

JANUARY 2001

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JANUARY 2001

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

Freeman United Coal Company v. Secretary of Labor, MSHA, Docket Nos. LAKE 2000-102-R through LAKE 2000-105-R. (Judge Melick, November 29, 2000)

Secretary of Labor, MSHA on behalf of Walter Jackson v. Mountain Top Trucking Company, Inc., et al., Docket No. KENT 95-613-D. (Petition filed by Walter Jackson - Judge Feldman, December 4, 2000)

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

Secretary of Labor, MSHA on behalf of Walter Jackson v. Mountain Top Trucking Company, Inc. et al., Docket No. KENT 95-613-D. (Petition filed by Mountain Top Trucking - Judge Feldman, December 4, 2000)

David Morales v. Asarco, Inc., Docket No. WEST 99-188-DM. (Judge Manning, December 8, 2000)

Consolidation Coal Company v. Secretary of Labor, MSHA, Docket Nos. WEVA 93-77-R, et al. (Judge Melick, December 12, 2000)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

January 19, 2001

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
on behalf of GRANT NOE, JR. :
v. :
Docket No. KENT 99-248-D
J & C MINING, L.L.C., and :
MANALAPAN MINING COMPANY, INC. :

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

ORDER

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"), Administrative Law Judge Gary Melick concluded that Grant Noe, Jr.'s refusal to transfer from the first shift to the third shift was not protected, and that J & C Mining, L.L.C. did not constructively discharge Noe in violation of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1). 22 FMSHRC 404, 410 (Mar. 2000) (ALJ). The judge consequently dismissed Noe's discrimination complaint. *Id.* at 411. On April 25, 2000, the Commission granted the Secretary's petition for discretionary review challenging the judge's decision.

On December 4, 2000, the parties filed a Joint Motion For An Order To Approve Settlement ("Joint Motion") and a General Release And Agreement ("Agreement"). In light of the parties' agreement to the terms of the settlement, we dismiss this matter and grant the parties' request to maintain the confidentiality of the Agreement to the extent permitted by law.

Accordingly, this proceeding is dismissed.

Mary Lu Jordan
Mary Lu Jordan, Chairman

James C. Riley
James C. Riley, Commissioner

Theodore F. Verheggen
Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr.
Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

January 19, 2001

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
v. : Docket No. WEST 94-645-M
DYNATEC MINING CORPORATION :
:

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). Following an investigation into a fatal accident that occurred at the Magma/Superior mine, inspectors from the Department of Labor's Mine Safety and Health Administration ("MSHA") issued one citation and 13 orders, pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), to Dynatec Mining Corporation ("Dynatec"), an independent contractor at the mine. Administrative Law Judge Richard Manning affirmed the citation and seven of the orders, and their associated special findings, and vacated the remaining six orders. 20 FMSHRC 1058, 1091 (Sept. 1998) (ALJ). The Commission granted Dynatec's petition for discretionary review challenging the judge's determinations. For the reasons that follow, we affirm in part and reverse in part.

I.

Factual and Procedural Background

During relevant times in 1992 and 1993, Magma Copper Company ("Magma") operated the Magma/Superior Mine, an underground copper mine in Gila County, Arizona. 20 FMSHRC at 1058. In December 1992, Magma awarded a contract to Dynatec to construct a 364-foot raise, raise structure, and other facilities at the mine. *Id.* at 1061. The raise was a nearly vertical opening (approximately 80 degrees from horizontal) which was driven through surrounding rock upward from the track level (the 4000 level) to connect with higher levels (the 3763, 3700, and 3636 levels). The raise contained a wooden structure with two side-by-side compartments

separated by a dividing wall: an ore pass and a manway. *Id.* at 1059; Jt. Ex. A at 9. The inside dimensions of the ore pass were approximately six-by-eight feet, while the dimensions of the manway were approximately six-by-six feet. 20 FMSHRC at 1059. Ore-bearing rock (referred to as "muck") was dumped into the ore pass at the intermediate levels and fell to a feeder at the 4000 level. *Id.*; Jt. Ex. A at 11. There the ore was moved to cars and transferred by track to the mill. 20 FMSHRC at 1059. The manway served as a secondary escapeway for miners in the event of an emergency and a means to gain access to various parts of the raise. *Id.*

Magma designed the raise structure.¹ *Id.* at 1061. The outside of the structure was constructed with ten-by-ten foot timber, and the inside was also lined with timber. *Id.* at 1060. The manway was enclosed with wooden lagging, or 3-inch thick horizontal boards, nailed outside the timber framework. *Id.*; Jt. Ex. A at 10; Tr. 533. The ore pass was lined with 6-by-8 inch armored cribs, using a "birdcage" design. 20 FMSHRC at 1060. The raise structure was vertically framed at intervals of seven-feet, four-inches, and each frame was referred to as a "set." *Id.* The succession of sets, one on top of the other, were consecutively numbered from the bottom. *Id.*; Jt. Ex. A at 10. The sets were interconnected at joints where the timber was notched with projections to fit together. Jt. Ex. A at 10.

As the raise structure was built, blocking was installed against the surrounding rock at each segment where the vertical and horizontal members of the framework were joined. 20 FMSHRC at 1060; Jt. Ex. A at 12-13. The blocking at each set prevented the raise structure from moving outward horizontally and kept the vertical posts in line. 20 FMSHRC at 1060. A single bearing set was located just above the feeder at the base of the first set.² *Id.* at 1061; Jt. Ex. A at 15. The base of the first set was hitched into surrounding rock with the entire set enclosed in concrete. Jt. Ex. A at 15. As each set was drilled and blasted, rock from the blast (referred to as "backfill") would fall between the framework of the raise structure and the host rock. 20 FMSHRC at 1060.

In June 1993, Dynatec completed construction of the raise from the 4000 level to the 3763 level. *Id.* at 1061. In late June, Magma began dumping muck from the 3763 level, while Dynatec continued to build the raise structure above the 3763 level to the 3636 level. *Id.* Between June 28 and July 11, boulders and timber were sometimes hung-up in the feeder chute, and explosives were used at the feeder to free the hang-ups. *Id.*; Jt. Ex. A at 19.

On July 29, 1993, a Magma loader operator dumped 30 to 50 loads of sandfill, a slurry consisting of cement and sand, into the raise at the 3763 dump site. 20 FMSHRC at 1061; Jt. Ex. A at 20. Muck was not pulled from the ore pass during that shift. 20 FMSHRC at 1061.

¹ During the bid process, Dynatec had submitted proposals for alternate methods of building the raise structure, which Magma rejected. 20 FMSHRC at 1061.

² A bearing set is designed to transfer the weight of the raise structure above the bearing set to the surrounding rock. 20 FMSHRC at 1061.

Starting on July 30, the ore pass was blasted to clear hang-ups on a regular basis. *Id.* Magma discovered that the sandfill had hardened near set 11 in the ore pass and that the hardened sandfill was responsible for the continuing hang-ups in the ore pass. *Id.*

On August 3, Magma made a concerted effort to blast a hang-up in the ore pass caused by the hardened sandfill. *Id.* The ore pass was blasted approximately four times on the B shift. *Id.* After hearing that the raise had been damaged, Dynatec Lead Miner Douglas Massey inspected the raise and later called Dynatec Project Superintendent Mark Spaulding at home to describe the damage he observed. Jt. Ex. A at 22.

On August 4, Spaulding and another Dynatec miner inspected the raise. 20 FMSHRC at 1061; Jt. Ex. A at 23. They discovered two pieces of armored cribbing missing between the ore pass and the manway at set 20, muck in the manway at that location, and a cracked divider at set 8. 20 FMSHRC at 1062. In addition, they determined that the raise structure had-settled cumulatively eight to ten inches below the 3763 level. *Id.*; Stip. Doc. 113; Jt. Ex. A at 23. Magma's team leader for the raise project, Matthew Kannegaard, was notified of the damage. Jt. Ex. A. at 23. Kannegaard and Spaulding then inspected the raise together. *Id.*

As a result of the damage, the raise was closed on August 4. 20 FMSHRC at 1062. Magma provided Dynatec with a memorandum listing nine items to repair. *Id.* These items included: removing the sandfill from the ore pass; installing short spreaders under all short manway wallplates; stabilizing the broken divider at set 8; repairing broken ladders; securing ladders to wallplates; and spraying shotcrete in sets 20 and 21. *Id.*; Stip. Doc. 115. In addition, the memorandum provided that the raise was to be returned to service on the C shift on Monday, August 8, 1993. Stip. Doc. 115.

On August 6, Dynatec Raise Superintendent Ronald Spry, Spaulding, Kannegaard, and Magma Chief Engineer Tom Fudge went to a restaurant to have lunch and bid farewell to Spry, who was moving to another job. Statement No. 42, at 31; Statement No. 44, at 33-34.³ Spaulding told Kannegaard that it was important that Magma stop blasting and overloading the raise. 20 FMSHRC at 1062. In addition, Spaulding suggested pouring a sand grout backfill between the raise and the surrounding rock. *Id.* Spaulding understood that Magma would blast hang-ups in the raise only as a last resort. *Id.*

From approximately August 4 through 9, Dynatec employees repaired the raise in accordance with the memorandum. Jt. Ex. A at 24-27. Dynatec employees blasted the raise to remove the hang-up, and completed most of the items set forth in the memorandum. 20 FMSHRC at 1062. On the B shift of August 9, Magma resumed using the raise for production. *Id.*

³ The parties stipulated to the admissibility of deposition and interview transcripts for 31 individuals. These depositions and interviews are listed in Stipulation No. 3, and are referred to in this decision as "Statement No.," followed by the number they are given in that list.

