JANUARY 2000

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

JANUARY 2000

There were no cases filed in which review was either granted or 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 12, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. WEST 2000-76-M A.C. No. 42-02242-05501
OGDEN CONSTRUCTORS, INC.	:	

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

ORDER

BY: Jordan, Chairman; Riley, 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 10, 1999, the Commission received from Ogden Constructors, Inc. ("Ogden") 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). The Secretary of Labor does not oppose the motion for relief filed by Ogden.

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, Ogden asserts that its failure to file a hearing request to contest the proposed penalty for an alleged violation of a mandatory standard was due to its mistaken belief that the cited crushing plant was not subject to the jurisdiction of the Department of Labor's Mine Safety and Health Administration ("MSHA"). Mot. at. 1. It explained that its Utah office closed earlier in the year and that it was led to believe by project sponsors that the new location and "purpose" of the crushing plant would place it under the jurisdiction of the Occupational Safety and Health Administration, and the Army Corps of Engineers, rather than MSHA. *Id.* Ogden maintains that, after consulting with MSHA, it subsequently determined that the plant was subject to MSHA jurisdiction, but that by then the time for contesting the citation had expired. *Id.* It further states that personnel from the Utah office were relocated throughout the country, making

it difficult to route correspondence to the proper person. *Id.* Ogden submits that the person assigned with the overall responsibility for health and safety is no longer employed by Ogden, and that it has not been successful in locating the original proposed assessment. *Id.* at 2. Accordingly, it requests that the Commission reopen the final order. *Id.*

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., Jim Walters Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co., Inc.*, 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 Services, 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, mistake, or excusable neglect. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

On the basis of the present record, we are unable to evaluate the merits of Ogden's position.[1] In the interest of justice, we remand the matter for assignment to a judge to determine whether Ogden has met the criteria for relief under Rule 60(b). *See M&Y Services, Inc.*, 19 FMSHRC 670, 671-72 (April 1997) (remanding when proposed penalty became final order because operator was unfamiliar with Commission procedure). 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

James C. Riley, Commissioner

Robert H. Beatty, Commissioner

[1] In view of the fact that the Secretary does not oppose Ogden's motion to reopen this matter for a hearing on the merits, Commissioners Marks and Verheggen conclude that the motion should be granted.

Distribution

Conrad Weidenkeller
Regional Safety Manager
Ogden Constructors
2725 Jefferson St., Suite 12
Carlsbad, CA 92008

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 12, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 2000-77-M
	:	A.C. No. 04-05373-05501
OGDEN CONSTRUCTORS, INC.	:	

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

ORDER

BY: Jordan, Chairman; Riley, 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 10, 1999, the Commission received from Ogden Constructors, Inc. ("Ogden") 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). The Secretary of Labor does not oppose the motion for relief filed by Ogden.

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, Ogden asserts that its failure to file a hearing request to contest the proposed penalty for Citation No. 7966771 was due to its mistaken belief that no action was required because the citation was the subject of an ongoing investigation by the Department of Labor's Mine Safety and Health Administration ("MSHA"). Mot. at 1. It explains that shortly after receiving the penalty proposal associated with the citation on August 18, 1999, it was contacted by an MSHA Special Investigator, who informed Ogden that he would be investigating the citation. *Id.* Ogden states that it believed that the actions against the company and any individuals were being investigated at the same time and that it requested, by letter dated September 7, that MSHA delay final disposition of the case pending the results of the investigation. *Id.* It submits that it received a letter dated October 15, 1999, from MSHA stating

that the enforcement actions against the company and individuals had been investigated separately and that penalties had been proposed separately. *Id.* Ogden states that it received the letter after the time for contesting the citation had expired. *Id.* Accordingly, it requests that the Commission reopen the case so that it may contest Citation No. 7966771.[1] *Id.* Ogden attached to its letter the October 15 letter from MSHA.

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., Jim Walters Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co., Inc.*, 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 Services, 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, mistake, or excusable neglect. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

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[1] Ogden mistakenly identified the case involving Citation No. 7966771 as identified by A.C. No. 42-02242-05501, rather than A.C. No. 04-05373-05501.

On the basis of the present record, we are unable to evaluate the merits of Ogden's position.[2] In the interest of justice, we remand the matter for assignment to a judge to determine whether Ogden has met the criteria for relief under Rule 60(b). *See Dean Heyward Addison*, 19 FMSHRC 681, 682-83 (April 1997) (remanding when proposed penalty became final because that individual mistakenly believed that a hearing on the individual penalty would be automatically conducted with the hearing on the penalty proposed against the operator); *M&Y Services, Inc.*, 19 FMSHRC 670, 671 (April 1997) (remanding when proposed penalty became final because operator was unfamiliar with the procedures for requesting hearing); *see also Rivco Dredging Corp.*, 10 FMSHRC 624, 625 (May 1988) (remanding when operator filed notice of contest but was unaware that contest of proposed penalties was required). 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

James C. Riley, Commissioner

Robert H. Beatty, Commissioner

[2] In view of the fact that the Secretary does not oppose Ogden's motion to reopen this matter for a hearing on the merits, Commissioners Marks and Verheggen conclude that the motion should be granted.

Distribution

Conrad Weidenkeller
Regional Safety Manager
Ogden Constructors
2725 Jefferson St., Suite 12
Carlsbad, CA 92008

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 12, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 99-368-M
	:	A.C. No. 02-02806-05501
VALLE CONSTRUCTION, LLC	:	

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On December 9, 1999, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Valle Construction, LLC ("Valle") for failing to answer the petition for assessment of penalties filed by the Secretary of Labor on September 9, 1999, or the judge's Order to Respondent to Show Cause issued on October 25, 1999. The judge assessed civil penalties in the sum of $1,533, proposed by the Secretary.

On December 27, 1999, the Commission received a letter from Valle asserting it closed its cinder pit on October 15, 1999, and removed all of its equipment, and that it received correspondence indicating that it was excused from paying the civil penalties. Letter from Norman Gobeil, Administrator. Valle requests an explanation for the default order directing it to pay the penalties. *Id.*

The judge's jurisdiction in this matter terminated when his decision was issued on December 9, 1999. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Valle's letter to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Resources, Inc.*, 10 FMSHRC 1130 (Sept. 1988).

On the basis of the present record, we are unable to evaluate the merits of Valle's position. In the interest of justice, we vacate the default order and remand this matter to the judge, who shall determine whether relief from default is warranted. *See General Road Trucking Corp.*, 17 FMSHRC 2165, 2166 (Dec. 1995) (deeming letter as timely filed petition for discretionary review, vacating default, and remanding to judge where pro se operator confused about Commission's procedural rules); *Amber Coal Co.*, 11 FMSHRC 131, 132-33 (Feb. 1989) (same).

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

Normand Gobeil, Administrator
Valle Construction LLC
HCR 34, Box B
Valle, AZ 86046

Alan Raznick, Esq.
Office of the Solicitor
U.S. Department of Labor
71 Stevenson St., Suite 1110
San Francisco, CA 94105

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 19, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 2000-19-M A.C. No. 11-03024-05503
SPROULE CONSTRUCTION CO., INC.	:	

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

ORDER

BY: Jordan, Chairman; Marks, Riley, and Verheggen, 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 September 13, 1999, the Commission received from Sproule Construction Co., Inc. ("Sproule") 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). The Secretary of Labor does not oppose the motion for relief filed by Sproule.[1]

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, Sproule requests that the Commission reopen an uncontested citation (Citation No. 7817699) that became a final order of the Commission by operation of section 105(a), and to consolidate it with a separate civil penalty proceeding involving the same operator, LAKE 99-24-M. In that proceeding, Chief Administrative Law Judge Merlin issued an Order of

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[1] On October 21, 1999, the Commission received an opposition to Sproule's request from the Department of Labor's Regional Solicitor's Office in Chicago, Illinois. Attached to the opposition were various documents including a copy of a certified receipt for the proposed penalty associated with Citation No. 7817699. Reg. Solicitor's Exs. C, D. On December 13, 1999, the Commission received a letter from the Appellate Litigation Division of the Solicitor's Office clarifying that the Secretary does not, in fact, oppose the motion to reopen.

Default to Sproule for its failure to answer the petition for assessment of penalties for various alleged violations of mandatory health or safety standards on March 15, 1999. On March 25, 1999, Sproule filed a Motion to Vacate any and all Defaults and for Leave to File an Answer to Petition for Assessment. On April 26, 1999, the Commission issued an order vacating the default, and remanding to the judge to determine whether relief from default was warranted. 21 FMSHRC 426, 428 (April 1999) (Chairman Jordan, dissenting). On June 10, 1999, Judge Merlin issued an order on remand, vacating the default order and assigning the matter to Administrative Law Judge Jacqueline Bulluck. 21 FMSHRC 691, 692 (June 1999) (ALJ). Judge Merlin reasoned that the operator had been pro se up until the time that the default order was issued and was unfamiliar with Commission procedure, and that the operator had contacted the Department of Labor's Mine Safety and Health Administration ("MSHA") when it first received the petition and erroneously believed that such action resolved the matter. *Id.*

Sproule states in its request that it subsequently filed its Answer to the Petition for Assessment, including in the Answer its challenge to Citation No. 7817699. Mot. at 2. Sproule submits that Judge Bulluck informed it that Citation No. 7817699 was not included in the Petition for Assessment of Penalty for Docket No. LAKE 99-24-M, and that Sproule could not include its challenge to that citation in its Answer. *Id.* Accordingly, Sproule requests that the Commission consolidate Citation No. 7817699 with LAKE 99-24-M. Sproule attached to its Motion to Join various documents filed and issued in LAKE 99-24-M.

The separate proceeding, LAKE 99-24-M, has been settled. Although Sproule's motion to consolidate Citation No. 7817699 with LAKE 99-24-M is now moot, Sproule continues to challenge the citation. Accordingly, Sproule's motion to reopen Citation No. 7817699 requires resolution.

The proposed assessment for Citation No. 7817699 was received by Sproule on November 20, 1998. Reg. Solicitor's Exs. C, D. Sproule did not file a green card request for a hearing with respect to the citation, and the proposed assessment became a final order of the Commission on December 20, 1998.

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., Jim Walters Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co., Inc.*, 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 Services, 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, mistake, or excusable neglect. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

Sproule offers no explanation in its motion for the reasons that it failed to file a green card request for a hearing with respect to Citation No. 7817699. However, it appears from the record and attachments to Sproule's motion that Sproule was pro se at the time that it received the penalty proposal and that it was unfamiliar with Commission procedure. *See* Reg. Solicitor's Exs. C, D (establishing that Sproule received Citation No. 7817699 on 11-20-98); Sproule's Ex. E at 1 (judge's remand order, in which the judge found that, in November 1998, Sproule was pro se and was not familiar with Commission procedure).

In the interest of justice and in order to serve judicial economy, we grant Sproule's unopposed request for relief and reopen the penalty assessment that became a final order with respect to Citation No. 7817699. *See Turner v. New World Mining, Inc.*, 14 FMSHRC 76, 77 (Jan. 1992) (reopening final order and finding sufficient allegation that counsel misunderstood Commission procedure); *Peabody*, 19 FMSHRC at 1614-15 (reopening final order when party's failure to submit hearing request was due to unfamiliarity with Commission procedure). The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

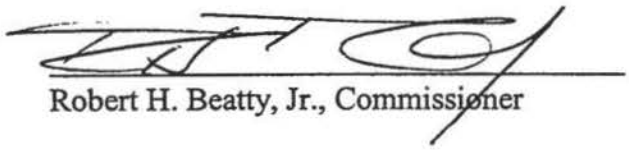
Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Commissioner Beatty, dissenting:

On the basis of the present record, I am unable to evaluate the merits of Sproule's position and would remand the matter for assignment to a judge to determine whether Sproule has met the criteria for relief under Rule 60(b). *See Dean Heywood Addison*, 19 FMSHRC 681, 682-83 (Apr. 1997) (remanding to judge to determine whether asserted lack of familiarity with Commission procedures met criteria for relief under Rule 60(b)); *REB Enterprises, Inc.*, 18 FMSHRC 311, 312-13 (Mar. 1996) (remanding where failure to file answer was claimed to be based upon lack of familiarity with Commission rules and procedures). I also note that Sproule has failed to provide any explanation for its failure to timely file a green card or to offer any affidavits to explain its position.



Robert H. Beatty, Jr., Commissioner

Distribution

Margaret Donnell, Esq.
Richard P. Reichstein, Ltd.
120 North Green St., Suite 601
Chicago, IL 60607

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 20, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. VA 2000-14-M
	:	A. C. No. 44-00024-05531
CHANTILLY CRUSHED 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 January 10, 2000, the Commission received from Chantilly Crushed Stone, Inc. ("Chantilly"), 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). The Secretary of Labor does not oppose the request filed by Chantilly.

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, Chantilly states that the proposed penalty assessments associated with Citation Nos. 7725030, 7725031, 7725032, 7725034, and 7725036 became final orders of the Commission due to delays at the U.S. Postal Service. Mot. at 1-2. It explains that the proposed penalty assessments were received by its mine on October 15, 1999, and subsequently forwarded to its safety director, Steven Herzberg, on October 22. *Id.* at 1. Chantilly submits that Herzberg returned the request for a hearing (green card) by first class mail on November 15, 1999. *Id.* It explains that, due to inexplicable mail delays, perhaps attributable to increased mail volume during the holidays, the hearing request was not received by the Department of Labor's Mine Safety and

Health Administration ("MSHA") until December 6, 1999. *Id.* at 1-2. Chantilly states that, in a letter dated December 29, 1999, MSHA notified Chantilly of the final orders, stating that the hearing request had been mailed by Chantilly on December 2, 1999, outside of the 30-day filing period. *Id.* at 2 n.3. Chantilly maintains that any delay in postmarking was outside of its control. *Id.* Accordingly, Chantilly requests that the Commission reopen the final orders on the basis of mistake or inadvertence pursuant to Fed. R. Civ. P. 60(b). Chantilly attached to its request an affidavit by Herzberg, the December 29 MSHA letter, and a copy of the green card.

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). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *see also Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). 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 (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 Chantilly intended to contest the proposed penalties, and that it may have timely filed its request for a hearing. The documents attached to Chantilly's request appear to be sufficiently reliable and support Chantilly's allegations. *See* Ex. A (Aff. of Steven Herzberg); Ex. C (green card signed by Herzberg and dated Nov. 15, 1999). In the circumstances presented here, any late filing of Chantilly's hearing request may be considered inadvertence or excusable neglect within the meaning of Rule 60(b)(1).[1] *See Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996) (granting operator's motion to reopen when operator had reasonable basis for believing that it timely mailed its hearing request and when any late filing was due to unique mail service at mine).

[1] In view of the fact that the Secretary does not oppose Chantilly's motion to reopen this matter for a hearing on the merits, Commissioners Marks and Verheggen would grant the motion.

Accordingly, in the interest of justice, we reopen this penalty assessment that became a final order with respect to Citation Nos. 7725030, 7725031, 7725032, 7725034, and 7725036.[2] The 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

[2] Commissioner Beatty votes to grant Chantilly's motion to reopen because it is supported by an affidavit.

Distribution

Adele L. Abrams, Esq.
Mark N. Savit, Esq.
Patton Boggs, LLP
2550 M Street, N.W.
Washington, D.C. 20037

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 31, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. SE 99-6-R through 99-10-R and SE 99-66
v.	:	
JIM WALTER RESOURCES, INC.	:	

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

DECISION

BY THE COMMISSION:

This case involves contest proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is whether the Central Supply Shop operated by Jim Walter Resources, Inc. ("JWR") is a "coal or other mine" under section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(1).[1] JWR refused to allow the Department of Labor's Mine Safety and Health Administration ("MSHA") to conduct an inspection of the premises during September 1998. Subsequently, MSHA issued several citations that are the subject of this

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[1] Section 3(h)(1) provides:

> "[C]oal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

proceeding. Administrative Law Judge Jerold Feldman found that the Central Supply Shop was not a "mine" and dismissed the proceedings against JWR. 21 FMSHRC 494 (May 1999) (ALJ). For the reasons that follow, we reverse the judge's decision and remand for reassessment of penalties.

I.

Factual and Procedural Background

JWR operates four underground coal mines in a two-county area in Alabama. 21 FMSHRC at 496. In one of those counties, JWR also operates its Central Machine Shop and Central Supply Shop. *Id.* The two facilities, which are adjacent to one another, are not on the property of any one of the coal extraction sites but are located 1 mile from the closest site, 6 miles from two of the sites, and 25 miles from the farthest site. *Id.*

The main function of the Central Machine Shop is to repair and maintain electrical and mechanical equipment used at the nearby JWR mines. *Id.* at 497. Typical jobs include the rebuilding of longwall stageloaders, continuous mining machines, ram cars, scoops, and roof bolters, overhauling longwall shields, and fabricating chutes and hoppers for coal preparation plants at the mines. *Id.* JWR employees deliver equipment from the mines to the Central Machine Shop using JWR vehicles. *Id.* The Central Machine Shop provides its services only to JWR's mines and related facilities. *Id.*

MSHA has inspected the Central Machine Shop annually since 1982, and JWR paid penalties for 43 violations as a result of such inspections. *Id.* at 496-97. JWR has complied with the Part 50 reporting requirements with regard to that shop. *Id.* at 497. The Central Machine Shop also has a mine identification number. *Id.* at 496.

The primary function of the Central Supply Shop is to warehouse materials and supplies used in JWR's nearby mines, preparation plants, and the adjacent Central Machine Shop. *Id.* at 498. Central Supply does not sell any of these materials to the public. *Id.* The value of the inventory in the Central Supply is approximately $12 million, which includes about $7 million in supplies on consignment. *Id.* Until such time as the goods are used, the vendor has the right to retrieve the goods, although this rarely occurs. *Id.*

Workers at the Central Supply Shop deliver materials and supplies to JWR mines in a company-owned flatbed truck. *Id.* Over 90 percent of inventoried supplies are used directly in JWR's mining operations. *Id.* Supplies include everything needed to support JWR's mines, including hard hats, safety glasses, nails, conveyor belts, belt structures, and oil filters. *Id.* The majority of items on the active inventory list are parts for maintaining and repairing machinery and equipment. *See* S. Br. in Support of Juris., Ex. B.

Before the incident at issue in this case, MSHA had not previously inspected the Central Supply Shop. 21 FMSHRC at 497. Nor had JWR secured a mine identification number for the shop.

Id. JWR employs 16 salaried and 7 hourly paid workers at the Central Supply Shop. *Id.* at 498. Although the regular hours of the Central Supply Shop are Monday through Saturday, on-call personnel are available to staff the facility around the clock, seven days a week. *Id.* at 499.

On September 23, 1998, MSHA issued five citations for alleged violations in the Central Machine Shop. *Id.* at 501; Order Correcting Sum. Dec. at 2. In addition, MSHA issued three citations for alleged violations in the Central Supply Shop, including JWR's refusal to allow MSHA entry to conduct an inspection, JWR's failure to provide a fire extinguisher on a fork lift, and its failure to have an audible horn on the fork lift. 21 FMSHRC at 502; Order Correcting Sum. Dec. at 2. JWR contested the citations on the basis that neither facility was a "mine" within the meaning of the Act. 21 FMSHRC at 494.

With regard to the Central Machine Shop, the judge regarded as controlling the Commission's decision in *U.S. Steel Mining Co.,* 10 FMSHRC 146 (Feb. 1988), in which the Commission held that a centrally located repair shop was covered by MSHA's surface mine regulations. 21 FMSHRC at 500-01. In addition, the judge considered it significant that maintenance of mine equipment was an integral part of the mining process and was one of the activities generally performed by mine operators. *Id.* at 501.[2] Thus, the judge held that the Central Machine Shop was subject to Mine Act jurisdiction. *Id.*

In addressing the Central Supply Shop, the judge first noted that MSHA's enforcement history was "inconsistent" because the agency had not previously sought to assert jurisdiction. *Id.* Further, the judge noted that, while the Mine Act's coverage is broad, in order to qualify as a "miner" under section 3(g) of the Act, 30 U.S.C. § 802(g),[3] one must work in a mine. *Id.* at 501-02 (quoting *National Indus. Sand Ass'n v. Marshall*, 601 F.2d 689, 704 (3d Cir. 1979)). The judge reasoned that some activities might be covered, if on mine property, but would not be covered if outside mine property. *Id.* at 502 (citing *Oliver M. Elam, Jr., Co.*, 4 FMSHRC 5 (Jan. 1982)). Finally, the judge noted that individuals performing supply activities were not exposed to hazards normally associated with mining. *Id.* Therefore, the judge concluded that the Central Supply Shop was not "a coal or other mine" under section 3(h) of the Mine Act. *Id.*

II.

Disposition

The Secretary argues that the Central Supply Shop is a mine under the plain language of section 3(h)(1) of the Mine Act. S. PDR at 7-9.[4] Alternatively, the Secretary argues that her

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[2] JWR has not appealed the judge's conclusion that the Central Machine Shop is a mine.

[3] Section 3(g) defines "miner" as "any individual working in a coal or other mine."

[4] The Secretary designated her petition for review as her brief.

interpretation of the Act is permissible and consistent with Congressional intent that the Act's definition of a mine be expansively interpreted. *Id.* at 9-12. The Secretary asserts that the judge's reliance on several cases was misplaced, in particular his analogy to cases interpreting who is a "miner." *Id.* at 12-15 & n.4. Finally, the Secretary contends that her interpretation is entitled to deference even though MSHA had not previously sought to assert jurisdiction over the Central Supply Shop. *Id.* at 16-18.

JWR's primary argument on review is that the judge's findings are supported by substantial evidence. JWR Br. at 8-9. It further argues that the judge's decision is in accordance with Commission precedent, because there are no cases on point in the Secretary's favor. *Id.* at 10. Finally, JWR argues that the judge's legal conclusions are correct. More particularly, JWR argues in support of the judge's conclusion that the Mine Act's definition of a "mine" does not apply to the Central Supply Shop because the facilities and equipment there are not used in the work of preparing coal. *Id.* at 10-11. JWR also contends that the judge correctly concluded that the Secretary's position is not reasonable because the activities performed in the Central Supply Shop are not of a type normally performed in coal mines. *Id.* at 11.

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); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). In ascertaining the plain meaning of the statute, courts utilize traditional tools of construction, including an examination of the "particular statutory language at issue, as well as the language and design of the statute as a whole," to determine whether Congress had an intention on the specific question at issue. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d at 44; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989).

The definitions of coal mine and coal preparation in sections 3(h) and 3(i) are "broad," "sweeping," and "expansive." *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 591-92 (3d Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980) ("[T]he statute makes clear that the concept that was to be conveyed by the word ['mine'] is much more encompassing than the usual meaning attributed to it — the word means what the statute says it means.").[5] Under section 3(h)(1), "coal or other mine" includes "lands, . . . structures, facilities, equipment, machines, tools or other property . . .

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[5] In addition, the legislative history of the Mine Act emphasizes that "what is considered to be a mine and to be regulated under this Act [shall] be given the broadest possibl[e] interpretation, and . . . doubts [shall] be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978).

used in, or to be used in, . . . the work of preparing coal . . . ." 30 U.S.C. § 802(h)(1). In light of the Mine Act's expansive language, we conclude that the Central Supply Shop is a mine under the definition of section 3(h)(1).

We further conclude that the language of the statute is clear. The stipulated record is equally clear in establishing that the Central Supply Shop is a dedicated off-site facility of a (multiple) mine operator where employees receive, stock, maintain, and deliver equipment, tools, and supplies used at JWR's coal extraction sites, preparation plants, and Central Supply Shop, including, inter alia, rock dust, line curtains, hard hats, machine parts, and conveyor belts.[6] Consequently, there is Mine Act jurisdiction because a "mine" includes "facilities" and "equipment . . . used in or to be used in" JWR's mining operations or coal preparation facilities.[7]

Our result is consistent with Commission case law. The Commission has stated, "[t]he definition [of 'coal or other mine'] is not limited to an area of land from which minerals are extracted, but also includes facilities, equipment, machines, tools and other property used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals." *Harless, Inc.*, 16 FMSHRC 683, 687 (Apr. 1994) (citation omitted). In *Harless*, the Commission rejected the operator's argument that its sand dredging operation was not a "mine" because it was not "an area of land from which minerals are extracted" and did not employ miners who worked underground. *See id.* at 686-88. In this proceeding, the judge failed to consider *Harless* in reasoning that the activities of JWR employees were not covered by the Mine Act because they were performed "off mine site property." 21 FMSHRC at 502.

Similarly, in *W.J. Bokus Indus., Inc.*, 16 FMSHRC 704, 708 (Apr. 1994), the Commission held that MSHA properly cited equipment in a storage garage that was shared by a sand and gravel operation and an asphalt plant. The Commission rejected the argument that title to the cited equipment was determinative and found it significant that the cited equipment was "used or to be used in mining and that . . . the cited conditions could affect miners in the garage."[8] *Id.*

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[6] The status of many items in JWR's Central Supply Shop, as equipment "used in, or to be used in," extracting or preparing coal, would not necessarily have been evident until it was delivered to JWR or another mine operator. Supplies such as nails, hard hats, conveyor belts and machinery parts or equipment stored by a manufacturer, distributor, or commercial vendor, are generally fungible and thus can be used in any number of industries, until they are to be used in mining.

[7] This case does not involve, and we therefore do not address, whether an off-site supply warehouse operated by a vendor, mining equipment manufacturer, or distributor would be covered under the Act, or even whether an off-site facility operated by a mining company or subsidiary that is open for 'commercial' business would be covered.

[8] In *Bokus*, the Commission did not reach the issue of whether the garage was a structure or facility used in mining and, therefore, was a "mine" within the meaning of section 3(h)(1) of the

U.S. Steel, 10 FMSHRC 146, on which the judge relied in affirming MSHA's jurisdiction over the Central Machine Shop, is suggestive, if not determinative, of the outcome of MSHA's assertion of jurisdiction over the Central Supply Shop as well. U.S. Steel operated a central machine shop away from any of its mines. *Id.* at 147. In concluding that the shop itself was a "mine," the Commission reasoned, "the Shop consists of 'lands . . . structures, facilities, equipment, machines, tools, or other property'" used in extracting or preparing coal and, therefore, was a mine. *Id.* at 149.[9] The Commission's reasoning applies with equal force to the Central Supply Shop, which contained equipment, machines, tools, or other property used in JWR's mining and coal preparation activities. S. Br. in Support of Juris., Ex. B.

The judge's reliance on the Commission's decisions in *Oliver Elam*, 4 FMSHRC at 5, and *Dilip K. Paul v. P.B. - K.B.B., Inc.*, 7 FMSHRC 1784 (Nov. 1985), is misplaced. The central issue in *Elam* was whether the operator of a commercial dock was engaged in the "work of preparing coal," within the meaning of sections 3(h)(1) and 3(i), 30 U.S.C. § 802(h)(1) and (i), when it loaded coal onto barges. 4 FMSHRC at 6. In concluding that Elam's facility was not a "mine," the Commission reasoned that coal preparation activities are generally undertaken to make coal suitable for a particular use or to meet market specifications. Although Elam performed some of the functions included in the Act's definition of coal preparation, these were done solely to facilitate its loading of coal onto barges. *Id.* at 8. In contrast to the operator in *Elam*, it was stipulated that JWR operated coal mines and coal preparation facilities. 21 FMSHRC at 496. There is no issue here concerning whether the Central Supply Shop was involved in the "work of preparing coal;" rather the basis for jurisdiction is the presence of equipment and facilities used in the extraction process. Thus, *Elam* and its progeny are inapplicable to determining whether the Central Supply is a "mine."

Paul is also readily distinguishable. That case, involving a complaint of discrimination, arose at the office of an engineering firm charged with designing a ventilation plan and shaft for storing nuclear waste. *Id.* at 1786-87. In dismissing the complaint, the Commission found it significant that there was only a preliminary engineering design, which "never left the drawing board," and therefore there was literally no mine in existence. *Id.* at 1787. In short, neither *Elam* nor *Paul* is dispositive of any issue in this proceeding.[10]

Mine Act. 16 FMSHRC at 708.

[9] The Commission also noted that the shop had a mine identification number and a history of citations. 10 FMSHRC at 149.

[10] *Cyprus Empire Corp.*, 15 FMSHRC 10, 14 (Jan. 1993), was also cited by the judge to support the statement that in order to qualify as a "miner" an employee must work in a mine. The issue in that case was whether striking employees at a mine could have their designated walkaround representative accompany an MSHA inspector. *Id.* at 15. Thus, the primary issue was whether *striking employees* were miners. *See id.* at 14.

Finally, in concluding that the Secretary's interpretation was unreasonable, the judge relied on the fact that the supply functions performed by JWR employees at the Central Supply Shop are generally performed by vendors not exposed to mine hazards. 21 FMSHRC at 502. However, the judge indicated that these same warehouse activities would be covered if the Central Supply Shop was located on the site of one of JWR's underground mines. *Id.* Coverage of JWR's Central Supply Shop employees should not be different because a mine operator has centralized supply room operations for four of its mines at a single offsite warehouse. In any event, the hazards to which miners are exposed are not limited to the hazards of underground mines, but include improperly maintained equipment and supplies that are used in mining. *See Bokus*, 16 FMSHRC at 708 (cited conditions of gas cylinders used in mining could affect miners in the garage where they were stored).[11] Moreover, the stipulated record shows that Central Supply Shop employees were regularly on the sites of JWR's underground mines to deliver supplies (21 FMSHRC at 498), and thus were exposed to the same hazards as miners who work in surface facilities or operations on site.

[11] It is apparent that, even under the judge's holding that the Central Machine Shop was a "mine," JWR's equipment and supplies would be covered if stored in the Central Machine Shop. However, as *Bokus* indicates, whether a mine operator's equipment is covered by the Mine Act is not determined by its location but rather by its function — that is, whether it is used in extracting or preparing coal. 16 FMSHRC at 708.

III.

Conclusion

For the foregoing reasons, we reverse the decision of the administrative law judge and conclude that the Central Supply Shop is a "mine" within the meaning of section 3(h)(1) of the Mine Act. We remand the proceeding to the judge for the assessment of the appropriate penalties, taking into consideration the penalty criteria of section 110(i), 30 U.S.C. § 820(i).[12]

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

[12] Notwithstanding that JWR agreed to pay the proposed penalties in the event that it lost on the issue of jurisdiction over the Central Supply Shop, the judge is required to make "[f]indings of fact on each of the statutory criteria [that] not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg Stone Co.*, 5 FMSHRC 287, 292-93 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

Distribution

Jack Powasnick, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Guy R. Hensley, Esq.
Jim Walter Resources, Inc.
P.O. Box 133
Brookwood, AL 35444

Administrative Law Judge Jerold Feldman
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 5, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 99-220-M
Petitioner	:	A. C. No. 34-01348-05524
v.	:	
	:	Bessie Plant Allied
ALLIED CUSTOM GYPSUM, INC.,	:	
Respondent	:	

DECISION

Appearances: Raquel Tamez, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Peter T. VanDyke, Esq., McAfee & Taft, P.C., Oklahoma City, Oklahoma, 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 Allied Custom Gypsum, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges eight violations of the Secretary's mandatory health and safety standards and seeks a penalty of $535.00. A hearing was held in Oklahoma City, Oklahoma. For the reasons set forth below, I affirm the citations and assess a penalty of $440.00.

