. At the beginning of the morning shift on October 20, 1997, Jut Anderson traveled to the loadout area and informed loadout personnel, including Billy Moss, of the schedule for the day, including the fact that he would be cleaning the railroad scales.

10. Respondent's employee, Jut Anderson, like other key employees throughout the site, was provided with a portable radio by respondent to assist in communications on the site despite the lack of any MSHA requirement.

11. On October 20, 1997, at approximately 8:30 a.m., Mr. Anderson commenced the cleaning of the railroad scales.

12. On the morning of October 20, 1997, Mr. Robert Hobbs stated to MSHA's inspectors that Mr. Jut Anderson did not communicate with him either by radio or in person that he would be cleaning the scales.

13. Mr. Robert Hobbs stated to MSHA inspectors that on the morning of October 20, 1997, he followed his normal procedure and performed part of his job by pushing the four railcars that were blocking the crossing toward the scale to clear the crossing.

14. As Mr. Hobbs pushed the four railcars along the track to clear the crossing, they hit the train, composed of the locomotive and ten attached cars, causing the train to move forward and critically injuring Mr. Jut Anderson, who was sitting on the track on the scales approximately 18 inches in front of the running locomotive.

15. The locomotive involved in the accident had two separate braking system control levers: One, an air brake system for the locomotive itself, and, two, another air brake system for railcars attached to the locomotive. These two systems were operated by two separate levers in the locomotive cab.

16. The railcars involved in the accident had two separate braking systems on each car: One, an air brake system that attaches by hoses to other cars and ultimately to the locomotive, and a mechanical braking system that is set or released by turning a wheel on each railcar.

17. Immediately following the accident the locomotive and railcars were moved to permit recovery of the victim.

18. The MSHA inspectors who investigated the accident and issued the citations did not examine the locomotive or railcars involved until the day following the accident.

19. The investigators who issued the citations determined through their interviews that Jut Anderson, the accident victim, communicated his activities and hazards present on the track to all of the loadout personnel both in person and using his radio but failed to communicate with Mr. Robert Hobbs on the morning of the accident.

20. Mr. Slaton acknowledges that the citation issued pursuant to his direction for an alleged violation of Section 56.14217 was issued for both the locomotive and the railcars because the standard covers both railcars and locomotives.

The stipulations were accepted with the caveat that a determination regarding the scope and effect of a mandatory standard was a matter for me to decide (Tr. 11).

Citation No. 4551641 dated, October 22, 1997, was issued pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), and charges a violation of 30 C.F.R. § 56.14217 for the following conditions or practices:

An accident occurred at this mine on October 20, 1997, severely injuring the employee. He died of these injuries the following day. The victim was seated approximately 3 feet from a 125 ton Alco RS-11 locomotive cleaning the rail scale with compressed air being supplied by the locomotive. The locomotive and the 10 rail cars attached to it were not blocked against movement. Four loaded rail cars were pushed into the locomotive and attached cars causing the locomotive to run over and pin the victim beneath the locomotive. Mine management was aware the scales were to be cleaned but failed to assure that the train was blocked against movement. The conduct of the operator was aggravated and constituted more than ordinary negligence. This is an unwarrantable failure.

30 C.F.R. § 56.14217 sets forth the following:

Parked railcars shall be blocked securely unless held effectively by brakes.

Order No. 4551642 dated, October 22, 1997, was issued pursuant to section 104(d)(1) of the Act, supra, and charges a violation of 30 C.F.R. § 56.14207 for the following conditions or practices:

An accident occurred at this mine on October 20, 1997, severely injuring the employee. He died of these injuries the following day. The victim was seated approximately 3 feet from a 125 ton Alco RS-11 locomotive cleaning the rail scale with compressed air being supplied by the locomotive. The locomotive and the 10 rail cars attached to it were left unattended and the parking brakes on the locomotive or rail cars were not set. Four loaded rail cars were pushed into the locomotive and attached cars causing the locomotive to run over and pin the victim beneath the locomotive. Mine management was aware the scales were to be cleaned but failed to assure the parking brakes were set. The conduct of the operator was aggravated and constituted more than ordinary negligence. This is an unwarrantable failure.

30 C.F.R. § 56.14207 sets forth the following:

Mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank.

Statement of Facts

The essential facts are as follows: At the loadout point in the operator's Camak Quarry, railcars were loaded with crushed stone and then gravity dropped to the storage area (Tr. 34, 114, 115). After the cars were dropped, a loader was routinely used to push them forward so they would attach to a locomotive which previously had been parked a few feet in front of the scales (Tr. 115, 140). The cars were then weighed at the scales and thereafter the locomotive moved them to a point where they were to be transported from the mine (Tr. 56, 165). On October 20, 1997, the decedent, Jut Anderson, was the leadman of the loadout crew (Tr. 139, 247, 302). He told the plant foreman, Donny Reese, and the loadout crew that he was going to clean the scales (Stip. 9, Tr. 180-181, 293-294). He did not, however, tell Robert Hobbs, the loader operator (Stip. 12). On the shift in question, Billy Moss, a member of the loadout crew, brought the locomotive to the rail scales (Tr. 113, 172). Moss parked the locomotive 18 inches to 3 feet before the scales and set the locomotive's brake (Tr. 196). Subsequently, ten railcars were dropped and attached to the locomotive (Tr. 140, 173, 256). Anderson asked Jason Jones to assist him in cleaning the scales by shoveling debris off the scales and later by digging a ditch to remove water under the scales (Tr. 170, 247-248, 251). Anderson used compressed air from the

locomotive to clean the scales. Hoping to increase the air pressure being used to clean the scales, he told Jones to release the air brake on the locomotive and Jones did so (Tr. 248, 250, 300). Anderson was in front of the locomotive, cleaning the scales and Jones was on a backhoe (Tr. 248-249, 268, 271). At that time four cars which were previously dropped from the loadout had come to a stop and were blocking an intersection (Tr. 141). Unaware that Anderson was on the track cleaning the scales, Hobbs used a loader to push the four cars into the ten cars (Tr. 141). The impact of the four cars caused the ten cars and the locomotive to move forward (Tr. 141). The locomotive hit and killed Anderson (Stip. 14, Tr. 141).

Duplication

The operator asserts that the citations are duplicative, arguing that 30 C.F.R. § 56.14217 covers the charges involving both the locomotive and the railcars. This assertion is without merit. Section 56.14217 specifically applies to parked railcars and does not refer to locomotives. When the mandatory standards delineate a specific requirement applicable to locomotives they use the term "locomotive." 30 C.F.R. § 56.14218. Similarly, when the standards apply a requirement to trains, it uses that term. 30 C.F.R. § 56.14219. Indeed, an examination of section 56.14217 and the sections that follow it, demonstrates that the mandatory standards are precise in their descriptions of the equipment they cover. When the standards impose requirements upon many types of equipment, a comprehensive definition is given to which the mandates apply. This is the case with mobile equipment which is described in broad terms including rail mounted equipment that is capable of moving. 30 C.F.R. § 56.14000. This definition plainly includes locomotives. Therefore, the requirements of 30 C.F.R. § 56.14207 relating to mobile equipment apply to the locomotive in this case.

The inspectors apparently believed that Section 56.14217 applied to both the locomotive and the railcars. However, as I made clear at the hearing, I am not bound by their interpretation (Tr. 11). It is however, disturbing that as enforcement under the Mine Act and its predecessor, the Coal Act, enters its fourth decade, inspectors come to the hearing supposedly prepared to testify but are confused about the standards they cite and hold views that conflict with those of the Solicitor in the case.

The operator also argues that Section 56.14207 does not apply to locomotives because the inspectors admitted that locomotives do not have parking brakes. I reject this argument and do not believe the testimony of the inspectors supports the operator's position. Inspector Wriston focused on the fact that the brakes in question were the locomotive's only brakes and not on whether the brakes were service brakes or parking brakes (Tr. 86). And he concluded by stating that the parking brake was the service brake (Tr. 95). Similarly, the testimony of Inspector Slaton does not support the operator's position. He also testified that the parking brake was the service brake (Tr. 191-192). The operator presented no evidence of the differences between service brakes and parking brakes. And it did not come forward with any evidence showing that the same brake cannot serve as both a service brake and a parking brake depending upon the circumstances. What the record does show is that when the locomotive was parked or came to a stop, the brake was set (Tr. 109, 113-114, 145, 147, 198, 269). I hold that this brake was a parking brake for the purposes of Section 56.14207.

Citation No. 4551642

A. Existence of a Violation

As set forth above, this citation was issued because the ten railcars attached to the locomotive were not blocked or secured effectively by brakes. When asked whether the cars were blocked, Moss who had parked the locomotive was evasive. He first asked for the question to be repeated and then said he did not understand the question (Tr. 119). But when queried from the bench, Moss finally agreed that he did not block the wheels of the railcars (Tr. 120). Hobbs, the loader operator, testified that past practice was not to block railcars (Tr. 149). He stated that the locomotive was blocked only at the end of the shift (Tr. 149). Inspector Slaton said that there was no evidence of any blocks (Tr. 176). At the hearing, the lack of any conflict on the matter of blocking was noted from the bench (Tr. 149). I find that the railcars were not blocked.