On August 10, Magma employees Jeff Christiansen and Nicholas Truett, who were assigned to pull muck from the bottom of the raise, began the B shift by attending a safety meeting from approximately 3:00 until 5:00 p.m. Jt. Ex. A at 28; Tr. 741. Christiansen and Truett then went to the 4000 level of the raise and began to pull muck. Jt. Ex. A at 28. Dynatec miner Ernest Villaverde was working on the feeder while two other Dynatec miners, Nathan Spry and Joe Castaneda, were inside the raise completing repairs, including installing spreaders and repairing ladders. *Id.*; Statement No. 6, at 23; Statement No. 40, at 5. A hang-up was reported at set 8. 20 FMSHRC at 1062. Christiansen unsuccessfully tried to use an air lance to free the hang-up. *Id.*; Jt. Ex. A at 28. Christiansen and Truett later returned to the raise with explosives. Jt. Ex. A at 28. As they were preparing to blast the raise, Villaverde reminded them that Spry and Castaneda were working inside the raise. *Id.*; Statement No. 48, at 8. Christiansen informed Spry and Castaneda about the impending blast, and they came down from the raise. Jt. Ex. A at 28; Statement No. 5, at 3-4. After the blast, Spry and Castaneda assisted Villaverde at the feeder and did not reenter the raise. Jt. Ex. A at 29; Statement No. 5, at 5-6. The ore pass hung up again. 20 FMSHRC at 1062. Before it was blasted a second time, the Dynatec miners completed their work at the feeder, and went to the 3600 level, as directed by Bill Wilson, the Dynatec raise superintendent who replaced Spry. *Id.*; Jt. Ex. A at 29; Statement No. 50, at 5-6, 20-21.

Magma Team Leader Alfred Edwards and Group Leader John Dalton separately traveled to the 4000 level to assist Christiansen and Truett with the hang-up. Jt. Ex. A at 1, 30-31. The four miners entered the raise from the 4000 level to set up the blast, and the raise failed at around 9:45 p.m. 20 FMSHRC at 1062. It appears that the dividing wall separating the ore pass and the manway failed, and muck moved from the ore pass into the manway and buried the four Magma employees, fatally injuring them. *Id.* at 1062-63.

Following an investigation into the accident, MSHA issued to Dynatec a section 104(d)(1) citation and an order alleging violations of 30 C.F.R. § 57.3360; an order alleging a violation of 30 C.F.R. § 57.11001; six orders alleging violations of 30 C.F.R. § 57.3401; and five orders alleging violations of 30 C.F.R. § 57.18002(a). Stip. Docs. 1-14. Magma also was cited for multiple violations of explosives and training standards in addition to receiving one 104(d)(1) citation and three orders alleging violations of section 57.3360; one 104(d)(1) citation and six orders alleging violations of section 57.3410; and four orders alleging a violation of section 57.18002(a). 20 FMSHRC at 1059; Jt. Ex. A at 53-113; Tr. 65. The Secretary of Labor proposed civil penalties totaling \$700,000 against Dynatec. 20 FMSHRC at 1059.

In 1996, an indirect subsidiary of Broken Hill Proprietary Company Limited merged with Magma Copper. *Id.* As a result of this merger, Magma became BHP Copper. *Id.* at 1058. The enforcement actions against Magma were settled after the merger. *Id.* at 1059. As part of the settlement agreement, BHP Copper agreed to pay civil penalties of \$800,000; to plead guilty to two misdemeanor counts under section 110(d) of the Mine Act, 30 U.S.C. § 820(d); and to pay associated criminal penalties. *Id.* BHP Copper also agreed to pay certain sums to the State of Arizona. *Id.* In July 1998, a United States Magistrate Judge of the U.S. District Court for the District of Arizona approved the settlement of the criminal matters, and Judge Manning approved

the settlement of the civil proceedings. *Id.*

Dynatec challenged the citation and orders, and the matter proceeded to hearing before Judge Manning. The judge affirmed the citation and orders alleging violations of section 57.3360, 57.11001 and 57.3401, and vacated one order alleging a violation of section 57.3360 and the five orders alleging violations of section 57.18002(a). 20 FMSHRC at 1091. In addition, the judge affirmed the significant and substantial ("S&S") and unwarrantable failure findings associated with the violations of sections 57.3360, 57.11001, and 57.3401. *Id.* at 1077, 1080, 1085. The judge assessed civil penalties totaling \$90,000 against Dynatec. *Id.* at 1090-91.

II.

Disposition

A. Alleged violation of 30 C.F.R. § 57.3360:⁴ Citation No. 4410466

1. Violation

The judge affirmed the citation alleging a violation of section 57.3360, reading the second and third sentences of section 57.3360 together to require that damaged, loosened, or dislodged timber of the raise structure must be replaced so that the ground support system (that is, the raise structure itself) does not present a hazard to miners. 20 FMSHRC at 1075-76. Noting that the citation related to Dynatec's maintenance responsibilities after the raise structure had already settled, the judge found that the raise structure was on the verge of failure and that any normal event such as loading the raise with muck had the potential to cause a massive failure of the structure. *Id.* at 1076. He concluded that it was foreseeable that the raise would become loaded with muck within a relatively short period of time and Dynatec knew that loading would put the structure at risk for failure. *Id.* The judge determined that the Secretary established a violation because Dynatec failed to make repairs that addressed the structural problems in the raise structure. *Id.*

⁴ Section 57.3360, entitled "Ground support use," provides:

Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks. Damaged, loosened, or dislodged timber use[d] for ground support which creates a hazard to persons shall be repaired or replaced prior to any work or travel in the affected area.

Dynatec argues that the Secretary failed to prove that a “hazard to persons” existed in the raise structure in violation of section 57.3360. PDR at 23-25; D. Reply Br. at 14-18. Preliminarily, it contends that the judge erred in considering the third sentence of the standard because the Secretary never argued that Dynatec violated it. PDR at 23-24. It next asserts that the raise was safe to use as a transfer facility, as evidenced by the lack of incident on August 9. *Id.* at 24. It maintains that its initial repairs eliminated any hazards to persons, in conformance with section 57.3360, and that Magma created a hazard to persons through its misuse of the raise. D. Reply Br. at 9 n.14. Dynatec also asserts that the Secretary did not prove a “hazard to persons” existed at the time that Dynatec’s employees were withdrawn on August 10. PDR at 24. It contends that the Secretary merely proved that a hang-up of three to four sets might present a danger to miners, but that the Secretary failed to prove that such a hang-up existed at the time that Dynatec employees were withdrawn from the raise on August 10. D. Reply Br. at 15-16. Dynatec further contends that it was not foreseeable that the raise would be loaded and that Magma would act contrary to its assurances that the raise would not be misused. PDR at 11; D. Reply Br. at 11 & n.22.

The Secretary responds that the judge properly found that Dynatec violated section 57.3360. S. Br. at 11. She asserts that evidence is undisputed that a “hazard to persons” existed after the raise settled. *Id.* at 11-12. The Secretary submits that Dynatec’s repairs did not address the structural problems caused by settlement, and that the raise structure was on the verge of failure. *Id.* at 12. She suggests that the judge correctly rejected Dynatec’s claim that there was no “hazard to persons” because the raise structure was safe to use to transfer ore. *Id.* at 12-13. The Secretary submits that Dynatec’s claim is belied by expert testimony and evidence it was foreseeable that the structure would become loaded. *Id.* at 14-15.

We affirm the judge’s conclusion that Dynatec’s failure to repair or replace ground support timbers so that the raise structure would not create a hazard to persons working there violated section 57.3360. In particular, substantial evidence⁵ supports the judge’s determination that after the raise settled, the raise structure presented a hazard to persons in that an event such as loading the raise had the potential to cause a massive failure within the structure.⁶ 20

⁵ When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

⁶ We reject Dynatec’s preliminary argument that, because the Secretary never argued that Dynatec violated the third sentence of section 57.3360, the judge erred in considering that portion of the standard. PDR at 23-24. The subject citation provided Dynatec with adequate notice that it included allegations that Dynatec allegedly violated the third sentence. See Stip. Doc. 1 (Citation No. 4410466) (providing in part, “Management failed to properly repair or replace the

FMSHRC at 1076. The judge credited the testimony of James Van Liere, a consulting engineer retained by the Secretary, who testified that after the raise was put back into use, it could fail because use would apply load, or outward pressure, to the ore pass walls. 20 FMSHRC at 1066, 1068, 1076; Tr. 321, 357. Van Liere stated that it was unknown how many sets of blocking (wooden wedges) were still in contact with the center posts, although they were probably reasonably intact. Tr. 269. He noted that when the ore pass was empty, there may have been no danger, even if blocking were missing, because there was no load against the ore pass walls. Tr. 321, 323-24. Van Liere testified, however, that when the raise was returned to use, a precipitating event such as loading or blasting could cause cribbing to come free of its restraint in the bird cage, resulting in failure of the raise structure. Tr. 318, 356-57. He explained that the failure that occurred on August 10 could have been precipitated "simply by having a loose set of blocking fall away." Tr. 269-70.

We reject Dynatec's assertion that the judge abused his discretion by crediting Van Liere's testimony. PDR at 13-16; D. Reply Br. at 15 n.31. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Testimony by Dynatec's own witnesses supports Van Liere's testimony that loading the raise would diminish safety. Dynatec's consulting engineer, Peter Stork, testified that, as repaired, it was safe for a miner to use the manway on August 10 only if no more than 30 tons of muck accumulated in the ore pass. Tr. 889, 895; R. Ex. 9. He explained that "thirty tons is based on a small accumulation of muck within the concreted set at the bottom of the raise." Tr. 889. Stork testified that safety was progressively diminished as the accumulated load exceeded 30 tons. Tr. 889-90; R. Ex. 9. In addition, Stork's report stated that the repaired raise was susceptible to damage under hung load conditions. See Jt. Ex. D. at 19. John Folinsbee, a consulting mining engineer retained by Dynatec, also testified the raise was compromised after it had settled and that it could not be used as it was intended (that is, to store material) without major repairs. Tr. 943. Folinsbee stated that if the raise were put into service, another hang-up would increase the possibility of divider wall breach and further settlement. Tr. 991. Thus, we do not find the extraordinary circumstances requiring that we overturn the judge's credibility determination.