At the beginning of the case, the parties stated that they had settled the case. The agreement provides that Citation Nos. 4460236, 4460238 and 4460239 will be modified by the Secretary to delete the "significant and substantial" designations and that the penalties for those three citations will be reduced from $66.00, $97.00 and $97.00, respectively, to $55.00 each. (Tr. 7-8.) The Respondent agreed to pay the proposed penalty for the five remaining citations in full.

Order

Having considered the representations and documentation submitted, I conclude that the settlement is appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C.

§ 820(i). Accordingly, the settlement is approved and the Respondent is **ORDERED TO PAY** a civil penalty of **$440.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Raquel Tamez, Esq., Office of the Solicitor, U.S. Department of Labor, 525 S. Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail)

Peter T. Van Dyke, Esq., McAfee & Taft, Two Leadership Tower, 10th Floor, 211 N. Robinson, Oklahoma City, OK 71102-7103 (Certified Mail)

/nj

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 7, 2000

SECRETARY OF LABOR, MSHA,	:	TEMPORARY REINSTATEMENT
on behalf of	:	PROCEEDING
VERNON DANIELS,	:	
Complainant	:	Docket No. KENT 2000-44-D
v.	:	BARB CD 99-21
	:	
MANALAPAN MINING COMPANY,	:	R.B. No. 7 Mine
Respondent	:	
	:	Mine ID 15-17701

ORDER GRANTING TEMPORARY REINSTATEMENT

Before: Judge Bulluck

This matter is before me upon application, filed by the Secretary on November 29, 1999, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2), for an order requiring Manalapan Mining Company, Incorporated ("Manalapan"), to temporarily reinstate Vernon Daniels to his former position as a mobile bridge carrier operator, day shift, at Manalapan's RB No. 7 mine, or to a similar position at the same rate of pay. Section 105(c) prohibits operators from discharging or otherwise discriminating against miners who have engaged in safety related protected activity, and authorizes the Secretary to apply to the Commission for temporary reinstatement of miners, pending full resolution of the merits of their complaints. The application is supported by declaration of MSHA Special Investigator Gary Harris, and a copy of the discrimination complaint filed by Daniels with MSHA on September 17, 1999. The application alleges that Daniels was laid-off by Manalapan, because he made himself available to testify at a temporary reinstatement hearing, and because, subsequently, he testified at the related discrimination hearing.

Manalapan elected to waive its right to a hearing and on December 9, 1999, filed its response, therein denying that Daniels had been laid-off for any discriminatory reason, and asserting that Daniels refused three offers to return to work. The Secretary filed a reply to Manalapan's response on December 27, 1999, noting that any post lay-off offers made by Manalapan to Daniels were for a different position, with less pay, or for a different shift at another mine.

Procedural Framework

The scope of this proceeding is governed by the provisions of Commission Rule 45(c), 29 C.F.R. § 2700.45(c), which limits the inquiry to a "not frivolously brought" standard, by providing that "If no hearing is requested, the Judge assigned the matter shall review immediately the Secretary's application and, if based on the contents thereof the Judge determines that the miner's complaint was not frivolously brought, he shall issue immediately a written order of temporary reinstatement."

It is well settled that the "not frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In *Jim Walter Resources v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990), the Court explained the standard as follows:

> The legislative history of the Act defines the 'not frivolously brought standard' as indicating whether a miner's 'complaint appears to have merit'-- an interpretation that is strikingly similar to a reasonable cause standard. [*Citation omitted*]. In a similar context involving the propriety of agency actions seeking temporary relief, the former 5th Circuit construed the 'reasonable cause to believe' standard as meaning whether an agency's 'theories of law and fact are *not insubstantial or frivolous.*' 920 F.2d at 747 (*emphasis in original) (citations omitted).*
>
> . . . Congress, in enacting the 'not frivolously brought' standard, clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. Any material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits. Also, the erroneous deprivation of the employer's right to control the makeup of his work force under section 105(c) is only a *temporary* one that can be rectified by the Secretary's decision not to bring a formal complaint or a decision on the merits in the employer's favor. *Id.* at 748, n. 11 (*emphasis in original*).

Ruling

The Mine Act accords to miners and miners' representatives protection from discharge or other discriminatory acts, based on their exercise of any statutory right under the Act. 30 U.S.C. § 815(c). The Commission has consistently held a miner seeking to establish a *prima facie* case of discrimination to proving that he engaged in activity protected by the Act, and that he suffered adverse action as a result of the protected activity. *Secretary on behalf of Pasula v. Consolidation Coal Company*, 2 FMSHRC 2786, 2797-2800 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981);

Secretary on behalf of Robinette v. United Coal Company, 3 FMSHRC 803, 817-18 (April 1981).

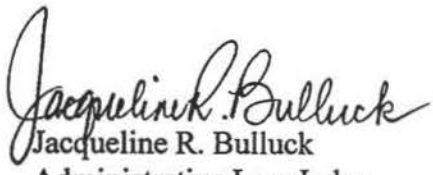
The Secretary's allegations are based, in part, on Inspector Harris's investigation of Daniels' discrimination claims. Based on his investigation, Harris found: 1) that Daniels had been employed at the RB No. 7 mine (J&C Mining prior to May 1999) from February 1997, until July 29, 1999; 2) that on January 19, 1999, day shift miners Vernon Daniels, William Daniels, Jeff Craig, Dwayne Hubbard, Grant Noe and Carl Runyon engaged in protected activity, when they testified in the wrongful discharge proceeding of *Middleton v. J&C Mining, L.L.C.,* 21 FMSHRC 217 (February 1999) (ALJ); 3) that on March 2, 1999, Manalapan discharged Noe; 4) that in May 1999, Manalapan took over J&C Mining, renamed the mine RB No. 7, and continued to employ all J&C Mining employees on one maintenance and two production shifts; 5) that during a day shift in June 1999, the foreman sent Daniels and Hubbard home early; 6) that on July 29, 1999, due to the depressed coal market, Manalapan laid-off 14 miners at the RB No. 7 mine, including Daniels, Hubbard and Donnie Adkinson, and transferred Runyon, Craig and William Daniels to another mine; 7) that Manalapan retained seven day shift miners at the RB No. 7 mine, who did not participate in the *Middleton* hearing; 8) that Manalapan replaced Daniels, Craig, Hubbard, and William Daniels with second shift miners, who have less seniority and mining experience; 9) that mine superintendent Earl Hensley, upon the advice of day shift foreman George Saylor, decided which miners to lay-off; 10) that foreman Saylor had knowledge of the miners' protected activity; and 11) that all day shift miners who testified in the *Middleton* hearing have suffered adverse action within six months of the protected activity. Based on these findings, Harris concluded that Daniels' allegation that he was laid-off because of his participation in the January 1999, *Middleton* hearing was not frivolous.

Manalapan's response seeks to establish that the discrimination complaint was frivolously brought by asserting, in part: 1) that on June 29, 1999, Manalapan shut down operations, by placing the miners on one week without pay, in addition to their paid vacation week; 2) that, due to the depressed coal market, Manalapan owner Duane Bennett decided to eliminate the second shift, and delegated the decision-making authority to mine superintendent Hensley; 3) that Hensley received recommendations from foreman Saylor, as to the best qualified and most reliable miners; 4) that, for reasons concerning production, Hensley determined that other miners were more dependable than Daniels, and Hensley also believed that the lay-off would only last for a couple of months; 5) that Jessie Saylor, foreman Saylor's son, was also involved in the *Middleton* proceeding, as well as the pending *Noe* wrongful discharge proceeding; 6) that Daniels was absent nine days, and left work early two days, between January and May 1999; 7) that Daniels refused three opportunities to return to work, one at his previous position; and 8) that, of 38 miners laid-off, 11 of which were bridge operators, only 8 bridge operators had been called back to work, as of December 9, 1999. Manalapan concludes, therefore, that the decision to downsize was motivated by a depressed coal market, that decisions on retention and placement of miners were based solely on job qualifications and work records, and that Daniels was not laid-off because he gave testimony in the *Middleton* wrongful discharge hearing.

While I have carefully considered Manalapan's response, because it has waived its right to a hearing on the Secretary's application, I must accept as true, the events, as alleged. The Secretary has set forth allegations of adverse treatment, close in proximity to protected activity so as to create a nexus, sufficient to raise an inference of discrimination. Manalapan has conceded the protected activity and has not challenged the Secretary's position that, at the time Daniels was laid-off, company officials responsible for the action had knowledge of Daniels' participation in the *Middleton* discrimination proceeding. At best, Manalapan has shown an intent to defend its actions at hearing, on the basis of legitimate business-related, non-discriminatory reasons. At this juncture, it is emphasized that, at hearing, the Secretary ultimately bears the burden of proving discrimination by a preponderance of the evidence, in order to sustain a violation under section 105(c). Accordingly, since the allegations of discrimination, as set forth in the Secretary's application, have not been shown to be clearly lacking in merit, it must be concluded that they are not frivolous and, therefore, satisfy the lesser threshold in this proceeding.

ORDER

For the reasons set forth above, it is **ORDERED** that Manalapan Mining Company, Incorporated, reinstate Vernon Daniels, retroactive to December 29, 1999, by agreement of the parties, to the position he held prior to his lay-off on July 29, 1999, at the same rate of pay and benefits for that position, or to a similar position with the same or equivalent duties, at the same rate of pay and benefits.



Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215

Richard D. Cohelia, Representative, Manalapan Mining Company, Route 1, P.O. Box 374, Evarts, KY 40828

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
January 7, 2000

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. SE 94-244-R
	:	Citation No. 3182848; 1/31/94
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	No. 7 Mine
ADMINISTRATION (MSHA),	:	Mine ID No. 01-01401

DECISION

Before: Judge Melick

This remanded contest proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* involves a citation issued by the Department of Labor's Mine Safety and Health Administration (MSHA), alleging a violation of 30 C.F.R. § 75.400[1] because of a trash accumulation in an entry of the No. 7 Mine of Jim Walter Resources, Inc. (JWR).

The factual and procedural background of the case was set forth by the Commission in its decision on April 19, 1996, (18 FMSHRC 508) as follows:

> On January 24, 1994, MSHA Inspector Thomas Meredith cited JWR for a violation of section 75.400 because of trash accumulations in the No. 2 entry of JWR's No. 7 Mine. Tr. 29-30; Govt. Ex. 3. *See* 16 FMSHRC at 1514.
>
> On January 31, 1994, the date of the citation at issue, Meredith conducted a follow-up inspection and confirmed that JWR had abated the conditions that led to the issuance of the January 24 citations. Tr. 31. During the inspection, he observed in the No. 3 entry an accumulation of trash at the check curtain, which directed ventilation across the longwall face and also separated the active outby area from the inactive inby area. Tr. 16; 64. The judge found that the trash in the

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[1] 30 C.F.R. § 75.400 provides as follows:

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

" Active workings" is defined in 30 C.F.R. § 75.2 as "[a]ny place in a coal mine where miners are normally required to work or travel."

outby area consisted of "[a] garbage bag, one box and one rock dust bag . . . ." 16 FMSHRC at 1513. Inby the curtain, there was a larger accumulation of trash that extended for 250 feet and included paper bags, rags, rock dust bags, wooden pallets and large cable spools. Tr. 21-24; Gov't Ex. 2. The materials on both sides of the curtain were combustible. Tr. 24. *See* 16 FMSHRC at 1512.

Inspector Meredith issued a citation, which charged a violation of section 75.400, and a withdrawal order, pursuant to section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2). [fn 1, supra]. The inspector designated the violation as S&S and alleged that it was due to the operator's unwarrantable failure to comply with the standard. 16 FMSHRC at 1511-13; Govt. Ex. 2.

JWR challenged the citation and, following hearing, Judge Melick affirmed the violation. [fn. 1, supra]. Although he noted that the existence of accumulations inby and outby the check curtain was undisputed, the judge concluded that "the inactive inby area cited in the order was not within the 'active workings' and the accumulations located therein were therefore not in violation of the cited standard." *Id.* at 1512. He further concluded that the evidence concerning combustible material outby the line curtain was insufficient to establish that the violation was S&S. 16 FMSHRC at 1512-13. The judge also determined that the evidence was insufficient to establish that the violation was due to the operator's unwarrantable failure. *Id.* At 1513-14.

Subsequent events were reported by the Commission in its August 16, 1997, decision as follows:

The Secretary petitioned the Commission to review the S&S and unwarrantable determinations. A divided Commission affirmed the judge's decision. 18 FMSHRC 508 (April 1996).

Subsequently, the Secretary filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit. On May 2, 1997, the court issued its decision, affirming in part and reversing and remanding in part the decision of the Commission. *Secretary of Labor v. FMSHRC*, 111 F.3d 913 (D.C. Cir. 1997). The court affirmed the Commission's determination that the section 7[5].400 violation was not S&S and rejected the Secretary's argument that, in considering whether the violation was S&S, the Commission should take account of the seriousness of the nearby non-violative accumulation. *Id.* at 917-18. Relying on the language of section 104(d)(1), the court determined that "Congress has plainly excluded consideration of surrounding conditions that do not violate health and safety standards" from the S&S determination. *Id* at 917.

However, the court determined that section 104(d)(1) was ambiguous on

the question whether the non-violative accumulation could be considered for the unwarrantable determination. *Id.* at 919-20. The court noted that, when the Mine Act is ambiguous on a point in question, a court is required to apply the analysis set forth in *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), and defer to a reasonable interpretation of the Secretary. 111 F.3d at 914-15, 919-20.

The court agreed with the Secretary's interpretation of Section 104(d) of the Act, which had not been advanced at the trial below, that, in determining unwarrantable failure, consideration must also be given to the surrounding non-violative conditions. The Secretary argued before the circuit court, for the first time before any tribunal, that the existence of inby trash, although not violating any health or safety statute or regulation, demonstrated negligence rising to unwarrantability. The court accordingly remanded this case to the Commission to determine whether, "applying the Secretary's interpretation of the statute, the record contains sufficient evidence of causation and culpability to support an 'unwarrantable failure' finding." In its subsequent remand order the Commission directed that "non-violative accumulations in the inactive area of the mine" therefore be considered "in light of the other factors that the Commission may examine in determining whether a violation is unwarrantable, including the extent of the violative condition, the length of time that the violative condition 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 and the operator's efforts in abating the violative condition made prior to the issuance of the citation or order."

In the instant remand the divided Commission held that the primary issue in this case is the "extent to which the non-violative accumulations [can] be considered in conjunction with the violative accumulations to ascertain unwarrantability" and directed that consideration be given to the factors set forth in *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994), including "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 and the operator's efforts in abating the violative condition made prior to the issuance of the citation or order." [emphasis added] 19 FMSHRC at 1379.

Since it is the Secretary who has the burden of proving unwarrantable failure and since it is the Secretary who has the responsibility of advancing and providing the necessary legal analysis to support her theories of unwarrantability, the Secretary (as well as JWR) was provided the opportunity to submit a brief in this regard following the instant remand. Unfortunately, the Secretary has largely squandered this opportunity by premising her brief largely upon the false assumption that the inby trash accumulations constituted violations of the cited standard and that the trial judge erred in finding that they were not violative. This issue was, of course, never raised by the Secretary in her initial petition for review. Moreover, the Secretary acknowledged before the circuit court, and it is clearly now the established law of the case, that the inby trash was not in violation of the cited standard.

The "Mullins" Case Factors:

1(a) *The extent of the violative condition.* The Secretary has failed to sustain her burden of proving that this condition was extensive. Indeed, according to MSHA ventilation specialist Thomas Meredith, the trash in the active outby area consisted of only a few items:

> "some paper bags from the rock dusting operations. There was [*sic*] sandwich bags. There was some cardboard boxes. There was a garbage bag that was half under the curtain, half out burst open at that point. (Tr. 18).

The garbage bag was plastic and contained paper sandwich bags and some oily rags (Tr. 20). As depicted on the Secretary's own exhibit, the area in which they were located was also quite small (See Gov't Exh. No. 1). It may reasonably be inferred from this evidence that the violative condition was therefore not extensive and not, in itself, an aggravating factor justifying an unwarrantable failure finding.

(b) *The extent of the non-violative condition.* Non-violative, i.e. lawful, accumulations existed in the inby area of the No. 3 entry over a distance of approximately 250 feet and included approximately 100 to 250 empty rock dust bags that had been piled 2 or 3 feet high along the rib, five wooden pallets and a five-foot diameter wooden cable spool (Tr. 22-23 and 44). These lawful accumulations may reasonably be characterized as extensive. Under the circumstances it may also reasonably be inferred that the operator on the date of the instant violation "knew or should have known" that trash, not in violation of the Secretary's regulations, existed in the inby area. However, since the Secretary by her own regulations imposed no duty to clean up this lawful inby trash the operator here can be charged with but little negligence. No inference of unwarrantability can be made from the extent of the lawful trash condition alone. In any event this Commission has rejected the use of a "knew or should have known" standard alone for determining unwarrantability. *Virginia Crews Coal Co.,* 15 FMSHRC 2103 (October 1993).

(c) *The relationship between the extent of the non-violative condition and the extent of the violative condition.* In this regard it has been suggested that the operator must have been aware of the violative trash accumulation because of the extensive, albeit lawful, inby conditions. 19 FMSHRC at 745 n.7. Such a conclusion depends however upon proof that the outby trash existed at the same time that an agent of the operator could have seen the inby trash. Indeed, the outby trash could very well have came into existence only shortly before it was cited. Thus, even assuming, *arguendo*, that an agent of JWR had known of the extensive inby trash at some point in time, if the outby trash did not yet exist, then the inby trash could hardly have placed JWR on notice of any outby trash. The Secretary has simply not sustained her burden of proof that the lawful inby trash thereby provided notice to an agent of the operator of the existence of any violative outby trash.

The Commission majority in the aforementioned footnote specifically stated as follows:

> The evidence suggests that, because of the inby conditions, the violation was obvious and JWR must have been aware of it. For instance, the inspector testified without contradiction that the operator had placed a ventilation curtain on top of the trash accumulation, splitting open a garbage bag and spilling its contents on the outby side of the curtain. Tr. 19-20, 65. The inspector testified that the accumulation that was outby the curtain was "just the continuation of everything that was inby the curtain." Tr. 19.

The cited transcript pages are set forth below:

Q. (By Mr. Lawson) Was the material you observed out by the check curtain, was this simply the remains of a lunch or was it more extensive than that?

JUDGE MELICK: Is there any objection to him leading the witness?

MR. TRUITT: Yes, Your Honor.

JUDGE MELICK: I think that would have to be sustained.

Q. (By Mr. Lawson), Describe the accumulations out by the curtain as far as the extent of them.

A. [Inspector Meredith] Out by the curtain?

Q. Right

A. It was just the continuation of everything that was in by the curtain.

JUDGE MELICK: Well, we don't know what was in by yet. So, you'll have to say exactly what was out by.

THE WITNESS: I've stated all I can remember that was out by. If I say anything else, it would not be factual. I cannot testify to things that factual.

JUDGE MELICK: You say that there was a plastic garbage bag beneath the curtain itself?

THE WITNESS: Yes, there was a plastic garbage bag on this corner over here that had trash in it. It was burst open and just laying all through here like something had ran over it and burst it open.

JUDGE MELICK: You were pointing to the in by side of the curtain.

THE WITNESS: The corner of the bag when I first noticed it was on this side where the paper bags were.

JUDGE MELICK: The out by side?

THE WITNESS: Yes, sir.

JUDGE MELICK: Where were the contents of that plastice bag spilled out?

THE WITNESS: Some of it was underneath the curtain. Some of it was out from underneath the curtain, and some of it was in by the curtain because it had been burst.

JUDGE MELICK: You were able to identify what was out by the curtain?

THE WITNESS: Yes, sir.

JUDGE MELICK: What exactly was out by the curtain that had spillled from that garbage bag?

THE WITNESS: That was sandwich bags and paper bags and some oily rags that was out by this area.

JUDGE MELICK: Are these plastic sandwich bags?

THE WITNESS: No, sir.

JUDGE MELICK: What were they?

THE WITNESS: They were some paper bags. The only plastic I observed was the plastic bag itself.

(Tr. 19-21).

* * * *

Q. Can you tell me specifically what items were out by the check curtain marked 1-31-94?

A. There were rock dust bags. There was the busted garbage bag with other bags that came out of it, and I know there was a cardboard box, but I can't remember if there was two at that point or the other one was behind the curtain.

Q. How many rock dust bags, do you remember?

A. I do not know the exact quantity. I did not count bags.

Q. Would it have been less than five?

A. I didn't count them. I couldn't testify one way or the other to be honest with you.

Q. It would be a small number?

A. I don't recall exactly how many bags it was because they were piled up on the rib. They were two or three foot high and they came all the way through the curtain there. They could have been stacked up two or three foot high. They could be 20 or 25 bags, and if they're not mashed down, there could be four or five. I didn't count bags.

Q. You just can't say how many bags were there?

A. Specifically I can't in that one location.

(Tr. 65).

From this testimony it is clear that it was Inspector Meredith's opinion that the plastic garbage bag had been burst open, not by the placement of the ventilation curtain onto the garbage bag, but from something running over it (Tr. 19 L.23 - Tr. 20 L.2). Indeed, Meredith subsequently opined that the scoop had run over this bag of garbage (Tr. 25 L. 22-23). According to the inspector's testimony some of the trash from that garbage bag was found beneath the check curtain and outby the curtain and, indeed, a portion of the bag itself was lying beneath the curtain. The inspector did not however testify that the operator had placed the ventilation curtain on top of the garbage bag. From the record it may reasonably be inferred that the trash had been forced or pushed under the curtain by the same equipment that the inspector thought had initially burst the garbage bag open. There is, moreover, no clear evidence to suggest that any agent of the operator had any knowledge of the violative ouby trash either at the time the check curtain was hung or at any later time.

The inspector also contradicts himself in his testimony that the outby accumulations "were just a continuation of everything that was inby the curtain" (Tr. 19). When the inspector was asked to itemize the specific materials outby the check curtain he did not include some of the materials he claims to have found inby the check curtain. There is no mention, for example, of any wooden pallets or spools outby. No inference that the outby accumulations were in fact a continuation of "everything" inby the curtain can therefore properly be drawn from such contradictory testimony. Moreover, even assuming, *arguendo*, that the same type of trash was found in both locations it cannot, in any event, thereby be inferred that it was placed there at the same time, or that the outby material was present at the time the check curtain was hung.

Under all the circumstances I cannot conclude that, because of the existence of the obvious but lawful inby trash, an agent of the operator must have been aware of the small amount of outby trash. Indeed, it is just as likely as not that the small amount of outby trash accumulated only after the accumulation of inby trash and only shortly before its discovery by the inspector. Moreover, the inspector himself seemed to express reservations as to whether that small amount of trash even constituted a violation.

2(a) *The length of time the violative condition existed.* It is undisputed that the violative condition came into existence sometime after January 24, 1994 and before the date the violation was discovered, January 31, 1994. Inspector Meredith observed no accumulations in the cited area on January 24, 1994. He acknowledged that he had no idea how long some of the materials had been present. Indeed, no direct evidence has been presented to show more precisely when each item of outby trash was placed in the entry. Accordingly, because of the inadequacy of the Secretary's proof, it may be inferred that the few items found in the outby area by Meredith on January 31, 1994, may have been in existence only briefly. No inference of unwarrantability can therefore be made.

(b) *The length of time the non-violative condition existed.* As noted above, the Secretary established only that these materials came into existence sometime between January 24, 1994 and January 31, 1994. Inspector Meredith opined that "[i]t was over a period of time that all this stuff had to accumulate in there on each shift" (Tr. 55). From the quantity of inby trash it may indeed reasonably be inferred that it had taken more than one shift to accumulate. Indeed, from Inspector Meredith's observations on January 24, it may be inferred that some of the same rock dust bags and wooden pallets may have remained since that date. However, as long as those materials were in an the inactive area, they were lawful and the operator had no statutory or regulatory duty to remove them. In addition, a portion of the trash could have come into existence only shortly before it was discovered by Inspector Meredith. Under the circumstances unwarrantability cannot be inferred.

(c) *The relationship between the length of time the violative condition existed and the length of time the non-violative condition existed.* Inasmuch as the Secretary failed to establish the length of time that either the violative or non-violative conditions existed (other than within the broad parameters between January 24 and January 31, 1994) no clear inferences or conclusions can be reached in this regard. More specifically, no relationship has been established because there is no clear evidence as to how long the outby trash had existed.

3(a) *Whether the violative condition was obvious.* The Secretary has failed to sustain her burden of proving that the violative condition was obvious. It consisted of a relatively small number of items in a small area (See Gov't Exh. No. 1) and included an uncertain number of paper bags (rock dust bags), some sandwich bags, a cardboard box or boxes and a plastic garbage bag containing some oily rags and sandwich wrappers. The size of the cardboard boxes, sandwich bags and plastic garbage bag was not established by the Secretary nor their color, nor other information such as whether they were covered by coal dust, the lighting conditions, or whether they were in open view in a well traveled area or hidden in a crevice or corner.

(b) *Whether the non-violative condition was obvious.* The non-violative accumulations extended throughout the No. 3 entry over a distance of 250 feet and included approximately 100-250 empty rockdust bags that had been piled 2 or 3 feet high along the rib, five wooded palettes and a number of wooden cable spools. While it is not known how long these accumulations had existed, it is clear that they would have been obvious to anyone inby the check curtain on January 31, 1994.

(c) *The relationship between the violative and non-violative conditions.* The suggestion that the obvious nature of the non-violative accumulations must have made management aware of the violative accumulations has previously been discussed and rejected.

4(a) *The degree of danger posed by the violative condition.* The Secretary failed in this case to sustain her burden of proving that the few combustible items found in the active area at issue were, in themselves, hazardous. The testimony of Inspector Meredith regarding the nature of the hazard included both the non-violative and violative trash (Tr. 51). Indeed, Inspector Meredith opined that one garbage bag, one box and one rockdust bag would not even constitute a violation of the cited standard (Tr. 66). The initial findings in this case that the violation was not "significant and substantial," are, moreover, now the established law of the case.

(b) *The degree of danger posed by the non-violative conditions.* Inspector Meredith testified that the accumulations were hazardous in that they "increased the possibility of fires - - more fuel for a fire if we had one on a longwall face" (Tr. 51). It was "very combustible." One should be skeptical of such testimony however in light of the fact that neither by statute nor by the Secretary's regulations are such accumulations prohibited in inactive areas. It is also noteworthy that while the Secretary has acknowledged the fact that such accumulations were lawful, the Secretary has not seen fit even after 5 ½ years to yet proscribe such conditions by regulation, as one would expect if they were indeed as hazardous as she claims.

However, as I have previously noted, even though the inby accumulations were lawful I agree that this trash presented some degree of hazard and that the operator had some duty to clean it up. The failure to have cleaned up those lawful accumulations therefore does demonstrate some degree of negligence. However, because they were not violative and the operator's duty to clean them up was not clearly stated by statute or regulation, such negligence was not so aggravated or of such a gross nature as to constitute the high degree of negligence necessary for an unwarrantable failure finding.

(c) *The relationship between the degree of danger posed by the violative condition and the degree of danger posed by the non-violative condition.* I do not find that the danger posed by the non-violative trash and the negligence of the operator in failing to have cleaned up that trash warrants a finding of negligence justifying unwarrantable failure findings transferrable to the violative condition. While the relatively small hazard of the violative trash could have been enhanced by the larger hazard of the lawful trash, because of the lack of proof as to length of time they co-existed no firm conclusions can be made in this regard.

5. *Whether the operator had been placed on notice that greater efforts were necessary for compliance.* In this regard, the Secretary argues that seven days before the order in this case was issued another withdrawal order had been issued for accumulations in an adjacent entry, presumably in an active area of the mine. The Secretary was unable to represent however that it was then a final order and was not therefore subject to being vacated. It was therefore admitted into evidence for a very limited purpose, not to show that a violative condition had in fact existed as alleged, but only to show that the Secretary believed a violative condition had existed. (Tr. 58-59). Thus, that order cannot ethically be used to show that the operator was thereby placed on notice by a similar previous violative condition.

In any event, since this previous order was apparently issued to an active area of the mine where the accumulations could very well have been violative, that order would not in itself have provided notice that the non-violative trash in the inactive area of the mine at issue herein was unlawful or had to be promptly removed. Finally, as I have previously found, "on the facts of this case, wherein only a few combustible items were found in the active area of a different entry and which could have been placed there inadvertently without the knowledge of a responsible official only a short time before discovery, no inference can be drawn from this prior condition alone sufficient to support a finding of gross negligence or unwarrantable failure."

6(a) *The operator's efforts in abating the violative condition made prior to the issuance of the citation or order.* No evidence has been presented to show that the operator made any effort to clean up the outby trash before the order was issued. However, it is not known how long this small amount of trash existed or whether any agent of the operator was aware of this trash.

(b) *The operator's efforts in abating the non-violative condition prior to the issuance of the citation or order.* There is no evidence that the operator attempted to abate or clean up the non-violative condition prior to the issuance of the order herein. As I have previously noted, the operator had some duty to clean up even this lawful accumulation and I have recognized that its failure to do so constituted a lesser degree of negligence not amounting to unwarrantable failure.

(c) *The relationship between 6(a) and 6(b).* There is insufficient evidence to establish any relationship between 6(a) and 6(b) because of the absence of a statutory or regulatory duty to clean up the lawful inby trash and because of the lack of evidence as to how long the outby trash had existed.

Under all the circumstances I do not find that the Secretary has sustained her burden of proving that the violation herein was the result of the operator's "unwarrantable failure."

ORDER

Order No. 3182848 is hereby modified to a citation under Section 104(a) of the Act without "significant and substantial" findings.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

David M. Smith, Esq., J. Alan Truitt, Esq., Maynard, Cooper & Gale, P.C., 1901 Sixth Avenue North, 2400 AmSouth/Harbert Plaza, Birmingham, AL 35203-2602

Guy Hensley, Esq., Jim Walter Resources, Inc., P.O. Box 133, Brookwood, AL 35444

William Lawson, Esq., Office of the Solicitor, U.S. Dept. of Labor, Chambers Building, Highpoint Office Center, Suite 150, 100 Centerview Drive, Birmingham, AL 35216

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 11, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 99-38-M
Petitioner	:	A. C. No. 11-00066-05536
v.	:	
	:	Thornton Quarry
MATERIAL SERVICE CORP.,	:	
Respondent	:	

DECISION

Appearances: Christine M. Kassak, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner;
Richard R. Elledge, Esq., Gould & Ratner, Chicago, Illinois, for the Respondent.