The critical issue, therefore, is whether the railcars were held effectively by the brakes. The parties addressed this issue solely in terms of whether the brakes on the railcars had been set. Their evidence on this question is unpersuasive. The inspectors testified that Parsons, the production manager and member of senior management, told them that the brakes on the railcars were not set (Tr. 30-31, 38-40, 173, 193). Parsons was not present at the quarry at the time of the accident, but went there shortly afterwards (Tr. 69-70). However, the Secretary did not call Parsons as a witness, although he was still in the area and working for another company (Tr. 308). Hearsay evidence is admissible in administrative proceedings but the probative weight to which it is entitled depends upon the circumstances. 29 C.F.R. § 2700.63(a); REB Enterprises Inc., 20 FMSHRC 203, 206 (March 1998); Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1135, 1139 (May 1984); Ideal Cement Co., 13 FMSHRC 1346, 1350 n.1 (September 1991). Since Parsons was not called as a witness, he was not available for cross examination on whether the notes and testimony of the inspectors adequately and fairly set forth what he told them. In addition, Parsons himself had no first hand knowledge of what happened. He was only repeating what other individuals had told him. Because Parsons was not called as a witness, there was no opportunity to ask him to identify his sources of information. Accordingly, even if the inspectors accurately wrote down what Parsons told them, there is no way to test the accuracy of Parsons' statements or his sources of information. Under the circumstances, I determine that the notes and testimony of the inspectors regarding Parsons are not entitled to any probative weight.

Every employee of the operator who testified, denied knowing if the brakes had been set. Moss testified that he did not know if the brakes on the railcars were set (Tr. 118).¹ Jones also denied knowing whether anyone set the brakes, although the inspectors testified that he told them the brakes were not set (Tr. 40, 43-44, 193, 261). So too, Hobbs said he did not set the brakes

¹ When Moss was asked questions by the Solicitor, he had to be admonished not to look at operator's counsel (Tr. 114, 131). And when operator's counsel objected to a question by the Solicitor, Moss immediately suffered a loss of memory or became unable to understand simple questions (Tr. 110-113, 118, 119). His difficulty in testifying might be attributable to the fact that as the locomotive operator, he was responsible for setting brakes on the railcars. Both Reese and Hobbs stated that the locomotive operator set brakes on the railcars (Tr. 145-146, 296).

and did not know if anyone did (Tr. 144-145). In addition, these individuals said they did not know who had dropped the ten railcars and brought them forward to become attached to the locomotive (Tr. 110, 116, 140, 256). These on site witnesses seem curiously ignorant of what must have been going on before their eyes. Reese testified that as a general matter, the operator of the locomotive set the brakes and the rail crew helped (Tr. 295-296). Reese also stated that brakes were not set on every car, but perhaps on every second or third car (Tr. 296-297). However, in this instance he did not know whether the brakes on any railcars were set (Tr. 304). It is strange that the plant foreman identified by the operator as the supervisor of the loadout area, did not know and did not ask about such an important matter.

In sum, therefore, none of the evidence is definitive or convincing with respect to whether the brakes were set. However, it is possible to determine the existence of a violation without relying upon the unpalatable evidence presented by the parties. This is so because the parties have incorrectly framed the issue to be resolved and misunderstood the question that needs to be asked and answered. The mandatory standard requires that railcars be held effectively by brakes. If brakes are not set, they obviously will not hold the cars effectively. But even if brakes are set, they must be set so as to hold the cars effectively. Therefore, the issue is not whether brakes were set, but whether the railcars were held effectively by the brakes.² The ten parked railcars moved forward when the four additional cars were pushed into them (Stip. 14, Tr. 141). As Stipulation No. 13 recognizes, Hobbs stated that in pushing the four cars he was acting in accordance with normal procedures. At the hearing Hobbs testified that for 24 years he had been pushing cars from the railroad crossing down toward the scale (Tr. 142). His statements are uncontradicted. Therefore, there was nothing unusual about this case where four cars were pushed forward to couple with ten cars already attached to the locomotive. In this instance, however, the motion of the four cars caused the ten cars to move forward and push against the locomotive which then moved ahead, running over Anderson and killing him. Accordingly, the brakes did not hold the railcars effectively or the cars would not have moved.³ As set forth below, the brake on the locomotive was not set, but that did not cause the cars to move forward in the first instance. The cars may have kept on moving because the locomotive brake was not

²There was evidence that general industry practice was to set every third brake (Tr. 92, 221). However, even assuming this were so, the mandatory standard is not premised upon general industry practice. It requires that the brakes hold the cars effectively. Testimony was uncontradicted that the cars would have been held effectively if brakes on every car had been set (Tr. 148, 199).

³At an early point in the hearing, operator's counsel stated that he would produce witnesses who would testify in the operator's favor on the interpretation of "effectively" (Tr. 89). But he did not do so. Inspector Wriston testified that effectively holding would be holding under the working circumstances that were present (Tr. 89). He further stated that effectively holding means holding when a sitting piece of equipment is hit by other equipment, if such an occurrence is normal activity (Tr. 89-90). As noted, Hobbs' testimony demonstrated that pushing the four cars forward with the loader was normal activity.

set, but they moved initially because their brakes, whether set or not, did not hold them effectively. This was a violation of the mandatory standard.

B. Significant and Substantial

A violation is significant and substantial, if based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Arch of Kentucky, 20 FMSHRC 1321, 1329 (December 18, 1998); Cyprus Emerald Resources, Inc., 20 FMSHRC 790, 816 (August 1998); National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission held that in order to establish a significant and substantial violation of a mandatory standard the Secretary must prove : (1) the existence of an underlying violation; (2) a discrete safety hazard-that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Commission's requirements for a finding of significant and substantial have been recognized and accepted by the courts. Buck Creek Coal Inc. v. FMSHRC, 52 F.3d 133, 135-136 (7th Cir. 1995); Austin Powder, Inc. v. Sec. of Labor, 861 F.2d 99, 103 (5th Cir. 1988); Consolidation Coal Co. v. FMSHRC, 824 F.2d 1071, 1075 (D. C. Cir. 1987). The Commission itself has declined the invitation to change the test. United States Steel Mining Co., 18 FMSHRC 862, 865-866 (June 1996); Energy West Mining, 15 FMSHRC 1836, 1839 (Sept. 1993); Texas Gulf Inc., 10 FMSHRC 498, 500 n. 4 (April 1988).

In this case the first requirement is met because there was a violation. The second element also is satisfied because the violation contributed to the danger that the cars would move forward and together with the locomotive hit someone. I also find that the failure of the brakes to effectively hold the cars created a reasonable likelihood of an injury and the reasonable likelihood that the injury would be of a reasonably serious nature. The cleaning of the scales required Anderson and Jones to work on or next to the rails directly in front of the locomotive. In fact, a fatality occurred. The movement of the cars was the precipitating factor setting off a chain of events which ended in Anderson's death. The violation was significant and substantial and very serious.

C. Negligence and Unwarrantable Failure

As explained in detail infra, I find that Reese, the plant foreman, was the responsible supervisor of the loadout area. It was his obligation to insure that the railcars were held effectively by the brakes. However, Reese did not know whether brakes on the railcars had been set (Tr. 304). In addition, he stated that as a general matter brakes were not set on every car, but just on some (Tr. 296). Brakes could be set on every other car or every third car (Tr. 296-297). Based on this testimony it appears that the standard for determining the number of brakes to set apparently was very flexible. Therefore, as the person in charge, Reese had a particular duty to make certain that sufficient brakes were set to hold the cars effectively. This crucial determination was not one that could be left to a non supervisor. I find that Reese was negligent in not properly performing his supervisory tasks and that as a member of mine management, his negligence is attributable to the operator.

I do not however, believe that the negligence in this case rises to the level required for a

finding of unwarrantable failure. The Commission has defined unwarrantable failure as aggravated conduct constituting more than ordinary negligence. Emery Mining Corp., 8 FMSHRC 1997, 2001 (Dec. 1987). It is characterized by such conduct as reckless disregard, intentional misconduct, indifference or serious lack of reasonable care. Id. at 2003-04; Cyprus Emerald Resources, supra at 813; Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 194 (Feb. 1991).

The inspectors found unwarrantable failure because they said the operator's past practice was not to set the brakes on railcars. However, the evidence they provided was not convincing. Inspector Wriston gave conflicting testimony. He first stated that Jones had told him that cars were dropped without the brakes being set, but then admitted he did not definitely know what the past practice was (Tr. 60-61, 74). Subsequently, he stated that Parsons had told him about past practice (Tr. 84). Inspector Slayton also testified that Parsons told him that past practice was not to set brakes on the railcars. As explained above, this testimony from the inspectors has no probative value because Parsons was not called as a witness. Moreover the inspectors' notes do not indicate that Parsons was asked or said anything about past practice. Inspector Slayton also testified that Hobbs told him that past practice was not to set the brakes, but here again, the inspector's notes do not contain such information (Tr. 187-188, 194). Inspector Slayton stated that Moss had told them about past practice, but then said he was not sure that Moss had said this (Tr. 194).⁴ If the inspectors had been told about past practice in their interviews as they alleged, their notes surely would have contained such information. The fact that the notes are silent about past practice renders the testimony of the inspectors suspect and unworthy of belief. Accordingly, the evidence of record does not establish the operator's past practice with respect to setting brakes on railcars. Since there is nothing else in the record to support the allegation of unwarrantable failure, that finding must be vacated.