Furthermore, substantial evidence supports the judge's determination that it was foreseeable that the raise would be loaded with muck in a relatively short period of time, and that it was unreasonable for Dynatec to believe that the raise structure would only be used to transfer ore. 20 FMSHRC at 1069, 1076. The record reveals that on August 9 and 10, a high volume of ore was being dumped into the raise structure as soon as it was released for production. On

cribbing and timber in the raise which was progressively damaged, loosened, or dislodged as a result of poor mining practices."). Further, Dynatec cannot claim lack of notice of the judge's consideration in view of its argument before the judge that it did not violate the third sentence. D. Post-Hr'g Br. at 26-30.

August 9, 12 cars of ore were loaded from the raise during the remainder of the B shift, and 81 cars were pulled during the C shift. Jt. Ex. A at 26-27. A Dynatec miner who helped repair the raise stated that while Dynatec was completing its repairs, Magma was mining and stacking muck in muck bays at all three levels of the raise, waiting for the ore pass to be released for production. Statement No. 29, at 13-15, 31, 36-37. He testified further that when the raise was released on August 9, there were two loaders with two-and-half yard buckets dumping at all three levels. *Id.* at 37; *see also* Statement No. 33, at 6-7; Statement No. 12, at 44-45 (establishing that ore was being dumped at all three levels); *see also* Stip. Doc. 62, at 4 (Magma accident report) (stating that, "with the exception of the time periods during which . . . blasting [occurred,] muck from several stopes was being dumped into the 865 Raise" on August 10). It further appears that the potential to dump ore was greater than it had been previously because the highest level in the raise, the 3636 level, was made available for dumping for the first time on approximately August 9 or 10. *See* Statement No. 17, at 19; Jt. Ex. B at II-3, II-4.

It appears that dumping ore into the ore pass was not synchronized with muck being pulled from the bottom in order to avoid muck accumulation. One of two loader operators at the 3763 dump site stated that, before he was told to shut down on the night of August 10, he had dumped 40 to 45 loads, and that he would get a load and dump it about every two minutes. Statement No. 33, at 4-5, 8. Folinsbee testified that a two-and-a-half yard scoop dumping a load every two minutes would fill up the ore pass from the bottom to approximately sets 8 to 10 in two-and-a-half hours. Tr. 940. A Dynatec miner who helped repair the raise testified that, while two loaders each were dumping at all three levels, there were only two miners at the bottom to load the muck onto the track. Statement No. 29, at 13-15, 36-37. He stated that the two miners at the bottom had to walk 300 to 400 yards to dump the material, while the loaders on the "37 level" had to travel only 30 feet from the muck bay to dump. *Id.* at 48-49. He stated that by the time the muckers at the bottom got back from dumping their load, muck would be piling up in the ore pass. *Id.* at 48-49. In addition, on August 10, the miners assigned to pull muck from the bottom of the raise participated in a team meeting for approximately two hours at the beginning of the shift and did not load ore into cars during that time. Jt. Ex. A at 28; Tr. 741. Furthermore, miners at the bottom sometimes had difficulty ascertaining whether the ore pass was empty or hung-up, which would appear to further hinder synchronization between dumping into the ore pass and pulling muck from the bottom. *See* Statement No. 27, at 11; Statement No. 48, at 4; Stip. Doc. 102. Thus, substantial evidence supports the judge's determination that if the miners pulling muck from the bottom of the ore pass could not keep up with the ore being dumped, it would not take long for the ore pass to become full or nearly full again. 20 FMSHRC at 1069.

Moreover, we disagree with Dynatec that its repairs to the raise structure eliminated any "hazards to persons," and that only subsequent misuse by Magma created a new hazard. PDR at 24; D. Reply Br. at 9 n.14. As the judge found (20 FMSHRC at 1067), evidence was undisputed that the repairs made by Dynatec did not address the settlement of the raise. Kannegaard, who drafted the repair memorandum with Fudge, acknowledged that the list of repair items did not address the raise's settlement. Statement No. 22, at 67, 79; *see also* Tr. 665; Statement No. 37, at 47-49; Statement No. 38, at 152. John Marrington, Dynatec's vice president and general

manager, also acknowledged that Dynatec turned over the raise “before all the repairs were effected that were necessary to make a stable structure were done.” Statement No. 23, at 53, 155-56.

Rather, the settlement of the raise was going to be addressed by the pouring of sand grout backfill around the raise structure during subsequent weekends, after the raise had already been returned to production. 20 FMSHRC at 1069 n.4, 1076. Kannegaard stated that during the August 6 lunch, no formal plan had been decided upon to address the settlement problem, and that discussions were ongoing. Statement No. 22, at 67. He explained that he had further discussions with Fudge about pouring sand grout backfill at various locations behind the raise structure during weekends after the raise had been returned to production. *Id.* at 102-04. Other Dynatec witnesses testified that the settlement of the raise would be addressed by pouring sand grout backfill after the raise had been returned to production. Statement No. 36, at 19, 25-26; Statement No. 37, at 47-49; Statement No. 38, at 139, 152; *see also* Statement No. 26, at 73; Statement No. 49, at 30-31, 77. Nonetheless, Dynatec’s plans to address the raise’s settlement after it had been returned to production do not negate a finding of violation in view of the standard’s requirement that structural timbers creating a hazard to persons shall be repaired or replaced “prior to any work or travel in the affected area.” 30 C.F.R. § 57.3360 (emphasis added).

Dynatec acknowledges that, at most, the repairs it made were sufficient to return the ore pass to production only if it were used to transfer ore. D. Reply Br. at 9-10. Dynatec’s engineer Stork testified that, although the repairs were sufficient to allow the raise to be used to transfer material, the repairs did not address the inability of the raise to resist vertical loads from accumulated muck, particularly under a hang-up condition, without sustaining permanent settlement. Tr. 872-73, 893. John Marrington, Dynatec’s Vice President, agreed that once the raise was turned over to Magma after the repairs had been made, another hang-up in the ore pass could have resulted in failure of the dividing wall. Statement No. 23, at 53, 155-56. Given evidence that loading was foreseeable, the repairs made by Dynatec did not eliminate a hazard to persons within the meaning of the standard.

In addition, contrary to Dynatec’s assertion (PDR at 24), the fact that no incident occurred on August 9 does not establish that the raise structure did not present a “hazard to persons.” Even in the context of considering whether a hazard contributed to by a violation is reasonably likely to result in an injury (for purposes of deciding whether a violation is significant and substantial, *see* n.7, *infra*), the Commission does not require the Secretary to prove the actual occurrence of an accident or injury. *Arch of Kentucky*, 20 FMSHRC 1321, 1330 (Dec. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 678 (Apr. 1987). Rather, in view of the limited repairs made by Dynatec, evidence regarding the potential for loading and hang-ups amounted to substantial evidence supporting the judge’s determination that a “hazard to persons” existed in the raise structure.

Similarly, we reject Dynatec's argument that it did not violate the standard on August 10 because no "hazard to persons" existed until after its miners left the raise. This argument finds no support in the record. Dynatec maintains that the hazardous condition developed after its withdrawal from the raise, when Magma continued to dump muck on top of the hang-up and continued to use explosives inside the raise. D. Reply Br. at 14 & n.29. In fact, a hazardous condition existed while Dynatec miners were in the raise because there existed a foreseeable potential for loading, and, in fact, a hang-up actually developed. Statement No. 6, at 24-25; Statement No. 40, at 5; Statement No. 48, at 8.

In any event, even if we were to assume that Dynatec employees left the raise before a hazardous condition developed, Magma employees were still in the raise and exposed to a hazardous condition resulting from Dynatec's failure to adequately repair or replace ground support timbers. If Dynatec's violative actions in failing to repair or replace timbers resulted in a "hazard to persons," Dynatec is liable for the violation regardless of which operator employed the miners placed at risk. As the Commission has previously recognized, "Employer-employee is not the test. The duty of an operator, whether owner or contractor, extends to all miners." *Republic Steel Corp.*, 1 FMSHRC 5, 11 (Apr. 1979). Furthermore, Dynatec cannot avoid liability for the violation by claiming that Magma's actions in "misusing" the raise created the "hazard to persons." While Magma's actions may have contributed to the "hazard to persons" in the raise, Dynatec remained responsible for its own actions in failing to repair or replace ground support timbers that present a hazard to persons before miners worked or traveled in the area. In sum, we conclude that substantial evidence supports the judge's determination that Dynatec violated section 57.3360 by failing to repair or replace ground support timbers so that the raise structure did not create a hazard to persons working in the structure. 20 FMSHRC at 1075-76.

2. S&S

The judge concluded that Dynatec's violation of section 57.3360 was S&S.⁷ 20

⁷ A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

FMSHRC at 1077. He determined that the violation contributed to a discrete safety hazard and that, without rehabilitating the raise structure, it was reasonably likely that a substantial failure of the structure would occur, resulting in an injury of a reasonably serious nature. *Id.*

Dynatec argues that the judge erred in concluding that its violation of section 57.3360 was S&S. PDR at 24-25. In support of its argument, Dynatec states only that “the Secretary did not prove that a ‘hazard to persons’ existed at the time that Dynatec’s employees were withdrawn . . . on August 10, 1993. Thus, the Secretary did not establish a violation of [section] 57.3360, let alone a significant and substantial one.” *Id.* The Secretary responds that the judge’s determination is supported by substantial evidence. S. Br. at 28-30.