Before: Judge Feldman

Before me is a petition for assessment of a $35,000 civil penalty filed by the Secretary of Labor (the Secretary) against the respondent, Material Service Corporation (MSC), pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). This matter concerns the August 18, 1997, fatality of Charles E. Street, a cartage driver employed by Jack Gray Transport, a contract haulage company servicing MSC's Thornton Quarry. The fatality occurred when the victim was buried and asphyxiated by the sloughage of limestone material after he had positioned himself on the base of a limestone stockpile, between the rear of his haulage truck and the stockpile. The hearing in this proceeding was conducted on September 28, 1999, in Chicago, Illinois. The parties' post-hearing briefs have been considered in this disposition.

The Secretary's petition seeks to impose a $35,000 civil penalty for Citation No. 7824527 that alleges a violation of the mandatory safety standard in section 56.9314, 30 C.F.R. § 56.9314. This mandatory standard provides that "[s]tockpile and muck pile faces shall be trimmed to prevent hazards to persons." For the reasons discussed below, the Secretary has failed to demonstrate, by a preponderance of the evidence, that the condition of the stockpile should have alerted MSC that it required trimming. Accordingly, Citation No. 7824527 shall be vacated.

I. **Findings of Fact**

a. The Stockpile

The Thornton Quarry, located in Cook County, Illinois, is a limestone quarry operated by MSC. The stockpile involved in this fatal accident contained Grade 8 material that was composed of a mixture of various sizes of crushed limestone, from ¾ inch particles to particles of sand. The site of the fatality was a very busy stockpile that was the most frequently used pile in the quarry. The stockpile was located in a lower level of the quarry, approximately 50 to 60 feet below street level. It was created, and constantly refilled, by material deposited off of a stacker conveyor that was located at a higher elevation. The conveyor system fed material onto the stockpile at a rate of 300 tons per hour (five tons per minute).

At the time of the August 18, 1997, accident, the subject stockpile was a "fresh pile" that was created the night before, after the stacker system had operated for approximately eight hours. On that day the stockpile had reached a height of approximately 75 feet. As the day progressed, the stacker continued to add material to the top of the stockpile. While the stacker continued to load material at the top, front-end loaders continued to remove material from the bottom of the stockpile in order to load material into haulage trucks. As the process of adding material to the top and removing material from the bottom continues, consistent with gravity, material continues to slough down the side of the stockpile throughout the day until, at any given moment, the material reaches its angle of repose.[1] In this regard, the Secretary's witness Joseph Molnar, a contract haulage truck driver who was familiar with the Thornton Quarry, testified that as material is loaded from the bottom, material from the top fills the void during a constant process wherein material "filters down all day." (Tr. 115-19). Consistent with Molnar's testimony, John Halloran, MSC's area manager, testified stockpiles continually slough and move as material is unloaded and replenished. (Tr. 270).

Stockpiles are frequently trimmed. Loader operator Michael O'Donnell estimated stockpiles are trimmed every other day. Area Manager John Halloran testified stockpiles are trimmed daily. The trimming occurs from the street level above, by using dozers to push material down when the stockpile becomes too high and the angle of repose becomes extreme. When necessary, dozers or loaders are used at the base of the stockpile to knock material down to fill hazardous voids that are created during the loading process. The Grade 8 stockpile had not been trimmed prior to the accident because it was a new stockpile that had been created the previous evening.

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[1] Stockpiles become unstable during loading and unloading. Sloughage (material falling down the side of the slope) occurs when a stockpile exceeds its angle of repose. A stockpile achieves its angle of repose when the pile reaches a state of relative equilibrium and the pile is at rest.

b. The Accident

At the time of the accident, Charles Street had already picked up and transported approximately 7 loads of crushed stone. The stone was transported and delivered to a construction site by utilizing spreader chains on the back of the truck bed. Spreader chains limit the opening in the truck bed to enable material to be spread , rather than dumped, at a site for purposes such as road bed construction. (Tr. 70).

At approximately 11:00 a.m., after Street's load was placed in his truck before he had driven off the Thornton Quarry premises, a MSC dispatcher was informed by a Jack Grey Transport dispatcher, that Street's last load had been canceled. The MSC dispatcher conveyed this information to Street who proceeded to drive back to the stockpile to unload.

Eyewitnesses told MSHA investigators that Street backed his truck into the base of the stockpile and raised his truck bed in an attempt to dump his load. However, the spreader chains prevented Street from dumping the load in a timely or efficient manner. MSHA accident investigator Fred Tisdale testified that, after Street had raised his truck bed:

> [Street]dropped his truck bed a little bit, went to the back of the truck, and unhooked the left or driver's-side spreader chain, crossed over [on the base of the stockpile] behind the truck, and was attempting to unhook the right spreader chains when the pile of material sloughed off and covered him up, trapping him behind the right-hand tandem wheel.

(Tr. 70-1; MSHA Accident Investigation Report, Gov. Ex. 6). Molnar testified the proper method of removing spreader chains is to remove them when the truck is a safe distance from the stockpile.

At the time of the August 18, 1997, accident, Michael O'Donnell, MSC's heavy equipment operator, was operating a loader for the purpose of filling haulage trucks at the Grade 8 stockpile. O'Donnell normally loads trucks on the driver's side. When the accident occurred O'Donnell was loading a truck driven by Joseph Molnar, operated by Brites Cartage, from the passenger side because Jack Gray Transport drivers, who were returning their loads, were parking on the driver's side of the trucks O'Donnell was loading. O'Donnell's loader was approximately 25 feet away from Street's truck. At the time O'Donnell finished loading Molnar's truck, O'Donnell noticed material behind Street's truck start to slide. But O'Donnell could not see Street because his view was obstructed by Molnar's truck. As Molnar was driving forward after receiving his load, O'Donnell could see Street being covered with material. O'Donnell testified that the amount of sliding "didn't look that big to [him]." (Tr. 169).

Molnar testified that, on August 18, 1997, the material at the Grade 8 stockpile was just normally filtering down "all day long," with the top filling the void at the bottom as trucks were loaded. (Tr. 115-16). Significantly, Molnar testified that as he looked at the stockpile through his rear view mirrors, he saw no unusual overhangs or other hazardous conditions. (*Id.*) Street

drove his truck to the stockpile and backed it against the stockpile next to Molnar's truck. Molnar observed Street as Street left his truck and walked on the base of the stockpile behind the truck.

John Halloran, MSC's area manager, was working in the vicinity of the Grade 8 stockpile at the time of the accident. Halloran immediately went to the accident scene to assist in the rescue efforts. Halloran directed O'Donnell and another loader operator to use their loaders to remove material from the side and from the rear of the truck. While the loader operators were removing material, material that was being loaded from the stacker conveyor above continued to slide down the stockpile and cover the victim. It took several minutes to turn off the conveyor.

Although Halloran did not know the approximate weight of the fatal slide, Halloran testified the sloughage area was not extensive in that Street was extricated from the waist up to his face pretty quickly. However, Street could not be removed because his legs were caught between the rear passenger tires. Halloran tried mouth-to-mouth resuscitation but was unsuccessful.

With respect to the nature and extent of the slide, Halloran explained:

> . . . what I gathered from the two Brites drivers I talked to . . . [Street] was up on the top of the pile; and when it sloughed, it kind of took his feet and pushed him underneath the truck. Because if he stood straight up, he would never have got (sic) buried. But what happened is his feet, with the motion of the pile, he slid underneath, and then he tried to dive out. And then when he dove out, the pile just came down and buried him. . . . he probably went underneath the tires. Because we found his feet when we pulled the truck forward. We couldn't get him out by just pulling him. Because we tried to put ropes on him and just pull him out. We couldn't do it, so we pulled the truck forward and then got him out.

(Tr. 286-87).

c. The Condition of the Stockpile

MSHA accident investigators Fred Tisdale and Steven Richetta arrived at the Thornton Quarry accident scene several hours after the accident had occurred. Thus, Tisdale and Richetta did not observe the stockpile prior to the accident. Although Tisdale and Richetta speculated about possible overhangs that may have required trimming, neither testified that their accident investigation revealed the existence of any potentially abnormal or otherwise hazardous conditions immediately prior to the accident. As previously noted, neither Molnar nor O'Donnell observed any abnormal stockpile conditions before the accident.

Although Richetta testified that the extent of the sloughage led him to believe there was an overhang in the slope of the stockpile, the magnitude and location of the sloughage that caused the fatality was disturbed and redistributed during the recovery efforts. Moreover, normal portions of the stockpile had to be removed and stacked in order to remove the victim.

While the Secretary relies on remnants of material on the back of Street's tailgate measuring approximately 7 to 8 feet in height from ground level to support her hazardous overhang theory, examination of accident scene photographs reflects Street's truck was backed into the slope of the stockpile. (Gov. Exs. 2, 3). Thus, the location of residue lines on the tailgate, 8 feet above ground level, is of little evidentiary value with respect to demonstrating the significance of the sloughage.

Of greater significance is the slope of the angle of repose immediately prior to, and after, the accident. MSHA's accident investigation concluded:

> Measurements taken at the [accident] scene indicated the angle of the stockpile was approximately 37 degrees. It was estimated that the angle of this stockpile prior to the accident was approximately 39 degrees.

(Gov. Ex. 6, p.3).

Richetta testified the angles of repose before and after the accident were determined through trigonometric formulas utilizing measurements taken at the accident site and adjacent to the accident site. (Tr. 231). Richetta further testified that 39 degrees verses 37 degrees would not be a discernible difference. (Tr. 233). In fact, Richetta conceded a 39 degree angle of repose was not necessarily hazardous. (*Id.*). Both Tisdale and Richetta testified that, based on their observations of the condition of the stockpile after the accident, the stockpile was in compliance with section 56.9314 in that it did not have to be trimmed. (Tr. 95, 96, 104, 240, 323).

Based on Tisdale and Richetta's accident investigation, on September 11, 1997, Tisdale issued Citation No. 7824527 alleging a violation of section 56.9314. The Citation stated:

> On August 18, 1997, a contract truck driver was fatally injured when the grade eight stockpile sloughed, covering him as he was removing the spreader chains from his truck's tailgate. **He had backed the truck against the base of the approximately 75 foot high stockpile**, and had walked between the truck and the stockpile, when the stockpile sloughed. (Emphasis added).

To abate Citation No. 7824527, Tisdale required MSC to provide documentation that safety meetings were held with truck drivers at which times the fatal accident, and ways to prevent further injury, were discussed. MSC was also required to provide cartage drivers with handouts concerning rules of behavior on mine property. The citation was terminated on October 14, 1997. The abatement action did not involve trimming or otherwise altering the stockpile accident site.

d. Procedural History of Citation No. 7824527

Citation No. 7824527 issued on September 11, 1997, the subject of this proceeding, initially alleged a violation of the mandatory safety standard in section 56.9314 that requires that "[s]tockpile and muckpile faces shall be trimmed to avoid hazards to persons." On March 25, 1998, MSHA modified Citation No. 7824527 to substitute section 56.3439, 30 C.F.R. § 56.3430, as the mandatory safety standard violated. This safety standard specifies, in pertinent part, that "[p]ersons shall not work or travel between machinery or equipment and the highwall bank or bank where the machinery or equipment may hinder escape from falls or slides of the highwall or bank."

Subsequent to the modification, the Secretary apparently became concerned about the applicability of a stockpile to the terms "highwall" and/or "bank" contained in 30 C.F.R. § 56.3430. Accordingly, on August 9, 1999, the Secretary filed a motion to allow modification of Citation No. 7824527 to reinsert section 56.9314 as the mandatory standard allegedly violated instead of section 56.3430. The Secretary's motion was granted by Order dated August 25, 1999.

II. **Further Findings and Conclusions**

As a threshold matter, in appropriate circumstances, mandatory safety standards should be broadly interpreted so that they can be adaptable to a myriad of circumstances. *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981). I note the hazard associated with the inability to escape from unstable highwalls or banks addressed in section 56.3430 is identical to the hazard posed by the inability to escape from an unstable stockpile. However, in this matter, the Secretary has elected to attempt to establish a section 56.9314, rather than a section 56.3430, violation. Accordingly, the issue of whether the victim's position between the rear of his truck and the stockpile constitutes a violation of section 56.3430 is beyond the scope of this proceeding.

As already noted, section 56.9314 requires that "[s]tockpile and muckpile faces shall be trimmed to avoid hazards to persons." Put another way, section 56.9314 requires a mine operator to trim a stockpile when the operator has a reason to know that the stockpile is hazardous or unsafe. In deciding whether a condition is unsafe, the Commission has determined that "the alleged violative condition must be measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including facts peculiar to the mining industry, would recognize a hazard requiring corrective action." *Alabama By-Products Corporation*, 4 FMSHRC 2121, 2129 (December 1982).

Thus, the issue for resolution is whether Material Service Corporation knew, or should have known, the stockpile was hazardous and required corrective action, *i.e.*, the angle of repose was too extreme and/or there was an overhang or other abnormal condition. In addressing this issue, sloughage, alone, is not evidence of a hazardous condition. Section 56.9314 does not repeal the law of gravity. When rock material is loaded from above by a stacker conveyor at a rate of five tons per minute, and removed from below by a front-end loader, obviously material will slide down the slope of the stockpile. Thus, the uncontroverted testimony, by both Secretary and MSC witnesses, is that sloughage is a normal and continuing process. (*See, e.g.*, tr. 124-29).

The first question, therefore, is whether the angle of repose was severe enough to alert MSC of a potential hazardous fall or slide. The evidence reflects the angle of repose prior to the accident was 39 degrees. The post-accident angle of repose in the vicinity of the accident was 37 degrees. MSHA investigator Richetta conceded there is no discernible difference between a 39 degree and 37 degree angle of repose. Moreover, Richetta admitted a 39 degree angle of repose was not necessarily hazardous. Both Tisdale and Richetta stated the 37 degree angle of repose after the accident complied with the provisions of section 56.9314 in that no trimming was required. Consistent with their testimony, MSHA did not require any trimming action to abate the citation. Consequently, the record does not reflect, nor does MSHA contend, that the angle of repose prior to the accident provided notice to MSC that trimming was necessary.

The second and more difficult question is whether there were any overhangs or other hazardous abnormalities that provided a basis for suspecting that remedial trimming action was appropriate "to avoid hazards to persons" as required by section 56.9314. It is not uncommon for the Secretary to establish the elements of a violation, *i.e.*, a hazardous overhang, by inference. *Mid-Continent Resources*, 6 FMSHRC 1132, 1138 (May 1984). However, there must be "a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Id.* Although Tisdale and Richetta admit the stockpile did not require trimming after the accident, they have no personal knowledge of the stockpile conditions prior to the accident. They infer there was a hazardous overhang based on what they believe was an extensive rock slide.

However, the accident scene was significantly altered to extricate the victim. Thus, piles of rock material removed by loaders from the side and rear of the truck, in an effort to reach the victim underneath the truck, are not necessarily evidence of a significant rock slide. Moreover, the residue sloughage on the rear of the tailgate likewise does not support the conclusion of a massive rock slide. Photographs of the accident scene reflect Street's truck was backed against the slope of the stockpile. (Gov. Exs. 1-3). The conclusion that Street backed his truck against the stockpile is consistent with the description of the accident in Citation No. 7824527, as well as MSHA's accident investigation report.[2] (Gov. Exs. 4, 6, p.4).

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[2] A photograph of the accident scene depicts the truck backed against the stockpile. (Gov. Ex. 2). The photograph reflects the position of the truck after it had been advanced several feet in an effort to free the victim.

Although, Tisdale and Richetta did not see the victim prior to his removal, MSC's manager, John Halloran participated in the recovery efforts. Halloran credibly testified that the fatality apparently occurred because the sloughage caused the victim to slide under the truck preventing his escape. With the victim in a prone position, confined to the area under the truck, it did not take a large amount of dislodged material to cause the fatality.

In concluding that the fatality was not caused by a large rock slide, I am not suggesting that the stockpile was stable immediately prior to the accident. To the contrary, given the loading from above at five tons per minute, and unloading from below, the stockpile was inherently unstable. However, it is significant that the Secretary does not argue that loading the top of the stockpile by stacker conveyor, at the same time material is being removed by loaders at the bottom, is a violation of any mandatory safety standard. In this regard, the Secretary responded:

> The Court: Ms. Kassak, let me ask you a question. How did the Mine Safety and Health Administration's abatement process prevent this accident, or prevent the sloughage from recurring if that was the problem, the loading at the top and - - by the stacker conveyor and the loading from the front-end loader at the bottom?
>
> Ms. Kassak: I don't believe we addressed that as a hazard your honor . . . .
>
> The Court: . . . the operator was not prevented from continuing that normal operation subsequent to the accident; is that correct?
>
> Ms. Kassak: I have to say that is correct . . . .

(Tr. 122-23).

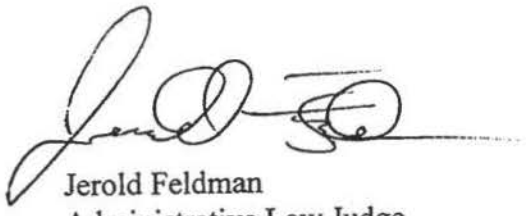
Although the process of loading from above creates constant "filtering" or sloughage, in view of the limited nature and extent of the localized sloughage at the accident site, the evidence does not suggest an observable overhang that required trimming. In this regard, neither Molnar nor O'Donnell observed any abnormalities in the stockpile immediately prior to the accident.

In the final analysis, the possibility of drawing two inconsistent inferences from the evidence does not, alone, preclude the Secretary's overhang theory. *Id.*, *citing NLRB v. Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106 (1942). However, the greater weight of the evidence, given the localized nature of the fatal sloughage behind the truck, the location of Street on the stockpile, the weight of Street's truck on the base of the stockpile, the weight of the material that may have been released when Street initially raised the truck bed before removing the spreader chains, and the lifting and lowering of the truck bed against the slope of the stockpile, leads to the conclusion that Street's position on the stockpile, as well as the contact of the stockpile with Street's truck and its material, substantially contributed to the dislodging of the material that resulted in this tragic accident.

Accordingly, the Secretary has failed to establish, by a preponderance of the evidence, that there was any observable hazardous stockpile condition prior to the accident that warranted remedial trimming. In reaching this conclusion, I have not addressed whether Material Service Corporation had a duty to prevent the exposure of cartage drivers to stockpiles, and, if so, whether Material Services Corporation satisfied its duty. Although there was testimony that signs were placed on mine property warning drivers to stay in their trucks, the adequacy of Material Service Corporation's efforts to address the disembarkment hazard that was the proximate cause of this fatality is not an issue in this case. (Tr. 262-63).

ORDER

In view of the above, Citation No. 7824527 **IS VACATED. ACCORDINGLY,** Docket No. LAKE 98-38-M **IS DISMISSED.**



Jerold Feldman
Administrative Law Judge

Distribution:

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

Richard R. Elledge, Esq., Gould & Ratner, 222 North LaSalle Street, 8th Floor, Chicago, IL 60601 (Certified Mail)

/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 19, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 99-129
Petitioner	:	A. C. No. 15-16666-03539
v.	:	
	:	Mine No. 3
WILLIAMS BROTHERS COAL CO., INC.,	:	
Respondent	:	

DECISION

Appearances: J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Hufford Williams, President, Williams Brothers Coal Company, Inc., Mouthcard, Kentucky, *Pro Se*.

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 Williams Brothers Coal Company, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges eight violations of the Secretary's mandatory health and safety standards and seeks a penalty of $642.00. A hearing was held in Pikeville, Kentucky. For the reasons set forth below, I modify four citations, affirm all of the citations and assess a penalty of $561.00.

Background

The No. 3 Mine is a small, underground coal mine operated by Williams Brothers Coal Company in Pike County, Kentucky. Coal is mined by continuous miner and is removed from the mine by a 6,000 foot conveyor belt-line. The height of the coal seam, and thus the height of the mine, is approximately 35 inches.

On Monday, September 21, 1998, MSHA Inspector, and electrical specialist, Kedrick Sanders began a quarterly inspection of the No. 3 mine. On that day, Sanders observed what he considered to be two violations of the Secretary's regulations. One concerned the failure to properly ground a battery charging system for the mine personnel carrier and the other dealt with a failure to keep records of inspections of surface electrical installations. However, rather than

issue citations, Sanders merely advised Hufford Williams what he should do to comply with the regulations.

Sanders returned to the mine on Thursday, September 24, to continue the inspection. He determined that neither of the electrical violations had been corrected and issued a citation for the battery charger. Sanders then accompanied Terry Williams, the mine foreman and Hufford Williams' nephew, underground. On arriving at the working section, Sanders noticed an employee lying in the conveyor boom of a continuous miner. Concluding that the continuous miner had not been properly de-energized, Sanders informed Terry Williams that he was issuing a citation for the violation. A heated conversation followed, the result of which was that Terry Williams refused to give the inspector a ride out of the mine, forcing him to have to crawl along the entire belt-line to the mine's surface.

When the MSHA Sub-District Manager learned of the tensions developing at the mine, he sent MSHA Electrical Engineer and Inspector Mark Bartley to attempt to defuse the situation. One of the first things that he did was to send Sanders home for the day.

On Friday, Sanders, MSHA Inspector Tommy Caudill and MSHA Supervisor Sam Harris returned to the mine to continue the inspection. Sanders and Caudill again inspected the belt-line. At the end of the day, Sanders issued citations for the failure to record examinations of surface electrical installations that he had observed the day before, for failure to properly maintain the No. 1 belt-line, for accumulations along the entire belt-line, which he had observed while crawling out the day before, and for a guarding violation at the No. 3 belt head drive. Caudill issued citations for failure to have an up-to-date mine map and for a non-functioning fire sensory system.

A total of eight citations were issued by Sanders and Caudill. The Respondent has contested all of them. They will be discussed *seriatim* in this decision.

Findings of Fact and Conclusions of Law

Citation No. 4515012

This citation alleges a violation of section 77.701 of the Secretary's regulations, 30 C.F.R. § 77.701, because: "Suitable frame grounding is not being provided for the Damascus Pneumatics Corp. personnel carrier. No frame grounding conductor is connected from the metallic frame of the unit to the 110 VAC 1-phase battery charger while the batteries are being charged." (Govt. Exs. 2 & 3.) Section 77.701 requires that: "Metallic frames, casings, and other enclosures of electric equipment that can become 'alive' through failure of insulation or by contact with energized parts shall be grounded by methods approved by an authorized representative of the Secretary."

Inspector Sanders testified, as set out in the citation, that there was no frame grounding extending from the battery charger to the personnel carrier. He stated that this grounding was necessary "because in case of a fault condition, the metallic frame can become alive. In other words, it can be energized. The person who would come in contact with that metallic frame could receive electric shock and could be seriously injured." (Tr. 222.) His opinion was corroborated by Inspector Bartley.

It is the Respondent's position that no additional grounding was necessary. Mr. Williams argues that the battery charger is "protected by the manufacturer's safeguards . . . [and] [t]here is no safety hazard present in using this charger in it's original condition." (Resp. Br. at 1.)

There is no dispute that there was no frame grounding between the charger and the carrier. As to whether the grounding is required by the regulation, I accept the opinions of Inspector Sanders, who has a bachelor's degree in Industrial Education with a specialization in industrial electricity and who is an electrical specialist, and Inspector Bartley, who has a degree in Electrical Engineering, that it is, over the opinion of Mr. Williams.[1] Accordingly, I conclude that the company violated the regulation as alleged.

Citation No. 4515013

This citation charges a violation of section 75.1725(c), 30 C.F.R. § 75.1725(c), since: "A person was observed working on the water sprays in the throat of the Joy continuous miner. The person was lying in the conveyor. The conveyor was not blocked against motion and the power to the unit was not de-energized and disconnected from the section power center." (Govt. Ex. 4.) Section 75.1725(c) provides that: "Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments."

The facts surrounding this violation are not disputed. A miner was lying in the conveyor of the continuous miner working on the water sprays. The circuit breaker on board the continuous miner was in the "off" position, but the power cable for the continuous miner had not been disconnected from the power center. The inspector testified that the regulation requires "that the power be de-energized with a visible disconnect at the section power center." (Tr. 275.) The Respondent argues that when the circuit breaker is in the "off" position, the power is "off."

---

[1] In support of his opinion, the Respondent submitted a copy of a January 2, 1979, letter from the Administrator for Coal Mine Safety and Health to J. and R. Manufacturing, Inc. (Resp's Ex. A.) However, since the letter concerns the propriety of using the connector housing between male and female battery connectors for grounding purposes, it is not relevant. Moreover, to the extent that it deals at all with grounding between the charger and the carrier, the diagram on page 4 indicates that there should be a "[g]rounding conductor from the battery charger frame to battery tray(s)." (*Id.*)

Inspector Sanders testified that a circuit breaker is not a suitable means of disconnecting power "[b]ecause you cannot visibly see the contacts. The lever could . . . be in the off position, but the contacts could still be in the closed position." (Tr. 277-78.) Inspector Bartley concurred in this assessment and added that "carbon tracking" from repetitive use could occur, which could conduct electricity. (Tr. 295.) Further, this has been the position of the Secretary since at least April 1990 as evidenced by the statement in MSHA's *Program Policy Manual* that: "The trailing cable shall be disconnected from the source of power before repairs are made on portable or mobile equipment, except when the equipment must be operated for making adjustments." Department of Labor, Mine Safety and Health Administration, *Program Policy Manual*, Vol. 5, 159 (04/01/90) (Govt. Ex. 7.)

A circuit breaker is: "An overload protective device installed in the positive circuit to interrupt the flow of electric current when it becomes excessive or merely exceeds a predetermined value." Bureau of Mines, U.S. Department of Interior, *Dictionary of Mining, Mineral and Related Terms*, 210 (1968). Since a circuit breaker is designed to interrupt the flow of *excessive* current, it is apparent that it is not designed to be an "on/off" switch under normal conditions. Thus, the inspectors' testimony that the contacts in the circuit breaker could still be in the closed position, and conduct normal current, even when it is set in the "off" position, is not inconsistent with the purpose of a circuit breaker. Indeed, even Mr. Williams admitted that in his 33 years in mining, he had seen "circuit breakers burn in." (Tr. 301.)

Therefore, I accept the inspectors' opinion, which is corroborated by the *Program Policy Manual*, that the only way to be sure that the power is off is to disconnect it at the power source. Since the Respondent did not do this, I conclude that it violated section 75.1725(c) as alleged.

Significant and Substantial

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

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

surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

Inspector Sanders testified that he believed that the violation was S&S because "with the position that this person was on the continuous miner, should there be a failure of a circuit breaker and should a person inadvertently hit the start switch on this or should a fault occur in the start switch, this conveyor could be started, the man could be crushed to death." (Tr. 282.) It is apparent that a confluence of factors would have to occur before this violation could result in a serious injury.

The Secretary did not present any evidence that the circuit breaker was faulty. In fact, in checking the continuous miner for permissibility the next day, the inspector was satisfied for his own safety when only the circuit breaker was placed in the off position; he did not disconnect the trailing cable from the power source. (Tr. 304.) In addition, while the miner, who was the continuous miner operator, was working on the sprays, the remote control for the continuous miner had been disconnected from his cap light battery, the circuit breaker had been placed in the "off" position and the machines headlights had gone out. All of this indicated that the continuous miner was not powered. Finally, Inspector Bartley testified that the motor on the machine would "typically not" start under the circumstances apparently present at the time of the inspection. (Tr. 297-98.)

Turning to the second factor suggested by the inspector, that someone could inadvertently hit the start switch, it is apparent from the picture of a continuous miner submitted by the Secretary, that the operator was not working anywhere near the start switch. (Govt. Ex. 6 at 3.) Thus, it is unlikely that he would inadvertently hit it. According to the evidence, the only other people present while these repairs were taking place were the inspector and the section foreman accompanying him. They were not likely to accidentally hit it. Likewise, the Secretary did not present any evidence that the start switch was faulty.

Based on the Secretary's evidence, I find that it is unlikely that the circuit breaker had a fault in it, it is unlikely that someone would inadvertently hit the start switch and it is unlikely that the start switch had a fault. I find it even more unlikely that all of these problems would occur in such a way as to start the continuous miner. Consequently, I conclude that the violation was not "significant and substantial" and will modify the citation accordingly.

Citation No. 4515014

This citation presents a violation of section 75.400, 30 C.F.R. § 75.400, stating:

> Based on conditions observed 09-24-98, combustible material in the form of loose coal, coal fines and coal dust is present in numerous intermittent locations along side, and under the conveyor belts nos. one through no. 4. The accumulation is present in depths from ½ inch to approximately 6 inches. The accumulation apparently occurred over a period of time. The material is dry and dusty in some locations.

(Govt. Ex. 11.) Section 75.400 provides that: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

Inspector Sanders testified that he first observed these accumulations while crawling the length of the belt-line on September 24. Then he and Inspector Caudill traveled the entire belt-line from the outside on the next day. They both testified that the accumulations were worst along the No. 1 belt, in some instances being so high that the belt rollers were turning in the accumulations. They agreed that there were accumulations situated at various locations along the remaining belt-lines, so that approximately 50 percent of the belt-lines, other than No. 1, had accumulations along them.

The operator did not present any evidence that there were no accumulations. Its only witness, Mr. Williams, testified that he did not travel any of the belt-lines. In fact, the company's main defense is that the accumulations were too wet to burn.

This defense, in turn, is based on a laboratory analysis of four buckets of material that the company submitted to Standard Laboratories, Inc. The lab report states that: "The following analysis does not indicate that this particular coal sample is a fire hazard, due to high moisture & ash content & low BTU value." (Resp. Ex. B.) It is apparent, however, that the sample did not present the accumulations as they existed when observed by the inspectors. Mr. Williams testified that to clean up the accumulations, he turned off the belts and had his miners shovel the accumulations onto the belts. Then he had the belts started and he took a sample of the material that was on each belt, four in all, and placed it in a bucket.

As noted by the Secretary, this method of collecting samples made the samples unrepresentative because, "it is clear that any dry coal accumulations--dry accumulations that both Inspectors Sanders and Caudill testified existed in the midst of predominately moist accumulations--would have been mixed with the wet accumulations such that they would lose their distinct identities as dry materials." (Sec. Br. at 10.) Thus, I find that this evidence fails to refute the testimony of the inspectors that at least some of the accumulations were dry.