Order No. 4551642

Existence of a Violation

As set forth above, the cited mandatory standard, 30 C.F.R. § 56.14207, requires that a locomotive shall not be left unattended unless the controls are placed in the park position and the parking brake is set. Inspector Wriston testified in accordance with his notes that he had been told by Parsons and Jones that the brake had not been set (Tr. 42-44). However, Inspector Slayton's notes state that Moss had parked the locomotive and set the brake when he parked it (Exh. 11). Inspector Slayton also testified that Moss told him the brake had been set (Tr. 197-198, 207). Moss testified that when he parked the locomotive, he set the brake (Tr. 109, 122). Finally, Jones testified that Anderson told him to release the brake (Tr. 248, 250). I find Jones a credible witness on this point and I accept his testimony that he released the brake. Obviously, the brake could not have been released unless it was set. There is no dispute that the locomotive

⁴ The inspectors differed in their accounts of their interview with Moss. Inspector Wriston said they only asked Moss two questions, one of which was whether he agreed with everything Jones had said (Tr. 79-80). But Inspector Slayton testified about many statements that Moss allegedly made to him in the interview (Tr. 172-173, 200). These differences reflect poorly upon the veracity of the inspectors.

was unattended when the accident occurred. Accordingly, I find that a violation occurred.

B. Significant and Substantial

The four step test required for a finding of significant and substantial has already been set forth. In this case the first requirement has been met. The second requirement is also met because the release of the locomotive brake contributed to the danger that the locomotive and cars would move forward and hit someone. I further find that the released brake created a reasonable likelihood that a reasonably serious injury would result from the hazard that had been created. The cleaning of the scales required Anderson and Jones to work on or next to the rails directly in front of the locomotive. Indeed, a fatality occurred. Although the rail cars were not held effectively by their brakes, the fact that the locomotive was not braked was a major factor in the continued forward movement of the entire train which resulted in the accident and fatality. Accordingly, I conclude that the violation was significant and substantial and very serious.

Negligence and Unwarrantable Failure

Inspector Wriston testified that the conduct of the operator was aggravated and constituted more than ordinary negligence because Anderson, the decedent, was mine management and put himself in a position of great danger and failed to inform others of the work he was going to perform (Tr. 72-73). Inspector Slayton also testified that there was an unwarrantable failure because a supervisor was involved and others were exposed to the hazard (Tr. 188).

As set forth above, the locomotive's brake was not set because Anderson told Jones to release it so more air pressure would be available to clean the scales. Based upon his knowledge and experience, Anderson surely knew that releasing the brake created the risk that the locomotive would move forward, especially since cars were being dropped at the time and could be expected to be pushed forward to couple with the locomotive. In addition, he failed to use available two way communication equipment to notify the loader operator that he was cleaning the scales (Stip. 10, 12, 19, Tr. 98-99, 233, 305-306). Under these circumstances Anderson displayed an extraordinary degree of recklessness, carelessness, indifference and wilful misconduct. His actions fit all the terms used by the Commission to describe unwarrantable failure and they constitute extreme negligence.

The issue is whether Anderson's very high degree of negligence and unwarrantable failure are imputable to the operator. Under Commission precedent, the negligence of a rank and file miner cannot be imputed unless the operator failed to discharge its responsibilities with respect to training, supervision or discipline. U.S. Coal Inc., 17 FMSHRC 1684, 1686 (Oct. 1995); Fort Scott Fertilizer-Cullor Inc., 17 FMSHRC 1112, 1116 (July 1995). However, the negligence of a supervisor is imputable to the operator unless the operator can demonstrate that no other miners were put at risk by the supervisor's conduct and that the operator took reasonable steps to avoid that particular class of accident. Nacco Mining Co., 3 FMSHRC 848, 849 (April 1981). The Commission also has stated that an agent's unexpected intentional misconduct may result in a negligence finding against the operator where the lack of care exposed others to risk or harm. Rochester & Pittsburgh, *supra* at 198. It is also well settled that an agent's conduct may be imputed to an operator for unwarrantable failure purposes. Wayne Supply Company, 19 FMSHRC 447, 451 (March 1997); Rochester & Pittsburgh, *supra* at 197-198.

There is no dispute that Anderson received all applicable training and that he conducted safety meetings with the loadout crew (Tr. 208, 236, 249, 276-277, 284-285, 287-289). There is no suggestion that the operator did not fulfill its responsibilities with respect to supervision or discipline of Anderson. Accordingly, if Anderson was a rank and file miner, his negligence would not be imputable to the operator.

If Anderson was a supervisor, it must be determined whether the defense under Nacco would be available to the operator. Jones testified that he was working in the immediate area when the accident happened and that not long before the accident he had been on the tracks working on the scales with Anderson to clean the scales (Tr. 247-248). At the moment of the accident Jones was on the backhoe adjacent to the track (Tr. 258, 271, 275). The locomotive brushed up against the backhoe, although it did not cause any damage or injury. However, Reese, the foreman, agreed that it was possible for Jones to have been standing on the track (Tr. 299). Based upon the foregoing, Jones' proximity to danger from the unbraked locomotive is clear. He was in the immediate area and might well have been standing on the tracks. Even on the backhoe, he was in danger. The locomotive could have hit the backhoe harder than it did or Jones might have fallen off. Anderson's actions put Jones at serious risk. The Nacco defense would not apply.

The determinative issue, therefore, is whether Anderson was a rank and file miner or a person charged with responsibility for the supervision of miners or the operation of all or part of a mine. The Commission has considered this issue on several occasions.

In U.S. Coal Inc., supra, a certified electrician suffered burns to his hand, when he failed to deenergize or lock out equipment before he began his repairs. The Commission held that he was not the operator's agent for purposes of imputing negligence. Although the electrician was authorized to tell miners to stop working on dangerous equipment and to remove such machinery from service, the Commission held that this evidence standing alone was insufficient to support a finding that the electrician was an agent of the operator. The Commission stated that in this type of case, it did not rely upon the job title or qualifications of a miner, but upon whether his function was crucial to the mine's operation and involved a level of responsibility normally delegated to management personnel. Id. at 1688. The Commission stated that the electrician's negligent conduct occurred while he was repairing equipment, a routine assignment not encompassing managerial or supervisory responsibilities. Id.

In Ambrosia Coal & Construction Company, et al, 18 FMSHRC 1552 (Sept. 1996), the Commission decided that an individual was an agent of the operator when he accompanied inspectors on their inspections and attended close out conferences as the operator's representative, gave work orders to abate citations, was responsible to see that equipment repairs were made, was paid a salary like management and did not receive extra pay for overtime like rank

and file miners, and was treated by the mine owner as a person in a responsible position. *Id.* at 1560-1561. Under these circumstances the Commission did not view as determinative the fact that he did not have the authority to recommend hiring or firing, discipline employees, change work schedules, or adjust pay and terms of employment. *Id.*

Thereafter, in Whayne Supply Company, *supra*, the Commission held that an experienced repairman who needed little supervision and helped less experienced employees, was not a supervisor. The repairman had been fixing a bulldozer, but failed to secure certain parts of the equipment and as a result became pinned under the equipment and was killed. He was working alone and not supervising anyone when the accident occurred. The Commission stated that an individual does not become a supervisor merely because he possesses greater skills and job responsibilities than his fellow employees. *Id.* at 451. And the Commission identified traditional indicia of supervisory responsibility as including the power to hire, discipline, transfer, and evaluate employees, none of which were possessed by the repairman in that case. *Id.* The Commission further noted that there was no evidence that the repairman controlled the mine or any portion thereof. *Id.* The Commission stated that if the repairman could be considered supervisory on the basis of his duty to evaluate a problem and repair it without supervision, potentially all repair personnel would fall into the supervisory category. *Id.* at 452.

More recently, in REB Enterprises Inc., *supra*, the Commission decided that a leadman on a highwall was not an agent of the operator where he did not have the authority to hire and fire employees, did not assign equipment to employees and was not given any instructions regarding discipline of employees. In addition, the Commission noted that there was no evidence that the leadman was directly responsible for controlling acts of the miners on the highwall, that he was responsible for their performance, or that he was responsible for the safety of miners and for ensuring their compliance with the mandatory standards. *Id.* at 211-212.

The facts of this case are similar in some respects to those already considered by the Commission. However, the instant situation viewed in its entirety, is distinguishable from prior cases and appears to fall somewhere between those where agency and supervision were not found and those where they were. Anderson assigned specific tasks to the miners in the loadout area and he had the authority to tell them how he wanted the job done and to stop them if he did not like what they were doing (Tr. 139, 303-304). On the day of the accident he told members of the loadout crew what tasks they should perform (Tr. 108, 139, 247). However, it was Reese, the foreman, who decided and told Anderson what work was to be done each day (Tr. 303). And if there was a problem with a miner Anderson, who could not discipline anyone, went to Reese (Tr. 151, 264). Anderson could not change an individual's job or the equipment on the job without permission (Tr. 282-283). Also, Reese visited the loadout area three or four times during the shift to check on how things were going (Tr. 154, 267, 281). In addition, Anderson could not hire, fire or evaluate miners in the loadout area and he was paid at an hourly rate (Tr. 151, 153-154, 264, 281). There is no evidence that he acted or held himself out as the operator's representative in any capacity or that it was up to him to decide what action to take to abate citations. In sum therefore, Anderson had somewhat more authority than the individuals in those cases where the Commission has held there was no agency or imputable negligence. REB Enterprises Inc., *supra*; Whayne Supply Company, *supra*; U.S. Coal Inc., *supra*. But he did not have the level of

responsibility which the Commission has heretofore held sufficient to establish that an agency relationship existed. Ambrosia Coal & Construction Company, supra.