We have concluded that substantial evidence supports the judge’s determination that the Secretary proved that a “hazard to persons” existed in violation of section 57.3360. Moreover, substantial evidence supports the judge’s determination that there was a reasonable likelihood that the hazard contributed to by Dynatec’s violation of section 57.3360 would result in a reasonably serious injury. 20 FMSHRC at 1077. The judge’s conclusion is supported by Van Liere’s testimony that, once the raise was returned to production, a precipitating event such as loading could cause failure of the raise structure. Tr. 356-57. Van Liere’s testimony was supported by Stork’s testimony that the safety of the raise would be diminished by the accumulation of muck exceeding 30 tons, and that the raise was not repaired in order to be used to hold material, particularly when a hang-up existed. Tr. 818-19, 867-68, 821, 823. Finally, MSHA Inspector Tyrone Goodspeed testified that he believed that the violation of section 57.3360 was S&S because the inadequate maintenance of the raise structure could result in a reasonably serious injury, such as death. Tr. 440, 449. In fact, on August 10, the raise structure, as repaired, failed, resulting in the deaths of four miners. Jt. Ex. A at 2, 30-33. Accordingly, we affirm the judge’s S&S determination.

3. Unwarrantable Failure

The judge held that Dynatec’s violation of section 57.3360 resulted from its unwarrantable failure. 20 FMSHRC at 1078. He determined that Dynatec did not address the structural and settlement problems in the raise structure, and that Dynatec knew that the raise structure presented a serious safety hazard to miners if the ore pass was loaded, or if blasting occurred in the raise. *Id.* In addition, he reasoned that Dynatec failed to adequately warn Magma of the severity of the hazard. *Id.* Thus, the judge concluded that Dynatec’s failure to take appropriate actions to ensure that the raise was rehabilitated before it was returned to production demonstrated a serious lack of reasonable care. *Id.*

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

Dynatec maintains that the judge erred in concluding that its violation of section 57.3360 was caused by its unwarrantable failure. It explains that it merely performed the limited repairs that Magma had decided were necessary, and that it only undertook such repairs after it received assurances that Magma would not misuse the raise and would later allow Dynatec to pour in sandfill during subsequent weekends. PDR at 25-26. The Secretary responds that the judge's determination is supported by substantial evidence. S. Br. at 31-36.

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*, 52 F.3d at 136 (approving Commission’s unwarrantable failure test).

We conclude that substantial evidence supports the judge’s determination that Dynatec’s violation of section 57.3360 was caused by its unwarrantable failure. As the judge found, Dynatec managers knew that the repairs were temporary and did not address the fundamental problems of the raise. 20 FMSHRC at 1069; Tr. 665; Statement No. 37, at 47-49; Statement No. 38, at 152; Statement No. 42, at 30; Statement No. 43, at 64. Dynatec conceded that the settlement problem was to be addressed during weekends after the raise had been returned to production. Statement No. 36, at 19, 25-26; Statement No. 37, at 47-49; Statement No. 38, at 139. As Marrington stated, installation of the backfill, which would have made the raise safe, was to occur after the raise had been returned to production. Statement No. 23, at 155-56.

Moreover, substantial evidence supports the judge’s determination that Dynatec knew that the raise structure, as repaired, posed a serious safety hazard to miners if the ore pass were loaded. 20 FMSHRC at 1070, 1078. In explaining that the raise should not have been loaded after Dynatec repaired it, Spry testified that if miners “dumped two cars [of muck] in it, they [needed to] pull two cars out [of] the bottom.” Statement No. 43, at 129. He agreed that any other practice would have been unsafe. *Id.* Further, as discussed above (slip op. at 7-8), substantial evidence supports the judge’s determination that it was foreseeable that the raise would become loaded, and it was unreasonable for Dynatec to conclude that no loading would occur.

In addition, substantial evidence supports the judge’s determination that Dynatec managers knew that the raise structure, as repaired, posed a serious safety hazard to miners if the ore pass was blasted. 20 FMSHRC at 1070, 1078. Spaulding and Spry acknowledged that the raise could “completely fall apart” or fail if blasted. Statement No. 37, at 50; Statement No. 39, at 51-52, 61; Statement No. 42, at 32.

Given this knowledge, before undertaking the repairs, Dynatec should have sought assurances from Magma that there would be no blasting. Instead, on August 6, after Dynatec had already started repairs, Dynatec only warned against blasting as part of idle conversation during Spry's good-bye luncheon.⁸ Statement No. 43, at 130-31. Dynatec could not reasonably have concluded that there would be no blasting. Spaulding testified that during the August 6 lunch, he had been informed that Magma would blast in the raise, albeit as a last resort. Tr. 729; Statement No. 39, at 40-41, 85-86; Statement No. 36, at 26; Stip. Doc. 112 (entry by Spaulding dated 8-6-94); Statement No. 38, at 142. Spaulding also stated that Kannegaard had informed him that he had met with team leaders and had circulated a memorandum stating that the raise could be blasted only as a last resort until it had been backfilled with concrete. Tr. 729; Statement No. 36, at 26; Stip. Doc. 112 (entry by Spaulding dated 8-6-94); Statement No. 38, at 142; Statement No. 39, at 40-41, 85-86. Consistent with Spaulding's testimony, Kannegaard stated that he had spoken with Dalton, who was responsible for the Magma crews working in the raise, and told him that blasting in the raise should be a last resort. Statement No. 22, at 94, 107. Thus, as the judge found, Spaulding understood that Dynatec would blast as a last resort. 20 FMSHRC at 1062.

In light of its knowledge that the raise would pose a serious hazard to miners if loading or blasting occurred until after permanent repairs were made, substantial evidence supports the judge's determination that Dynatec exhibited a serious lack of reasonable care by agreeing to a plan whereby it would immediately perform limited repairs and make permanent repairs after the raise had been returned to production. 20 FMSHRC at 1069-70, 1078. As the judge noted, Dynatec did not control the raise. *Id.* at 1069. Nonetheless, Dynatec had control over the decision of whether to undertake the limited repairs. It was unreasonable for Dynatec to rely upon assurances that it would be able to rehabilitate the raise by pouring sand grout backfill during subsequent weekends. Instead, Dynatec was required to adequately repair the raise structure *before* miners returned to work. Dynatec knew or should have known that making the

⁸ Substantial evidence supports the judge's related finding that Dynatec failed to take appropriate action to establish that Magma appreciated the hazard posed to miners by returning the raise to production before permanent repairs were made. 20 FMSHRC at 1070, 1076, 1078. As the judge found, Dynatec's verbal warnings to Magma were framed more in terms of longevity of the raise, rather than ensuring that miners' lives were not placed at risk. *Id.* at 1070, 1076. Kannegaard stated that when he examined the damaged raise with Spaulding, Spaulding stated that continual blasting of the raise would hurt the raise beyond repairability. Statement No. 22, at 106-07. In addition, on August 4, when Spaulding spoke with Magma's manager for underground mines, Steve Lautenschlaeger, Spaulding testified that he did not inform Lautenschlaeger that it would be unsafe to use the raise if it were not rebuilt. Tr. 545, 727. Spaulding stated that his concern when he spoke to Lautenschlaeger was the longevity of the raise. Tr. 727; *see also* Stip. Doc. 84. Spry testified that at the August 6 lunch, he told Kannegaard and Fudge that he thought the repairs were "good . . . [for] straighten[ing] out [or] fix[ing] up" the raise, but that the repairs were only a temporary rather than a permanent solution. Tr. 632-33.

temporary repairs would likely result in miners' exposure to serious risk of harm, and it exhibited aggravated conduct in making such repairs.⁹ Accordingly, we affirm the judge's determination that Dynatec's violation of section 57.3360 was caused by its unwarrantable failure.

4. Civil Penalty

Dynatec argues that the penalty assessed for its violation of section 57.3360 is excessive. PDR at 38-39. It asserts that the penalty criteria reflect congressional intent to treat small, generally compliant operators differently than large, non-compliant ones, and that the fine assessed against Dynatec is only \$10,000 less than the one for Magma for the same violation. *Id.*

We conclude that substantial evidence supports the judge's penalty of \$40,000 for Dynatec's violation of section 57.3360. The judge made findings with respect to all six penalty criteria, and specifically relied in part on Dynatec's favorable history of previous violations, and on the fact that it was a mid-sized independent contractor. 20 FMSHRC at 1089. Moreover, we decline Dynatec's invitation to compare its penalty with the penalty paid by Magma as part of a settlement agreement. *See Northern California Power Agency v. FERC*, 37 F.3d 1517, 1522 (D.C. Cir. 1994) ("It would be nonsensical for an agency to adjust every judgment it rendered in order to conform to the results of related . . . settlements."). The assessment of a civil penalty is a matter of discretion involving the application of the statutory criteria to the facts of each particular case.¹⁰ *See Pyro Mining Co.*, 6 FMSHRC 2089, 2091-92 (Sept. 1984).

Finally, because we would affirm the judge's S&S and unwarrantable failure findings, we conclude that the judge's findings that the violation was serious and caused by high negligence are supported by substantial evidence. *See Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 & n.11 (Sept. 1987) (noting that the penalty criteria of gravity and negligence are based frequently upon the same or similar factual circumstances as findings of S&S and unwarrantable failure,

⁹ Commissioners Riley and Verheggen would emphasize that they do not consider Dynatec to be a guarantor of Magma's conduct, particularly given Dynatec's inability to control Magma's actions or the raise. Nonetheless, they conclude that, given Dynatec's knowledge, the lack of formality of Dynatec's warnings is a factor demonstrating Dynatec's disregard of a known hazard, and supports the judge's unwarrantable failure finding.