The Commission has held that a construction of section 75.400 "that excludes loose coal that is wet or that allows accumulations of loose coal mixed with noncombustible materials, defeats Congress' intent to remove fuel sources from mines and permits potentially dangerous conditions to exist." *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (August 1985). Accordingly, I conclude that Williams Brothers violated section 75.400.

Significant and Substantial

Over the objection of the Respondent, I granted the Secretary's motion to amend this citation to allege that the violation was "significant and substantial."[2] As is usual in S&S cases, the issue is whether a reasonably serious injury would be reasonably likely to result from this violation. For this citation, the specific issue is whether the accumulations were combustible.

Both inspectors testified that there were several rollers in the No. 1 belt-line that were stuck and would not turn. They contended that the friction of the belt passing over the stuck rollers would create enough heat to ignite the accumulations, particularly in those areas where the rollers were actually in the accumulation. As noted above, they also testified that there were areas where the accumulations were dry enough to ignite.

While some of the accumulations were dry and combustible, most of the accumulations were wet. However, the fact that some of the coal accumulations were wet is not determinative of whether the violation is S&S, because "damp coal dries in the presence of fire." *Utah Power & Light Co.*, 12 FMSHRC 965, 970 (May 1990). Therefore, taking into consideration the ignition source from the rollers, the fact that in some places the rollers were actually in the coal accumulations, the extent of the accumulations and the fact that some of them were dry, I conclude that this violation was "significant and substantial."

Citation No. 4515015

A violation of section 77.502-2, 30 C.F.R. § 77.502-2, is alleged in this citation, which states: "The operator has no record of having made an examination of the surface electrical installations within the past month." (Govt. Ex. 1.) Section 77.502-2 requires that: "The examinations and tests required under the provision of this § 77.502 shall be conducted at least monthly." Section 77.502, 30 C.F.R. § 77.502, provides that: "Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept."

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[2] Mr. Williams admitted that he would not have presented any different evidence than he did, if the citation had originally alleged that the violation was S&S. (Tr. 189.) As the company clearly suffered no prejudice by amending the citation, I granted the motion. *Cyprus Empire Corporation*, 12 FMSHRC 911, 916 (May 1990).

Inspector Sanders testified that when he asked the Respondent to show him the electrical inspection records, he was shown a book which contained records of the monthly examinations of the high-voltage circuit breakers located on the mine surface. He stated that he advised Mr. Williams that the regulations also required examinations of other electrical equipment such as belt drives, stacker belts, charging stations, pump station facilities and other electrical facilities on the surface. The inspector related that he told Williams that a lot of operators were unaware of the requirement, so he was putting him on notice so he could start keeping the records.

Sanders said that when he returned three days later, the company had not recorded any examinations and Mr. Williams told him that he did not think that he was required to. As a consequence, the inspector issued the citation in question.

At the hearing, Mr. Williams reiterated his position that examination of the circuit breakers is all that he is required to do. (Tr. 214-18.) However, his argument is not persuasive. Sections 77.800-1 and 77.800-2, 30 C.F.R. §§ 77.800-1 and 77.800-2, set out a specific requirement for examining circuit breakers and keeping a record of those examinations.[3] Plainly, section 77.502-2 is a different requirement. Accordingly, I conclude that the company violated the regulation by not having a record of the monthly examinations of the other surface electrical installations.

Citation No. 4515016

This citation alleges a violation of section 75.1725(a), 30 C.F.R. § 75.1725(a), because:

> Approximately 20 conveyor idler assemblies are defective on the No. 1 belt flight. There are approximately 30 individual idlers stuck and they are worn from the conveyor belt rubbing them. Damp coal and coal dust is deposited around the return idlers. The operator removed the belts from service.

(Govt. Ex. 10.) Section 75.1725(a) provides that: "Mobile and stationary equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

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[3] Section 77.800-1 requires, in pertinent part, that: "(a) Circuit breakers and their auxiliary devices protecting high-voltage circuits to portable or mobile equipment shall be tested and examined at least once each month . . . ." Section 77.800-2 provides that: "The operator shall maintain a written record of each test, examination, repair, or adjustment of all circuit breakers protecting high-voltage circuits. Such record shall be kept in a book approved by the Secretary."

As noted in the discussion concerning Citation No. 4515014, *supra*, Inspectors Sanders and Caudill traveled the length of the No. 1 belt-line. Inspector Sanders was on the "off" side of the belt and Inspector Caudill was on the "travel" side. They testified that they counted 30 rollers on the belt that would not turn and that some of the rollers had a flat space worn into them from the rubbing of the belt.

Mr. Williams testified that he did not examine the belt-line. (Tr. 183.) He did, however, offer two pages from the belt examiner's book which showed that on September 22 and September 25, the belt examiner noted that the No. 1 belt "needs structure replaced" and "needs structure changed."[4] (Resp's Ex. D.) No one else from the company testified.

Based on the evidence, I conclude that the Respondent violated section 75.1725(a) by not maintaining the No. 1 belt in safe operating condition.

Significant and Substantial

The inspector found this violation to be "significant and substantial." For the reasons enumerated in finding the violation in Citation No. 4515014 S&S, *supra*, I conclude that this violation was "significant and substantial."

Citation No. 4515017

This citation charges a violation of section 75.1722(a), 30 C.F.R. § 75.1722(a), because:

> Suitable mechanical guarding is not being provided at the No. 3 belt head drive. A hole approximately 2 inches by 18 inches is present where the sprocket chain has worn through the existing guarding. A hole approximately 4 inches in diameter is present in the gear covers where a person can come in contact with moving mechanical parts. The cover is missing from the coupling between the motor and speed reducer.

---

[4] The operator questions whether as many rollers as claimed by the inspectors were defective. He never asserted, however, that none were defective, and the examination book pages, as well as his testimony, indicate that the company was aware that some were bad. The exact number makes no difference in whether this was a violation.

(Govt. Ex. 13.) Section 75.1722(a) requires that: "Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

Inspector Sanders testified that in inspecting the guarding around the No. 3 belt's head drive, he observed that there was a hole in the guarding approximately 18 inches long and two inches high. The hole had apparently been worn through by the sprocket chain. He stated that there was another hole on the other side of the guard that measured approximately four inches in diameter. He believed that the holes were large enough that a miner could inadvertently slip his hand through them and come in contact with the moving machinery. Inspector Caudill corroborated this testimony.

The company did not present any evidence on this citation. It relies on an ambiguous comment of MSHA Supervisor Sam Harris, in a statement he made prior to the hearing, to show that there was no violation. Mr. Williams asked him "regarding Citation number 4545017--about measuring a hole at the No. 3 belt," if that was a violation in his opinion. (Jt. Ex. 1 at 7.) Harris responded: "If there is a pinch point they are regulated [*sic*] to guard it. Couldn't get a finger let alone a hand through the opening." (*Id.*)

I accept the testimony of Inspectors Sanders and Caudill on this citation. Based on their description of the size of the two holes, it is apparent that a miner's hand could fit through the openings. If the Respondent believed that the holes were not as large as described by the inspectors, it should have measured the holes or otherwise presented evidence to rebut the inspectors' testimony. Mr. Harris' statement fails to do that. In the first place, he only mentions one opening. In the second place, it is not clear whether he is talking about the holes in the guard or the guard that was missing from the coupling that connected the electric motor to the speed reducer. Finally, he provided no description of the openings.

With respect to the missing coupling cover, the Secretary's evidence is not sufficient to establish that this was a violation. However, since the two holes in the guarding are clearly violations, I conclude that the company violated section 75.1722(a).

Significant and Substantial

Both inspectors testified that the area around the head drive was wet and slippery, that the drive required daily maintenance, necessitating someone to be in close proximity to it every day, and that a slip, fall or stumble could result in a hand going through the opening and being seriously injured by being caught in the moving machinery. On the other hand, as pointed out by the Respondent, the miners in this mine are working in "low coal" and both of the holes in the guarding are small. This means that the miners are working on their hands and knees, or their backs, and are, therefore, not as likely to slip and fall as someone working on his feet. In

addition, while a hand could fit through the holes in the guarding, the chances of sticking a hand directly through the hole by inadvertence appears improbable.

Accordingly, I find that there was not a reasonable likelihood that a serious injury could result to a miner, in the normal course of mining, from this violation and that the violation is, therefore, not "significant and substantial." The citation will be modified appropriately.

Citation No. 7349834

This citation charges a violation of section 75.1200, 30 C.F.R. § 75.1200, because: "The 75-1200 mine map that was posted in the mine office for the purpose of showing the active workings, ventilation controls, and worked out areas, was not accurate. This was due to the certified map did not show pillared out areas, nor approved mp's. on this map." (Govt. Ex. 8.) Section 75.1200 requires, in pertinent part, that:

> The operator of a coal mine shall have in a fireproof repository located in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, an accurate and up-to-date map of such mine drawn on scale. Such map shall show:
>
> (a) The active workings;
>
> (b) All pillared, worked out, and abandoned areas . . . .

Inspector Caudill testified that when he asked Mr. Williams to show him on the mine map hanging on the mine office wall where the active section was, Mr. Williams pointed to an area that was not marked on the map. He related that Mr. Williams showed him three different maps and not one of them accurately reflected where the active mining was taking place or reflected areas where pillaring had been completed.

Mr. Williams admitted that the top map did not show all of the areas in which pillaring had been completed. He testified that: "[I]n replacing this map to satisfy the state, I had to get a new map to put up and the map — it took a certain amount of time to have the map printed up and so on. And so we pulled some pillars during that time which were not shown on the map, which I would have had to have marked on myself." (Tr. 339-40.)

Finding that the Respondent did not have an "up-to-date" mine map as required by the regulation, I conclude that the company violated section 75.1200.

Citation No. 7349838

This citation alleges a violation of section 75.1103-1, 30 C.F.R. § 75.1103-1, because: "The fire sensor system that was provided for the company — 1, 2, 3, and 4 belt lines would not work when tested." (Govt. Ex. 12.) Section 75.1103-1 requires that: "A fire sensor system shall

be installed on each underground belt conveyor. Sensors so installed shall be of a type which will (a) give warning automatically when a fire occurs on or near such belt; (b) provide both audible and visual signals that permit rapid location of the fire."

Inspectors Caudill and Sanders testified that Caudill tested the fire sensor system several times by placing a magnet on the sensor mechanism at the No. 2 belt head drive. Nothing happened. No warning signal occurred at their location and no telephone or other communication was received from the surface to alert them to the danger.[5]

Both inspectors reported seeing wires on the floor of the mine, which they believed to be part of the system, that had been severed in several places. Inspector Caudill also testified that when he arrived at the surface, he observed that the key to the sensor system was "turned off." (Tr. 113.)

The Respondent contends that wires are frequently severed in the mine and are replaced, but not removed, and that there was an active wire for the system. He also maintains that the key that Caudill observed to be off, does not turn off the system, but only turns off the sirens.

Inherent in section 75.1103-1 is a requirement that the system be functional. *Cf. Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 998 (June 1997) (requirement that conveyor belt be equipped with slippage and sequence switches means *functional* switches); *Fluor Daniel, Inc.*, 18 FMSHRC 1143, 1145-46 (July 1996) (requirement that self-propelled mobile equipment be equipped with a service brake system means *functioning* system); *Mettiki Coal Corp.*, 14 FMSHRC 760, 768 (May 1991) ("switches to be used to lock out electrical equipment must be equipped with *functioning* lockout devices") (emphasis added). For whatever reason, when tested, the system did not function.

Consequently, I conclude that the Respondent violated section 75.1103-1.

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[5] Section 75.1103-5, 30 C.F.R. § 75.1103-5, provides, in pertinent part, that:

> (a) Automatic fire sensor and warning device systems shall upon activation provide an effective warning signal at either of the following locations:
>
> (1) At all work locations where men may be endangered from a fire at the belt flight; or
>
> (2) At a manned location where personnel have an assigned post of duty and have telephone or equivalent communication with all men who may be endangered.

Significant and Substantial

The inspector found this violation to be "significant and substantial." Considering the accumulations along the belt lines and the ignition sources present, it takes little imagination to find that this violation was reasonably likely to result in a serious injury, in the normal course of mining. Therefore, I conclude that the violation was "significant and substantial."

Civil Penalty Assessment

The Secretary has proposed a penalty of $642.00 for these violations. 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). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the civil penalty criteria, the parties have stipulated, and I so find, that: (1) The Respondent "demonstrated good faith in abating" the violations; (2) "Reasonable penalties will not affect the ability of [the company] to remain in business;" (3) The "No. 3 Mine is a small size coal mine;" and (4) "Williams Brothers Coal Company is a small size mine operator." (Jt. Ex. 3.) Based on the Respondent's Assessed Violation History Report, (Jt. Ex. 2), I find that the Respondent has a good previous violation history.

I agree with the inspectors that the operator's negligence for all of the violations was "moderate," with the exception of Citation No. 7349834, the mine map violation, where I find that it was "low." With regard to gravity, I find that the gravity of Citation Nos. 4515014, 4515016 and 7349838 was serious and with regard to the remaining citations it was not so serious.

Taking all of these criteria into consideration, I assess a civil penalty of $561.00, broken down as follows:

Citation No.	Penalty
4515012	$ 55.00
4515013	$ 55.00
4515014	$ 97.00
4515015	$ 55.00
4515016	$ 97.00
4515017	$ 55.00
7349834	$ 50.00
7349838	$ 97.00
Total	$561.00

Order

Citation Nos. 4515012, 4515015, 4515016 and 7349838 are **AFFIRMED**; Citation No. 4515014 is **MODIFIED**, in accordance with the motion of the Secretary granted at the hearing, in section 10, to state that an injury is "reasonably likely" and that the violation is "significant and substantial" and is **AFFIRMED** as modified; Citation Nos. 4515013 and 4515017 are **MODIFIED** by deleting the "significant and substantial" designations and are **AFFIRMED** as modified; and Citation No. 7349834 is **MODIFIED** by reducing the level of negligence from "moderate" to "low" and is **AFFIRMED** as modified.

Williams Brothers Coal Co., Inc., is **ORDERED TO PAY** a civil penalty of **$561.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

J. Phillips Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Hufford Williams, President, Williams Brothers Coal Company, Inc., 258 Cantrell Road, Mouthcard, KY 41548 (Certified Mail)

/nj

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

January 19, 2000

MARY JOHNSON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEVA 99-81-D
	:	MORG CD 99-02
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	
	:	Loveridge No. 22 Mine
	:	Mine ID No. 46-01433

DECISION

Appearances: Katherine L. Dooley, Esq., The Dooley Law Firm, Charleston, West Virginia, on behalf of Complainant;
Elizabeth S. Chamberlin, Esq., Consol, Inc., Pittsburgh, Pennsylvania, on behalf of Respondent.

Before: Judge Melick

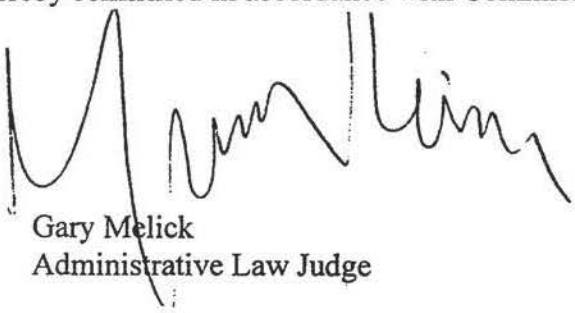
Hearings under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," commenced in this case on December 21, 1999, in Fairmont, West Virginia. Those proceedings and the bench decision that followed are set forth below with only non-substantive changes:

> Judge Melick: We've had an extensive pre-trial conference this morning, and as I understand from this conference the Complaint in this case is that the Consolidation Coal Company delayed, at least several times, accepting a Workers' Compensation claim from the Complainant for injuries she sustained while passing through a man-door in the subject mine, thereby delaying her Workers' Compensation payments. In this regard the Complainant seeks as remedy, interest on the late Workers' Compensation benefits she received. Now, is that a correct statement of the Complaint?
>
> Attorney Dooley: Yes, Your Honor.
>
> Judge Melick: All right. I understand then at this time you have a motion, Ms. Chamberlin?
>
> Attorney Chamberlin: Yes, Your Honor. Consolidation Coal Company moves to dismiss the complaint for failure to state a claim under the Mine Act.

Judge Melick: As I said in the pre-trial conference, that Complaint does not come within the purview of section 105(c)(1) of the Mine Act.[1] A remedy may exist with the Workers' Compensation laws of West Virginia but it's not the purpose of the Mine Act to provide relief under these circumstances. The filing of a Workers' Compensation claim is not as presented here, in itself, a protected activity under the Mine Act and without any other claim of protected activity, the Complainant cannot prevail in this case under section 105(c). As I say, if there is any remedy for delaying Workers' Compensation benefits under the present circumstances it may be under West Virginia Workers' Compensation law. These proceedings are therefore dismissed.

ORDER

The dismissal of these proceedings is hereby confirmed in accordance with Commission Rule 69(a), 29 C.F.R. § 2700.69(a).



Gary Melick
Administrative Law Judge

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

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

Distribution:

Katherine L. Dooley, Esq., The Dooley Law Firm, P.O. Box 11270, 815 Quarrier St., Suite 311, Charleston, WV 25339-1270 (Certified Mail)

Elizabeth S. Chamberlin, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

January 19, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 99-39-M
Petitioner	:	A. C. No. 30-02851-05504
v.	:	
	:	
DOUGLAS R. RUSHFORD TRUCKING,	:	
Respondent	:	Seymour Road Pit

DECISION

Appearances: Suzanne Demetrio, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, on behalf of Petitioner; Thomas M. Murnane, Esq., Stafford, Trombley, Owen & Curtin, PC, Plattsburgh, New York, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," charging Douglas R. Rushford Trucking (Rushford) with four violations of mandatory standards and proposing civil penalties of $27,000.00 for those violations.[1] The general issue before me is whether Rushford violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act. Additional specific issues are addressed as noted.

On August 28, 1998, mechanic and welder Nile Arnold, was injured when a wheel rim exploded while he was inflating a tire on a 1967 Chevrolet fuel truck. He died on August 30, 1998, as a result of those injuries. The truck was customarily used as a stationery storage tank to fuel mobile equipment. The 2-piece wheel rim which exploded consisted of a center section and an outer ring. The inner surface of the center section was corroded and had rusted through in several locations. The rim was mounted with a recapped tire with a tube and stem. The tire was not marked with a maximum inflation pressure and had been flat for an unknown period of time prior to the accident. According to the investigation report, as the tire was being inflated by Arnold, the force of the expanding inner tube caused the center section of the rim to separate

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[1] During hearings Citation No. 7716908, charging one of these violations, was vacated by the Secretary.

where it had corroded. The section along the perimeter of the rim exploded outward hitting Arnold in the head. Arnold was apparently kneeling with his head close to the wheel at the time.

Mark Goddeau had been working for Rushford for about one year at the time of the accident. Mine owner Douglas Rushford, had directed Goddeau that day to wash the power screen and to inflate one of the four tires on the screen. There was no standoff inflation device available and Goddeau had never seen one at the pit. He therefore used a tire chuck which must be held onto the valve stem while the tire is inflated.

At this time Arnold had already begun welding on the power screen. The welder ran out of fuel oil so Goddeau went to get the fuel truck. One of its tires was low on air so Arnold began inflating it using the same tire chuck Goddeau had used. Goddeau was standing 6 to 8 inches behind Arnold and, after inflating the tire for 20 to 30 seconds, it exploded. Arnold fell back with a gash on his head. He was unresponsive so Goddeau ran for help. Goddeau was at the pit when the ambulance arrived. According to Goddeau there was no room for the rescue workers so he and co-worker Fonze Rushford, moved the fuel truck and backhoe about 10 feet away.

New York State corrections officer Vernal Favreau was a captain in the responding volunteer fire department on September 28, 1998. When he arrived the vehicles and the victim were in the positions depicted on Government Exhibit No. 1. The victim was lying two to three feet from the fuel truck. Favreau gave orders to an employee to move the backhoe to enable the ambulance to get closer to the victim. He did not consider the fuel truck to be a hazard and did not give orders to have it moved.

New York State police Sergeant Patrick Jones also responded to the accident scene arriving at 4:10 to 4:15 p.m. He was present when another investigator took photographs at the accident scene. According to Jones those photographs (Gov't Exh. No. 3/1 - 3/12) accurately depict the scene as he observed it on August 28, 1998, around 5:30 p.m. He did not then see any white Toyota truck. Jones also testified that the fuel truck was then parked parallel to the trailers approximately 150 yards from the victim and as depicted on Government Exhibit No. 4. The Occupational Safety and Health Administration (OSHA) was notified of the accident by another state police investigator.

Fonze Rushford is a grandson of owner Douglas Rushford. He was in the pit area at the time of the accident and maintains that he saw Arnold's pickup truck at the accident scene at point "A" on Government Exhibit No. 10. He maintains an "EMT" told him to move the backhoe and he did so. The police said only that they were "finished with it."

Todd Lapham is owner Douglas Rushford's son in-law. He was in the pit on the day of the accident but did not see it. At the time he went to lunch that day he saw Arnold's truck in the pit area at position "A" on Government Exhibit No. 11. He did not observe it later that day. Lapham testified that some 1 ½ to 2 months later he drove the truck from the shopyard in Plattsburgh to his house. As he was planning to paint the truck he removed the tool box on the back of the truck and gave the tools contained therein to Douglas Rushford. He maintains that he

then observed a standoff device in the truck. He claims to have seen the same device in the Plattsburgh shop before.

Supervisory mine inspector Randall Gadway, testified that the Mine Safety and Health Administration (MSHA) district office was first notified of the August 28, 1998 accident on September 1, 1998 by "OSHA." Gadway described the Seymour Pit when he arrived on September 2, 1998, as depicted in Government Exhibit No. 2 with the fuel truck parked parallel to the work trailers at "F" and the backhoe located at Box "B." Gadway concluded that no standoff device had been used to inflate the tire. He found moreover, that none of the employees had received training in the use of a standoff inflation device. Indeed, none of the employees present, including Mark Goddeau, Fonze Rushford, Todd Lapham, even knew at that time what a standoff inflation device was. Douglas Rushford told Gadway that he had a standoff inflation device at the shop but Gadway was later shown only three clip-on air chucks. Gadway later found it necessary to draw Douglas Rushford a picture of a standoff inflation device to describe it. Rushford never produced any standoff inflation device during the time of Gadway's investigation.

Citation No. 7716903

This citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.141104(b)(2) and charges as follows:

> A mechanic/welder was fatally injured at this operation on August 28, 1998, when he was struck by a section of wheel rim which exploded while he was inflating a truck tire. A stand-off-inflation device was not used. The mine operator's failure to provide and require the use of a stand-off-device for inflating tires is a lack of reasonable care constituting more than ordinary negligence and is an unwarrantable failure to comply with a mandatory standard.

The cited standard, 30 C.F.R. § 56.14104(b), provides as follows:

> To prevent injury from wheel rims during tire inflation, one of the following shall be used: (1) a wheel cage or other restraining device that will constrain all wheel rim components during an explosive separation of a multi piece wheel rim, or during the sudden release of contained air in a single piece rim wheel; or (2) a stand-off inflation device which permits persons to stand outside of the potential trajectory of wheel components.

There is no dispute in this case that neither a wheel cage nor a stand-off inflation device was used when employee Nile Arnold inflated the tire on the fuel truck at Respondent's Seymour Road Pit. Since mine operators are liable without fault for violations at its mines the violation is proven as charged. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112 (July 1995). The violation was also "significant and substantial." A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a

reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory 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.

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

The 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).

The failure to use a wheel cage or other restraining device or a stand-off inflation device under the circumstances of this case resulted in Arnold's fatal injuries. There can be no question on the facts of this case that the violation was therefore "significant and substantial."

I also conclude that the violation was also the result of "unwarrantable failure" and high negligence. Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Jim Walter Resources Inc., v. Secretary*, 103 F.3d 1020 (D.C. Cir. 1997); *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence," "thoughtlessness," and "inattention") *Emery Mining Corp.*. 9 FMSHRC at 2001. Unwarrantable failure is also characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 189, 193-94 (February 1991).

In finding unwarrantable failure and high negligence in this case I have considered the evidence that Rushford had never bothered to obtain a copy of the health and safety regulations governing the operation of his mine and the credible evidence that not only did the deceased fail to use an appropriate device for protection during tire inflation but that no such device was available either at the mine site where the accident occurred or at the mine shop in Plattsburgh.

In fact, Douglas Rushford made no provision for compliance with the cited standard and indeed, had himself directed another employee to inflate a tire at the mine site without a stand-off device on the same day as this fatality. In addition, I find credible Inspector Gadway's testimony that mine owner Douglas Rushford did not even know what a stand-off inflation device was. The hazard presented by this violation was also particularly dangerous as evidenced by the fatality. These factors clearly support a finding of unwarrantability and gross negligence .

In reaching this conclusion I have not disregarded the testimony of Todd Lapham, Douglas Rushford's son in-law, that several months after the fatal accident he found a stand-off inflation device in the tool box of the victim's pickup truck. Rushford thought that the device was discovered about one and one half months after the accident. Even assuming, *arguendo,* that this testimony is credible and that a stand-off device was found in the victim's truck six weeks or more after the accident, such evidence is clearly insufficient to permit an inference that such a device was available to the victim on the date of the accident. It could very well have been a device that Rushford subsequently purchased to abate the citation. This conclusion is supported by Mark Goddeau's testimony that he did not see such a device in the victim's truck on the date of the accident and, indeed, had never seen such a device at the mine.

Citation No. 7716904

The citation alleges a violation of the standard at 30 C.F.R. § 50.10 and charges as follows:

> A mechanic/welder was fatally injured at this operation on August 28, 1998, when he was struck by a section of wheel rim which exploded while he was inflating a truck tire. He died on August 30, 1998. The mine operator failed to notify MSHA of the accident.

The cited standard, 30 C.F.R. § 50.10, provides as follows:

> If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict office, it shall immediately contact the MSHA headquarters in Arlington, Virginia by telephone at 800-746-1553.

There is no dispute in this case that Rushford failed to notify MSHA of the accident as required by the cited standard. The New York State police officer who responded to the accident notified the Occupational Safety and Health Administration which, in turn, notified MSHA. The violation is accordingly proven as charged.

Rushford argues that any negligence should nevertheless be negated or mitigated by its efforts, albeit unsuccessful, to contact MSHA. Rushford bookkeeper, Mary Pelkey, attempted to call MSHA by using a telephone number she had been given by an MSHA employee around 1991.

Pelkey called that number but received only a recorded message that the number had been disconnected and no forwarding number was provided. It is undisputed that the MSHA offices had moved in the interim and their telephone number changed. Pelkey was unaware of the toll free number provided in the Secretary's regulations. She also acknowledged that she did not attempt to call "information" to obtain the current MSHA telephone number and made no further attempts to call MSHA after her father, Douglas Rushford, told her that the state police would tell MSHA anyway. She did call the victim's wife and for emergency services.

I agree that Pelkey's efforts to contact MSHA, while clearly inadequate, do warrant some consideration. Accordingly, I find Respondent chargeable with only moderate negligence. The Secretary's low gravity findings are accepted for purposes of assessing a civil penalty.

Citation No. 7716905

This citation alleges a violation of the standard at 30 C.F.R. § 50.12 and charges as follows:

> A mechanic/welder was fatally injured at this operation on August 28, 1998, when he was struck by a section of wheel rim which exploded while he was inflating a truck tire. The mine operator altered the accident site by moving the truck involved in the accident before MSHA was notified and initiated its investigation.

The cited standard, 30 C.F.R. § 50.12 provides as follows:

> Unless granted permission by a MSHA's District Manager or Subdistrict Manager, no operator may alter an accident site or an related area until completion of all investigation pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

There is no dispute that the fuel truck at issue was moved by Rushford employee Mark Goddeau before MSHA was notified of the accident and initiated its investigation. Rushford maintains that there was nevertheless no violation because of the need to rescue and recover the victim in this case.

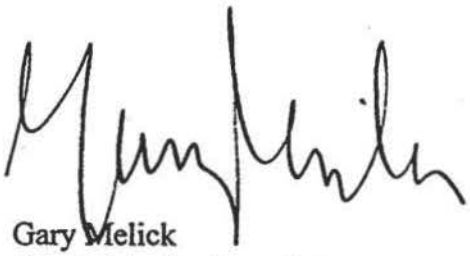
According to the undisputed testimony of Mark Goddeau, who was standing directly behind the deceased when the tire exploded, the deceased was knocked onto his back with his feet only about 6- inches from the wheel. His arm was lying on the backhoe bucket and the bucket was only 1 to 1 ½ feet from the fuel truck. Goddeau was also present when the emergency personnel arrived. He thought it was necessary to move the fuel truck because there was insufficient space for emergency personnel to aid the victim. Goddeau then drove the truck about 20 to 25 feet away. I find that, under the circumstances, it was reasonable for Goddeau to have moved the truck in the good faith and reasonable belief that it was necessary to aid in the rescue

of Arnold. There is no evidence of any attempt to alter the accident scene for purposes of concealing the cause of the accident, and indeed, in the end, the movement of the truck and backhoe had little, if any, impact on the MSHA investigation. It would indeed be counterproductive and contrary to public policy to discourage the safe and prompt recovery of accident victims based on the reasonable and good faith actions of rescuers. Under the circumstances I find that there was no violation of the cited standard as charged and Citation No. 7716905 must accordingly be vacated.

In assessing civil penalties herein I have also considered the operator's small size, lack of a history of recent violations, apparent good faith abatement and absence of evidence that the penalties would affect its ability to stay in business.

ORDER

Citations No. 7716905 and 7716908 are vacated. Citation Nos. 7716903 and 7716904 are affirmed and Douglas R. Rushford Trucking is directed to pay civil penalties of $3,000.00 and $100.00, respectively, for the violations charged therein within 40 days of the date of this decision.



Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

Suzanne Demitrio, Esq., Office of the Solicitor, U.S. Dept. of Labor, 201 Varick St., Room 707, New York, NY 10014

Thomas M. Murnane, Esq., Stafford, Trombley, Owens & Curtin, PC, One Cumberland Avenue, P.O. Box 2947, Plattsburgh, NY 12901

\mca

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

January 20, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 99-110-M A.C. No. 02-00144-05563 A
v.	:	Sierrita Mine
FRED CHISMAR, employed by CYPRUS SIERRITA CORPORATION, Respondent	:	

DECISION

Appearances: Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Fred Chismar pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §820(c) (the "Act"). The petition alleges that Mr. Fred Chismar knowingly violated 30 C.F.R. §§ 56.15001 and 56.15006 of the Secretary's safety standards. A hearing was held in Tucson, Arizona, and the parties filed post-hearing briefs.