After careful consideration of the evidence, I find that Anderson did exercise a certain degree of control over the loadout area and the miners who worked there. I further find, however, that the control which he exercised and the responsibilities which were given to him were tightly circumscribed. He did not decide what work was to be done and he did not set work priorities. Although he assigned specific tasks and stopped work being done improperly, he did not resolve any disputes occurring on site. And he was subject to constant supervision since the foreman visited the area several times during the shift. He possessed none of the indicia traditionally associated with a supervisory position such the authority to hire, fire, discipline or evaluate. The fact that he was paid on an hourly basis demonstrates that the operator did not look upon him as member of management. Under these circumstances, I conclude that Anderson was not a supervisor and that therefore, his negligence cannot be imputed to the operator. I further conclude that although Anderson had some authority, it cannot fairly be said that he was an agent in control of a mine or part of a mine and that therefore, his unwarrantable failure conduct cannot be attributed to the operator. Finally, since the general practice was to set the brake and because the brake was initially set in accordance with that practice, the operator was not negligent.

Remaining Criteria

The Commission has held that each Commission judge must expressly consider and make findings with respect to all six criteria. In addition, the Commission has made clear that the judge bears the responsibility of insuring that the record is sufficient to allow him to discharge his responsibilities. Sec. Labor on behalf of Kenneth Hannah, et al. v. Consolidation Coal Co., 20 FMSHRC 1293, 1302 (Dec. 15, 1998). If the record or the judge's decision is found wanting, reversal or remand will result. Id.

As set forth above, the parties have stipulated to good faith abatement. I accept the stipulation and find that the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

As set forth above, the parties have stipulated to the quarry's number of employees and annual tonnage. I accept the stipulation and based thereon find that the operator is large in size.

As set forth above, the parties have stipulated to the quarry's accident frequency rate and the accident frequency rate for the industry. I accept the stipulation and find that the operator has a very good history of previous violations.

As set forth above, the parties have stipulated that imposition of a penalty will not affect the operator's ability to continue in business. I accept the stipulation and find that imposition of a penalty will not affect the operator's ability to continue in business.

Penalty

After careful consideration of the evidence of record and my findings and conclusions based thereon and with due regard for the six criteria, I determine that a penalty of \$12,500 for Citation No. 4551641 and a penalty of \$2,000 for Order No. 4551642 are appropriate.

The post-hearing briefs filed by the parties have been reviewed. To the extent the briefs are inconsistent with this decision, they are rejected.

Order

It is **ORDERED** that in accordance with stipulation 4 the finding of a violation for Citation No. 4551643 is **AFFIRMED**.

It is further **ORDERED** that a penalty of \$267 be **ASSESSED** for Citation No. 4551643.

It is further **ORDERED** that the finding of a violation for Citation No. 4551641 is **AFFIRMED**.

It is further **ORDERED** that the significant and substantial designation for Citation No. 4551641 is **AFFIRMED**.

It is further **ORDERED** that the finding of unwarrantable failure for Citation No. 4551641 be **VACATED**.

It is further **ORDERED** that Citation No. 4551641 be **MODIFIED** from a 104(d)(1) citation to a 104(a) citation and to reduce negligence from high to ordinary.

It is further **ORDERED** that a penalty of \$12,500 be **ASSESSED** for Citation No. 4551641.

It is further **ORDERED** that the finding of a violation for Order No. 4551642 be **AFFIRMED**.

It is further **ORDERED** that the significant and substantial finding for Order No. 4551642 be **AFFIRMED**.

It is further **ORDERED** that the finding of unwarrantable failure for Order No. 4551642 be **VACATED**.

It is further **ORDERED** that Order No. 4551642 be **MODIFIED** from a 104(d)(1) order to a 104(a) citation and to reduce negligence from high to none.

It is further **ORDERED** that a penalty of \$2,000 be **ASSESSED** for Order No. 4551642.

It is further **ORDERED** that the operator **PAY** a total penalty of \$14,767 within 30 days of the date of this decision.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
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January 25, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-333-M
Petitioner	:	A.C. No. 04-03425-05503 TIR
	:	
v.	:	Washington Mine
	:	
UNIQUE ELECTRIC,	:	
Respondent	:	

DECISION ON REMAND

BEFORE: Judge Manning

In my original decision in this civil penalty proceeding, I held that Unique Electric violated 30 C.F.R. § 57.12025 and I assessed a civil penalty of \$400 for the violation, *Unique Electric*, 19 FMSHRC 783 (April 1997). In the decision, I found that Unique Electric was a sole proprietorship, without employees or assets, operated by Mr. Kim Warnock and that it was no longer performing work at any mine. The Secretary of Labor appealed my decision to the Commission on the basis that I improperly reduced the \$8,500 civil penalty proposed by the Secretary based on my analysis of the “ability to continue in business” criterion in section 110(i) of the Federal Mine Safety and Health Act of 1997, (“Mine Act”) (30 U.S.C. § 820(i)). The Commission granted the Secretary’s petition for review. The single citation in this case was issued following a fatal accident, as described in my original decision.

I. DECISION OF THE COMMISSION

In its decision, the Commission vacated my \$400 penalty assessment in this case and remanded the case to me for further proceedings consistent with its decision. *Unique Electric*, 20 FMSHRC 1119 (October 1998). The Commission vacated the penalty I assessed based on concepts developed in its decisions in *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 271-72 (February 1997) and *Ambrosia Coal & Construction Co.*, 19 FMSHRC 819, 823-24 (May 1997). These decisions discuss how penalties should be assessed against agents of corporate mine operators under section 110(c) of the Federal Mine Safety and Health Act of 1997, 30 U.S.C. § 820(c). The \$8,500 penalty in this case was proposed by the Secretary under section 110(a) of the Mine Act. The Commission held that the present case is “akin to one brought against an individual under section 110(c) of the Mine Act” because Mr. Warnock, the owner of Unique Electric, was self-employed at the time the citation was issued. 20 FMSHRC at 1122.

In its decision, the Commission directed that I reconsider the penalty taking into consideration the six criteria set forth in section 110(i) of the Mine Act.¹ With respect to the ability to continue in business criterion, the Commission directed that I consider “whether the proposed penalty would affect Warnock’s ability to meet his financial obligations.” *Id.* With respect to the size of the business criterion, the relevant inquiry is whether the penalty is appropriate “in light of the individual’s income and net worth.” *Ambrosia*, 19 FMSHRC at 824. In *Sunny Ridge*, the Commission set forth its analysis with respect to penalties brought against individuals as follows:

The criteria regarding the effect and appropriateness of a penalty can be applied to individuals by analogy, and we find that such an approach is in keeping with the deterrent purposes of penalties assessed under the Mine Act. In making such findings, judges should thus consider such facts as an individual’s income and family support obligations, the appropriateness of a penalty in light of the individual’s job responsibilities, and an individual’s ability to pay. Similarly, judges should make findings on an individual’s history of violations and negligence, based on evidence in the record on these criteria. Findings on the gravity of a violation and whether it was abated in good faith can be made on the same record evidence....”

19 FMSHRC at 272.

The Commission further analyzed how penalties should be assessed against individuals in *Wayne Steen, employed by Ambrosia Coal & Construction Co.*, 20 FMSHRC 381, 385-86 (April 1998). The Commission stated that “our judges must engage in a two-step analysis...” as follows:

First, they must determine [an individual’s] household financial condition. Then they must make findings on the ... “size” and “ability to continue in business” criteria on the basis of the [individual’s] share of his or her household’s net worth, income, and expenses.

Id.

¹ The criteria are “the [mine] operator’s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator’s ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.” 30 U.S.C. § 820(i).

II. PROCEEDINGS ON REMAND

On October 26, 1998, I ordered Mr. Warnock to provide me with information concerning his income, financial obligations, and net worth. 20 FMSHRC 1241 (October 1998). I asked for a listing of his major assets and liabilities, indicating which assets were held jointly with his wife and which liabilities were joint obligations. I also asked him to describe his "family support obligations." Finally, I asked for a copy of his Federal tax return so that I could verify the information submitted. This information was submitted to me. I sealed the tax returns submitted by Mr. Warnock.

A. Information Supplied by Mr. Warnock

The information submitted shows that all assets and liabilities of Mr. Warnock are shared jointly with his wife, as follows:

1. Major Assets

a. Home - The Warnocks own a home that is valued at about \$83,000. The present mortgage is about \$69,900 and the monthly payment is \$735. Thus, their equity in the home is about \$13,100.

b. Automobile - The Warnocks own a car that is valued at about \$8,500. The outstanding loan on the car is about \$8,000 and the monthly payment is \$250. Thus, their equity in the car is about \$500.

c. Trailer Recreational Vehicle (5th Wheel) - The Warnocks own an R.V. that is valued at about \$7,000. The outstanding loan on the R.V. is about \$6,000 and the monthly payment is \$120. Thus, their equity is about \$1,000.

d. Truck - The Warnocks own a truck that is valued at about \$5,700. The loan has been paid. Thus, their equity is about \$5,700.

2. Major Liabilities

a. Loans - In addition to the home mortgage and loans listed above, the Warnocks owe about \$6,000 on a Visa charge card. They make a monthly payment of about \$300.

b. Monthly payments - The Warnocks' monthly payments for the assets listed above including the Visa bill is about \$1,400. In addition, they estimate that their monthly payments for other basic goods and services to be about \$1,100. These payments include the cost of utilities, phone service, life and health insurance, auto insurance, food, and gasoline. The total monthly payments are about \$2,500.

3. **Income**

The citation in this case was issued in September 1994. In that year, the Warnocks' household adjusted gross income was about \$32,000. Of this amount, about \$20,000 was from earnings by Mr. Warnock from Unique Electric.