¹⁰ We reject Dynatec's argument that the penalties assessed against Dynatec impermissibly exceeded the statutory maximum of \$50,000 per violation because Magma had been assessed penalties of \$50,000 for the same standards that Dynatec allegedly violated. PDR at 39-40. Section 110(a) of the Mine Act expressly recognizes that there may be multiple violations of one standard, that each violation may constitute a separate offense, and that each violation by an operator shall be assessed a civil penalty up to \$50,000. 30 U.S.C. § 820(a). Dynatec and Magma were separately cited for violations that they each allegedly committed. Thus, each may be assessed a civil penalty of up to the maximum statutory amount for each violation.

respectively). The judge appropriately considered that Magma had decided which repairs were necessary, and that Dynatec had received assurances that Magma would not misuse the raise and would later allow Dynatec to pour sandfill, in his reduction of the proposed penalty of \$50,000 to the assessed penalty of \$40,000.¹¹ 20 FMSHRC at 1090.

B. Alleged violation of 30 C.F.R. § 57.11001:¹² Order No. 4410468

1. Violation

The judge determined that a safe means of access was provided and maintained to working places within the manway during the time that Dynatec performed repairs, but that safe access was not provided after the raise was returned to production on August 9. 20 FMSHRC at 1079-80. Based on that finding, he reduced the scope of the order alleging a violation of section 57.11001 from August 4 through August 10, to August 9 and 10. *Id.* The judge concluded that Dynatec violated the standard on August 9 and 10 by failing to remove its employees from the manway and by failing to provide sufficient warning to Magma that the manway did not provide a safe means of access. *Id.* at 1080.

Dynatec argues the judge erred in finding a violation of section 57.11001 because the Secretary failed to prove that a hazardous condition existed when Dynatec employees gained access to working places on August 9 and 10. PDR at 20-22. As to August 9, it contends that there was no violation because there was no evidence that Dynatec worked inside the raise after it was returned to service on the B or C shifts, and that there were no incidents during those shifts. *Id.* at 20; D. Reply Br. at 9-10. It maintains that the Secretary failed to prove a violation on August 10 because there is no evidence that the raise was loaded when it gained access “to” working places on that date. PDR at 20; D. Reply Br. at 10, 16-17. It maintains that even if the standard is read to require safe access “from” working places, in addition to “to” working places, the Secretary did not prove a violation because the Secretary did not prove that the raise was full enough to pose a hazard at the time of Dynatec’s withdrawal. PDR at 21; D. Reply Br. at 10 n.18, 16-17. Dynatec also argues that the judge erred in considering Dynatec’s failure to warn Magma because section 57.11001 does not impose a duty to notify. PDR at 33. The Secretary responds that substantial evidence supports the judge’s finding that Dynatec violated section 57.11001 because the raise structure was unsafe, and there is no dispute that, on August 9 and 10, Dynatec permitted employees to gain access to working places using the raise structure. S. Br. at 17.

¹¹ We reject Dynatec’s assertion that Magma’s negligence was imputed to Dynatec for unwarrantable failure and penalty assessment purposes. PDR at 36-37. The judge did not impute Magma’s negligence to Dynatec but, rather, reduced penalties assessed against Dynatec based in part on Magma’s actions. 20 FMSHRC at 1090.

¹² Section 57.11001 provides that a “[s]afe means of access shall be provided and maintained to all working places.”

To prove a violation of section 57.11001, the Secretary must establish that a safe means of access to working places was not provided to and maintained for miners gaining access. The Secretary, however, need not prove that safety is diminished to the degree that an accident or injury actually will occur while the miners are using the route. *Cf. Arch of Kentucky*, 20 FMSHRC at 1330 (holding that the Secretary does not have to show that a violation caused an accident in order to prove that the violation is S&S.). In considering whether the Secretary proved a violation, the appropriate focus is on the standard's requirement that safe access be "provided and maintained," rather than on whether access is "to" or "from" working places. *See Homestake Mining Co.*, 4 FMSHRC 146, 151 (Feb. 1982) (considering means of access for reaching and leaving workplace in identically worded predecessor to section 57.11001); *Hanna Mining Co.*, 3 FMSHRC 2045, 2046-47 (Sept. 1981) (considering means of access for reaching and leaving workplace in identically worded standard). Thus, we find irrelevant Dynatec's arguments regarding the distinction between access "to" and "from" working places, and the conditions that existed when Dynatec's miners initially arrived in the manway, or eventually departed. PDR at 20-21; D. Reply Br. at 10, 16-17. In addition, we reject Dynatec's assertion that the judge erred in finding a violation on August 9 because no accident occurred on that date. PDR at 20-22.

We conclude that substantial evidence supports the judge's determination that Dynatec violated section 57.11001. As discussed above (slip op. at 7-8), on August 10, a high volume of muck was being dumped into the ore pass, and it was foreseeable that the ore pass would become loaded, potentially resulting in the failure of the divider wall between the ore pass and the manway. As acknowledged by Dynatec witnesses, the raise structure had not been repaired to withstand loading, but was safe only to transfer ore. Tr. 889-90; R. Ex. 9; Jt. Ex. D at 19; Statement No. 43, at 129. During the B shift, the ore pass was loaded, and became hung up. Statement No. 6, at 23; Statement No. 40, at 5. A hang-up within the ore pass applied load to the ore pass walls and could have resulted in failure of the divider wall between the ore pass and manway. 20 FMSHRC at 1066; Tr. 321, 357, 991; Jt. Ex. D at 19. Thus, on August 10, a safe means of access was not provided and maintained in the manway.

It is undisputed that Dynatec permitted its employees to gain access to the manway on August 10 while the manway was unsafe. Dynatec employees were in the manway on August 10 when the ore pass was being loaded, and while it was hung up.¹³ Statement No. 50, at 5; Statement No. 36, at 15-16; Statement No. 6, at 24-26; Statement No. 40, at 5. Dynatec employees were withdrawn from the ore pass only when the hang-up was going to be blasted. Statement No. 6, at 24-25; Statement No. 40, at 5; Statement No. 48, at 8. Accordingly, we

¹³ Because evidence of Dynatec's employees in the manway on August 10 amounts to substantial evidence supporting the judge's determination that Dynatec violated section 57.11001, we need not reach Dynatec's remaining arguments that the judge erred in finding a violation due to Dynatec's presence in the manway on August 9, and Dynatec's failure to adequately warn Magma that the manway did not provide a safe means of access.

affirm the judge's determination that Dynatec violated section 57.11001.¹⁴

2. S&S

The judge determined that Dynatec's violation of section 57.11001 was S&S. 20 FMSHRC at 1080. He reasoned that once the raise was returned to production as repaired, it was reasonably likely that the raise would fail thereby killing or seriously injuring miners in the manway. *Id.*

Dynatec argues that the judge erred in concluding that its violation of section 57.11001 was S&S because the Secretary failed to prove the third *Mathies* factor. PDR at 22. It submits that Van Liere testified that there was only a possibility that the raise might fail, while Stork testified that it was very unlikely that the raise would fail under the conditions that probably existed at the time of Dynatec's withdrawal. *Id.*

Substantial evidence supports the judge's determination that the repaired raise structure was reasonably likely to fail, resulting in injury to miners who gained access to the manway during production on August 10. 20 FMSHRC at 1080. As discussed above (slip op. at 6-10), substantial evidence supports the judge's determination that, as repaired, the raise structure presented a hazard to persons after the raise was returned to production in that a precipitating event, such as loading the raise, could cause the dividing wall to fail. Stork's testimony supports the judge's S&S conclusion in that Stork testified that the repairs to the raise structure were adequate only if the raise was used to transfer ore and did not become loaded. Stork acknowledged that safety would be progressively diminished if muck accumulated beyond the concreted set at the bottom of the raise, and that the raise was vulnerable to further distortion under another hang-up. Spry also acknowledged that the ore pass would not be safe unless muck

¹⁴ Dynatec's asserts that the judge erroneously penalized Dynatec twice for allegedly exposing its employees to hazardous conditions in the raise on the B shift on August 10, and that the citation alleging a violation of section 57.3360 and the order alleging a violation of section 57.11001 are duplicative. PDR at 35-36. We disagree. The Commission has recognized that citations are not duplicative when the standards involved impose separate and distinct duties on an operator. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003 (June 1997); *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993). While the citation and order alleging violations of sections 57.3360 and 57.11001 are related in that the failure to repair or replace ground support timber also contributed to making access to a work place unsafe, section 57.3360 requires repair or replacement of damaged ground support timbers, while section 57.11001 requires that safe access be provided and maintained. In effect, Dynatec violated section 57.3360 by an act of omission by failing to repair or replace ground support timbers, and violated section 57.11001 by an act of commission by allowing its miners to gain access to an area in which safe access to working places had not been provided and maintained. See *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463 (Aug. 1982) (holding that violations of omission and commission were not duplicative).

was removed from the ore pass as soon as it was dumped. On August 10, while Dynatec miners were in the manway, the ore pass became loaded and hung-up. Thus, there was a reasonable likelihood of injury resulting from Dynatec's actions in permitting its employees to gain access to the manway on August 10, while safe access was not provided or maintained. Accordingly, we affirm the judge's S&S determination.

3. Unwarrantable Failure

The judge determined that Dynatec's violation of section 57.11001 was caused by its unwarrantable failure. 20 FMSHRC at 1080. He reasoned that Dynatec demonstrated a serious lack of reasonable care by allowing its miners to work in the structure after the hangup developed, and by failing to suitably warn Magma employees that they were endangering their lives by continuing to work in the raise structure below the hangup. *Id.* at 1080-81.