I. BACKGROUND

A. Summary of the Facts

On November 25, 1997, MSHA Inspector Jack Sepulveda issued a citation and order under section 104(d)(1) of the Act against Cyprus Sierrita Corporation ("Sierrita') for two alleged violations at its Sierrita Mine in Pima County, Arizona. The citation and order were issued following an accident at the mine. Sierrita contested the citation, order, and proposed penalty in WEST 98-254-M. On October 30, 1998, Commission Judge Todd Hodgdon approved a settlement in that case in which the characterizations as to gravity and negligence remained unchanged. In addition, the settlement did not change the unwarrantable failure and significant and substantial determinations made by the MSHA inspector.

On February 22, 1999, the Secretary filed this proceeding under section 110(c) of the Act alleging that Mr. Chismar "knowingly authorized, ordered, or carried out" these violations. Chismar admits that he is an agent of Sierrita, subject to the provisions of section 110(c), but denies that he knowingly authorized, ordered, or carried out the violations.

This case arose out of an accident at the Sierrita Mine on September 26, 1997. George Borquez was helping unload a truckload of lime into the tailings dam catch pond (the "tailings pond") when he came in contact with a mixture of lime and the solution in the tailings pond. His legs were severely burned in the accident. The lime was being transported by an independent contractor, CTI Trucking ("CTI"). At the time of the accident the only two individuals at the tailings pond were Mr. Borquez and Warren Forrey, the driver of the CTI truck.

CTI regularly delivers lime to the Sierrita Mine, which is a large copper mine. On September 26, 1997, the lime was being placed in the tailings pond to neutralize an acidic mixture in the pond called raffinate[1]. The raffinate is produced during the solvent extraction ("SX") process in which copper is leached from oxide ore through the use of sulfuric acid. As a result of a power failure and heavy rains, the tailings pond was considerably more acidic than usual. Sierrita decided to add lime (which is a base) to the tailings pond to neutralize the acid. This was a rare event at the mine and Mr. Chismar had only been responsible for adding lime to the tailings pond once since 1991. The tailings pond is about two and a half miles outside the main gate of the mine and one must travel on a county road to get there.

Mr. Chismar, who is the operations supervisor for the leach fields and the SXEW plant, ordered lime from CTI. He was present when the first truck was unloaded. The lime was contained in tanks on the truck and it was unloaded using a hose that can be attached to the truck. Each hose is about 20 feet long and is between 4 and 6 inches in diameter. Persons unloading the truck were not required to handle the lime. The lime is a dry powder and a pump on the truck blows the powder out the hose. Mr. Chismar sent Larry Whitman, a Sierrita employee, to get supplies needed to tie the hose to a pipe that joined the tailings pond with another tailings pond. Mr. Chismar instructed Mr. Whitman to wear personal protective equipment when he was working near the pond. The personal protective equipment consisted of rubber boots, rubber pants, rubber coat, and a face shield. This equipment is commonly called "acid gear" at the SXEW plant. Mr. Whitman wore protective clothing when he was near the tailings pond and removed it after he returned to the road adjacent to the tailings pond.

As the first truck was being unloaded, Mr. Chismar called Mr. Borquez to the tailings pond so that he could assume responsibility for escorting the lime trucks to the tailings pond from the mine gate. Mr. Borquez frequently acted as a relief supervisor when Mr. Chismar was absent and also as a lead man directing other employees who worked with him.

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[1] Raffinate is the "aqueous solution remaining after the metal has been extracted by the solvent; the tailing of the solvent extraction system." *A Dictionary of Mining, Mineral, and Related Terms 2nd edition,* 443 (1997).

A road ran between the tailings pond and the adjacent tailings pond. Mr. Borquez's job was to wait at the main gate in a pickup truck. When a CTI truck arrived, he would instruct the driver of the CTI truck to follow him to the tailings pond. After they arrived at the tailings pond, Borquez would show him where to dump the lime. Mr. Chismar instructed Mr. Borquez to not let the lime build up along the side of the tailings pond.

When Mr. Borquez received a call from Mr. Chismar to report to the tailings pond, he was told to bring a flotation device. This flotation device consisted of several plastic barrels, each about the size of a "pony keg," that were tied together. A hose and a rope were attached to the flotation device and the device was put into the tailings pond. Mr. Chismar testified that he expected that once the flotation device was set up, everyone associated with this project would stay up on the road. The bank along the side of the road declined rather steeply to the tailings pond. Mr. Chismar expected that as each lime truck arrived, the driver of the truck would attach his hose to the end of the other hose at the road and that the far end of this hose would remain attached to the flotation device. He also believed that if the flotation device needed to be moved to a different location in the tailings pond, the employees would pull it out by the rope, move it to a lime-free area of the pond, and throw it back into the pond. Government Exhibit 1 shows the proximity of the road to the tailings pond and the steep bank that separated the two.

During most of the day, Mr. Borquez simply escorted trucks to and from the main gate. Near the end of his work day, the Sierrita employee who was assisting him had to leave. When the sixth CTI truck arrived, Mr. Borquez stayed at the tailings pond and assisted the CTI driver, Mr. Forrey. Mr. Borquez noticed that the hose had come loose at the flotation device and the lime was shooting straight up rather out into the pond. He walked down the bank to the edge of the tailings pond to fix the problem. He was not wearing any protective clothing. As he turned to return to the road, both of his feet fell into the tailings pond. Apparently he was not standing on solid ground, but was standing on a crust of lime that had built up on top of the pond. When lime and water mix, intense heat is produced in an exothermic reaction. Large portions of his legs got wet as he exited the tailings pond. Mr. Borquez realized that his legs were badly burned and he went to his truck as quickly as possible to pour eye wash onto his legs. He then drove to where there was water in an Igloo container. He called Mr. Chismar on the radio who advised him to go to the adjacent reclaim tank to rinse off. Mr. Borquez declined and told Chismar that he was going to the main gate where there were showers.

The mine's "first responders" were notified and met Mr. Borquez at the gate. They assisted Mr. Borquez by removing his clothing and getting him into the shower. He showered for about 20 minutes and then Mr. Chismar drove him to a hospital. Mr. Borquez received very serious burns on his legs and he required skin grafts. Although Mr. Borquez is still employed at Sierrita, this accident was a life-altering event for him.

B. MSHA's Enforcement Action

MSHA did not investigate this accident until it received an anonymous complaint. At the conclusion of its investigation, MSHA issued one citation and one order dated November 25, 1997, under section 104(d)(1) of the Mine Act. Citation No. 4718158 alleges a violation of 30 C.F.R. § 56.15006 as follows:

> Safe equipment or protective clothing was not used [by] an employee who on Sept. 26, 1997, suffered chemical (lime) burns, after he fell in lime.
>
> The employee was assisting in dumping (unloading) lime at the south-side of the Sierrita tailings dam, at a catch pond.
>
> Management engaged in conduct constituting more than ordinary negligence in that they knew employees were working around/with caustic material and did not have suitable protective clothing. This violation is an unwarrantable failure. Fred Chismar, SXEW Supervisor.

This citation was modified a number of times and the language above represents the final language adopted by MSHA on December 22, 1997. The citation was terminated on November 25, 1997. Section 56.15006 provides that "[s]pecial protective equipment and special protective clothing shall be provided, maintained in a sanitary and reliable condition and used whenever hazards of process or environment, chemical hazards, radiological hazards, or mechanical irritants are encountered in a manner capable of causing injury or impairment."

Order No. 4718159 alleges a violation of 30 C.F.R. § 56.15001 as follows:

> An employee was seriously injured when he fell in lime to about waist high. This employee was not provided with water or neutralizing agents in an appropriate amount to counteract harmful substances being used. This occurred on Sept. 26, 1998, at about 1600 hours.
>
> The occurrence was at the South-side of the Sierrita tailings dam and at the catch pond.
>
> Management engaged in aggravated conduct constituting more than ordinary negligence in that they knew employees were working around/with caustic material and did not provide suitable or an adequate supply of water or neutralizing agents. This violation is an unwarrantable failure. Fred Chismar, SXEW Supervisor.

This order was also modified a number of times and the language above incorporates the modifications. The order was also terminated on November 25, 1997. Section 56.15001 provides, in part, that "[w]ater or neutralizing agents shall be available where corrosive chemicals or other harmful substances are stored, handled, or used."

C. Summary of the Parties' Arguments

1. Secretary of Labor

Mr. Chismar was aware that chemical hazards were present in the tailings pond that were capable of causing injury or impairment. Mr. Chismar planned the entire liming project. He was familiar with the hazards and knew that protective clothing should be worn. At the hearing, he admitted that he did not even think about having water present as a first aid precaution. His only defense in this case is his testimony that he did not think that the precautions required by the standards were necessary, given the work to be performed at the tailings pond.

A supervisor's blind acquiescence to unsafe working conditions is not permitted under the Mine Act. Mr. Chismar failed to require Mr. Borquez to wear protective clothing. Chismar failed to recognize that Borquez would be exposed to the hazard even though Chismar observed other employees working very close to the tailings pond. He failed to task train Mr. Borquez on how to perform his work safely. He never specifically told Borquez to stay away from the edge of the tailings pond. Chismar also failed to have the minimum amount of clean water at the worksite available to ensure emergency treatment in the event of an accident. Mr. Chismar's "see no evil" approach does not protect him from liability. Chismar's inexcusable failure to provide Mr. Borquez and the other employees who worked on the liming project with the minimum level of protections required by MSHA's standards clearly amounts to aggravated conduct. Mr. Chismar knowingly authorized, ordered, or carried out the violations set forth in the citation and order at issue.

2. Sierrita

Mr. Chismar did not knowingly violate section 56.15006. He did not have knowledge, either direct or constructive, of the violation regarding protective clothing. Such clothing was not necessary to perform the tasks that Mr. Chismar assigned to Mr. Borquez. Chismar reasonably did not expect anyone to handle the hose while the lime was being unloaded. He expected that the flotation device would be moved by using the rope attached to it. Mr. Chismar was aware of the hazard as indicated by the fact that he told Whitman to put protective clothing on when he was required to go down to the tailings pond earlier that day. He did not expect Mr. Borquez or anyone else to do so without wearing protective clothing. The evidence clearly establishes that if Chismar had been at the tailings pond when Borquez walked down to bank to the pond, he would have ordered him away or told him to get his protective clothing. Chismar reasonably believed that Mr. Borquez was aware of the hazard.

The Secretary did not establish a violation of this standard because it is unconstitutionally vague. Mr. Chismar also did not knowingly violate section 56.15001. Given the scope of the work to be performed, Mr. Chismar did not believe that there was a potential hazard present that merited his providing clean water in the immediate area. He believed that Mr. Borquez and other Sierrita employees would simply be escorting the CTI trucks between the gate and the tailings ponds and, if they needed to assist the CTI driver in unloading the lime, they would perform this task without exposing themselves to the hazard presented by the lime.

II. DISCUSSION WITH FINDINGS AND CONCLUSIONS

Whenever a corporate operator violates a safety or health standard, any director, officer, or agent of such corporation "who knowingly authorized, ordered, or carried out such violation" shall be subject to civil penalties. 30 U.S.C. § 820(c). In order to assess penalties against Mr. Chismar in this case, I must find that (1) Sierrita committed the alleged violations set forth in the citation and order; (2) Mr. Chismar was a director, officer, or agent of Sierrita; and (3) Mr. Chismar knowingly authorized, ordered, or carried out the alleged violations. Chismar stipulated that he was an agent of Sierrita. (Stip. 7).

The principal issue is whether Mr. Chismar knowingly authorized, ordered, or carried out the violations set forth in the citation and order.[2] The Secretary must establish that Mr. Chismar knew or had reason to know of the violative conditions. *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981). She must prove that Mr. Chismar knowingly acted, not that he knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992). An individual has knowingly acted when he "fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Richardson*, at 16. The Secretary is required to show that the person charged demonstrated aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines*, 14 FMSHRC 1232, 1245 (August 1992). A finding of ordinary negligence will not, by itself, support a violation of section 110(c). *Freeman United Coal Mining Co.*, 108 F3d. 358, 364 (1997).

A. Failure to Wear Protective Clothing, § 56.15006

On September 26, 1997, Mr. Chismar determined that, due to a power failure and heavy rains, the raffinate in the tailings ponds was too acidic and needed to be neutralized. He called CTI and ordered lime to be delivered by truck. Although Sierrita orders lime for other purposes,

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[2] Mr. Chismar also contends that the Secretary's investigation and issuance of the proposed civil penalties in this case were unreasonably delayed by the Secretary and that the case should be dismissed on that basis. Mr. Chismar's motion is denied. In an unpublished order dated July 2, 1999, I set forth the chronology of MSHA's investigation in this case. Based on that chronology and the stipulations filed by the parties (Nos. 24-35), I find that the Secretary did not unreasonably delay the investigation and prosecution of this case.

it is unusual for Sierrita to put lime in the tailings pond.[3] When the first CTI truck arrived at the gate, Mr. Chismar escorted it to the tailings pond. Mr. Larry Whitman was with him and the hose from the truck was first placed over the bank directly into the tailings pond. When the CTI driver attempted to unload the lime through the hose, it did not work well. Mr. Chismar stopped the unloading process and told Mr. Whitman to get his protective clothing and other supplies. Mr. Whitman's protective clothing was in his locker at the SX shop.

When he returned, Mr. Whitman put on his protective clothing, went down to the tailings pond, and attached the hose with wire to a culvert that extended into the pond. After Whitman secured the hose to the culvert, he returned to the road and Mr. Chismar told the CTI driver to start pumping the lime again.

A short time later, Mr. Chismar called Mr. Borquez on the radio and told him to report to the tailings pond and to bring a flotation device. Chismar frequently used Borquez as a "lead man" and Borquez also functioned as his relief supervisor from time to time. Because of his work history at several copper mines, Chismar believed that Borquez was fully aware of the hazards of working around lime. Mr. Borquez had never worked around the tailings pond at Sierrita and testified that he was not aware of the hazard. When Borquez arrived, Whitman was up on the road and he may have been wearing some of his protective clothing. Mr. Borquez brought Bobby Martinez along to assist him. Chismar did not tell Borquez to bring his protective clothing and Borquez left his protective clothing in his locker in the SX shop.

When he called, Chismar told Borquez to bring a flotation device so that a hose could be attached to it. Chismar decided that a hose should be attached to the flotation device and that it should be placed in the tailing pond so that as the lime was pumped out, it would spray out into the pond rather than accumulate along the shore. He testified that he used this system so that Sierrita employees would not be required to handle the hose or go down the bank to the pond. He stated that it was his expectation that everyone would stay up on the road. Mr. Whitman briefed Mr. Borquez about the project. Borquez was told that he would be "taking over" the project and that his principal duty would be to escort the CTI trucks to the tailings pond. Mr. Borquez was not given any safety training with respect to this project by Mr. Chismar. Mr. Borquez took the floater off his pickup and put it about 10 to 15 feet from the pond. Borquez then went to escort the next CTI truck in. Mr. Whitman left the area at some point after Mr. Borquez arrived to attend to other duties. The record does not reveal who placed the flotation device into the tailings pond or how close anyone was to the pond when this task was performed.

Mr. Chismar escorted the third truck in and Mr. Borquez escorted the fourth CTI truck. At some point, Mr. Chismar was called away to the SX plant and so Mr. Borquez continued

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[3] On the most recent occasion, CTI delivered lime in dump trucks and the lime was dumped directly into the tailings pond.

escorting the trucks from the mine gate to the tailings pond. Mr. Martinez stayed in the tailings pond area while the trucks were unloaded by the CTI drivers.

Sometime between one and two that afternoon, Mr. Chismar traveled to the tailings pond to check on the status of the liming project. He observed Mr. Martinez down near the pond holding the flotation device while shooting the lime across the pond. Chismar yelled at Martinez and told him to get away from the tailings pond. Mr. Borquez was present when Chismar ordered Martinez back up to the road. Chismar did not tell anyone to get protective clothing.

Later that afternoon at about 2:30, Mr. Chismar returned to the tailings pond area with his supervisor Ramon Hernandez. Mr. Hernandez saw Mr. Borquez in his pickup on the road near the tailings dam and told Mr. Borquez to be careful around the lime because it can get very hot.[4]

Later that afternoon, Mr. Borquez called Mr. Chismar to tell him that Mr. Martinez was leaving for the day. Borquez told Chismar that he would finish the job. Chismar told Borquez not to allow lime to accumulate along the bank of the tailings pond and to move to a "clean" area whenever it was necessary. At about 3:45 p.m., Mr. Borquez called Chismar to tell him that he had been burned by the lime. Only the CTI truck driver and Mr. Borquez were present when the accident occurred. As stated above, Mr. Borquez walked down the bank to the tailings pond to adjust the hose on flotation device. Without knowing it, Mr. Borquez walked onto the pond and was standing on accumulations of lime. When he fell in, he was badly burned.

I find that the Secretary established that Sierrita committed a violation of section 56.15006.[5] As discussed above, the liming project was an unusual undertaking. Sierrita did little to plan the project or consider the potential hazards present. Sierrita's safety department did not send a safety representative to the area to evaluate the hazards. Mr. Borquez and the other Sierrita employees had little or no experience in the work involved or the hazards present. Mr. Borquez and the other employees should have been told to bring their protective clothing to the tailings pond area and told not to walk down from the road to the tailings pond without wearing their protective clothing under any circumstances. Sierrita's failure to properly instruct its employees as to these requirements constitutes a violation of the safety standard. Moreover, because the Mine Act imposes strict liability on mine operators, Sierrita is responsible for Mr. Borquez's failure to wear protective clothing when he walked down to the tailings pond.

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[4] At the hearing, Mr. Borquez was not asked whether he observed Chismar ordering Martinez away from the tailings pond or whether Mr. Hernandez warned him that the lime could get hot. I credit the testimony of Messrs. Chismar and Hernandez with respect to these events. This testimony is consistent with the statements they gave to the MSHA special investigator.

[5] Under the principles set forth in *Kenny Richardson*, I am required to independently determine whether Sierrita violated the safety standards despite the fact that Sierrita admitted liability for purposes of the Mine Act when it settled the civil penalty case brought against it. 3 FMSHRC at 9-11.

I find, however, that the Secretary did not establish a knowing violation of section 56.15006. Mr. Chismar did not know or have reason to know that Mr. Borquez or any other employee would walk down the bank at the edge of the road to the tailings pond without wearing protective clothing. Mr. Chismar testified that he understood that Mr. Borquez had worked around lime for a number of years at the Sierrita Mine and at the Anamax Mine, an unrelated copper mine. Mr. Borquez had protective clothing in his locker and he had been warned just 45 minutes earlier by Mr. Hernandez, in Mr. Chismar's presence, that the lime in the tailings pond could get very hot. When Chismar observed Mr. Martinez near the tailings pond, he ordered Martinez to return to the road in Mr. Borquez's presence. Mr. Chismar credibly testified that, because he did not expect Mr. Borquez to walk down to the tailings pond, Chismar did not believe that protective clothing was necessary.

The Commission's holding in *Roy Glenn* is instructive. 6 FMSHRC 1583 (July 1984). In that case, several miners were instructed by their supervisor, Mr. Glenn, to weld a valve on an oxygen line in a mill building. To perform this welding, it was necessary to stand on an adjacent girder some distance above the floor. Rather than using a ladder to access the area, the miners climbed some stairs and walked along the girders without using safety lines to get to the work site. Glenn went to another area to check other valves and when he returned he saw one of the miners walking across the girder. He waived him down with a flashlight just as an MSHA inspector was entering the area.

The Commission reversed the administrative law judge and determined that Glenn did not knowingly violate the safety standard. The Commission determined that the judge's finding that Glenn had reason to know that miners "might"or "could" walk across the girders was insufficient to establish a knowing violation. *Id.* at 1588. A supervisor always has "reason to know" that miners "might" perform tasks in an unsafe manner. *Id.* This "degree of knowledge is too contingent and hypothetical to be legally sufficient" under the test set out in *Kenny Richardson*. *Id.* The Commission went on to state:

> Before personal liability under section 110(c) can be imposed on an operator's agent for "knowingly" authorizing, ordering, or carrying out a violation, the Secretary's proof must rise above the mere assertion that, at the time of assignment, an assigned task could have been performed by miners in an unsafe manner. Adoption of this rationale could mean that ... an operator's agent could be held personally liable under section 110(c) for failing to anticipate the miner's unsafe actions and not giving specific instructions to each miner, at the time of the assignment, to avoid all hazardous approaches to a task that could be followed.

Id.

In *Roy Glenn*, the Commission tailored its *Kenny Richardson* analysis to those situations where a "violation of a mandatory standard does not exist at the time of the corporate agent's failure to act, but occurs subsequent to that failure." *Id.* at 1586. The Commission held as follows:

> [A] corporate agent in a position to protect employee safety and health has acted "knowingly," in violation of section 110(c) when, based on the facts available to him, he either knew or had reason to know that a violative condition or conduct would occur, but he failed to take appropriate preventive steps. To knowingly ignore that work will be performed in violation of an applicable standard would be to reward a see-no-evil approach to mine safety, contrary to the strictures of the Mine Act.

Id.

Although the present case has some similarities with *Roy Glenn*, there are some important differences. Mr. Glenn had specifically instructed the miners to bring their safety lines while Mr. Chismar did not mention or require protective clothing, except in the case of Mr. Whitman. The work that the miners were to perform for Mr. Glenn required safety lines. Mr. Chismar believed that Mr. Borquez did not need protective clothing to escort CTI's trucks to and from the mine gate because he would not be required to walk down to the tailings pond.[6] In *Roy Glenn*, the hazard of falling was obvious while in the present case the hazard of being injured by the lime-raffinate mixture was not obvious.

In *Warren Steen*, Mr. Steen was held liable under section 110(c) even though he was not at the mine when a fatal accident occurred. 14 FMSHRC at 1131. In that case, however, he carried out the violation by ordering a stacker-conveyor to be moved to an area that he knew was within 10 feet of energized power lines. Thus, he knowingly authorized the violation.

Messrs. Chismar and Hernandez should not have relied on their understanding that Mr. Borquez and other Sierrita employees had worked at other copper mines with similar hazards. Apparently they believed that Mr. Borquez was fully aware of the hazard presented by the presence of lime in the tailings pond as a result of his work history. I credit Mr. Borquez's testimony that he did not realize that he could be severely burned if he got the tailings mixture on

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[6] At the hearing, the Secretary took the position that the miners should have been wearing protective goggles or face shields when they were on the road adjacent to the tailings pond to protect their eyes from blowing lime. This allegation is not contained in the citation. The citation relates solely to Sierrita's failure to require Mr. Borquez to wear protective clothing when he was adjacent to the tailings pond. The CTI driver was not wearing goggles or a face shield and CTI did not receive any MSHA citations. Mr. Borquez was wearing safety glasses on the day of the accident. I reject the Secretary's attempt to expand the citation beyond that written by the MSHA inspector.

his skin. Mr. Borquez should have been given more explicit instructions as to the nature of the work he was to perform and the hazards present.[7] In addition, Mr. Chismar should have anticipated that something might go wrong as the lime was being unloaded and that Sierrita employees might be tempted to work next to the tailings pond to fix the problem. It is human nature for someone to take a shortcut in such situations to avoid driving two miles to get protective equipment.

Mr. Chismar is at least partially responsible for the violation. A finding that Mr. Chismar was negligent, however, is insufficient to establish a section 110(c) violation. *Freeman United* 108 F3d. at 364. The Secretary must establish that the violation was the result of Mr. Chismar's aggravated conduct. I find that Mr. Chismar's conduct did not amount to aggravated conduct with respect to this violation. He envisioned, incorrectly as it turned out, that Mr. Borquez and the other Sierrita employees would only be escorting CTI trucks to and from the tailings pond. He believed that they would only be driving company pickup trucks back and forth from the mine gate, not working down by the tailings pond. Chismar also thought that any assistance given the CTI truck drivers could be provided without leaving the road. He simply did not believe that protective clothing was necessary for the work assigned to Mr. Borquez. His belief was incorrect.

Mr. Chismar did not take a "see-no-evil" approach, however. When Mr. Whitman was required to walk down to the pond to attach the hose to the culvert, Chismar told him to wear his protective clothing. When he observed Mr. Martinez down near the tailings pond, he told Martinez to get away. I find that if Mr. Chismar had been present when Mr. Borquez approached the tailings pond, Chismar would have told him to get away as well. In his mistaken belief that the employees were aware of the hazard, Chismar did not provide sufficient instruction or training to Mr. Borquez, but this failure does not rise to the level of aggravated conduct. As stated above, Chismar heard Hernandez warn Borquez about the hazard 45 minutes before the accident. Accordingly, the $500 civil penalty proposed against Mr. Chismar for an alleged knowing violation of section 56.15006 in Citation No. 4718158 is **VACATED**.

B. Failure to Have Water or Neutralizing Agents Available, § 56.15001

Sierrita did not make any provision for water or neutralizing agents in the immediate area of the tailings pond where lime was being deposited. The closest water supply was a tank, referred to as the "reclaim tank," that was somewhere between 75 and 200 yards away. This tank contained a mixture of reclaimed water from the tailings dam and well water. The record reveals that this water would have been of sufficient purity for Mr. Borquez to use to wash his legs, but Mr. Borquez was not familiar with the tank, he did not know what was stored in it, and he did not know where any valves or hoses were that he could use to wash himself. After he used all of the

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[7] I reject Chismar's argument that Mr. Borquez was working as a relief supervisor on this project after Mr. Chismar left the area.

water in his Igloo cooler, he got back in his pickup truck and drove to the mine to shower. His refusal to use the reclaim tank and his decision to proceed to the showers is entirely reasonable.

Mr. Chismar argues that the Secretary failed to prove that Sierrita violated the safety standard. He contends that the standard is too vague to be enforceable for a number of reasons including the fact that it does not set forth how much water is required, at what distance it must be placed, and how pure the water must be. Sierrita admitted a violation of the standard, for purposes of the Mine Act, when it settled the case brought against it.

I reject the arguments raised by Mr. Chismar concerning the vagueness of the standard under the facts presented in this case. I find that under any reasonable interpretation of the standard, water or a neutralizing agent was not available at the tailings pond. The water in the Igloo cooler was clearly not sufficient. The water in the reclaim tank was not available because it was located some distance away and it was not designated for such use. The tank was not there for the purpose of providing first-aid for chemical burns. The area was surrounded by weeds, employees had not been advised to use it for first-aid, and they had not been given instruction as to how to use it for the purpose washing off chemicals or other harmful substances. It was a spur-of-the-moment suggestion by Mr. Chismar.

Whether water or neutralizing agents were required at the tailings pond when the CTI trucks were delivering lime is separate question. Mr. Chismar contends that since the liming project did not entail handling "corrosive chemicals or other harmful substances," water was not required. He maintains that Sierrita's employees were assigned to escort CTI trucks to the tailings pond. I reject Mr. Chismar's arguments. It is clear that Chismar knew that Mr. Whitman would be working around the tailings pond. Mr. Chismar told him to get his protective clothing before working near the pond. Sierrita had knowledge that at least one employee could be exposed to the chemical reaction in the tailings pond. For purposes of this decision, I find that the Secretary established that Sierrita violated section 56.15001.

I find, however, that the Secretary did not establish that Mr. Chismar knowingly violated the safety standard. The analysis set forth above with respect to section 56.15006 is also applicable here. With the exception of Mr. Whitman, Mr. Chismar did not expect anyone to work down along the tailings pond. Although he should have anticipated that water might be needed for first-aid purposes, his failure to have water at the tailings pond does not rise to the level of aggravated conduct. Once the liming project was started and the floater was placed into the pond, Chismar did not believe that anyone would be exposed to chemicals or other harmful substances. Thus, he believed, with some reason, that water was not necessary. Indeed, Chismar and Hernandez testified that providing water for first-aid purposes did not occur to them because of the nature of the work to be performed.

The principal chemical hazard in the SXEW area is acid. Sierrita provides washing stations at several locations in the SXEW area as required by the safety standard. Thus,

Mr. Chismar is familiar with the safety standard and its requirements. He believed that the work to be performed at the tailings pond did not require water or neutralizing agents because his employees would not be handling the lime or working alongside the tailings pond. Although I determined that the standard was applicable here, Mr. Chismar's failure to require that water be available does not demonstrate aggravated conduct. Accordingly, the $500 civil penalty proposed against Mr. Chismar for an alleged knowing violation of section 56.150016 in Order No. 4718159 is **VACATED**.

III. ORDER

The civil penalties brought against Fred Chismar for alleged knowing violations of sections 56.15006 (Citation No. 4718158) and 56.15001 (Order No. 4718159) are **VACATED** and this proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Suite 400, Arlington, VA 22203-1954 (Certified Mail)

R. Henry Moore, Esq., Buchanan Ingersoll, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219-1410 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 24, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 99-24-M
Petitioner	:	A. C. No. 30-02863-05501 8UQ
v.	:	
	:	West Bloomfield Mine
ROOT NEAL & COMPANY,	:	
Respondent	:	

DECISION

Appearances: James A. Magenheimer, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for the Petitioner; Robert G. Walsh, Esq., Walsh, Fleming & Chiacchia, P.C., Blasdell, New York, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed by the Secretary of Labor (the Secretary) pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). The Secretary seeks to impose a total civil penalty of $5,102.00 against the respondent, Root Neal & Company (Root Neal), for two alleged violations of Part 56 of the Secretary's mandatory safety standards. 30 C.F. R. Part 56. Root Neal is a contractor that had performed services at the West Bloomfield Mine in Geneva, New York. The West Bloomfield Mine is a surface mine owned and operated by Elam Sand and Gravel, Inc. (Elam).

Specifically, this matter involves an accident that occurred at Elam's West Bloomfield facility on May 9, 1998, when Michael Corbin, an Elam employee, was pinned under the bucket of a front-end loader when the raised, unsecured bucket suddenly descended on Corbin while he was under the vehicle. At the time of the accident, Corbin had been assigned by Elam to assist Root Neal employees in the installation and calibration of hydraulically operated scales on Elam's front-end loader vehicles.

As a result of the Mine Safety and Health Administration's (MSHA's) accident investigation, Root Neal was issued 104(d)(1) Citation No. 7714628 alleging an unwarrantable and significant and substantial (S&S) violation of the mandatory safety standard in section 56.14211(c), 30 C.F.R. §56.14211(c), that requires raised components of mobile equipment to be secured to prevent accidental lowering when persons are working on or around such equipment. The Secretary proposes a $5,000.00 civil penalty for this alleged violation. In addition, the Secretary seeks to impose a $102.00 civil penalty for 104(a) Citation No. 7714627 for Root Neal's alleged S&S violation of the provisions of section 56.18006, 30 C.F.R.