In 1997, the most recent year for which tax returns are available, the household adjusted gross income was about \$70,000. In September 1997, Mr. Warnock took a new job and his monthly gross income was about \$2,880. This new position is closer to home but it pays significantly less than the job he held before September 1997. As of the end of 1997, Mr. Warnock's gross annual income was about \$34,500. At the end of 1997, Mrs. Warnock's gross monthly income was about \$1,360, or about \$16,300 annually. Thus, as of December 1997, the Warnocks' gross annual income from employment was about \$50,800. As of December 1998, Mr. Warnock's gross monthly wage is \$2,400, about \$400 lower than in 1997.

4. **Financial Condition**

The household net worth of the major assets shown above is about \$20,300. The household monthly payment for loans, insurance, utilities, telephone, food, and gasoline is about \$2,500 per month or about \$30,000 per year. The household gross income is less than \$50,800.

The information supplied by the Warnocks indicates that all assets and liabilities are joint. There is no indication whether the Warnocks are supporting any children, so I assume that there is no such support obligation. In his submission, Mr. Warnock states that after paying taxes and monthly bills, the household had about \$700 of discretionary income per month to cover other essentials such as non-reimbursed medical expenses, as well as nonessential items and services.

B. Response of the Secretary of Labor

In her response to Mr. Warnock's submission, the Secretary contends that the information supplied is "materially incomplete" with regard to Mr. Warnock's net worth. Specifically, she states that Mr. Warnock's submission does not indicate whether he owns "any additional assets, including any investments such as additional real estate, IRA's, 401(k)'s, [or] vested pension assets...." Counsel states that without such information, the Secretary cannot make any "meaningful submission regarding the appropriate amount of penalty...." The Secretary provided an affidavit that the Department of Labor uses to determine whether a civil penalty should be reduced due to financial hardship and suggests that Mr. Warnock should be required to fill it out or to provide a sworn statement that he has no interest in any additional assets.

III. ANALYSIS AND PENALTY ASSESSMENT

I find that Mr. Warnock provided sufficient information on which I can assess a civil penalty under the Commission's remand order. In its decision, the Commission stated that, when I evaluate the ability to continue in business criterion, I should consider whether the proposed

penalty would affect Mr. Warnock's ability to meet his financial obligations, and that when I evaluate the size criterion, I should consider Mr. Warnock's income and net worth. I have reviewed the Warnocks' tax returns and I am satisfied that the information submitted is accurate and provides a good outline of his financial condition. The 1997 tax return shows that the Warnocks' earned minimal interest, and no dividends or capital gains. My examination of the tax return also shows that they do not own any real estate other than their home. When assessing a penalty, I will assume that the Warnocks have a checking account and some tax sheltered savings for retirement in the form of an IRA, 401(k), or a vested retirement plan that is commensurate with their economic profile.

In assessing a civil penalty, I must consider all six penalty criteria. I review each of them below. For the criteria that are not at issue on remand, I incorporate my findings from my original decision.

A. The Operator's History of Previous Violations

Neither Unique Electric nor Mr. Warnock has any history of previous violations of the Mine Act or the Secretary's safety and health standards.

B. The Appropriateness of the Penalty to the Size of the Business of the Operator

There is no dispute that Unique Electric was a small electrical contractor operated by Mr. Warnock. Unique Electric was a sole proprietorship without any employees or assets. Unique Electric was simply the name that Mr. Warnock used when he provided services to his customers; it was not a separate legal entity. Mr. Warnock was a mine "operator" under section 3(d) of the Mine Act because he was an "independent contractor performing ... services at [a] mine." 30 U.S.C. § 802(d). I have considered Mr. Warnock's share of the household income and net worth when analyzing this criterion.

C. Whether the Operator was Negligent

The citation in this case was issued under section 104(d)(1) of the Mine Act and charged that the violation was caused by the unwarrantable failure of Unique Electric to comply with section 57.18025. At the hearing, the Secretary did not present any evidence with respect to the unwarrantable failure allegation in the citation. Accordingly, I vacated the unwarrantable failure allegation and modified the citation to a section 104(a) citation. I found that Mr. Warnock was negligent in failing to ground the pump circuit in accordance with his normal practice.

D. The Effect on the Operator's Ability to Continue in Business

The Commission held that I should consider "whether the *proposed penalty* would affect Warnock's ability to meet his financial obligations" when analyzing this criterion. 20 FMSHRC at 1122 (emphasis added). Given the financial profile provided by Mr. Warnock, which I believe

to be reasonably accurate, I find that a \$8,500 penalty would affect his ability to meet his financial obligations. If I determined that such a penalty was appropriate after considering all six of the penalty criteria, I would allow Mr. Warnock to pay the penalty in installments over a period of time. As discussed below, however, I find that such a penalty is not appropriate.

E. The Gravity of the Violation

I found that the violation was serious and was of a significant and substantial nature.

F. Demonstrated Good Faith of the Person Charged in Attempting to Achieve Rapid Compliance after Notification of the Violation

I found that the violation was abated in good faith. The violation was abated by replacing the electric pump with a compressed air pump. Because it is not clear to what extent Warnock was involved in the abatement, this criterion is not a major factor in my penalty assessment. Mr. Warnock testified that he recommended that an air pump be used instead of an electric pump when he was originally asked to install the pump. (Tr. 75, 372-73).

G. Determination of an Appropriate Civil Penalty

In determining an appropriate penalty, I take into consideration my findings with respect to all six of the criteria. As directed by the Commission, I have not assumed that because Kim Warnock no longer provides services to the mining industry, no deterrent purpose would be served by the penalty proposed by the Secretary or any other penalty. 20 FMSHRC at 1123.

I find that the Secretary's proposed penalty is not appropriate for a number of reasons. First, Unique Electric was an extremely small business, as described above and in my original decision. The proposed penalty was not appropriate given Mr. Warnock's income and net worth. Second, Unique Electric had no history of previous violations. Third, the Secretary did not establish that the violation was a result of Unique Electric's unwarrantable failure. This fact directly relates to the negligence criterion and it was a major factor in my assessment of a penalty in my original decision and in this decision. Fourth, the proposed penalty would affect Mr. Warnock's ability to meet his financial obligations.

As stated above, the "good faith" criterion was not a major factor in my penalty assessment. Finally, I considered the gravity criterion. This criterion is extremely important because it takes into consideration the hazards created by the violation. I reemphasize my finding that the violation was serious and was of a significant and substantial nature.

The penalty proposed by the Secretary was "specially assessed" under 30 C.F.R. § 100.5. The Secretary usually proposes civil penalties for S&S violations using the formula set forth in section 100.3. Section 100.5 gives the Secretary wide discretion to "specially assess" penalties. Penalties proposed under section 100.5 are generally higher than penalties proposed under section 100.3. Among the factors that the Secretary considers when deciding whether to

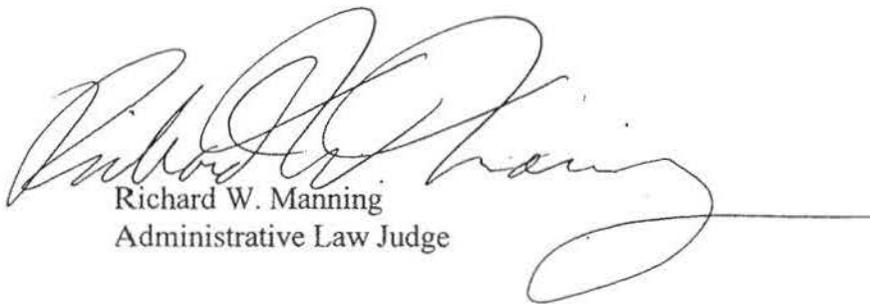
specially assess a penalty are whether the violation involves a fatality or serious injury and whether the citation alleges an unwarrantable failure. (30 C.F.R. § 100.5(a) & (b)). As stated above, I vacated the Secretary's unwarrantable failure determination. At the hearing, the Secretary maintained that Mr. Warnock was "not being charged with responsibility for" the fatality. (Tr. 414, 28).

If the Secretary had proposed the penalty in 1995 under the "regular assessment" formula in section 100.3, the proposed penalty would have been \$292 (41 points) using Inspector Pederson's high gravity and high negligence determinations, without a 30% reduction for good faith abatement. I am not bound by the Secretary's penalty regulations. I present this information solely to show that establishing an appropriate civil penalty using the criteria is not an exact science and that different techniques yield different penalties.

I find that a penalty of \$400 is appropriate for the citation in this case; Citation No. 3910427 issued September 9, 1994. I reach this conclusion taking into consideration all six penalty criteria. The criteria that resulted a lower assessment than that proposed by the Secretary are: (1) history of previous violations; (2) appropriateness of the penalty to the size of the business (income and net worth); (3) the negligence of the operator; and (4) the effect of the penalty on the ability to stay in business (ability to meet financial obligations).

IV. ORDER

Mr. Kim Warnock, acting on behalf of Unique Electric, is **ORDERED TO PAY** the Secretary of Labor the sum of \$400.00 within 60 days of the date of this order, if he has not already done so. Upon payment of this penalty, this case is **DISMISSED**.


Richard W. Manning
Administrative Law Judge

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RWM

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

January 26, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 98-75-M
Petitioner	:	A. C. No. 44-00061-05536
v.	:	
LESUEUR-RICHMOND SLATE	:	Richmond-Arvonion Quarry
CORPORATION,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

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

The operator has filed a motion to dismiss the penalty petition on the ground that the Secretary failed to file the petition timely.

This case involves two orders that were issued on March 17, 1998, under section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), for alleged violations of mandatory standards.