Dynatec argues that the judge erred in finding that its violation of section 57.11001 was unwarrantable because the judge failed to evaluate the reasonableness of Dynatec's decision to allow its employees to work in the raise on August 9 and 10. PDR at 22-23. It asserts that it was highly unlikely that a hazardous condition would arise while its employees were in the raise; that it had received assurances from Magma that the raise would not be misused; and that Dynatec withdrew its employees when blasting was to occur. *Id.* at 23.

Substantial evidence supports the judge's unwarrantable failure determination. As discussed above (slip op. at 12), Dynatec knew that the repairs it performed were inadequate to make the raise structure safe if the raise became loaded, or was blasted. In addition, substantial evidence supports the judge's determination that it was foreseeable that the raise would become loaded. Although Dynatec claims that it received assurances that the raise would not be misused, Spaulding understood that Magma considered blasting in the raise as an option, albeit one of last resort. Tr. 729; Statement No. 39, at 40-41, 85-86; Statement No. 36, at 26. Given the inadequacy of the repairs, the conditions that existed during production, and Dynatec's knowledge that the raise structure posed a serious hazard to miners if it became loaded or was blasted, Dynatec engaged in aggravated conduct by permitting its employees to gain access to the manway during production on August 10. Contrary to Dynatec's assertions, its conduct in withdrawing its miners before the raise was blasted does not demonstrate that its conduct was not aggravated. While its actions ultimately saved Dynatec miners' lives, its actions in permitting its employees to gain access in the first instance nonetheless demonstrated a serious lack of reasonable care.¹⁵ Accordingly, we affirm the judge's finding that Dynatec's violation of section 57.11001 was caused by its unwarrantable failure.

¹⁵ The judge appropriately considered Dynatec's actions in withdrawing its miners by reducing the penalty from \$50,000 to \$20,000, although concluding, nonetheless, that Dynatec's violation was unwarrantable. 20 FMSHRC at 1080-81, 1090.

C. Alleged violation of 30 C.F.R. § 57.3401:¹⁶ Order Nos. 4410469 through 4410474

The judge noted that the purpose of section 57.3401 is to ensure that ground and ground support do not pose a hazard to miners. 20 FMSHRC at 1083. He found that on August 6, Dynatec knew that the raise structure was compromised, but did not know what portions of the structure had failed. *Id.* The judge noted that while Dynatec examined the manway prior to the beginning of each shift, the examinations were not comprehensive enough to pinpoint hazards given that the raise had settled eight to ten inches, and that Dynatec knew that the settlement posed a significant safety hazard. *Id.* at 1083-84. In addition, he concluded that Dynatec failed to examine the ground surrounding the raise structure. *Id.* at 1084. Accordingly, the judge concluded that Dynatec violated section 57.3401, and affirmed the six orders alleging violations of the standard. *Id.* at 1083-84.

Dynatec argues that, by reading “ground support structures” into the meaning of “ground conditions,” the judge interpreted the standard contrary to its plain meaning. PDR at 27. Dynatec also asserts that it was deprived of fair notice because a reasonably prudent person would not have recognized that the standard required examination of ground support structures. *Id.* at 28. It maintains that, even if the standard is applicable, Dynatec met its requirements by examining, measuring and monitoring the timber, and that it did pinpoint hazards. *Id.* at 29-30. Dynatec contends that, from its examinations, it determined that blocking had been compromised, and recommended to Magma that it completely rebuild the raise. D. Reply Br. at 6. Dynatec also asserts that a reasonably prudent person would not have removed timber to examine ground conditions absent some indicia that ground conditions were problematic. *Id.* at 4 n.3.

The Secretary argues that the judge’s finding that Dynatec failed to perform adequate examinations is supported by substantial evidence. S. Br. at 20. She maintains that the judge correctly accepted the Secretary’s interpretation that an examination under the standard requires an examination of the support structure, which she submits is apparent from the plain meaning of the standard. *Id.* at 22-23. She contends that Dynatec failed to make complete examinations of the raise structure. *Id.* at 24-25. In addition, the Secretary asserts that, even though surrounding

¹⁶ Section 57.3401 provides:

Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Underground haulageways and travelways . . . shall be examined weekly or more often if changing ground conditions warrant.

rock appeared stable, Dynatec did not know that because it did not attempt to examine the ground. *Id.* at 20-21.

The judge faulted Dynatec for failing to implement a plan for examining blocking and for not determining whether the rock walls surrounding the raise structure were contributing to the damage of the raise structure. 20 FMSHRC at 1084. The judge explained that if Dynatec had conducted a more extensive examination, Dynatec “may have been able to use a written report of such an examination to convince Magma Copper to shut down the raise until permanent repairs were completed.” *Id.* Whether an examination of the blocking or the surrounding rock might have persuaded Magma to shut down the raise pending Dynatec’s completion of permanent repairs is too speculative a basis for us to uphold the violations of section 57.3401.

Rather, the adequacy of Dynatec’s examinations must be judged in light of the purpose of the standard, which means that the examinations should be, as the judge stated, “designed to pinpoint the problems so that they can be fixed before miners are exposed to the hazards.” 20 FMSHRC at 1084 (emphasis omitted). It is undisputed that Dynatec examined the inside of the manway prior to each shift. 20 FMSHRC at 1083. Both parties agree that:

Dynatec inspections revealed that the structure had settled eight to ten inches from its original installation; that there was separation between the joints; that a divider plate was broken; that blocking was sheared; that ladders were loose and broken; that landings and the divider wall were displaced; and that divider cribbing and ore was present in the manway.

S. Br. at 3; D. Reply Br. at 3. Moreover, Dynatec contends that, from its examinations, it determined that blocking was compromised, and that it had slipped, shifted, or sheared. D. Reply Br. at 5. Based upon its examinations, Dynatec recommended to Magma that either the entire raise had to be rebuilt or a metal liner had to be inserted into the ore pass. Tr. 630-32, 726-27. In addition, Dynatec discussed with Magma pouring sand grout backfill at various locations behind the raise structure. 20 FMSHRC at 1069 n.4, 1076; Tr. 728. Had Dynatec’s recommendations been implemented before production resumed, it is undisputed that those repairs would have restored the stability of the raise structure. 20 FMSHRC at 1069 n.4, 1076. Thus, Dynatec’s examinations of the raise structure pinpointed the problems that needed to be fixed to insure that miners would not be exposed to hazards.¹⁷

¹⁷ We also note that, contrary to the judge’s findings, Dynatec’s development and implementation of a specific plan for examining blocking at strategic locations would not necessarily have allowed Dynatec to better identify hazards in the raise structure. 20 FMSHRC at 1083-84. While drilling holes in the lagging would have allowed for some examination of blocking behind the manway and at the center posts (Tr. 95-96, 111-12, 460, 639), it would not have allowed examination of blocking behind portions of the ore pass, because the ore pass was enclosed with armored cribbing. Tr. 196, 639; Statement No. 42, at 40-41; Statement No. 43, at

As for the surrounding rock, Dynatec asserts that a reasonably prudent person would not have removed timber in the raise structure to examine ground conditions absent some indicia that ground conditions were problematic. D. Reply Br. at 4 n.3. Damage to the raise structure was discovered on August 3 directly following shifts when Magma had made a concerted effort to blast the hang-up. 20 FMSHRC at 1061; Tr. 622-23, 716-17. Overwhelming evidence in the record reveals that Dynatec witnesses believed that the raise structure had settled and been damaged as a result of the hang-up and blasting between July 30 and August 3. *See* Tr. 804, 935-36, 941, 977; Statement No. 9, at 10-11; Statement No. 11, at 9, 22; Statement No. 22, at 49; Statement No. 26, at 46-48; Statement No. 38, at 109; Statement No. 49, at 15-16; Statement No. 50, at 8-10; Statement No. 42, at 18-25; Statement No. 23, at 154. Given the correlation in time between the blasting, hang-up, and observed damage, we agree with Dynatec that a reasonably prudent person would not have recognized that he or she was required to examine the ground conditions of the surrounding rock to determine whether they contributed to the damaged raise structure, when it appeared that damage to the raise structure had been caused by the blasting and hang-up. Moreover, the record is devoid of any evidence that hazards might have remained unaddressed as a result of Dynatec's failure to examine the rock surrounding the raise structure. Even assuming that the initial damage suffered by that structure had resulted in part from the surrounding rock wall, if Dynatec's suggestions had been carried out before production began again, the stability of the raise structure would have been reestablished. Thus, substantial evidence does not support the judge's determination that Dynatec violated section 57.3401 by failing to examine the ground surrounding the raise structure. Accordingly, we reverse the judge's determination that Dynatec violated section 57.3401 and vacate the associated civil penalties assessed by the judge.

D. Alleged Violation of 30 C.F.R. § 57.18002(a):¹⁸ Order Nos. 4410475 through 4410479

The judge vacated the five orders alleging violations of section 57.18002(a) as duplicative, based on his determination that the examinations required by 57.18002(a) were the same as those required under section 57.3401. 20 FMSHRC at 1088, 1091. He also concluded, however, that if he had found that the violations issued under section 57.3401 had been invalid, he would alternatively affirm the violations issued under section 57.18002(a), and their associated special findings, and that his analysis would be the same under either standard. *Id.* at 1089.

132; Statement No. 49, at 61-63.

¹⁸ Section 57.18002(a) provides:

A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate an appropriate action to correct such conditions.

Dynatec argues that the judge correctly vacated the orders alleging violations of section 57.18002(a). PDR at 31. It contends that, if the Commission finds it necessary to consider the orders alleging violations of section 57.18002(a), it should find that the judge erred in concluding that Dynatec violated section 57.18002(a). PDR at 31-32. The Secretary responds that the judge properly found in the alternative that Dynatec violated section 57.18002(a). S. Br. at 26. In its reply brief, Dynatec argues that the alleged violations of section 57.18002(a) are not before the Commission because the Secretary failed to preserve them by filing a cross-petition for discretionary review. D. Reply Br. at 8 n.13.