§ 56.18006, that require new employees to be trained in safety rules and safe work procedures.

The hearing in this proceeding was conducted on August 3 and August 4, 1999, in Rochester, New York.[1] The record was left open to allow Root Neal to depose John Patterson, an MSHA special investigator. Patterson's deposition was conducted on October 22, 1999, at which time the record was closed. The parties' post-hearing briefs have been considered in the disposition of this matter.

I. Findings of Fact

Elam Sand & Gravel, Inc., operates several quarries, and provides trucking services, in the Rochester, New York area. At its facilities, Elam produces sand, gravel, crushed stone and washed stone. The West Bloomfield mine is a single bench sand and gravel mine. At West Bloomfield, front-end loaders are used to load haulage trucks that transport extracted material to the primary crushing plant where the material is crushed, sized, and conveyed to stockpiles.

Front-end loader scales are mounted on loader buckets. They measure the rpm's of the loader motor and the hydraulic pump pressure of the bucket system to determine the amount of material loaded into haulage trucks throughout the day. (Tr. I, 54). The scales can be used to measure the amount of finished product loaded for sale, as well as the amount of tonnage hauled to the processing plant. In addition, the scales can be used to ensure that haulage trucks traveling over public roads are not overloaded.

Elam had three loader scales that had been purchased from a vendor of commercial scales, Evergreen Weigh (Evergreen), a Division of SI Technologies, Inc., headquartered in Seattle, Washington. The scales had been installed by a company named 5-Star, located in Rochester, New York. In the beginning of 1998, Elam decided to buy two additional scales for its other front-end loaders. However, Elam's President, David Spallina, was unhappy with the accuracy of the loader scales that had been installed by 5-Star. In late January or early February 1998, Spallina contacted Evergreen to purchase two new scales. During sales negotiations concerning pricing and installation, Evergreen offered to send a sales representative to Elam from out of town that would install the loader scales. However, Elam would have to incur the sales representative's travel and lodging costs. Approximately one week later, Evergreen called Spallina to inform him that Root Neal & Company, located in Buffalo, New York, could do the installation at Elam's West Bloomfield mine.

In March 1998, Spallina spoke to Richard T. Neal, Root Neal & Company's corporate Secretary, about installation of the scales. Richard Neal had been informed by Evergreen of Elam's desire to have the scales installed. Spallina told Neal the scales were to be installed on two 980G Caterpillar front-end loaders. Neal asked Spallina to fax a schematic of the

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[1] Transcript references refer to the two volume condensed version of the transcript. The August 3 and August 4, 1999, transcripts are referred to as volumes I and II, respectively.

Caterpillar Model 980G so that Neal could examine the loader's hydraulic system. A few days later, Spallina faxed the schematic to Neal that Spallina had obtained from Elam's Caterpillar dealer, Syracuse Supply.

Shortly after receiving the loader's hydraulic specifications, Neal contacted Spallina and agreed to install the scales. Spallina told Neal he wanted two scales installed with the possibility of needing two additional scales installed in the near future. Neal stated he would send two technicians in a service truck to Elam's West Bloomfield site. Neal agreed to install two scales on a Saturday from 6:00 a.m. until 5:00 p.m., so that Elam would not have to take its loaders out of service during the week.

The installation required welding electronic eye brackets to the outside of the boom. As the boom is raised, the electronic eyes send a message to initiate operation of the scale. During the sales negotiations, Neal told Spallina there was no welding machine on Root Neal's service truck. Spallina agreed to supply an Elam welding machine and an Elam employee to "stick weld" the brackets on the outside of the bucket arms.

Spallina testified, in addition to Elam providing a welder, the agreement included allowing Elam's mechanic to observe the Root Neal technicians' installation of the scales so that the Elam mechanic could learn how the scales worked in case of future problems. In this regard, Spallina testified he wanted his main mechanic, Harold Robinson, to observe how the hoses on the scale were connected during installation in case a hose broke or something went wrong with a scale. (Tr. I, 39, 45). Spallina also testified that the parties also agreed that an Elam loader operator would be present to learn how to calibrate the scales once they were installed.

Richard Neal's recollection of the agreement differs markedly from that of Spallina. Neal testified that his technicians "were to have an understanding of the set up and get involved with the scale set up, but it was important for Elam to provide a[n] operator to raise and lower the bucket and that they have a mechanic/welder, that was one or two people." (Tr. II, 164). Neal explained he required Elam's personnel to be present because Root Neal's technicians were not qualified welders or certified mechanics knowledgeable in hydraulics. (Tr. II, 165).

On April 15, 1998, Richard Neal faxed Dave Spallina a memorandum memorializing their agreement. (Resp. Ex. 1). The memorandum, signed by Richard Neal, noted that two Root Neal scale technicians were scheduled to install and calibrate loader scales on Saturday, April 25, 1998, for a fee of $900. In addition, Root Neal's technicians were to calibrate and check existing loader scales for a $300 service charge. (*Id.*) The April 15, 1998, memorandum was silent with regard to any actions that were required by Elam personnel.

On Saturday, April 25, 1998, from approximately 6:30 a.m. until 6:00 p.m., Root Neal's senior scale technician Francis (Frank) Pluta, and his assistant, John Wall, installed and calibrated two new scales, and calibrated two existing scales, on loaders at Elam's West Bloomfield mine. As agreed, Elam mechanic Harold Robinson was present during the installation. Robinson is a certified mechanic qualified to work on the hydraulic systems of the

Caterpillar machine. Wall testified that Robinson directed the installation work. Pluta also testified all work done on the hydraulic system was performed by Robinson.

Contrary to the testimony of Wall and Pluta, Spallina testified Robinson only was there to observe the installation and to perform the welding. Elam also provided a loader operator, John Collet, to operate the machine. Collet also was there to observe how the scales were calibrated. (Tr. I, 37, 39). Spallina explained the loader operator has to know how to calibrate the bucket at different speed rates in order to obtain accurate weight readings. (Tr. I, 45).

Despite Wall and Pluta's testimony that the hydraulic installation was performed by Robinson, on April 25, 1998, Pluta completed a hand-written invoice, numbered 17609, reflecting "Install 2 tuffer payloader scales and isp and cal 2 others. 4 total. All adj cal and tested O.K. Per quote price $1200." (Rep. Ex. 11). The April 25, 1998, scale service work was followed by a formal invoice, dated April 30, 1998, itemizing the fees for work performed on April 25, 1998, as a $900 "scale service" fee for "installation and calibration," and a $300 "scale service" fee for calibration of existing scales. (Resp. Ex.10). Thus, the invoices reflect a service charge of $900 for installed scales, and only a $300 service fee for previously installed scales that were calibrated. Consistent with Root Neal's April 15, 1998, memorandum of understanding, Root Neal's invoices do not reflect that Root Neal played a limited role in the installation process, or, that Elam was otherwise responsible for the installation process.

After the April 25, 1998, installation, Spallina purchased two more scales from Evergreen. Spallina arranged for Evergreen to ship the scales to Root Neal. Richard Neal and Spallina again agreed that Root Neal would install and calibrate the two scales on a Saturday for a fee of $900. Spallina also requested Root Neal to recalibrate the scales they had been installed on April 25, 1998, because they were not performing properly. Spallina testified that, prior to the second installation by Root Neal, he did not discuss with Richard Neal which Elam employees would be present at the second installation. (Tr. I, 50).

On Saturday, May 9, 1998, at approximately 7:30 a.m., Pluta and Wall arrived at Elam's West Bloomfield mine to install two additional scales. The scales were to be installed on Caterpillar Model 966F and Caterpillar Model 980G loaders. Once again, senior scale technician Pluta, who had worked for Root Neal for 18 years, was in charge. Wall again served as Pluta's assistant. Spallina introduced Pluta and Wall to Alan (Jody) Randolph, Elam's superintendent. Randolph assigned Michael Corbin to assist Pluta and Wall. Corbin had worked for Elam since March 1994 as a welder/fabricator, a plant operator, and a loader operator. Corbin was not a mechanic, nor did he have any experience with respect to hydraulic systems. (Tr. I, 205). Pluta and Wall told Corbin they were expecting Harold Robinson, and that they were disappointed that Robinson was not there to help them. (Tr. I, 186, 205).

The first scale was to be installed on the Caterpillar Model 966F front-end loader. The Caterpillar 966F has a five-cubic yard bucket that weighs more than one ton when empty. (Tr. I, 55, 159). The loader's motor is in the back, and there is an operator's cab in the center

of the machine. There are two arms supported by hydraulic pumps that raise the bucket from behind.

Installation of the first loader scale began at the mine's maintenance shop. At the April 25, 1998, scale installation, Pluta and Wall used tools that were furnished by Robinson. Since Robinson was not present on May 9, 1998, Pluta asked Corbin to obtain the necessary tools.

Corbin was going to use a welding machine that was located in the shop. Consequently, Corbin backed the 966F Caterpillar into the shop. However, the bucket could not be raised in the shop. At Pluta's direction, Corbin pulled the loader forward so that the bucket was positioned outside of the shop on the ground. As Corbin prepared the welder for use, Pluta, who was not a qualified loader operator, took the controls of the loader. Pluta raised and lowered the bucket while Wall determined the appropriate location for Corbin to weld the brackets to the bucket's arms.

Corbin, following Pluta's directions, spot weldeded the brackets. As Corbin was welding, Randolph came to the shop and asked Pluta to check the scales that were installed on April 25, 1998, that were on loaders that were parked outside the shop. When Pluta exited the cab to leave the shop, he left the loader bucket ". . . about three-quarters of the way in the air," without securing or blocking the loader against accidental lowering. (Tr. II, 139, 224-25). Pluta stated it was common sense that working under an unsecured elevated bucket was a dangerous condition. (Tr. II, 140-41).

When Pluta left the shop, he did not direct the work to be discontinued in his absence. Thus, Corbin was left to work under the direction of Wall. Wall began to read the scale installation instruction pamphlet. While reading the instructions, Wall instructed Corbin to drill a hole in the floor of the cab so that wires could be run to the scale. Wall then told Corbin to "fish" a red wire into the cab. Wall next instructed Corbin to go underneath the loader to install the scale hoses that would connect the scale in line with the hydraulic system. (Tr. I, 193-96). From a kneeling position between the right front and rear tires, Wall pointed to hoses and told Corbin, "we need some wrenches to take them (sic) lines off." (Tr. I, 194). At that time, the bucket continued to be raised and unsecured in the air.

Corbin crawled out from under the loader and went to his truck to get the necessary wrenches. Corbin returned and was told by Wall to go back underneath the loader. Wall gave Corbin an empty coffee can, explaining to Corbin "You're going to get a little bit of oil. Instead of making a mess on the floor, we'll put it in the can." (Tr. I, 196). Wall, lying down behind the front tire, with his head facing toward the bucket, pointed to a hose line and told Corbin, "Okay, I want you to take that line off. We got to put this little block on." (Tr. I, 197). The "block" contained a fitting that was designed to connect the scale to the hydraulic line.

Corbin testified Wall appeared confused and instructed Corbin to tighten the hose and disconnect an adjacent hose. Corbin began loosening the second hose at which time

Wall changed his mind and instructed Corbin, "Okay take the first one back off." (Tr. I, 198). Unbeknownst to Corbin, that hose was the loader's hydraulic line that was used to support the bucket. The hose was connected with four bolts. Corbin removed the first bolt. As he was removing the second bolt, the hose suddenly "blew" spilling warm hydraulic oil in Corbin's eyes and mouth, and on his face. Temporarily blinded by the oil, Corbin tried to crawl out from underneath the loader. Corbin crawled towards the light at the front of the loader. As he did, he was struck by, and pinned under, the descending 3,000 pound bucket.

Corbin's head and arms were pinned under the bucket. He was ultimately rescued by the fire department. Fortunately, Corbin was not crushed by the bucket because of an indentation in the ground where he fell, and because there was an open space under the bucket in an area between two steel skid plates that were welded to the bottom of the bucket. Corbin was briefly hospitalized and he has received chiropractic treatment for an arm injury.

MSHA accident investigators determined the primary cause of the accident was the failure to support the raised bucket from movement, or, in the alternative, the failure to lower the bucket to the ground. The investigators also concluded a contributing factor was Corbin's lack of training in the task he was performing. As a result of MSHA's investigation, on May 20, 1998, 104(d)(1) Citation No. 7714628 was issued to Root Neal citing an alleged S&S violation of the provisions of section 56.14211(c). MSHA concluded the violation was attributable to Root Neal's unwarrantable failure. Section 56.14211(c) provides:

> A raised component must be secured to prevent accidental lowering when persons are working on or around mobile equipment and are exposed to the hazard of accidental lowering of the component.

The accident investigation also resulted in the May 20, 1998, issuance of 104(a) Citation No. 7714627 citing an alleged S&S violation of the mandatory safety standard in section 56.18006. This mandatory standard requires new employees to "be indoctrinated in safety rules and safe work procedures."

II. **Further Findings and Conclusions**

A. Jurisdiction

Section 3(d) of the 1977 Mine Act expanded the definition of "operator" contained in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977), to include "any independent contractor performing services . . . at such mine." However, Root Neal asserts that, despite its contractor status and its performance of services at Elam's mine, it should not be subject to Mine Act jurisdiction because it did not have "substantial participation" in the operation of the mine as evidenced by its short term presence on mine property. Thus, Root Neal relies on the Fourth Circuit Court of Appeals decision in *Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (1985), wherein the court concluded a power company that installed, maintained and read an electric meter monthly at a substation, that was separated from the rest of mine property by a chain link fence, was not an operator

within the meaning of section 3(d) of the Mine Act. In addition, Root Neal seeks shelter in the Third Circuit Court of Appeals holding in *National Indus. Sand Ass'n v. Marshall*, 601 F.2d 689, 701 (1979) in which the court stated "there may be a point . . . at which an independent contractor's contact with a mine is so infrequent or *de minimis* that it would be difficult to conclude that services were being performed."

The Commission has addressed the narrower jurisdictional approaches discussed in *Old Dominion* and *National Industrial Sand*, noting that the 1977 Mine Act expressly expanded its statutory jurisdiction to include "any independent contractor performing services" at a mine. *See e.g., Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1357 (September 1991). The Commission established a two pronged-test for determining whether an independent contractor shall be considered to be an "operator" under section 3(d) in its *Otis Elevator Company* cases. 11 FMSHRC 1896 (October 1989) ("*Otis I*") and 11 FMSHRC 1918 (October 1989) ("*Otis II*"), *aff'd on other grounds*, 921 F.2d 1285 (D.C. Cir. 1990).

First, "the independent contractor's proximity to the extraction process" and whether its work is "sufficiently related" to that process are examined. *Otis I, 11 FMSHRC* at 1902. The Commission has determined a contractor's activities are sufficiently related to the extraction process when its employees are exposed to mining hazards and they have "a direct effect on the safety of others . . . ." *Id.* Second, the Commission examines "the extent of [the contractor's] presence at the mine." *Id.* The Commission has articulated that the essence of this test is whether the contractor's "contacts with the . . . mine were not so rare, infrequent and attenuated as to bring [the] case within the holding of *Old Dominion* . . . ." *Otis II,* 11 FMSHRC at 1922-23; *see also Joy Technologies Inc.*, 99 F.3d 991, 999 (10th Cir. 1996) (expressly rejecting the *Old Dominion* approach and adopting the broad jurisdictional reach in *Otis Elevator*).

Applying the Commission's two-pronged test set forth in its *Otis Elevator* cases, it is clear that the servicing of heavy mine equipment, such as front-end loaders, is "sufficiently related," if not indispensable, to the extraction process. Moreover, the fact that Root Neal's activities had "a direct effect on the safety of others" is self evident in this case. Finally, Root Neal's limited presence at Elam's West Bloomfield mine site on only two occasions on April 25 and May 9, 1998, was a reflection of its unsatisfactory performance, rather than the *de minimis* nature of its services. Although Root Neal purportedly had installed a similar loader scale on only one previous occasion, it was representing itself as a provider of scale service to all mine operators operating front-end loaders throughout the mining industry. Thus, it cannot be said that its services were so attenuated or otherwise far removed from the mining industry to warrant an exemption from Mine Act jurisdiction. Accordingly, by virtue of its independent contractor scale service activities, Root Neal is an "operator" as contemplated by section 3(d) of the Act, and, as such, is subject to Mine Act jurisdiction.[2]

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[2] Section 4 of the Mine Act provides:

> Each coal or other mine, the product of which enter commerce, . . . **and each operator of such mine**, and every miner in such mine shall be subject to the provisions of this Act. 30 U.S.C. § 803

B. 104(d)(1) Citation No. 7714628

i. Fact of Occurrence of the Violation

As noted above, 104(d)(1) Citation No. 7714628 alleges an unwarrantable and S&S violation of the mandatory safety standard in section 56.14211(c) that requires raised components of mobile equipment to be secured from accidental lowering when persons are working on or around such equipment. Root Neal concedes "there can be little doubt that [the cited standard requires] a bucket on a front-end loader should be blocked or lowered to prevent an accident when employees are working under the bucket." (Root Neal post-hrg. br. at 18). However, Root Neal asserts, at the time of the accident, Wall and Corbin were under the direct supervision and control of Elam's superintendent Randolph, and, that it was Randolph, rather than Pluta, who was supervising the installation of the scale. Accordingly, Root Neal argues it should not be held accountable for the obvious violation of section 56.14211(c).

As a threshold matter, the evidence fails to support Root Neal's assertion that it was merely responsible for calibrating, rather than installing, the scales on Elam's Caterpillar loaders. In the first instance, Evergreen referred Spallina to Root Neal as a contractor that could perform the installation service. Root Neal's assertion that it did not contract to provide installation service is belied by its invoices, as well as its pricing structure. Root Neal's invoices reflect services for both installation and calibration. In addition, the $900 scale service fee for the two scales installed and calibrated on April 25, 1998, was three times the $300 scale service fee for the two existing scales that were calibrated but not installed on April 25, 1998. Thus, it is apparent that the $600 difference in service fee reflects the additional services rendered with respect to installation. Consequently, Root Neal's assertion that it was not responsible for installing the scales is not supported by the evidence and must be rejected.

Although Elam agreed to furnish an employee to assist Pluta and Wall in the installation of the scales, the installation was performed under Pluta's supervision and control. In this regard, Pluta testified that, before leaving the maintenance shop area, he instructed Wall and Corbin not to do any work under the loader while the bucket was raised. In fact, Pluta's testimony demonstrates that he was in charge of Wall and Corbin:

Pluta : . . . . I let the guys know that there was to be no work done underneath the bucket, that I did say when I left, and I asked them if they were comfortable working together while I had to go work on the other two machines.

Q: You told the guys not to do any work under the bucket?

Pluta: Yes, common sense tells you not to do anything under something that is suspended in the air.

(emphasis added).

Q: What did you say to them?

Pluta: "Don't work under the bucket until it is down."

Q: Until it is down?

Pluta: Yes, and he - - they agreed to work together and I left to go work with Jody [Randolph].

Q: When you say you told "them," you mean John Wall and Michael Corbin?

Pluta: Yes.

(Tr. II, 140).

The Secretary may cite both an operator and its independent contractor for violations of mandatory safety standards committed by the independent contractor. *Consolidation Coal Company*, 11 FMSHRC 1439 (August 1989); *Bulk Transportation Services, Inc., supra*. In this instance, Elam was cited for violations related to Corbin's accident and elected not to contest the citations. The fact that Elam's superintendent Randolph may also have been responsible for ensuring that the raised bucket was blocked or lowered, does not preclude the Secretary's action in this matter against Root Neal based on Pluta's failure to prevent Corbin's exposure to the unsecured bucket. Thus, the Secretary has demonstrated that Root Neal is liable for the cited section 56.14211(c) in 104(d)(1) Citation No. 7714628.

ii. Significant and Substantial

A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *United States Steel Mining, Inc.*, 7 FMSHRC 1125, 1129, (August 1985), the Commission explained its *Mathies* criteria as follows:

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

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

In this case, the significant and substantial nature of the violation involving the failure to secure the 3000 pound loader bucket when persons are working underneath the loader is self evident. This violation caused the hazard that resulted in Corbin's serious accident and injury. Accordingly, the violation was properly designated as significant and substantial.

iii. Unwarrantable Failure

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

A fundamental issue is whether Root Neal's scale technicians had the requisite knowledge and expertise to safely install loader scales in line with a front-end loader's hydraulic system. Richard Neal testified that Root Neal is an industrial supply company with five major divisions. Its scale sales and service division stocks and distributes analytical and accounting scales, truck scales, and specialty type scales. (Tr. II, 158). When asked how much experience Root Neal had in servicing front-end loader scales, Neal replied, "it's something we touched upon . . ." (Tr. II 159).

Senior scale technician Francis Pluta, has been employed by Root Neal since 1981. Pluta testified his duties consist of :

> Going out and setting up and calibrating various types of scales. Basically, the senior position means I've been there longer . . . . [I work on] various kinds [of scales], most often platform scales, truck scales, small analytical scales with different parameters have to be set up, calibrated and sent out to the customer or the customer just starts using it from that point.

(Tr. II, 91).

Pluta testified, that during his 18 year tenure with Root Neal, he had only been involved in the "setting up and calibrating" of one similar front-end loader scale that had occurred within one year of the Elam installations. (Tr. II, 97, 122). With respect to his assistant John Wall's expertise, Pluta testified, Wall "was just a set of hands to hold a wrench, to hold a tool, to read a paragraph in a manual." (Tr. II, 104). Thus, it is apparent that Root Neal's scale technicians lacked the background and expertise to install scales that required modification of the hydraulic systems on heavy mining equipment. Consequently, Richard Neal's acceptance of Spallina's request to provide scale service for Elam's front-end loaders, a job that Root Neal was not qualified to perform safely, constituted unjustifiable conduct evidencing an unwarrantable failure.

Notwithstanding the fact that the acceptance of the Elam job was unwarrantable conduct, the high negligence demonstrated by Pluta and Wall at the job site is imputable to Root Neal and also provides a basis for an unwarrantable failure finding. Pluta, as senior scale technician, was in charge of the Elam job. Pluta testified there are several hoses connected to the hydraulic lifting cylinders on the Caterpillar loader. Removal of the pressure line would cause the bucket to descend. Pluta stated that neither he nor Wall knew which hose was the pressure line. Pluta and Wall also conceded Corbin also had no knowledge of hydraulic systems. Pluta was asked, if he, Wall and Corbin didn't know about hydraulics, who knew which line was the pressure hose? Pluta responded, "Nobody knew." (Tr. II, 152-53). Attempting to modify the hydraulic system on a hazardous piece of heavy mining equipment without the requisite knowledge of how such a modification should be performed is the essence of an unwarrantable failure.

In addition, Pluta left Wall in charge immediately before the accident when Pluta left the maintenance shop area with Randolph to calibrate other scales. Pluta knew Wall was not qualified to proceed with the installation process, yet he asked Corbin and Wall if they felt comfortable working together in his absence. After Pluta left the maintenance shop area with the front-end loader bucket suspended in the air, Wall directed Corbin to remove the pressure hose that resulted in Corbin's accident. Pluta's decision to leave Wall in charge, and Wall's decision to attempt to continue the installation process when he was not qualified to do so, manifest a high degree of negligence on the part of each of these individuals.

The negligence of management personnel is imputable to an operator for unwarrantable failure and civil penalty assessment purposes. Thus, Pluta's negligence is imputable to Root Neal. While the negligence of rank-and-file employees is ordinarily not imputable to

an operator, an employee's negligence is imputable if there was a lack of supervision and training. *Fort Scott Fertilizer*, 17 FMSHRC 1112, 1116 (July 1995); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 261, *aff'd on other grounds*, 870 F.2d 711 (D.C. Cir. 1988); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982). It is obvious that Wall lacked adequate supervision and training. Accordingly, Wall's high degree of negligence also is imputable to Root Neal.

In short, the evidence of record amply supports the Secretary's unwarrantable failure charge. Accordingly, 104(d)(1) Citation No. 7714628 shall be affirmed. Root Neal is a moderate size company with little, if any, previous exposure to the mining industry and it has no history of previous mine safety violations. Given the very high degree of negligence and the serious gravity associated with the cited violation of section 56.14211(c), the $5,000 civil penalty initially proposed by the Secretary for 104(d)(1) Citation No. 7714628 shall be assessed.

C. 104(a) Citation No. 7714627

i. Fact of Occurrence of the Violation

104(a) Citation No. 7714627, citing a violation of section 56.18006, states:

> An employee was not indoctrinated in safety rules and safe work procedures as evidenced on May 9, 1998, when he was seriously injured by a descending loader bucket. The employee had removed a hydraulic line supporting the raised bucket without first either blocking the bucket against movement or lowering the bucket to the ground. The employee was not a mechanic and this was the first time he aided in installing a bucket scale which required modification to the hydraulic system.

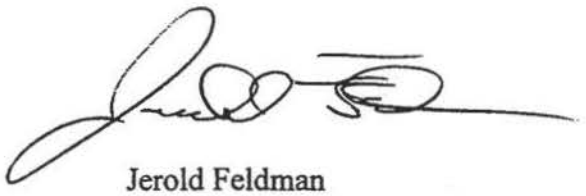
Section 56.18006 provides "new employees shall be indoctrinated in safety rules and safe work procedures."

Ordinarily, I would be reluctant to impose liability on an independent contractor for the lack of training of an employee of the operator. However, in this instance Root Neal preferred the assistance of mechanic Harold Robinson rather than Michael Corbin because it knew Corbin was a laborer with no mechanical expertise. Thus, Wall's directive that Corbin remove the hydraulic pressure line, a task Pluta and Wall knew, or should have known, Corbin was not qualified to do, constitutes a violation of section 56.18006. Given the consequences that followed, it is apparent that the violation was properly characterized as significant and substantial. The high degree of negligence and serious gravity associated with this violation clearly warrants the relatively small $102.00 civil penalty the Secretary seeks to impose.

ORDER

In view of the above, 104(d)(1) Citation No. 7714628, and 104(a) Citation No. 7714627, **ARE AFFIRMED**.

IT IS ORDERED that Root Neal & Company **SHALL PAY** a total civil penalty of $5,102.00 in satisfaction of the subject citations. Payment shall be made within 40 days of the date of this decision. Upon timely payment of the $5,102.00 civil penalty, Docket No. YORK 99-24-M **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

Distribution:

James A. Magenheimer, Esq., Office of the Solicitor, U.S. Department of Labor, 201 Varick Street, Room 707, New York, NY 10014 (Certified Mail)

Robert G. Walsh, Esq., Walsh, Fleming & Chiacchia, P.C., 3819 South Park Avenue, Box 1909, Blasdell, New York, 14219-0109 (Certified Mail)

/mh

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

January 27, 2000

SECRETARY OF LABOR, MSHA on behalf of LEVI BUSSANICH, Applicant	:	TEMPORARY REINSTATEMENT PROCEEDING
v.	:	Docket No. WEST 2000-99-D
CENTRALIA MINING COMPANY, Respondent	:	Centralia Mine

DECISION AND ORDER DENYING TEMPORARY REINSTATEMENT

Appearances: James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Applicant;
Timothy M. Biddle, Esq., Crowell & Moring, Washington, D.C., for Respondent.

Before: Judge Manning

This case is before me on an application for temporary reinstatement brought by the Secretary of Labor on behalf of Levi Bussanich against Centralia Mining Company ("Centralia") under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2) (the "Mine Act"). The application was filed on or about December 30, 1999. This case was assigned to me on January 6, 2000, and Centralia requested a hearing within ten days of receipt of the Secretary's application. The application alleges that Centralia's "decision to dismiss Mr. Bussanich was premised on his exercise of a protected activity as described in section 105(c)(1) of the Mine Act" and that Mr. Bussanich's discrimination complaint is not frivolous. (Application at 2). A hearing in this temporary reinstatement proceeding was held in Tacoma, Washington, on January 21, 2000. For the reasons set forth below, I find that the Secretary failed to establish that the discrimination complaint was not frivolously brought.

I. BACKGROUND

The issue in a temporary reinstatement proceeding is very narrow. This case presents a rather unique set of circumstances because Centralia alleges that it did not fire Mr. Bussanich but that he quit his job. For this reason, a more detailed discussion of the factual background is necessary in this case than is typical in a temporary reinstatement case.

Centralia operates a surface coal mine in Lewis County, Washington. Mr. Bussanich was employed at the Centralia Mine for 14 years and worked as a welder for the previous 5 years. On October 10, 1999, Mr. Bussanich sustained a back injury at work and was placed on workers' compensation ("L & I leave"). On November 4, 1999, Rachel Woolley, Human Resources Administrator with Centralia, sent a memorandum to Mr. Bussanich at his home seeking information to determine if his leave is protected under the Federal Family and Medical Leave Act ("FMLA"). (Tr. 88-89; Ex R-1). Attached to the memo was a U.S. Department of Labor form entitled "Certification of Health Care Provider." When he did not respond to her memo, she sent a letter reminding Mr. Bussanich to have his attending physician complete and return the form. (Tr. 90-91; Ex. R-2). The form was never returned by Mr. Bussanich.

On November 30, 1999, Ms. Woolley received a phone call at her office from a man who identified himself as Levi Bussanich. (Tr. 91-92, 95). The conversation lasted only about a minute and ended at about 11:29 a.m. Within minutes of hanging up, Ms. Woolley recorded the conversation as follows:

Levi:	I have a few issues, I am not on FMLA, I am on L & I.
Rachel:	I said actually they run at the same time so you are on FMLA.
Levi:	It doesn't matter, I got another job, so I quit, I'll be out to pick up my tools, all I need is my 401(k) money.
Rachel:	Actually, you will need to talk to Sandy Wallace about that
Levi:	O.K. fine
Rachel:	What about a final check
Levi:	I'll take care of that, I got another job so that's it, I am sick of this crap
Rachel:	O.K. that's fine

(Exs. R-3, R-4; Tr. 96-98).

On December 3, 1999, Sandy Wallace, Senior Benefits Specialist for Centralia, sent Mr. Bussanich a letter, which noted that he quit on November 30 and which asked Mr. Bussanich to make arrangements to retrieve his tools from the mine and to schedule an exit interview to go over his retirement benefits, 401(k), and other issues. (Ex. R-6A; Tr. 159). She enclosed two checks with the letter: his final paycheck and a check for $1,740.62 representing his accrued vacation pay. (Ex. R-6C). The checks were deposited by Mr. Bussanich on or about December 9, 1999. (Tr. 58, 183; Ex. R-10).

On December 7, 1999, Mr. Bussanich sent a letter to Ms. Wallace stating that he is under a doctor's care for an on-the-job injury and that he did not quit. (Ex. G-1). The letter states:

> I have not spoken directly to Rachel Woolley in many months. I did not call her on November 30, or any other time to

> say that I was quitting. I did not tell anyone else at CMC that I was quitting. I did not quit. I am not quitting.