On July 15, 1998, the Secretary issued a notice of proposed civil penalty assessments. According to the certified mail return receipt, the operator received the notice of proposed civil penalties on July 22, 1998. The operator contends that it timely contested this assessment by letter dated July 23, 1998, and it has provided a copy of the letter together with a certified mail receipt signed by an MSHA employee showing that on July 27, 1998, the letter was received. 29 C.F.R. § 2700.26. Based upon the receipt date, the 45 day period allowed for filing the penalty petition expired on September 10, 1998. 29 C.F.R. § 2700.28.

The Solicitor advises that MSHA's Civil Penalty Office has no record of receiving the July 23 letter. MSHA mailed a demand letter for payment on September 23, 1998, and on September 28, 1998, counsel for the operator faxed to MSHA a copy of the July 23 letter. The faxed copy is the only record MSHA has of the operator's contest. Thereafter, the Civil Penalty Office changed the status of the case from closed to open and treated September 28 as the date of receipt of the hearing request. The penalty petition was filed on November 6, 1998, which is within 45 days of September 28.

Under standards established by the courts, the operator is only required to use a method to effectuate service that is reasonably calculated under all the circumstances to apprise the interested party of the pendency of the action. Mullane v. Central Hanover B. & T. Co., 339 U.S. 306 (1950). Certified mail has been held to satisfy the due process due a litigant or prospective litigant. Fuentes-Argueta v. I.N.S., 101 F.3d 867, 872 (2nd Cir. 1996); U.S. v. Clark, 84 F.3d 378, 381 (10th Cir. 1996); Sarit v. U.S. Drug Enforcement Admin., 987 F.2d 10, 14-15 (1st Cir. 1993). Moreover, the courts have recognized that due process does not require that the interested party actually receive notice. In Re Blinder, Robinson & Co., Inc., 124 F.3d 1238, 1243 (10th Cir. 1997); Fuentes-Argueta v. I.N.S., supra at 872; U.S. v. Clark, supra at 381; Katzson Bros., Inc. v. U.S.E.P.A., 839 F.2d 1396, 1400 (10th Cir. 1988); Weigner v. City of New York, 852 F.2d 646, 650 (2nd Cir. 1988); Stateside Machinery Co., Ltd v. Alperin, 591 F.2d 234, 241 (1979).

The certified mail receipt demonstrates that the operator's request for hearing was properly mailed and served. The receipt also establishes that on July 27, 1998, MSHA received the hearing request. See, Brian Forbes, 20 FMSHRC 461 (April 1998). The Solicitor does not challenge the validity of the certified mail receipt and he does not dispute that on July 27 the contest was received. He merely states that MSHA has no record of receiving the contest and submits an affidavit from the Acting Chief Civil Penalty Compliance Office setting forth general procedures for handling contests. Based upon this record, I find that service by the operator was proper and complete on July 27. I reject the Solicitor's contention that MSHA did not receive notice of the operator's contest until September 28. The fact that MSHA may have misplaced, misfiled or lost the contest does not render service invalid and does not alter the date the contest was filed. Accordingly, the penalty petition was untimely.

The Commission permits late filing of penalty petitions where the Secretary demonstrates adequate cause for the delay and where the 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. Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1989). Adequate cause has been found in a number of situations. See e.g. Medicine Bow Coal Co., 4 FMSHRC 882 (May 1982); Wharf Resources USA Incorporated, 14 FMSHRC 1964 (November 1992); Fisher Sand and Gravel Company, 14 FMSHRC 1968 (November 1992); Roberts Brothers Coal Company, 17 FMSHRC 1103 (June 1995); Lone Mountain Processing Incorporated, 17 FMSHRC 839 (May 1995); Austin Powder Company, 17 FMSHRC 841 (May 1995); Ibold Incorporated, 17 FMSHRC 843 (May 1995); Secretary of Labor v. Roger Chistensen, 18 FMSHRC 1693 (August 1996).

In this case, the Solicitor does not allege adequate cause for late filing and therefore, he offers no reasons why the operator's contest was not recorded when it was received. The Solicitor's sole basis for opposing dismissal is the argument that the date of filing for the contest should be the date MSHA finally recorded receipt. As I have already held, MSHA's errors or lapses do not control filing dates. If the Solicitor had come forward with reasons sufficient to demonstrate adequate cause for not recording receipt, as Solicitors have done in the past, the result here might have been different.

In light of the foregoing, it is **ORDERED** that the operator's motion to dismiss be **GRANTED** and that this case be **DISMISSED**.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a long horizontal stroke at the beginning and a small dot at the end.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

January 29, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-42-M
Petitioner	:	A. C. No. 39-00226-05512
	:	
v.	:	
	:	
SWEETMAN CONSTRUCTION CO.,	:	Summit Pit
Respondent	:	

DECISION

Appearances: Mark Nelson, Esq., Office of the Solicitor,
 U.S. Department of Labor, Denver, Colorado,
 for Petitioner;
 Robert Portice,
 Sioux Falls, South Dakota,
 for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under sections 105(d) and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* The "Mine Act." The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges Sweetman Construction Company with violating five mandatory safety standards set forth in 30 C.F.R. Part 56 concerning sand and gravel mining operations. At the hearing, two of the citations were accepted by Respondent, three citations were fully contested and, after presentation of documentary and testimonial evidence by both parties, were submitted for decision.

STIPULATIONS

A. Sweetman Construction Co. is engaged in mining and selling of sand and gravel in the United States, and its mining operations affect interstate commerce.

B. Sweetman Construction Company is the owner and operator of the Summit Pit, MSHA I.D. No. 39-00226.

C. Sweetman Construction Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* ("the Act").

D. The Administrative Law Judge has jurisdiction in this matter.

E. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

F. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

G. The proposed penalties will not affect respondent's ability to continue in business.

H. Respondent demonstrated good faith in abating the violations.

I. Sweetman Construction Co., is a mine operator with a total of 155,789 total hours worked in 1997 with 18,251 hours worked at the Summit Pit.

J. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citations.

The Inspection

Mine Inspector Larry Larson inspected Respondent's Summit Plant on October 15, 1997. The plant had one shift with eight men working ten-hour days, five days a week. Inspector Larson stated he was there to make a "regular" inspection with special emphasis on power haulage equipment. The power haulage equipment consisted of two trucks that were inside the yard and two front-end loaders that were running when he arrived at the plant at 8 a.m. He completed his inspection by 1 p.m. and issued five citations for violations he observed at the plant.

Citation Nos. 7915818 (headlights) and 7915819 (windshield wipers)

Both citations allege defects Inspector Larson found on a certain white construction yard truck company #404. Both citations charge the Respondent with a violation of the provisions of 30 C.F.R. § 56.14100(b) which reads as follows:

(B) Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.

Citation No. 7915818 charges nonfunctional headlights on the white yard truck and reads as follows:

The White constructor yard truck company #404 did not have the head lights being maintained in a functional condition. This truck is used on a daily basis when the plant is running, to empty material from the bunkers. Safety items must be maintained or repaired in a timely manner.

Citation No. 7915819 charges a violation of the same safety standard for defects on the same white yard truck consisting of nonfunctioning windshield wipers. The citation states:

The White constructor yard truck company #404 did not have the wind shield wipers being maintained in a functional condition. This truck is used on a daily basis when the plant is running, to empty material from the bunkers. Safety items must be maintained and or repaired in a timely manner.

I credit the testimony of Federal Mine Inspector Larson. About three hours after commencing his inspection, Inspector Larson checked out the White truck #404 which he observed under a hopper with the gate open and material running into the truck. Mr. Lien, the driver of the truck, told the inspector that he made a preshift inspection of the truck that morning and checked everything out. Mr. Lien did not indicate there was anything wrong with the truck.

It is undisputed that, upon checking the truck, the inspector found that the headlights and the windshield wipers were not functional. The inspector determined that both of these defects affect safety and were not corrected in a timely manner. The operator had trouble trying to get the windshield wipers working. A can of WD 40 was used to spray the windshield wipers in an attempt to make them functional. After starting up the truck, a "big air leak" was discovered in the air- pressure system that activates the windshield wipers. The truck had to be taken to the plant's garage where the necessary repair and maintenance work was done to abate the citation.

On being asked how the nonfunctional headlights and windshield wipers affected safety, the inspector replied in pertinent part as follows:

... in South Dakota we all know that the storms blow in in the summertime very quickly. I have seen storms in South Dakota here where they will come in, and it gets black and day — black as night and the headlights and everything come on — or the street

lights will come on it's so dark. And these deluges, they might last 15, 20 minutes and put a lot of rain down. So I feel that this plant is not going to shut down for a 15 minute rainstorm, and that the windshield wipers would be very handy to have during a rain storm, and the lights for the visibility of the truck out in the yard.

Clearly, the maintenance and the timely repair of headlights and windshield wipers on a haulage yard truck is an important step in avoiding a hazard not only to the drivers but also to persons that are in and around the mine property. Defects which make the headlights and/or windshield wipers of a yard haulage truck nonfunctional affect safety and timely correction is required by the cited safety standard. The evidence established that this was not done. I find these were two separate violations of 30 C.F.R. § 56.14100(b). Both citations are affirmed.

Citation No. 7915820 - (Berms at elevated dump site)

This citation charges the operator with an S&S violation of 30 C.F.R. § 56.9301 which provides as follows:

Berms, bumper blocks, safety hooks, or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or overturning.