Chairman Jordan and Commissioner Beatty would vacate that portion of the judge's decision holding that the orders alleging violations of section 57.3401 and 57.18002(a) are duplicative, and vacating the orders alleging violations of section 57.18002(a), and remand for further consideration by the judge. Commissioner Riley and Commissioner Verheggen conclude that the orders alleging violations of section 57.18002(a), and the judge's determination of duplication, are not before the Commission. The effect of the split decision is to leave standing the judge's vacation of the orders alleging violations of section 57.18002(a). *See Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

The separate opinions of Commissioners follow.

III.

Separate Opinions of the Commissioners

Chairman Jordan and Commissioner Beatty, in favor of vacating and remanding:

We would vacate that portion of the judge's decision vacating the orders alleging violations of section 57.18002(a), and would remand for further consideration by the judge.

Preliminarily, we conclude that the issue of whether the judge properly vacated the orders alleging violations of section 57.18002(a) is within the scope of the Commission's review. Under the Mine Act and the Commission's procedural rules, review is limited to the questions raised in the petition and by the Commission *sua sponte*. 30 U.S.C. § 823(d)(2)(A)(iii) and (B); 29 C.F.R. § 2700.70. Dynatec argues that the Secretary did not file a cross-petition for review of the judge's ruling vacating those orders. D. Reply Br. at 8 n.13.

However, our review of the question of whether section 57.18002(a) was violated is a "direct and logical outgrowth" of our reversal of the judge's determination that Dynatec violated section 57.3401 and is therefore properly before us. *See Black Mesa Pipeline Inc.*, 22 FMSHRC 708, 716 & n.8 (June 2000). As a result of our reversal of the judge's ruling on that violation, Dynatec is now no longer subject to a penalty for violating section 57.3401. Consequently, the judge's rationale for vacating the orders alleging violations of section 57.18002(a) — the inequities of penalizing Dynatec for violations of both section 57.3401 and section 57.18002(a), which he found to be duplicative, 20 FMSHRC at 1088-89 — no longer exists, as the alleged violations of section 57.3401 are now vacated. The Secretary was not obligated to file a cross-petition in anticipation of this procedural scenario. *See* 15A Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* 2d § 3904 at 203-04 (2d ed. 1992) ("Cross-appeal also is not required to preserve the right to orderly disposition of issues that become relevant only because of reversal.").

This position is consistent with the Commission's decision in *Black Mesa*. In that case, the Commission reversed a judge's finding of a violation of a regulation that the Secretary claimed was due to the operator's failure to provide a person qualified to conduct a high voltage electrical examination. 22 FMSHRC at 713. In reversing this violation, the Commission invalidated part of the Secretary's program for qualifying electricians, which had more stringent standards for high voltage work. *Id.* It then went on to reverse the judge's finding of a violation of a record-keeping requirement, which the inspector had alleged was violated because the records were not kept by a high-voltage qualified electrician. *Id.* at 716. Although the operator had not included this issue in its petition for discretionary review, the Commission stated that it could review it because it was a "direct and logical outgrowth" of the disposition of the related first violation. *Id.* at 716 & n.8. Similarly, we may review the issue of whether Dynatec violated section 57.18002(a), because that question is naturally resuscitated by our reversal of the

violation of section 57.3401.¹

When the judge concluded that sections 57.3401 and 57.18002(a) had duplicative examination requirements with respect to the violations alleged herein, he confined his consideration to the first sentence of section 57.18002(a). 20 FMSHRC at 1087-89. He did not discuss whether Dynatec could have violated the second sentence of the regulation by failing to promptly initiate appropriate action to correct conditions affecting safety. Moreover, the parties have not fully briefed that question. Under these circumstances, we deem it appropriate to vacate that portion of the judge's decision vacating the orders alleging violations of section 57.18002(a), and remand for further consideration consistent with our opinion. On remand, we would instruct the judge that he may give the parties an opportunity to submit additional briefs regarding whether Dynatec violated the provisions of section 57.18002(a).



Mary Lu Jordan

Mary Lu Jordan, Chairman



Robert H. Beatty, Jr.

Commissioner

¹ We also note that some courts and commentators have concluded that an appellee's failure to file a cross-petition does not amount to a jurisdictional defect precluding the court from enlarging a judgment in favor of the appellee. See *Coe v. County of Cook*, 162 F.3d 491, 497 (7th Cir. 1998), cert den. 526 U.S. 1040 (1999); 15 James Wm Moore et al., *Moore's Federal Practice* § 205.04[2] at 205-46 through 205-47 (3d ed. 2000); 15A Charles Alan Wright, et al., *Federal Practice and Procedure* § 3904 at 211-18 (2d ed. 1992). In *Coe*, the Seventh Circuit explained that because the purpose of requiring a cross-petition is "to notify the appellant that the appellee wants to alter and not merely defend the judgment . . . , there is no compelling reason to enforce it when the appellant has been adequately notified of the appellee's intentions." 162 F.3d at 497. Dynatec cannot claim lack of notice of this since it raised in its own petition for discretionary review the question of whether the judge erred in his alternative finding that Dynatec violated section 57.18002(a). PDR at 31-32.

Commissioners Riley and Verheggen, in favor of not reaching the issue of whether the judge properly vacated the five orders alleging violations of section 57.18002(a) as duplicative:

We do not reach the issue of whether the judge properly vacated the five orders alleging violations of section 57.18002(a) as duplicative because this issue is not before the Commission. Under the Mine Act, review is limited to the questions raised *sua sponte* by the Commission, or in a petition for discretionary review filed by “[a]ny person adversely affected or aggrieved by a decision of an administrative law judge.” 30 U.S.C. § 823(d)(2). Here, the Secretary did not appeal that portion of the judge’s opinion in which he vacated the orders alleging violations of section 57.18002(a). Nor did the Commission order *sua sponte* review of that portion of the judge’s decision. The issue is thus not before the Commission.¹

We do not agree with our colleagues when they state that “the question of whether section 57.18002(a) was violated is a ‘direct and logical outgrowth’ of our reversal of the judge’s determination that Dynatec violated section 57.3401 and is therefore properly before us.” Slip op. at 23. First, the relevant question is not “whether section 57.18002(a) was violated.”² Instead, had the issue been brought before us by the Secretary, she would necessarily have had to argue that the judge erred in finding the section 57.18002(a) orders as duplicative of the section 57.3401 orders, and she would have had to offer reasons why the two sets of orders were not duplicative.

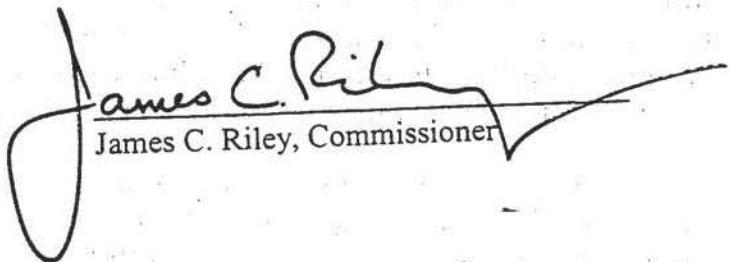
Nor do we view the question posed by our colleagues as “a ‘direct and logical outgrowth’ of our reversal of the judge’s determination that Dynatec violated section 57.3401.” Slip op. at 23. To the contrary, the full Commission’s reversal of the judge’s holding on the section 57.3401 violations has no impact on the independent and separate allegations made by the Secretary with respect to section 57.18002(a). In the *Black Mesa Pipeline Inc.* case cited by our colleagues, the Commission invalidated a policy of the Secretary that was at odds with the regulation the policy sought to implement. 22 FMSHRC 708, 713 (June 2000). In light of this holding, the Commission went on to reverse the judge’s determination that Black Mesa violated an intrinsically related record-keeping requirement. *Id.* at 716 & n.8. The alleged record-keeping violation in *Black Mesa* was effectively no longer a violation because the Commission invalidated the policy on which the violation was ultimately based. In *Black Mesa*, the record-keeping violation was “a direct and logical outgrowth” of the Commission’s holding on the policy in the same way, for example, the failure to enter an accumulation on a record of a

¹ Our colleagues state that “[t]he Secretary was not obligated to file a cross-petition in anticipation of” the Commission’s decision to reverse the judge’s finding that Dynatec violated section 57.3401. Slip op. at 23. Neither the Mine Act nor the Commission’s Procedural Rules, however, make any provision for filing cross petitions similar to the provision for filing cross appeals contained in Rule 4(a)(3) of the Federal Rules of Appellate Procedure.

² The judge’s “alternative finding” that he would have affirmed the section 57.18002(a) violations had he vacated the section 57.3401 violations is dicta on which we offer no opinion.

pre-shift examination would be directly affected by a finding that the alleged accumulation did not exist.

Accordingly, we thus disagree with our colleague's decision to reach this issue, which, for the foregoing reasons, we do not reach.


James C. Riley
James C. Riley, Commissioner


Theodore F. Verheggen
Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 26, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 2001-37-M
	:	A.C. No. 39-00022-05543
DACOTAH CEMENT	:	

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

ORDER

BY: Jordan, Chairman; Beatty, Commissioner

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 20, 2000, Chief Administrative Law Judge David Barbour issued an Order of Dismissal to Dacotah Cement ("Dacotah") dismissing this civil penalty proceeding for payment of the proposed penalty. On January 9, 2001, the Commission received from Dacotah a request to vacate the judge's dismissal order. The Secretary of Labor does not oppose the motion for relief filed by Dacotah.