Id. Marjorie Taylor, Senior Human Resources Manager, sent a letter to Bussanich in response to his letter stating that Centralia considered him to have quit on November 30. (Tr. 28).

On December 23, 1999, Ms. Wallace conducted an exit interview with Mr. Bussanich by telephone. (Tr. 44-45, 166). Mr. Bussanich expressed interest in getting the money from his 401(k) account and pension plan quickly. (Tr. 168-71; Ex. R-8). He elected to take the entire proceeds in cash and did not roll it over into an IRA. Mr. Bussanich testified that he needed the 401(k) money to support himself and pay off some of his debts, and that he could not take part of it in cash and roll over the rest. (Tr. 45-47, 54-55, 68-69, 202). On or about December 28, 1999, Mr. Bussanich received a check for $61,792, which is the net proceeds from his 401(k) account. (Exs. G-4, R-8; Tr. 172).

On December 18, 1999, Mr. Bussanich filed a discrimination complaint with MSHA. The complaint recites the letter he received from Ms. Wallace, his response to the letter, and Ms. Taylor's reply. The complaint then states:

> I was receiving labor and industries pay, I have not been released by my doctor to return to work, why would I quit.
>
> I feel this is another attempt by the company to terminate my employment due to my earlier complaints due to safety at the mine.

MSHA Special Investigator William Denning was assigned to investigate this complaint. He interviewed Mr. Bussanich and Mr. John Gift, Jr., another welder at the Centralia Mine. (Tr. 82). This application for temporary reinstatement was filed before interviews could be arranged with Centralia management. (Tr. 149). As a consequence, no further interviews were conducted, pending the results of this case.

After this case was filed, Centralia served a subpoena on U.S. West, the local telephone company, to determine where the phone call received by Ms. Woolley at about 11:29 a.m. on November 30 originated. The letter and memorandum that she sent to Mr. Bussanich in November concerning FMLA contained her private office phone number and she testified that the call came in on that line and not the general mine telephone number. (Tr. 50, 187). Based on information provided by U.S. West and GTE Northwest, it appears that the call originated from a phone registered in the name of Kim Whisnant, who lives in Portland, Oregon. (Exs. R-11, R-12; Tr. 191-92, 197).

Mr. Bussanich owns and operates several businesses outside of his employment with Centralia. (Tr. 66-67). One of these businesses is an independent video store in Olympia,

Washington. (Tr. 59). His business partner in that venture is Bradley Whisnant, the husband of Kim Whisnant. (Tr. 48, 60, 198, 211). Counsel for Centralia subpoenaed Mr. and Mrs. Whisnant to testify at the hearing in this case. Bradley Whisnant advised local counsel for Centralia, Mr. Paul Buchanan, that he would appear at the hearing. (Tr. 216-17; Ex. R-15). Bradley Whisnant also told Mr. Buchanan that his home phone was registered in Kim's name but that she did not have any relationship with Centralia or Mr. Bussanich. (Tr. 211). Mr. and Mrs. Whisnant failed to appear at the hearing.[1]

At the hearing, Mr. Bussanich could not remember where he was or what he was doing on November 30, 1999, but he denied making a call to Rachel Woolley and denied that he quit his job. (Tr. 23, 25-26, 40, 54, 224). Mr. Bussanich testified that he owes Mr. Whisnant $75,000 because, under the terms of their business agreement, he is obligated to buy out Mr. Whisnant's share of the business. (Tr. 49, 60-61). Bussanich testified that on or about January 18, 2000, after the subpoena was served on Mrs. Whisnant, Bradley Whisnant called him because he was upset about the subpoena. (Tr. 48, 51, 61, 63). At that time, Whisnant told Bussanich that he called the mine sometime in November to inquire about Bussanich's employment status. (Tr. 50-51, 63-64). Bussanich testified that Whisnant often called him at the mine. Whisnant also told Mr. Buchanan that he called the mine sometime in November. (Tr. 212, 221).

Bussanich testified that in November 1999 Whisnant was very concerned that Bussanich would not have the money to pay him the $75,000 that he was owed. (Tr. 52). Bussanich and Whisnant were at the video store in November when Bussanich threw the FMLA forms sent by Ms. Woolley into the trash. Bussanich was angry that she sent the forms and, after starting to fill them out, he threw them away. (Tr. 49, 56, 212). Apparently, Whisnant retrieved these papers from the trash. (Tr. 50, 213).

There is no dispute that Mr. Bussanich engaged in protected activity on many occasions. He has three outstanding discrimination complaints pending before MSHA in addition to the complaint discussed above. His first discrimination complaint, filed on February 11, 1997, alleges that, after he raised safety concerns with an MSHA inspector, he was not permitted to leave the welding shop while at work. Apparently, MSHA has not completed its investigation of this complaint, despite the fact that almost three years have passed, and section 105(c)(3) requires the Secretary to notify the complainant of the results of her investigation within 90 days of receipt of the complaint.

---

[1] At the hearing, Centralia moved to have the Commission enforce the subpoenas against Mr. and Mrs. Whisnant. (Tr. 229-31). The Secretary opposes the motion. Section 113(e) of the Mine Act and 29 C.F.R. § 2700.60(c) provide that a subpoena of a Commission judge may be enforced in the U.S. District Court. Temporary reinstatement proceedings are heard on an expedited basis and the issue in each case is very narrow. Enforcing the subpoena would require an additional hearing to take their testimony and would delay my resolution of this proceeding. Because I am able to resolve the issues in this case without their testimony, I deny the motion.

His second discrimination complaint, filed on February 19, 1999, alleges that, when he was released by his doctor to return to work after a non-work related injury, the company would not permit him to work because management was "not happy with the doctor's note." In the complaint, he alleges that other employees were allowed to return to work with similar doctors' releases and that he was treated differently because of the complaint he filed on February 11, 1997. He was eventually allowed to return to work. This complaint is still under investigation by the Secretary.

His third discrimination complaint, filed on August 26, 1999, alleges that he was forced to allow a sheriff's deputy to search his truck at the employee parking lot because someone reported that he was seen putting a stolen CB radio in his truck. Apparently, someone called the mine and reported that he had a company CB in his truck. (Tr. 134). The call may have been made from someone at the mine. (Tr. 225). After the call was received, mine management called the sheriff's office and Bussanich's truck was searched in his presence. Although he had a new CB radio in his truck, he had purchased it and it was not stolen. The complaint alleges the search was made "in retaliation [for] the (2) current complaints I have against the company with MSHA." This complaint is still under investigation by the Secretary.

In addition to these pending discrimination complaints, Mr. Bussanich made other complaints to MSHA inspectors and mine management about safety conditions at the mine. (Tr. 34-39). In November 1999, while he was on L & I leave, Bussanich received a phone call from John Gift, Jr., another welder at the mine. (Tr. 56, 72). Mr. Gift had just been fired by Centralia and had filed a grievance under the collective bargaining agreement. Mr. Bussanich advised Mr. Gift to file a discrimination complaint with MSHA. (Tr. 56, 72). Subsequently, the parties settled Mr. Gift's grievance; Mr. Gift was reinstated to his job; and the section 105(c) complaint was withdrawn. (Tr. 71, 73). Centralia management was aware that Mr. Bussanich advised Gift to file a complaint with MSHA. (Tr. 73). Mr. Bussanich testified that he filed a grievance for his own alleged termination but his union representative advised him that he had missed the deadline for filing a valid grievance. (Tr. 28-29).

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS

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

"The scope of a temporary reinstatement proceeding is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Resources Inc. v FMSHRC*, 920 F.2d 738 (11th Cir. 1990). It is "not the judge's duty ... to resolve ... conflict[s] in testimony at this preliminary stage of proceedings." *Secretary of Labor on behalf of Albu v. Chicopee Coal Co., Inc.*, 21 FMSHRC 717, 719 (July 1999). At a temporary reinstatement hearing the judge must determine "whether the evidence mustered" by the miner to date establishes that his complaint is nonfrivolous, "not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources*, 920 F.2d at 747.

Courts and the Commission and have equated the "not frivolously brought" standard contained in section 105(c)(2) of the Mine Act with the "reasonable cause to believe standard" at issue in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). It has also been equated with "not insubstantial" and "not clearly without merit." *Jim Walter Resources*, 920 F.2d at 747. The legislative history of the Mine Act defines the "not frivolously brought standard" as whether a miner's complaint "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 624-25 (1978).

At the start of the hearing, the parties entered into a number of stipulations, including the following:

> For purposes of this temporary reinstatement proceeding, Centralia Mining Company, by counsel, hereby stipulates that Complainant Levi Bussanich has in the past engaged in protected activity under the Mine Safety Act insofar as he filed, prior to November 30, 1999, three section 105(c) complaints against Centralia Mining Company, beginning in January 1997. Mr. Bussanich also filed a complaint on December 18, 1999. These complaints ... all apparently remain under investigation by MSHA.
>
> Although Centralia Mining Company denies that it has taken any adverse action against Mr. Bussanich on account of these protected activities, or any other alleged protected activities, Centralia Mining Company stipulates that for purposes of this temporary [reinstatement] proceeding only, if there is a reasonable evidentiary basis that Centralia Mining Company has discharged Mr. Bussanich, then the allegation that Centralia Mining Company did so on account of Mr. Bussanich's protected activities is not frivolous. That, therefore ... is the sole issue for hearing, whether there is a colorable claim that Mr. Bussanich was discharged.

(Tr. 5-6).

Ms. Woolley testified that she is certain that it was Mr. Bussanich who called her on November 30, 1999, because she recognized his voice and he spoke knowingly about his employment situation, his 401(k) plan, and his tools. (Tr. 91-92, 95, 106). Immediately after she hung up, she discussed the call with Centralia's safety director, Ralph Sanich, and subsequently with Ms. Taylor. (Tr. 98, 102, 119, 180). Mr. Thomas Means, of the law firm of Crowell and Moring, was called by Mr. Sanich to seek his advice. (Tr. 102, 120, 138-39). Mr. Means was called on a speaker phone and Ms. Woolley was in the room during this conversation. Means asked whether the mine accepted oral resignations from employment. (Tr. 140-41). When Mr. Sanich replied in the affirmative, Mr. Means advised the company to treat Mr. Bussanich no differently than any other employee who resigns in such a manner. (Tr. 105, 110, 140-42, 153).

For purposes of this proceeding, I assume that Mr. Bussanich did *not* call Ms. Woolley to quit his job on November 30, 1999. I find, however, that the uncontroverted evidence establishes that Centralia management sincerely believed, and continues to believe, that Mr. Bussanich voluntarily quit his job on November 30, 1999. (Tr. 91-92, 122, 184). All of their actions from November 30 to the present are premised on that belief.[2]

Centralia did not fire Mr. Bussanich. Centralia separated him from his employment because it understood that he called the mine and quit his job. Given that Centralia management acted on the understanding that Mr. Bussanich quit his job, there is no colorable claim that he was discharged by Centralia for his protected activity. There is no evidence to support a theory that Centralia fired Mr. Bussanich, even accepting the Secretary's evidence. Consequently, there is no reasonable cause to believe that he was terminated from his employment as a result of his protected activity. The Secretary failed to show that the complaint is nonfrivolous.

In section 105(c) cases, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). Although, in this temporary reinstatement case, the Secretary need only show that the evidence mustered to date establishes that the complaint is nonfrivolous; she must present a colorable theory of the case. The discrimination complaint must "appear to have merit." There has been no showing that Mr. Bussanich's discrimination complaint of December 18, 1999, has any merit.

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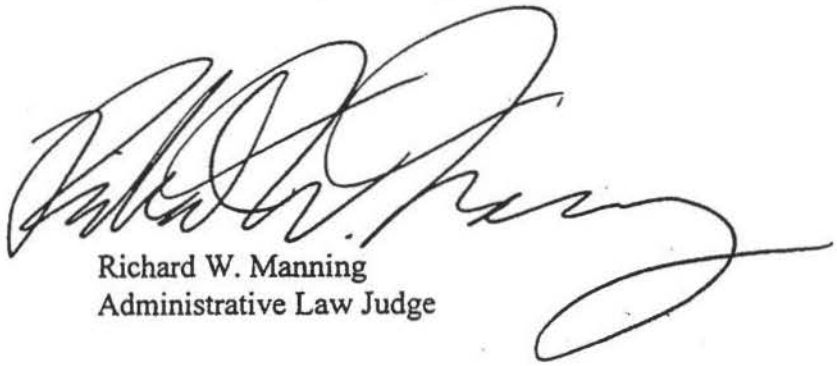
[2] Mr. Biddle expressed Centralia's theory as to why it believes that Mr. Bussanich quit his job. It alleges that he wanted to cash out his 401(k) plan so he could pay the debt he owed Mr. Whisnant and then he filed a discrimination complaint to get his job back. (Tr. 236-37). I make no findings on this allegation and my decision is not based on any consideration of the allegation. I mention the allegation merely to show what Centralia expressed at the hearing as a reason why it contested the application for temporary reinstatement in this case.

explaining that he did not actually quit his job. The theory would be that Centralia failed to reinstate him at that time because of his protected activity. The discrimination complaint does not contain such an allegation; the Secretary did not argue this point at the hearing; and the record contains no evidence to support it. The evidence of record establishes that Centralia treated Mr. Bussanich in the same manner as other employees who orally quit their jobs.
Mr. Sanich knew of no situations in which a miner quit his job and then was rehired because his resignation had been a mistake. (Tr. 127).

III. ORDER

For the reasons set forth above, the application for temporary reinstatement filed by the Secretary of Labor or behalf of Levi Bussanich against Centralia Mining Company under section under section 105(c)(2) of the Mine Act is **DENIED** and this proceeding is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

Distribution:

James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203-1954 (Facsimile Transmission and Certified Mail)

Timothy M. Biddle, Crowell & Moring, 1001 Pennsylvania Ave., NW Washington, DC 20004-2595 (Facsimile Transmission and Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 28, 2000

NOLICHUCKEY SAND COMPANY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	Docket No. SE 2000 62-RM
v.	:	Citation No. 7778464; 1/3/2000
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. SE 2000 63-RM
	:	Citation No. 7778465; 1/3/2000
Respondent	:	Docket No. SE 2000 64-RM
	:	Citation No. 7778466; 1/3/2000
	:	Bird's Bridge Mine
	:	Mine ID No. 40-03145

DECISION

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon Notices of Contest filed by Nolichuckey Sand Company, Inc. ("Nolichuckey") on January 4, 2000, challenging the issuance by the Secretary of Labor ("Secretary") of three section 104(b) withdrawal orders based on an alleged failure to abate previously issued citations alleging violations of 30 C.F.R. § 56.14109(a).[1] A Motion to Expedite accompanied the notices of contest.

On January 6, 2000, in a telephone conference call initiated by the undersigned with counsel for both parties, it was agreed by counsel that the parties would waive a right to an oral evidentiary hearing, and present the matter for decision based on a stipulated set at facts, and legal argument. On January 12, 2000, the parties filed points and authorities. On January 13, 2000, in a recorded telephone conference call pursuant to the parties' agreement, the parties presented oral arguments.

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[1]/ 30 C.F.R. § 56.14109(a) provides that "[u]nguarded conveyors next to the travelways shall be equipped with - (a) Emergency stop devices which are located so that a person falling on or against the conveyor can readily deactivate the conveyor motor; or (b) Railings which - (1) Are positioned to prevent persons from falling on or against the conveyor; . . . ."

On January 12, 2000, the parties filed the following joint stipulations regarding the relevant and materials facts in these cases as follows:

1. Nolichuckey Sand Co., Inc., (Nolichuckey) is the owner and operator of the Bird's Bridge Mine, MSHA Mine ID No 40-03145.
2. Nolichuckey and the Bird's Bridge Mine are subject to the provisions of the Federal Mine Safety and Health Act of 1977 and this court has jurisdiction over this proceeding.
3. The Secretary agrees to admit the attached notarized Affidavit of Nolichuckey President Thomas Bewley as proffer of testimony, but does not stipulate to the truth of the matters states therein.
4. During 1999 and currently, the Bird's Bridge mine employs four miners.
5. Annual production at this mine is approximately 150,000 tons of aggregate material.
6. Employees worked approximately 8,000 hours at this mine in 1999.
7. Mr. Elton Hobbs, the inspector who issued the subject citations and orders, is a duly authorized representative of the Secretary of Labor.
8. Copies of the relevant citations and orders previously filed with the Administrative law Judge are authentic copies and were properly served.
9. On January 28, 1999, MSHA Inspector Elton Hobbs issued six non-significant-and-substantial, low negligence citations to Nolichuckey for alleged violations of 30 C.F.R. § 56.14109(a) at its Pit No. 436, because of failure to install railings or emergency stop devices on the inside of the catwalks at six conveyors.
10. Nolichuckey timely contested the January 1999 citations and they were assigned to Dockets No. SE 99-101-RM, SE 99-102-RM, SE 99-103-RM, SE 99-104-RM, SE 99-105-RM and SE 99-106-RM.
11. A trial was conducted concerning the January 1999 citations and on June 30, 1999, Administrative Law Judge Weisberger issued a decision affirming the citations.
12. Nolichuckey timely appealed this decision and the Federal Mine Safety and Health Review Commission granted the Petition for Discretionary Review on July 30, 1999. The case has been fully briefed before the Commission and a decision is now pending.
13. MSHA has agreed to extend abatement on the Pit No. 436 conveyor citations throughout the trial before ALJ Weisberger, however, it set an abatement date of September 10, 1999 (subsequently extended until October 15, 1999).
14. On September 14, 1999, MSHA Inspector Hobbs issued Citations No. 7777974, 7777976 and 7777978 to Nolichuckey for alleged violations of 30 C.F.R. § 56.14109(a) at its Bird's Bridge Mine. All three citations were categorized as non-significant and substantial (gravity of unlikely to result in lost workdays/restricted duty) and moderate negligence.
15. The above-listed citations allege a failure to provide a mandatory railing or emergency stop device on the inside of the catwalks on three conveyors.

16. Citations No. 7777974, 7777976 and 7777978 were timely contested on September 22, 1999, by Nolichuckey and were assigned to Dockets No. SE 99-289-RM, SE 99-290-RM and SE 99-291-RM.
17. An initial abatement date of October 1, 1999, was designated for Citations No. 7777974, 7777976 and 777978.
18. According to the Affidavit of Thomas Bewley, Nolichuckey's Bird's Bridge mine has not been in production since November 14, 1999, and it is not scheduled to resume production until on or about February 15, 1999. Further, Mr. Bewley states that the cited conveyors are permanently locked out and are not operational. See *Bewley Affidavit at paragraph 2 and 4*. Nolichuckey informed the Secretary of this fact prior to December 31, 1999.
19. On December 31, 1999, MSHA refused to grant Nolichuckey's request for further extension of abatement on both the Bird's Bridge and Pit 436 citations, pending the final decision of the Commission in Dockets No. SE 99-102-RM through SE 99-106-RM.
20. Nolichuckey subsequently abated the alleged violations at is Pit 436 and those six citations have been terminated without any further enforcement action.
21. On January 4, 2000, MSHA Inspector Hobbs issued Orders No. 7778464, 7778465, and 7778466 (dated January 3, 2000) at Nolichuckey's Bird's Bridge mine, alleging a failure to abate Citations No. 7777974, 777976 and 7777978 under Section 104(b) of the Mine Act, 30 U.S.C. § 814(b).
22. Nolichuckey timely contested Orders No. 7778464, 7778465, and 7778466 on January 4, 2000, and requested expedited proceedings.
23. At this time, the Commission has not rendered its decision on the merits in *Nolichuckey Sand Co., Inc. v. Secretary of Labor*, SE 99-102-RM through SE 99-106-RM.
24. The actual mechanical installation of stop cords or hand railings is not at issued with respect to the time of abatement.

In addition, in a telephone conference call, on January 12, 2000, the parties agreed to the following stipulation: "Inspector Hobbs drafted the orders on January 3, 2000, and that he physically served the orders on Nolichuckey on January 4, 2000"

In contesting a section 104(b) order[2], the operator may challenge the reasonableness of

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[2]Section 104(b) of the Federal Mine Safety and Health Act of 1977 provides as follows:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the

(continued...)

time set for abatement, or the Secretary's failure to extend that time. (*Energy West Mining Company 18* FMSHRC 565, 568 (1996) *affirmed*, 111 F.3rd 900 (D.C. Cir. 1997); *Clinchfield Coal Company,* 11 FMSHRC 2120, 2128 (November 1989).

In evaluating whether the Secretary's failure to extend the time set for abatement was reasonable I am guided by the following language set forth by the Commission in *Energy West, supra*: ". . . in reviewing an operator's challenge to the Secretary's failure to extend an abatement time, the Commission considers whether the inspector `abused his discretion' issuing the order. The Commission has noted that `abuse of discretion' has been found when `there is no evidence to support the decision or if the decision based on an improper to understanding of the law'. *Utah Power and Light Co.,* 13 FMSHRC 1617, 1623 n.6 (October 1991), *Bothyo v. Moyer,* 772 F.2nd 353, 355 (7th Circuit 1985)." (18 FMSHRC at 569).

The underlying citations allege that Nolichuckey was not in compliance with 30 C.F.R. § 56.14109(a) which requires that unguarded conveyors next to travelways be equipped with either emergency stop devices or railings. Nolichuckey does not assert that by December 30, 1999, the date set for abatement in the last extension, it had provided the subject equipment with either stop devices or railings, that it was in the process of making such installations, or that it had encountered unanticipated difficulties in making such installations. It appears to be Nolichuckey's position that the equipment at issue does not come within the purview of Section 56.14109(a) and that accordingly compliance with the section is not required. Nolichuckey argues that since this issue is presently pending before the Commission in *Secretary v. Nolichuckey Sand Co. Inc.,* Docket No. SE 99-101-RM *et al,* it is unreasonable not to extend abatement until the Commission rules on this controlling issue.

In the absence of the binding authority I must conclude that there was no abuse of discretion on the Secretary's part to refuse to extend abatement pending a decision by the Commission where the operator has not taken any steps to comply with the standard that is the subject of the issued citations.

Nolichuckey argues further that the Secretary's representative abused his discretion in not extending the abatement time, since he failed to take into consideration the lack of risk for non-compliance based on the non-significant and substantial character of the citations at issue, and the fact that the Secretary in the past implicitly recognized the lack of risk by granting a number of extensions while the equipment was in operation, whereas at present the conveyors in issue have

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[2](...continued)
extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately caus all persons, expect those persons referred to in subsection (c), to be withdrawn from, and to be prohibited form entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

been locked and tagged and are not scheduled to be in operation until February 15, 2000.[3]

I find no merit to Nolichuckey's arguments since there is no evidence in the record that Nolichuckey is in compliance with Section 14109(a) *supra,* or that it has taken or intends to take any actions to comply with the cited standard, and hence to abate the violations. In the absence of any controlling authority I cannot find that failure to extend abatement when the equipment is not in operation constitutes an abuse of discretion. I note that *Secretary of Labor v. Noland Corporation* 15 FMSHRC 468, 477 (Judge Morris 1993), the only case wherein this issue was actually litigated, is contrary. However *Noland, supra* was decided by a Commission judge (since retired). Since this decision is not binding precedent, I choose not to follow it.

Lastly, *Nolichuckey* argues, in essence, that, due to the nature of its operation, were it to comply with section 14109(b) *supra*, and thus abate the violations at issue, it would be in violation of 30 C.F.R. § 56.14109(b)(3) which requires that unguarded conveyors be equipped with emergency stop devices or railings that ". . . are constructed and maintained so that they will not create a hazard". In essence, this argument is in reality based on "diminution of safety." It has been held by the Commission that "diminution of safety" is not available to an operator as a defense unless it had first filed a petition for modification, and the Secretary had granted the modification but nonetheless continued the enforcement proceedings. (*Sewell Coal Company*, 5 FMSHRC 2026, 2029 (December 1983). Accordingly, I find that the argument of diminution of safety is not relevant to the instant proceedings.

Therefore, for all the above reasons, I conclude that the Secretary was not unreasonable in deciding not to extend the time set for abatement beyond December 30.

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[3]In this connection, Nolichuckey argues that for the Secretary to refuse abatement now is unreasonable. Nolichuckey relies on the following language from the Commission's decision in *Secretary v. Nolichuckey Sand Co., Inc.,* 21 FMSHRC 1218, 1220 (November 30, 1999): "The Secretary's insistence at this particular time to require abatement makes little sense . . . ." This statement is clearly dicta as it was not necessary to the Commission's decision that the temporary reinstatement procedures in section 105(b)(2) of the Act do not include temporary relief from section 104(a) citations. Accordingly, the relied upon language form Nolichuckey is not binding precedent, and I choose not to follow it for the reasons set forth above.

ORDER

It is **ORDERED** that the notices of contest filed in these proceedings shall be dismissed. It is further **ORDERED** that these cases be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

Distribution:

Adele L. Abrams, Esq., Patton Boggs, LLP, 2550 M Street, N.W., Washington, D.C. 20037 (Certified Mail)

Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 28, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 98-37
Petitioner	:	A.C. No. 46-01968-04266
v.	:	
	:	Blacksville No. 2 Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Daniel M. Barish, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner; Elizabeth S. Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary) against Consolidation Coal Company (Consol). The petition sought to impose a civil penalty for Citation Nos. 3500519 and 4540528 issued at Consol's Blacksville No. 2 Mine. A decision approving partial settlement of this matter was issued on July 7, 1998, accepting Consol's agreement to pay a reduced civil penalty of $1,155.00 for Citation No. 3500519.

Remaining Citation No. 4540528, issued during the midnight shift on August 5, 1997, involves an alleged violation of the mandatory safety standard in section 72.630(d), 30 C.F.R. § 72.630(d), that provides the requirements for adequate ventilation control of drill dust. Section 72.630(d) provides:

> To adequately control dust from drilling rock, the air current shall be so directed that the dust is readily dispersed and carried away from the drill operator or any other miners in the area.

Resolution of Citation No. 4540528 was stayed pending a decision in *Hobet Mining, Inc.*, 20 FMSHRC 889 (August 1998) (ALJ), that addressed issues that are similar to this case. The *Hobet* case concerned the proper parameters for issuing citations, without air sampling, for alleged drill dust violations at a surface mine, and, whether such violations are presumptively significant and substantial (S&S) in nature. After the release of the *Hobet* decision, on May 4, 1999, the Secretary modified Citation No. 4540528 to delete the S&S designation from the cited section 72.630(d) violation.

The stay in the disposition of Citation No. 4540528 was lifted on June 11, 1999, shortly after the Secretary's modification action. The hearing in the Citation No. 4540528 matter was conducted in Morgantown, West Virginia, from September 1 through September 3, 1999. The parties' post-hearing proposed findings and conclusions have been considered.

I. Statement of the Case

It has long been recognized that underground coal drilling operations during the roof bolting process present significant respiratory hazards to roof bolt operators. (Gov. Ex. 9) However, it is also recognized that drilling is "one of the most prolific dust-producing operations." (*Id.*). The mandatory safety standard in section 72.630(a) three general types of dust control measures. These measures are: (1) dust collection, by vacuuming dust at the dust source; (2) water control, by circulating water through a hollow steel drill at the dust source; and (3) ventilation control, by directing air flow to disperse and carry dust away from the drill operator.[1]

Although all three measures of dust control are permissible, some methods of permissible dust control are superior to others. For example, dust collection, that removes dust by vacuum at the source, is a more effective method of dust control than ventilation that removes dust after it is released in the air. (Gov. Ex. 9). Regardless which approved method is used, in the final analysis, in order to satisfy the dust control provisions of section 72.630, the dust control method employed by the mine operator must be "effective in controlling dust." In other words, section 72.630 does not require an operator to use the most efficient method of dust control as long as the selected method is effective.

Respirable dust particles are very small particles that are not visible. (Tr. 1272). Therefore, observation of a dust cloud by an MSHA inspector, particularly at the site of a dust producing rock drilling activity, is not, alone, evidence of ineffective dust control measures.

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[1] Section 72.630(a). 30 C.F.R. § 72.630(a), provides:

> Dust resulting from drilling in rock shall be controlled by use of permissible dust collectors, or by water, or water with a wetting agent, or by ventilation, or by any other method approved by the Secretary that is as effective in controlling dust.

Rather, ineffective dust control measures must be evidenced by an operator's identifiable failure to follow the MSHA approved ventilation and dust control plan, or, an identifiable defect in the dust control equipment. Thus, in this case, in order to establish a section 72.630(d) ventilation dust control violation, the Secretary must identify a failure by Consol to follow MSHA's approved ventilation and dust control plan, such as Consol's use of an inadequate exhaust fan, and/or the existence of a ventilation control defect, such as defective ventilation tubing.

II. Findings of Fact

Since the early 1970's, ventilation control and scroll auger drill steels on roof bolting machines had been used at the Blacksville No. 2 Mine without incident. A scroll auger drill has a spiral drill design. As the drill penetrates the roof, larger rock particles are displaced onto the drill's spirals or ribs to allow the drilled material to escape from the hole to prevent the drill from plugging up. (Tr. 90). The particles displaced by the auger drill fall towards the ground. The lighter dust particles are pulled into the inby end of a ventilation tube located within 10 feet of the face by a section ventilation fan located at the opposite, outby end of the ventilation tube. Regardless of the length of the ventilation tube, the exhaust fan must remain at the outby end of the tube to ventilate the dust away from the working section. The degree of effectiveness of the ventilation is a function of the length of the ventilation tubing. In other words, as the section face advances, even though an operator has "done everything" it can, there is a negative correlation between the ventilation tube length and the intensity of the vacuum created by the exhaust fan. (Tr. 685-86).

During the mid-1990's, miners who had previously worked at mines where state-of-the-art dust collection, rather than ventilation control measures, were used, came to work at the Blacksville No. 2 Mine. The dust collection method uses a hollow steel drill with a vacuum at the drill hole. The vacuum is connected to a dust collection box. Unlike ventilation control that redirects dust through the atmosphere into a ventilation tube, dust control methods remove dust from the atmosphere at the source. Consol miners who had prior experience with dust collection methods, began to question why the roof bolting work stations on the continuous mining machines at the Blacksville No. 2 mine were not equipped with dust collection equipment. Miners began complaining to MSHA about their exposure to drill dust.

Randy Murray has been a safety committeeman since 1990. (Tr. 219). At approximately the beginning in 1997, Murray had received complaints from miners about their exposure to drill dust. Murray explained, although "a roof bolter['s] [exposure to drill dust] . . . was a normal condition . . . we're trying to better it." (Tr. 225-26). Murray testified that he believed Consol could not adequately control drill dust using the ventilation method because "we would still be getting dust no matter what they did." (Tr. 209-10, 240-42). Murray stated that "individual miners that come from other mines for employment in our mines, they tell us stories of dust collectors in mines. They said that we 'can't believe that you're 20 years in the past.'" (Tr. 239-40). Murray concluded that only the dust collection method could adequately control drill dust exposure. (Tr. 242).