The citation alleges a violation of the cited standard as follows:

There were no berms, bumper blocks or similar restraints on the elevated mason sand stockpile, to keep equipment from backing or driving over the edge of the dump site and overturning. This elevated stockpile is of sufficient height that the operator of the piece of equipment could get seriously injured if a roll over should occur. Persons in mobile equipment are in and around this elevated stockpile on a daily basis when the plant is running.

Inspector Larson testified that there were no berms, bumper blocks or similar restraints on the elevated mason sand stockpile dump site to keep mobile equipment from backing or driving over the edge of the dump site and overturning. The inspector observed that there was no berm of any kind at the dump site at the end of the mason sand stockpile ramp and only a 10- inch berm of mason sand along the side of the ramp. To comply with the regulations, a berm must be axle height of the mobile equipment that traveled up the ramp to the elevated dump site. To meet this requirement in this case, the height of the berm would have to be at least 2½ feet high. Inspector Larson also rebutted testimony by Respondent that wind may have blown away the mason sand berm. Inspector Larson was of the opinion that winds of up to 37 miles per hour would not cause more than a slight deterioration of the berm.

The evidence clearly established a violation of 30 C.F.R. § 56.9301.

Significant and Substantial Violations

Inspector Larson testified the dump site was close to 15 feet high and stated that the elevated dump site was of sufficient height that the driver of mobile equipment could get seriously injured if a roll-over should occur. Persons in mobile equipment are in and around this elevated stockpile on a daily basis when the plant is running.

I agree with Inspector Larson's opinion that if the dump site was left unbermed, it was reasonably likely that an accident of a serious nature would occur. I find that the lack of adequate berms on the elevated stockpile dump site was a significant and substantial violation of the cited safety standard. 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." 30 U.S.C. § 814(d)(1). A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained:

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

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

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); See also *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

I credit Inspector Larson's testimony and find that the evidence presented by Petitioner established each of the elements required to show that this was an S&S violation of 30 C.F.R. § 56.9301.

Citation Nos. 7915816 and 7915817 Were Accepted

Both citations were issued under section 104(a) of the Act alleging non-significant and substantial violations. MSHA proposed a civil penalty of \$50.00 for each of the citations. At the hearing, the operator accepted both violations along with MSHA proposed penalties in full, totaling \$100.00. I find the proposed penalties for these two violations are appropriate under the criteria set forth in section 110(c) of the Act. The proposed penalties are approved.

Assessment of Civil Penalties

In assessing a civil penalty under section 110(i) of the Act, the judge is required to give consideration to the appropriateness of the penalty to the size of the operator's business, the probable effect on the operator's ability to continue in business, the operator's history of previous violations, the operator's negligence, the gravity of the violations and the operator's good faith abatement.

I have considered the statutory criteria in my *de nova* review and determination of the appropriate penalties and I find the MSHA proposed penalties are the appropriate penalties for each of the violations.

ORDER

Based on the statutory criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i) I assess the following penalties:

<u>Citation No.</u>	<u>30 CFR §</u>	<u>Penalty</u>
7915016	56.4101	\$ 50.00
7915017	56.12030	50.00
7915818	56.14100(b)	50.00
7915819	56.14100(b)	<u>157.00</u>
	TOTAL	\$357.00

Accordingly, each of the five citations is **AFFIRMED** and Respondent, Sweetman Construction Co., is **ORDERED TO PAY** the Secretary of Labor the sum of \$357.00 within 40 days of the date of this decision. Upon receipt of timely payment, this case is dismissed.



August F. Cetti
Administrative Law Judge

Distribution:

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Mr. Robert Portice, Safety Director, SWEETMAN CONSTRUCTION CO., 1201 West Russell, P.O. Box 84140, Sioux Falls, SD 57118-4140 (Certified Mail)

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

January 12, 1999

EAGLE ENERGY, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 98-45-R
	:	Order No. 7171660; 1/22/98
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine No. 1
ADMINISTRATION (MSHA),	:	Mine ID 46-07711
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-39
Petitioner	:	A.C. No. 46-07711-036660
v.	:	
	:	Docket No. WEVA 98-69
EAGLE ENERGY INCORPORATED,	:	A.C. No. 46-07711-03666
Respondent	:	
	:	Mine No. 1
	:	
	:	Docket No. WEVA 98-81
	:	A.C. No. 46-07711-03670
	:	
	:	Mine No. 2

ORDER DENYING EAGLE ENERGY INCORPORATED'S MOTION TO COMPEL DISCOVERY

Before me for consideration is Eagle Energy Incorporated's (Eagle Energy's) December 15, 1998, Motion to Compel the Secretary to produce the following:

1. Copies of the reports of the health and safety conferences conducted by representatives of the Mine Safety and Health Administration (MSHA) with Eagle Energy company officials on October 7, 1997 (2 pages), December 4 and 10, 1997 (5 pages), and February 26, 1998 (2 pages);
2. A copy of hand written notes by MSHA Supervisor Terry Price regarding his November 5, 1997, meeting with Eagle Energy company officials (1 page); and
3. A copy of a memorandum dated April 14, 1998, from MSHA Conference and Litigation Representative Ira Lee to the Secretary's counsel, Yoora Kim.

The Secretary filed an Opposition to Eagle Energy's motion to compel on December 17, 1998, asserting the health and safety conference reports as well as Price's notes of his November 5, 1997, meeting are protected by the work product and deliberative process privileges. The Secretary's opposition also asserted the April 14, 1998, memorandum from Lee to counsel was protected by the attorney-client privilege. Eagle Energy replied to the Secretary's opposition on December 31, 1998. In its reply, Eagle Energy conceded the Lee memorandum was protected by the attorney-client privilege. However, Eagle Energy asserts the health and safety conference reports and Price's notes are not protected because they were prepared during the normal course of business.

The Work Product Privilege

Commission Procedural Rule 56(b), 29 C.F.R. § 2700.56(b), provides that parties may obtain discovery of any relevant matter that is not privileged. The work-product privilege has been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure.¹ In *ASARCO, Inc.*, 12 FMSHRC 2548 (December 1990), the Commission discussed the work-product privilege, stating:

In order to be protected by this immunity under [Rule] 26(b)(3), the material sought in discovery must be:

1. "documents and tangible things;"
2. "Prepared in anticipation of litigation or for trial;" and
3. "by or for another party or by or for that party's representative."

¹Commission Procedural Rule 1(b), incorporates the Federal Rules of Civil Procedure, so far as practicable, on any procedural question not regulated by the Mine Act, the Commission's Procedural Rules, or the Administrative Procedure Act. Rule 26(b)(3) of the Federal Rules of Civil Procedure provides in relevant part:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

It is not required that the document be prepared by or for an attorney. If materials meet the tests set forth above, they are subject to discovery “only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” If the court orders that the materials be produced because the required showing has been made, the court is then required to “protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”

Id. at 2558 (*citations omitted*). The burden of satisfying the three-part test is on the party seeking to invoke the work-product privilege, but once that party has met its burden, the burden shifts to the party seeking disclosure to make a requisite showing that there is substantial need and undue hardship to overcome the privilege. *P. & B Marina, Ltd. Partnership v. Logrande*, 136 F.R.D. 50, 57 (E.D.N.Y. 1991), *aff’d*, 983 F.2d 1047 (2d Cir. 1992).

It is clear that the conference notes and the notes prepared by MSHA Supervisor Price are “tangible documents” prepared “by or for the Secretary.” The dispositive question concerning the applicability of the work product privilege is whether these documents were “prepared in anticipation of litigation or for trial.” Whether these documents are privileged because they were prepared with litigation in mind must be based on the nature of the documents and the factual situation in each particular case. *ASARCO*, 12 FMSHRC at 2558. If the documents can fairly be said to have been prepared **because of the prospect of litigation**, then the documents are covered by the privilege. *Id.* [*citing Wright & Miller, Federal Practice and Procedure* § 2024, p.198-99 (1970)] If, on the other hand, litigation is contemplated but the document was prepared in the ordinary course of business rather than for the purposes of litigation, it is not protected. *Id.* In addition, particular litigation must be contemplated at the time the document is prepared in order for the document to be protected. *Id.*

Eagle Energy argues the subject notes are not protected because they were made in the ordinary course of business regardless of whether litigation was contemplated. As asserted by Eagle Energy, the question is whether MSHA reports of a safety and health conference are routinely prepared in the ordinary course of business without regard to whether litigation is contemplated. In addressing this question, it is necessary to analyze MSHA’s procedures for health and safety conferences contained in 30 C.F.R. § 100.6. Operators that elect not to contest citations may decide not to request a safety and health conference. Safety and health conferences are only conducted, subject to MSHA’s approval, upon an operator’s request.

30 C.F.R. §§ 100.6(b) and (c). Such conferences are the means by which operators may submit mitigating information including facts that operators believe warrant a finding that no violation occurred. 30 C.F.R. § 100.6(e). Citations that are not vacated are referred by the safety and health conference official to the Office of Assessments with the inspector's evaluation as a basis for determining the appropriate amount of civil penalty to be assessed. 30 C.F.R. §§ 100.6(f) and (g).

Thus, generally, only contested citations are the subjects of safety and health conferences. Moreover, the MSHA official conducting the conference uses the information submitted by the operator as a basis for the referral to the Office of Assessments. Upon receipt of a notice of proposed penalty issued by the Office of Assessments, the operator has 30 days to pay or contest the proposed penalty. 30 C.F.R. § 100.7(b). In essence, the safety and health conference is the initial step in the litigation process if the operator contests the proposed civil penalty. Consequently, such conferences are not routinely conducted, but rather, they are conducted when an operator challenges the initial citation. Accordingly, the notes of such conferences, including the notes of Supervisor Price, were prepared in contemplation of litigation and, as such, are protected by the work product privilege. Likewise, any notes prepared by an operator's representatives during such conferences are also protected.