Section 103(g)(1) of the Mine Act, 30 U.S.C. § 813(g)(1), confers on a miner the right to obtain an immediate MSHA inspection if the miner notifies a representative of the Secretary that he has a reasonable basis for believing that a violation of a mandatory safety standard exists. On December 5, 1996, in response to a section 103(g) complaint, MSHA inspector Richard Stephanic issued Citation No. 4073086 citing an alleged violation of section 72.630(d) based on Stephanic's observations of visible drill dust in the 9-S section in the vicinity of the return-side roof bolter operator. The citation was abated by applying plastic wrap to a ventilation tube joint.

In early 1997, ventilation in the Blacksville No. 2 working sections was improved by replacing 45 horsepower exhaust fans with 75 horsepower fans. At that time, a 75 horsepower fan was the largest fan used for dust ventilation control purposes.

On April 8, 1997, Consol's corporate dust coordinator Craig Yanak, and Consol superintendent Roy Pride, had a meeting with MSHA Assistant District Manager Pat Brady and MSHA Inspector William Ponceroff to discuss dust control parameters. At the meeting Brady expressed concern over "new" scroll augers that were used on the continuous miners at Blacksville No. 2. Yanak responded that Blacksville No. 2 had used these steel auger drills since at least 1984. Yanak testified that, at the meeting, Ponceroff stated his next project was to get rid of the scroll augers and that he 'would continue to see dust until the steel auger drills were eliminated from the mine.' (Tr. 973, 1038; Resp. Ex. 10).

On April 30, 1997, Citation No. 3492306 was issued on the 9-S section for an alleged violation of the respirable dust standard in section 70.100(a), 30 C.F.R. § 70.100(a). (Gov. Ex. 8). The citation was based on an average respirable dust concentration of 2.98 milligrams of respirable dust per cubic meter of air (2.98 $mg/m^{3)}$ that exceeded the 2.0 mg/m^3 standard. The 2.98 mg/m^3 average dust concentration was based on samples taken over an unusually long two month period from February 20 through April 23, 1997.

To terminate the Citation No. 3492306, the slider tube on the inby end of the ventilation tube was wrapped. Yanak also designed and installed a piece of conveyor strip along the roof bolting drill chuck to divert the drill rock dust from falling on the roof bolt operator's work position. The citation was abated on June 17, 1997, after respirable air dust samples taken from May 7 through June 11, 1997, revealed average respirable dust concentration levels below 2.0 milligrams. (Resp. Ex. 5). Many of the samples taken during the abatement process were voided due to oversized particles.[2]

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[2] Although there is no evidence to support their supposition, Consolidation Coal Company officials speculate that respirable dust samples were tampered with by miners who were committed to demonstrating that the company's ventilation controls were inadequate.

On June 4, 1997, inspector Ponceroff issued Citation No. 4540525 alleging a violation of the ventilation control standard in section 72.630(d). (Gov. Ex. 6). The violation was based on Ponceroff's observations of drill dust in the vicinity of the return-side roof bolter operator, occupation code 048, in the 9-S section. The citation was terminated on June 11, 1997, after belting was installed on the frame of the continuous miner, and at the drill head, to divert dust away from the drill operator. Significantly, Ponceroff's observations of excessive dust due to inadequate ventilation control were not confirmed by MSHA's respirable air dust sample results taken on the 048 occupation during the period June 4 through June 6, 1997, to abate Citation No. 3492306 issued on April 30, 1997. (Resp. Ex. 5). Those respirable dust results reflect mg/m^3 readings for the 048 occupation of 0.8, 1.1, 2.4, 2.0 and 0.7, for a five sample average of 1.4 mg/m^3, well below the average 2.0 mg/m^3 respirable dust concentration standard in section 70.100(a). (*Id.*).

On June 5, 1997, Yanak, Consol's dust control specialist, returned to the 9-S section to evaluate the effectiveness of the 9-S section's dust ventilation control system. Yanak took spot respirable dust concentration readings for the return side drill operator using a real time aerosol monitor (RAM). A RAM measures the particles of aerosol in the air, whether the particles are dust, water vapor, or some other contaminant. (Tr. 1072). Since RAM readings can't distinguish between dust particles and other particles, RAM readings for respirable dust tend to be higher than air sampling using the cassette method. (*Id.*) The readings showed respirable dust concentrations within permissible limits, between .1 and .2 mg/m^3.

In response to continuing complaints from union representatives about the miners' exposure to drill dust, Ponceroff returned to the Blacksville Mine on the midnight shift on August 5, 1997. (Tr. 88). Ponceroff was accompanied by safety committeeman and miners' representative Randy Murray. Ponceroff went to the 9-S section to observe the roof bolters drilling on the Joy 1210 continuous miner. Murray and Ponceroff walked inby the 9-S section to approximately 15 to 20 feet behind the drill operators' stations. (Tr. 110-11). Ponceroff observed that the return-side roof bolter operator as well as the intake-side roof bolter operator were being exposed to drill dust from drilling the rock in the roof above them. He observed drill dust engulfing both roof bolter operators. Ponceroff reportedly observed the drill dust traveling across the continuous miner, exposing the return-side bolter to "a very dense cloud of dust." (Tr. 109, 117). Based on his observations, Ponceroff concluded the dust was in the roof bolters' breathing zones around their noses and mouths.

The ventilation control system in the S-9 section was designed to divert the dust into the end of a slider tube that is the last extension segment of the ventilation tube. The slider tube is periodically extended as the face advances so that the end of the slider tube always remains within 10 feet of the face. In this way, dust is ventilated in a forward direction, away from the roof bolting stations. Ponceroff concluded the ventilation system was diverting the dust into an opening, located slightly behind the return-side roof bolter, between the main ventilation tube and the slider tube. Thus, Ponceroff concluded the ventilated dust was being directed across the roof bolters' faces, instead of being directed in an inby direction away from their faces. (*See* Gov. Ex. 3).

At the time of Ponceroff's inspection, the continuous miner was deep into the mining cycle, approximately 15 feet from cutting through to the No. 3 track entry. The ventilation tubing extended approximately 84 feet in the crosscut being mined, an additional 74 feet in the No. 4 belt entry, plus an additional 30 feet into the adjacent crosscut where the exhaust fan was located. Thus, the total length of the exhaust tubing was approximately 188 feet long. (Gov. Ex. 2; Tr. 683-84). Mining deep in the mining cycle is a worst case scenario for ventilating dust because of the distance between the exhaust fan and the face. In this regard, Ponceroff's contemporaneous August 5, 1997, notes reflect "[Consol] management was to evaluate the [ventilation] system to assure that it was effective during the complete mining cycle." (Gov. Ex. 1, p.9).

At the time of Ponceroff's inspection, the return-side roof bolter was Ralph Justus and the intake-side roof bolter was Charles Robert Fetty, Jr. On August 5, 1997, Justus was filling in for Jerry Price, the regular midnight return-side roof bolter who was on disability leave. Justus testified, no matter how you placed the exhaust tubing, he was exposed to dust from his own bolter as well as from the intake-side bolter. Justus stated the dust traveled under the mining machine and came up into his face. Justus believed he was inhaling the dust because "there was dust on my teeth when I come out of the mine." (Tr. 410). Although Justus acknowledged that roof bolting "is a dusty job," he stated the 9-S roof bolting "was dustier than any other bolting job that I had." (Tr. 411, 413).

Fetty, the intake-side bolter, also testified that he believed he was exposed to breathing in drill dust on the midnight shift of August 5, 1997. Fetty testified he was exposed to dust that came down from the roof directly in front of his face. Fetty opined that the belting that had been installed on the frame of the continuous miner in an attempt to suppress the dust made matters worse in that it exposed him to more dust. (Tr. 450-51). Fetty, consistent with Justus' testimony, stated that the return-side bolter was exposed to more dust than the intake-side bolter because of the dust that traveled up from under the continuous miner. Fetty testified he had complained to safety committeeman Randy Murray and safety manager Ron Thomas about the dust.

Murray, who accompanied Ponceroff, observed dust around the roof bolters, including dust in the vicinity of their faces. Although he admitted the section ventilation was adequate, Murray testified he believed Consol's exhaust ventilation was not carrying the dust away adequately from the miners. (Tr. 231). In this regard, Murray testified:

> , . . . They can't do it . If they say they can do it by ventilation, no, they can't do it by ventilation. Because we would still be getting dust no matter what they did.

(Tr. 209-10).

As a result of his observations, Ponceroff issued Citation No. 4540528 alleging an S&S violation of section 72.630(d) for ineffective ventilation dust control measures. After the citation was issued at 3:20 a.m., at Ponceroff's suggestion, Consol added an additional ventilation tube section to extend the main part of the tube further inby the roof bolters. (Tr. 135-37, 1210, 1215-17). Consol also repaired the belting that had been placed on the frame of the continuous miner to abate Citation No. 4540525 previously issued by Ponceroff on June 4, 1997. The belting had been installed, at Ponceroff's suggestion, to prevent dust from migrating from underneath the machine on the intake side to the vicinity of the return-side roof bolter. In addition, water sprays were installed. (Tr. 142-47, 183, 188, 342-43, 1214-15). It is apparent, however, that the absence of belting and water sprays did not contribute to the excessive dust observed by Ponceroff, as these measures did not improve the dust conditions observed by Ponceroff on the midnight shift.

Ponceroff returned to the 9-S section on the day shift of August 5, 1997, to determine if the dust control had improved. Ponceroff was accompanied by safety committeeman Phil Nine. Nine, who had been chairman of the safety committee, stated that continuous miners with auger steels had been used at Blacksville No. 2 since the late 1970's without complaints. Nine stated in the mid-1990's new miners that had worked at other mines started asking why dust collection methods were not being used. Consequently, Nine stated that he had complained to mine management about drill dust problems on numerous occasions starting in 1996. (Tr. 652, 657-58, 669). Specifically, Nine stated he had complained to safety supervisor Frank Nickler and superintendent Roy Pride. Nine related that sometimes Consol would correct the ventilation problems. However, once mining progressed more than 80 feet down an entry, the dust conditions would intensify and the condition was not corrected regardless of what was tried. (Tr. 660).

When the complaints from miners continued, the safety committee turned to MSHA to try to correct the problem. (Tr. 660-61). As noted above, a section 103(g) complaint resulted in the issuance of Citation No. 4073086 on December 5, 1996, for the first dust control related condition in the 9-S section. (Tr. 659). Like safety committeeman Murray, Nine opined that the basic problem was Consol's use of ventilation control instead of dust collection technology. (Tr. 687-88).

The August 5, 1997, day shift return-side roof bolter was Frank Burnette and the intake-side roof bolter was Kenny Leach. Both Burnette and Leach testified that they were exposed to dust in their breathing zones. (Tr. 531, 467-470, 474). Leach stated that he "ate dust." (Tr. 475). Return-side bolter Burnette testified that he was exposed to dust from his drill and from Leach's drill. (Tr. 531-32). Burnette also stated he was exposed to dust that came from underneath the continuous miner. (*Id.*).

As a result of Ponceroff's observations on the day shift of August 5, 1997, Ponceroff concluded that the cited dust control problem on the midnight shift had not been corrected despite his remedial suggestions. Ponceroff extended the termination date for Citation No. 4540528 until August 12, 1997, to obtain an evaluation from MSHA's technical support staff. (Tr. 148-49; Gov. Ex. 5).

MSHA technical support personnel observed mining operations in the 9-S section on August 12, and August 19, 1997. (Gov. Ex 13). The face was advanced up to a distance of 50 feet during the technical support investigation. (*Id.* at p.5). After the August 12, 1997, technical support visit, Consol replaced the Joy 12-CM continuous miner with a Joy 12-CM continuous satellite miner. (*Id.* at p.4). The roof bolter operator's controls on the satellite miner are located 2.7 feet from the drill hole, a little further back than the location of the controls on the Joy 12-CM miner. (*Id.*). In addition, the configuration of the satellite miner's frame results in less dust dispersion from underneath the machine than the dust that was generated from under the Joy 12-CM.

During the August 19, 1997, technical support visit, the satellite miner was operating only 50 feet from the exhaust fan, as compared to 188 feet from the exhaust fan when Ponceroff issued Citation No. 4540528 on August 5, 1997. Thus, it could not be determined if the satellite miner would have corrected the ventilation problem Ponceroff observed on August 5, 1997. MSHA's technical support staff determined the 75 horsepower exhaust fan utilized by Consol and the resultant face exhaust air velocity were adequate. (*Id.* at pp.2,4). The final recommendation of the technical support team was for Consol to replace its 18 inch diameter oval tubing with 18 inch diameter round tubing with internal seals. With the exception of the oval tubing being replaced by round tubing, the auxiliary face ventilation system configuration remained unchanged. (Id. at p.4). The technical support team concluded "no visible dust was observed in the breathing zone of the roof bolters during the drilling process." (*Id.* at p.5).
Thus, on August 19, 1997, Ponceroff terminated Citation No. 4540528 because the drill dust was being adequately controlled.[3]

The miners generally testified that, although the satellite miner improved the situation, they still believed that they were exposed to unacceptable levels of drill dust. (Tr. 534-39, 558, 560, 611-13). As a result of the miners' continued complaints, despite the technical support findings, MSHA and Consol informally agreed that over the next 18 months, as continuous miners were brought to the surface for maintenance and repair, the continuous miners would be retrofitted with hollow steel drills and dust collection systems. Apparently, the dust control methods at the Blacksville No. 2 Mine are no longer a problem.

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[3] The condition cited by Ponceroff in Citation No. 4540528 on the midnight shift on August 5, 1997, was never abated because the continuous miner had been moved to a new location, for operations early in the next mining cycle, when Citation No. 4540528 was terminated on August 19, 1997.

As previously noted, on May 4, 1999, Ponceroff modified Citation No. 4540528 by deleting the significant and substantial designation.

III. Further Findings and Conclusions

Respirable dust is comprised of extremely small particles that are not visible in the atmosphere. Although respirable dust may be mixed with visible dust, the goal of dust control is to divert lighter respirable dust particles away from miners even though visible dust may continue to exist. (Gov. Ex 9, p.8323). In fact, the use of auger steels ensures that drill dust will be visible. In this regard, inspector Ponceroff testified:

> Q: Is it your position that any visible dust created from the drilling of rock is a violation of 72.630?
>
> A: No. You're always going to have dust . . . . You're going to have dust coming out of that hole. When that drill is drilling in that rock the dust must be ventilated away and readily dispersed from that worker . . . .
>
> Q: . . . But what about heavier dust particles? You mean some dust can fall in the vicinity of workers?
>
> A: Sure. That's what I was talking about, the dust generating sources. Because even though large particles are falling, you're still going to have smaller particles attached. So if very heavy particles are falling at a very rapid rate of speed, that's why we look at the floor.

(Tr. 1270-71).

The issue in this case is whether the Secretary has met her burden of proving that the ventilation control system in the 9-S section was inadequate on the midnight shift on August 5, 1997. In *Hobet,* Judge Melick found several violations of the drill dust control standard for surface mining in section 72.620, 30 C.F.R. § 72.620, based on missing or defective dust control measures. 20 FMSHRC at 898. For example, Judge Melick found holes were not drilled wet, although wet drilling was required by section 72.620. *Id.* In other instances, Judge Melick concluded dust collection systems were not maintained in proper working order. *Id.* at 899-90. In view of these defective dust control systems and faulty dust control practices, Judge Melick determined it was unnecessary to address the issue of whether the presence of visible dust, alone, can establish a violation of a drill dust control standard. *Id.* at 898.

In addressing the issue of whether visible dust, alone, can support a cited section 72.630(d) violation, the preamble to the Secretary's drill dust control health standards notes "the Public Health Service in conjunction with the Bureau of Mines has identified drilling as one of the most prolific dust-producing operations." (Gov Ex. 9 at 8322). Thus, drill dust observed in

the beam of an underground mine cap light is a normal condition. The notion that visible dust observed in a cap light during the drilling process in an underground mine, alone, should provide a generic basis for allegations of violative conduct must be rejected. In fact, Ponceroff conceded, "I believe that visible dust is not a violation of [the section 72.630] standard. I believe that. I believe it is not a violation of the MSHA standard." (Tr. 1295).

Subjective visible observations that serve as the sole basis for alleging a 72.630 violation are not always reliable. For example, as discussed above, Ponceroff's June 4, 1997, observations of visible dust that served as the basis for Citation No. 4540525 alleging a violation of the ventilation control standard in section 72.630(d), a citation not contested in this proceeding, were shown to be unreliable based on MSHA's non-violative respirable dust sampling results. (Resp. Ex. 5).

Moreover, the significance of visible observations of drill dust is particularly suspect in this case, where pressure was brought to bear on MSHA inspectors to force Consolidation Coal Company officials into replacing the ventilation controls with dust collection systems. Thus, Ponceroff's observations and conclusions must be viewed in context. As Ponceroff stated, "its very difficult because I'm in a bad position," and "[the miners] were never totally satisfied." (Tr. 1273, 1291). As a result of the miners' continuing complaints, Ponceroff concluded in his August 7, 1997, notes, "ventilation was no longer acceptable." (Gov. Ex. 1, p.11). While I am cognizant of the vivid descriptions of dust exposure provided by the miner witnesses in this proceeding, these descriptions must be viewed in the context of the roof bolter's general dissatisfaction with ventilation as a means of controlling drill dust, and their desire for state-of-the-art dust collection. As Justus testified, roof bolting "is a dusty job." (Tr. 411). Accordingly, Ponceroff's observations of visible dust, alone, do not provide an adequate basis for establishing the cited section 72.630(d) violation.

The remaining issue, which must be decided on a case-by-case basis, is whether MSHA has identified a missing, defective or otherwise ineffective means of dust control on the part of Consolidation Coal Company under the unique facts of this case. In this regard, the preamble to the Secretary's dust control standards notes, "MSHA issues a citation for a [dust control] violation . . . if visual observation indicates that drill dust controls on the equipment are not functioning properly." (Gov. Ex 9 at 8321-22).

At the outset, it is important to note, while ventilation is not the most effective method of dust control, it is a permissible method of dust control under section 72.630(d). Significantly, Consol's ventilation and dust control plans had been approved by MSHA. Moreover, MSHA's technical support team determined the 75 horsepower exhaust fan used by Consol, and the resultant exhaust air velocity in the exhaust tube at the face, were adequate. In fact, with the exception of the oval tubing being replaced by round tubing, a distinction without a significant difference, MSHA's technical support personnel did not recommend any substantive changes in Consol's ventilation system configuration. (Gov. Ex. 13 at p.4).

Turning to the August 5, 1997, midnight shift implementations of Ponceroff's suggested modifications, the forward movement of the ventilation tube, as well as the installation of the belting on the frame of the Joy 12-CM continuous miner, were not shown to be defective ventilation equipment or practices. I reach this conclusion because, according to Ponceroff, these modifications did not lessen the level of dust exposure of the roof bolters on the August 5, 1997, day shift. Finally, there is no evidence to support the conclusion that use of the Joy satellite miner instead of the Joy 12-CM miner on August 5, 1997, would have effectively controlled the dust. Unlike August 5, 1997 when the exhaust fan was 188 feet away from the face, when the Joy satellite miner was observed by the technical support staff on August 19, 1997, the miner was positioned in an early stage in the mining cycle when the inby end of the ventilation tube only was 50 feet from the exhaust fan.

In the final analysis, the roof bolters' desire to work under the most optimum dust control conditions is understandable. MSHA's response to the miners' repeated complaints achieved an admirable result - - replacement of the ventilation control system with a state-of-the-art dust collection vacuuming system. In fact, perhaps Consolidation Coal Company voluntarily should have installed dust collection methods sooner. However, the fact remains that Consol's use of ventilation controls was permitted by section 72.630(d) of the Secretary's mandatory safety standards. In this regard, the preamble to section 72.630(d) states:

> Paragraph (d) recodifies existing § 70.400-3 with no change in the existing requirement that air currents be so directed that the dust is readily dispersed and carried away from the drill operator or other workers in the area. . . . One commenter recommended deleting paragraph (d), stating that the preferred means of drill dust control should be limited to permissible dust collectors, water, or water with a wetting agent. This commenter stated that ventilation is less effective in the control of drill dust and harder for MSHA to enforce.
>
> MSHA recognizes that ventilation may not always be a practical method of drill dust control and that it is not the predominant method used in underground coal mines. Under some circumstances, continuous mining machines and roof bolters work on a single split of air, and this can result in only the drillers being protected while persons working downwind could be exposed. If proper precautions are taken, however, ventilation can be an effective method of drill dust control. MSHA, therefore, has not deleted paragraph (d). MSHA will continue to determine compliance with this requirement under the final rule as it has enforced § 70.400-3; i.e., through the measurement of air quantity or other measures set forth in a mine's ventilation and methane and dust control plan. MSHA does not intend that exposure samples be the routine method of determining compliance with this paragraph.

(Gov. Ex 9 at 8325). If the Secretary now wishes to require dust collection methods instead of ventilation control she may wish to initiate a rulemaking proceeding.

In summary, on balance, the Secretary has failed to demonstrate, by a preponderance of the evidence, that Consolidation Coal Company's ventilation control configuration was defective, or that it otherwise failed to adequately control dust from rock drilling on August 5, 1997. This conclusion is not inconsistent with MSHA's May 4, 1999, decision to delete the significant and substantial designation in Citation No. 4540528. For the conclusion that the cited condition was unlikely to cause respiratory illness, when viewed in the context of continued mining operations, is difficult to reconcile with MSHA's assertion that the roof bolters were not adequately protected from drill dust exposure. *Halfway Incorporated*, 8 FMSHRC 8, 12 (January 1986) (whether a violation is reasonably likely to result in serious illness or injury must be viewed in the context of continued mining operations); *Cement Division, National Gypsum, Co.*, 3 FMSHRC 822, 825 (April 1981). Accordingly Citation No. 4540528 shall be dismissed.

ORDER

In view of the above, Citation No. 4540528 **IS DISMISSED**. The settlement agreement with respect to payment of a $1,155.00 civil penalty for Citation 3500519, the remaining citation in this docket proceeding, was previously approved by Order dated July 7, 1998. All citations in this docket proceeding now having been resolved, this matter **IS HEREBY DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution:

Daniel M. Barish, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 516, Arlington, VA 22203 (Certified Mail)

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

/mh

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., Room 6003
WASHINGTON, D. C. 20006-3868
Telephone No.: 202-653-5454
Telecopier No.: 202-653-5030

January 6, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 99-299-DM
ON BEHALF OF DIANE KROCK,	:	SC MD 99-09
Complainant	:	
	:	Point Comfort Facility
v.	:	
ALCOA ALUMINA AND CHEMICAL,	:	Mine ID 41-00320
LLC,	:	
Respondent	:	

ORDER TO SUPPLEMENT OPPOSITION TO MOTION

In this discrimination proceeding, brought by the Secretary on behalf of Diane Krock against Alcoa Alumina & Chemical, L.L.C. (Alcoa), the company has moved to "compel the Secretary . . . to return to Alcoa copies of Alcoa's . . . electronic mail messages ('e-mails') which were generated by and received by Alcoa employees . . . [and] which . . . are admittedly in Complainant's possession" (Motion to Compel 1). The Complainant has opposed the motion and has asserted that the e-mails are protected from discovery by the informant's privilege as codified at 29 C.F.R. § 2700.61. Although I find below that she has not provided facts sufficient to establish her claim of privilege, I will allow the Complainant additional time within which to supplement her opposition.

BACKGROUND OF THE MOTION

(1) Shortly after the proceeding was initiated, counsel for Alcoa requested by letter that MSHA voluntarily send counsel a copy of the file the agency complied while investigating the Complainant's discrimination charges;

(2) Counsel for the Secretary responded by forwarding selected portions of the file, but withheld certain parts she claimed were privileged;

(3) By subsequent letter, and following an inquiry by counsel for Alcoa, Counsel for the Secretary stated that she "withheld e-mail messages from a miner, which were given to . . . [the MSHA investigator] during the course of his investigation" (Alcoa Brief In

Support of Motion 2, citing Exh. C);

(4) Counsel for Alcoa protested and again requested the return of the e-mail messages;

(5) Counsel for the Secretary once more refused to send the e-mails, stating that she "[could] not turn over the e-mail messages without disclosing the identify [sic] of a government informant who provided a print out of the messages to MSHA" (Id., citing Exh. E).

(6) Alcoa then initiated a Request for Production of Documents and the Secretary produced copies of e-mails from an Alcoa hourly employee, Miguel Monroy. The copies were dated from March 22, 1999 through March 24, 1999 and were from the Complainant to groups of Alcoa employees, including Monroy. Some of the e-mails contained attachments (Id., Exh. F). Alcoa maintains the e-mails were printed from Monroy's Alcoa-owned computer located at Alcoa's facility and that Monroy admitted as much during his deposition (Id., 4);

(7) Respondent also maintains that during the same deposition, Monroy identified an Alcoa fax cover sheet where by he sent 4 pages of documents to an MSHA instigator by an Alcoa fax machine. A handwritten message of the cover sheet states: "Here is what you asked for. Hope this is enough". The cover sheet states that it and the documents are being sent by "Mike Monroy" (Id., 4-5, Exh. G). When he was deposed the MSHA investigator confirmed the fax number on the cover sheet was his fax number. During his deposition Monroy agreed that only his handwriting appeared on the fax cover sheet (Id., 5, Exh. J 4). Questions regarding what Monroy might have sent to the investigator, indeed, whether or not he participated in the investigation, were repeatedly objected to by counsel for the Secretary on the basis the facts relating to such information were protected by the informant's privilege (See Id. Exh. J 3 et seq.).

WHAT ALCOA WANTS

Alcoa wants the e-mail messages that are in the possession of the Complainant to be returned. It argues they are the property of the company. They were generated by Alcoa equipment, were sent over Alcoa's internal computer network and were received by Alcoa's employees. The company asserts that it is "likely" that information contained in the withheld

e-mails is the proprietary and confidential information of Alcoa. Further, the company asserts the internal e-mails are business records of Alcoa and that the Complainant did not have the right to obtain such records from an Alcoa employee without following proper discovery procedures or without Alcoa's consent. It asserts that regardless of the identification of the employee who made the e-mails available to MSHA, they are the private property of the company and they must be returned to Alcoa. Finally, at the very least, Alcoa asserts the e-mails should be returned in redacted form to prevent the identification of the employee who made them available to MSHA (Motion to Compel 5-6).

THE COMPLAINANT'S RESPONSE

The Complainant responds that in fact she withheld 21 pages of e-mail messages from her response to Alcoa's first request for production of documents and from Alcoa's informal request for MSHA's investigation file. The e-mail messages were withheld because their format and content would identify the miner(s) who provided information to the MSHA special investigator during the course of his investigation. On the other hand, the Complainant did turn over to Alcoa all of the e-mail messages that Ms. Krock provided to MSHA, including those from Monroy. Although the Complainant has waived the government informant's privilege with respect to Krock and to any information she has provided MSHA, it has not waived the privilege with respect to any other miners (Complainant's Response 2).

THE RULING

Counsel for the Secretary argues, and I agree, that in resolving the issues raised in the motion, protection of the informant's privilege must remain paramount. It bears repeating that it is the well-established right of the government to withhold from disclosure the identity of persons furnishing information of possible violations of law to enforcement officials. The privilege is designed to protect the public interest by maintaining the free flow of information to the government concerning possible violations and to protect the person supplying such information from possible retaliation (Sec. Ex Rel Logan v. Bright Coal Co., Inc., 6 FMSHRC 2520, 2522-23 (November 1984)). Although this issue has arisen in the context of e-mail messages, it is no different from a situation in which a miner gives an internal company memoranda to an MSHA investigator and return of the memoranda would identify the informer. In the latter instance, and, I believe in this, the identity of the informer must be protected, provided the government can establish the document(s) would tend to reveal the identity of the informer (Asarco, Inc., 14 FMSHRC 1323, 1329 (August 1992)). The burden of proof on the government is not necessarily a high one. For example, the Commission has held that an affidavit setting forth why disclosure of the material might tend to reveal the informer's identity may be sufficient (Asarco, 14 FMSHRC at 1330).

The Secretary asserts that the identity of those who provided the e-mails to the MSHA special investigator is revealed by their "format and content" (Complaint's Response 2). In my view, if this is so it ends the matter. As Counsel for the Secretary points out, "it is the identity of

the informant, not the contests of the information" — and, I would add, not the form of the information — that is protected (Id.).

Further, I agree with the Secretary that, except for Ms. Krock, the record does not indicate that the Secretary, or any other person, expressly has identified any individual as an informant nor does it show any express waiver of the privilege by any miner (Complaint's Response 3). For the privilege to be relinquished there must be a definite identification or waiver (See Thunder Basin Coal Co., 15 FMSHRC 2228, 2236 (November 19993)). It is not enough that evidence may suggest the identification or even may point strongly to the identification if it is conceivable there are others who may be the informant.

Counsel for the Secretary has suggested that to protect any legitimate privacy concerns of the company the parties could be governed by a protective order requiring the Complaintant not to produce the privileged e-mail messages to third parties and to destroy the e-mail messages once litigation in the case is completed and the file is closed (Complainant's Response 3). Alcoa opposes the suggestion (Alcoa's Reply 2).

The suggestion is premature. As matters now stand, the Secretary's assertion of privilege is just that, an assertion. The Commission has noted that an assertion usually is not enough to sustain the privilege (Asarco at 1329, quoting 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice ¶ 26.60[1]). To meet her burden of proof, the Secretary must establish how or why disclosure of the sought after e-mails will identify the informant(s). An affidavit explaining this may be sufficient. Or, the Secretary may offer an on-record explanation and request it be accompanied by an in camera inspection of the documents. The choice is the Secretary's, but whatever course she chooses the record must contain facts upon which a ruling can be based. If she cannot establish such facts, Alcoa's motion must be granted.

ORDER

ACCORDINGLY, the Secretary **SHALL HAVE** 10 days within which to supplement her Response by offering facts to support her opposition to Alcoa's motion to compel.

David F. Barbour
Chief Administrative Law Judge

Distribution: (Certified Mail)

Suzanne F. Dunne, Esq., Office of the Solicitor, 525 S. Griffin Street, Suite 501, Dallas, TX 75202

Timothy P. Ryan, Esq., Jill M. Szafranski, Esq., Eckert Seamans Cherin & Mellott, LLC, 44th Floor, 600 Grant Street, Pittsburgh, PA 15219

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