Having concluded that the conference reports and notes are protected, the analysis shifts to whether Eagle Energy can overcome the privilege by demonstrating a substantial need for the information, and establishing that it will suffer an undue hardship if it must attempt to obtain the information by other means. It is difficult for Eagle Energy to make such a showing for summaries of meetings with MSHA conference officials and Price that were attended by its own company representatives. General assertions, as advanced by Eagle Energy, that the protected material is needed to compare present recollections against prior statements, or for general purposes of impeachment, are not sufficient to overcome the work product privilege. *Consolidation Coal Company*, 19 FMSHRC 1239, 1243-44 (July 1997). Consequently, Eagle Energy has failed to overcome the privilege, and its motion to compel the safety and health conference reports and Supervisor Price's notes shall be denied.²

² Having determined the conference reports and Price's notes are protected by the work product privilege, I need not address the Secretary's assertion that they are also protected by the deliberative process privilege. However, I note that deliberative process in contemplation of hearing is protected under the work product doctrine. See fn.1 *infra*. The distinction between these two privileges would be blurred if all deliberations in anticipation of hearing were also covered by the deliberative process privilege. Rather, the Commission has defined the deliberative process privilege as one which "attaches to inter- and intra-agency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy." *In re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 992 (June 1992)[quoting *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978)]. It has neither been alleged nor shown that the conferences or Price meeting concerned the formulation of agency policy.

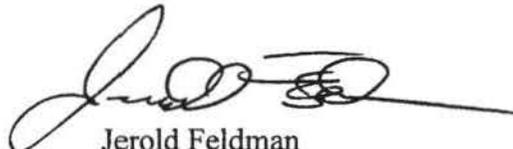
In the alternative, if Eagle Energy does not prevail in its motion to compel, it requests *in camera* review of the subject conference reports and Price's notes to determine if they contain "purely factual materials" which are not protected. It is inappropriate to request the trier of fact to review, *in camera*, protected work product documents containing trial strategy, opinions or other confidential information solely on the basis of mere speculation that some severable, purely factual material may exist. Rather, the proponent of the *in camera* review must provide sufficient detail identifying the nature and substance of the factual material sought to be discovered.

Commission Rule 56(c) permits the Judge, upon his own motion to limit discovery to prevent undue burden or delay. 29 C.F.R. § 2700.56(c). The discretion to order *in camera* review should be used judiciously. The *in camera* review process must not be used like a fishing expedition. Accordingly, absent a threshold showing identifying the nature of the information sought to be discovered, Eagle Energy's request for *in camera* review is denied.

Attorney-Client Privilege

Eagle Energy, in its reply to the Secretary's opposition to its motion to compel, concedes the April 14, 1998, memorandum from MSHA Conference and Litigation Representative Ira Lee to the Secretary's counsel, Yoora Kim, is protected by the attorney-client privilege. (*Reply*, pp.16-17). Therefore, I construe Eagle Energy to have withdrawn its motion to compel the Lee memorandum.

In view of the above Eagle Energy's Motion to Compel **IS DENIED**.



Jerold Feldman
Administrative Law Judge

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Yoora Kim, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Room 516, Arlington, VA 22203 (Certified Mail)

/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D.C. 20006-3868
January 19, 1999

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-196-M
Petitioner	:	A. C. No. 03-01735-05512
	:	
v.	:	
J & J SAND AND GRAVEL,	:	J & J Sand & Gravel
Respondent	:	

ORDER VACATING DEFAULT
ORDER OF ASSIGNMENT

Before: Judge Merlin

On December 14, 1998, an order of default was issued in the above-captioned case directing the operator to pay the proposed penalties immediately because it failed to file an answer to the Secretary's penalty petition.

On December 29, 1998, the Solicitor filed a notice of response by the respondent advising that the operator had filed an answer with his office on August 12, 1998. The Solicitor enclosed the answer he received from the operator which is dated August 5, 1998, and is addressed to the Commission. The Solicitor maintains that the default in this case is appropriate because the operator failed to respond to the show cause order issued on October 19, 1998.

Under Commission precedent, a problem in communication or with the mail may justify relief from default. Con-Ag, Inc., 9 FMSHRC 989, 990 (June 1987); United Rock Products Corp., 14 FMSHRC 79 (January 1992); Lynx Coal Company, 15 FMSHRC 979 (June 1993); AMI Construction, 16 FMSHRC 670 (April 1994); Sandy Jones Construction, 16 FMSHRC 2375 (December 1994). It appears that such a problem occurred in this case. Furthermore, the operator's August 5 answer was a timely response to the penalty petition which was filed on August 3, 1998. Consequently, the October 19 show cause order should not have been issued in the first place. I reject the Solicitor's argument that default is warranted because the operator did not respond to the show cause order. Failure to respond to an order that was erroneously issued is not grounds for a default. Indeed, if the Solicitor had timely advised the Commission of the operator's answer, no show cause would have been issued. Therefore, I find that relief from the default is warranted.

In light of the foregoing, the December 14 order of default issued in this case is hereby **VACATED**.

This case is hereby assigned to Administrative Law Judge David Barbour.

All future communications regarding this case should be addressed to Judge Barbour at the following address:

Federal Mine Safety and Health
Review Commission
Office of Administrative Law Judges
Two Skyline Place, Suite 1000
5203 Leesburg Pike
Falls Church, VA 22041

Telephone No. 703-756-5232
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A handwritten signature in black ink that reads "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

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Brian L. Pudenz, Esq., Office of the Solicitor, U. S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202

Mr. Bill Warford, J & J Sand and Gravel, 15902 Highway 70, Benton, AZ 72015

/gl

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

January 20, 1999

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-292
Petitioner	:	A. C. No. 29-00845-03591
	:	
v.	:	
THE PITTSBURG & MIDWAY COAL	:	
MINING COMPANY,	:	York Canyon Surface Mine
Respondent	:	

ORDER ACCEPTING APPEARANCE
ORDER ACCEPTING LATE FILING
ORDER OF ASSIGNMENT

It is **ORDERED** that the Conference and Litigation Representative (CLR) be accepted to represent the Secretary in accordance with the notice of unlimited appearance he has filed with the penalty petition. Cyprus Emerald Resources Corporation, 16 FMSHRC 2359 (November 1994).

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

The CLR has filed a motion to accept late filing of the penalty petition. A penalty petition must be filed within 45 days from receipt of the operator's notice of contest which requested a hearing. 29 C.F.R. § 2700.28(a). A review of the Commission file shows that the contest was received by MSHA on September 29, 1998. The petition was due on November 13, 1998. 29 C.F.R. § 2700.8. Filing is effective upon mailing and the petition was sent on November 18, 1998. 29 C.F.R. § 2700.5(d). The petition was, therefore, 5 days late.

According to the CLR, the operator's notice of contest was forwarded to Denver and received by the Denver District 9 Office, Conference and Litigation Representative, on October 9, 1998. However, the CLR states that the petition was late because of "the database problem with the computer and a breakdown in communication." The operator has filed a motion in opposition arguing that a breakdown in communication within the agency does not constitute adequate cause.

The Commission has not viewed the 45 day requirement as jurisdictional or as a statute of limitation. Rather, the Commission permits late filing of penalty petitions where the Secretary demonstrates adequate cause for the delay and where the respondent fails to show prejudice from the delay. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981). The operator has not alleged prejudice. Therefore, the issue to be resolved is whether the Secretary has demonstrated adequate cause.

Late filings have been permitted where there has been a rise in the mine safety caseload together with a lack of support personnel. Salt Lake, supra; Medicine Bow Coal Co., 4 FMSHRC 882 (May 1982). See also Wharf Resources USA Incorporated, 14 FMSHRC 1964 (November 1992); Fisher Sand and Gravel Company, 14 FMSHRC 1968 (November 1992). Out of time filing of the penalty petition was allowed when the delay was due to the adoption by MSHA of a new system for handling mine safety cases. Roberts Brothers Coal Company, 17 FMSHRC 1103 (June 1995). So too, late filing was permitted when it was due to a mistake in the computation of the 45 days by a Conference and Litigation Representative (CLR) when the CLR program was new. Lone Mountain Processing Incorporated, 17 FMSHRC 839 (May 1995); Austin Powder Company, 17 FMSHRC 841 (May 1995); Ibold Incorporated, 17 FMSHRC 843 (May 1995). An extraordinary circumstance like a government shutdown also has been recognized as adequate reason for late filing. Secretary of Labor v. Roger Chistensen, 18 FMSHRC 1693 (August 1996). In this case, the reason given is a database problem with the computer and a breakdown in communication. I find this circumstance constitutes adequate cause, but in future cases the CLR should explain the problem in more detail and furnish dates.

In light of the foregoing, the motion to accept late filing is **GRANTED**.

The operator has filed its answer. Accordingly, this case is hereby assigned to Administrative Law Judge Richard W. Manning.

All future communications regarding this case should be addressed to Judge Manning at the following address:

Federal Mine Safety and Health
Review Commission
Office of the Administrative Law Judges
Colonnade Center
Room 280, 1244 Speer Boulevard
Denver, Colorado 80204

Telephone No. 303-844-3577
Telephone No. 303-844-5268 (Fax)

A handwritten signature in black ink that reads "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

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Steven R. Ellinwood, Esq., Pittsburg & Midway Coal Mining Co., P. O. Box 6518, Englewood,
CO 80155-6518

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