In its request, Dacotah contends that on January 2, 2001, it received a phone call from Tom Giblin, counsel to Judge Barbour, notifying it that this proceeding was dismissed. Mot. at 1. Dacotah asserts that it told Mr. Giblin that it "decided to pay the penalties not to admit guilt," but to prevent the accrual of interest on the penalties. *Id.* It states that it "evidently paid . . . in error" and requests a hearing. *Id.* Attached to its request is a copy of Judge Barbour's order dismissing the proceedings, with a notation by John Harris, Dacotah's safety director, of receipt on December 26, 2000.

The judge's jurisdiction in this matter terminated when his decision was issued on December 20, 2000. 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

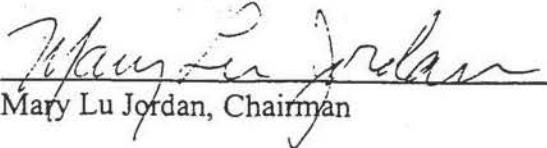
discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Dacotah's motion to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Resources, Inc.*, 10 FMSHRC 1130 (Sept. 1988).

It appears from the official file that on November 16, 2000, the Commission received Dacotah's timely-filed request for a hearing to contest the proposed penalty assessment at issue in this civil penalty proceeding. On December 7, 2000, the Commission received from MSHA a confirmation of its receipt of Dacotah's payment in this matter. Consequently, on December 20, 2000, Judge Barbour issued an order of dismissal.

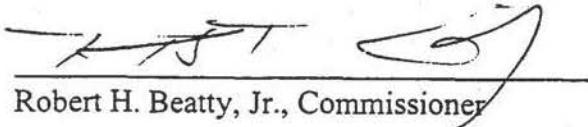
The record indicates that Dacotah contested the proposed assessment by timely returning the green card, but subsequently paid the assessment. In circumstances in which an operator intentionally paid a proposed penalty assessment, the Commission has denied the operator's request to vacate an order of dismissal so that it could continue its contest of the related citation. *Old Ben Coal Co.*, 7 FMSHRC 205, 210 (Feb. 1985). In *Old Ben*, the Commission held that an operator's payment of a civil penalty proposed for a violation extinguishes the operator's right to contest the fact of violation. *Id.* at 209. However, the Commission noted that where a civil penalty was paid by genuine mistake, the operator's right to contest the violation may not be lost. *Id.* at 210 n.6. In *Tug Valley Coal Processing*, the Commission vacated an order of dismissal and remanded based on its conclusion that the statement by the operator that it mistakenly paid a penalty did not amount to sufficient information for the Commission to determine whether payment was a "genuine mistake." 16 FMSHRC 216, 217 (Feb. 1994); *see also Westmoreland Coal Co.*, 11 FMSHRC 275, 276 (Mar. 1989) (same).

It appears that while Dacotah may have made a deliberate decision to pay in an effort to prevent any accrual of interest on the proposed penalties, it may have intended to continue its challenge of the penalties and underlying violations. However, whether Dacotah intended to continue its challenge of the proposed penalties is not entirely clear from its request. Thus, the record does not contain sufficient information to permit us to determine whether Dacotah's penalty payment was a "genuine mistake." Compare *Old Ben*, 7 FMSHRC at 210 & n.6 (denying operator's motion to vacate dismissal, and rejecting operator's argument that contest of citation should continue where operator did not intend to challenge proposed penalties that it paid) with *Consolidation Coal Co.*, 22 FMSHRC 1182, 1183-84 (Oct. 2000) (granting motion to vacate dismissal where operator inadvertently paid proposed penalties that it intended to challenge).

Accordingly, in the interest of justice, we grant Dacotah's petition, vacate the judge's dismissal order, and remand this matter to the judge, who shall determine whether relief from the dismissal order is warranted. If the judge determines that relief is appropriate, the case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



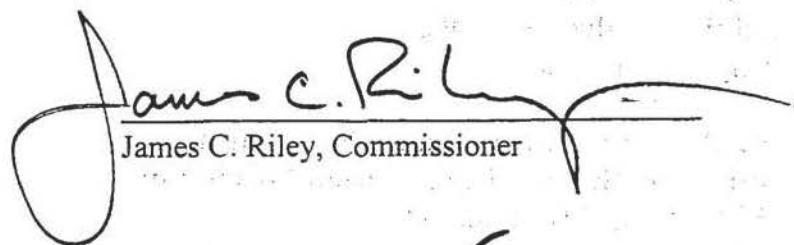
Mary Lu Jordan, Chairman

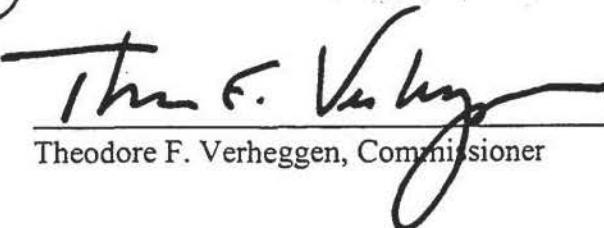


Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, concurring:

We would grant the operator's request for relief here, because the Secretary does not oppose and the operator has offered a sufficient explanation for its failure to timely respond. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Rule 60(b). *See Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

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January 29, 2001

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
: Docket No. CENT 2000-437-M
v. : A.C. No. 41-03153-05517
STAR SAND COMPANY, INC. :

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

ORDER

BY: Jordan, Chairman; Beatty, Commissioner

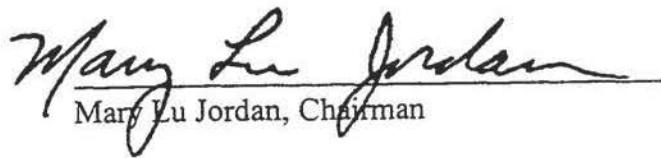
This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On December 18, 2000, Chief Administrative Law Judge David F. Barbour issued an Order of Default to Star Sand Company, Inc. ("Star Sand") dismissing this civil penalty proceeding for failing to answer the Petition for Assessment of Penalty filed by the Secretary of Labor on September 20, 2000, or the judge's Order to Respondent to Show Cause issued on November 8, 2000. The judge assessed civil penalties in the sum of \$800 proposed by the Secretary.

On January 16, 2001, the Commission received from Star Sand a request to vacate the judge's default order. Mot. In its request, Star Sand contends that it failed to file an answer when it received the Secretary's Petition for Assessment of Penalty in this proceeding because it mistakenly believed that this case was included in the group of cases that it was in the process of settling at that time. *Id.* It requests that the Commission reopen this case. *Id.* The Secretary does not oppose Star Sand's request.

The judge's jurisdiction in this matter terminated when his decision was issued on December 18, 2000. 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 Star Sand's motion to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

On the basis of the present record, we are unable to evaluate the merits of Star Sand'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 Valle Constr., LLC*, 22 FMSHRC 9, 10 (Jan. 2000) (vacating default and remanding to judge where operator did not answer Secretary's petition or judge's show cause order based on its mistaken belief that it was excused from paying the civil penalties because it was in the process of closing); *Ogden Constructors, Inc.*, 22 FMSHRC 5, 7 (Jan. 2000) (remanding to a judge where operator failed to timely file contest because it mistakenly believed that proceeding was suspended while MSHA conducted investigation). If the judge determines that relief is appropriate, the case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

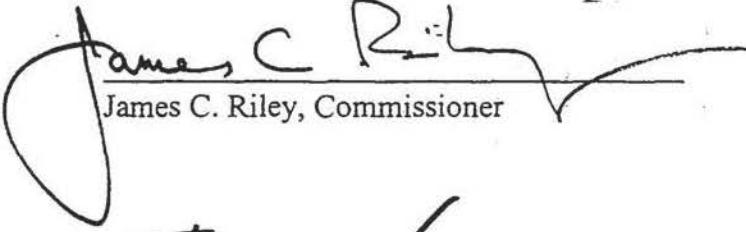

Mary Lu Jordan
Mary Lu Jordan, Chairman

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Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, concurring:

We would grant the operator's request for relief here, because the Secretary does not oppose and the operator has offered a sufficient explanation for its failure to timely respond. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Commission Procedural Rule 60(b), 29 C.F.R. § 2700.60(b). *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 10, 2001

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

v.

U.S. STEEL MINING COMPANY, LLC,
Respondent

: CIVIL PENALTY PROCEEDING
: :
: Docket No. SE 2000-100
: A.C. No. 01-00851-04075
: :
: Oak Grove Mine
: :
: :

DECISION

Appearances: Terry G. Gaither, Conference and Litigation Representative, U. S. Department of Labor, Birmingham, Alabama, on behalf of Petitioner;
Anthony F. Jeselnik, Esq., U.S. Steel, Law Department, Pittsburgh, Pennsylvania, on behalf of Respondent.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor against U.S. Steel Mining Co., L.L.P., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815. The petition alleges a single violation of the Secretary's mandatory health and safety standards and proposes a civil penalty of \$55.00. A hearing was held in Hoover, Alabama on October 14, 2000. The parties submitted post-hearing briefs on December 1, 2000, and reply briefs on December 22, 2000. For the reasons set forth below, I affirm the citation and assess a penalty of \$55.00.

The Evidence -- Findings of Fact

On July 14, 1999, Robert D. Norris, an inspector for the Secretary's Mine Safety and Health Administration (MSHA), conducted an inspection of U.S. Steel's Oak Grove Mine. At about 10:30 a.m., he issued Citation No. 7664934, for what he perceived to be a violation of 30 C.F.R. § 75.206(a)(3)(i), which requires that roof supports "be installed to within 5 feet of the uncut face." His observations were described in the citation as follows:

The 6-east set up section has two faces not bolted to within 5 feet of the un-cut face. The left side of the #2 face was cut 5 feet beyond the right side, making a distance of 10 feet from the last permanent roof bolts installed to the

face. The crosscut turned from #3 to #2 was cut approximately 5 feet beyond the right side, making a distance of 7 feet from the last permanent roof bolt installed to the face. (spelling and punctuation errors corrected)

The citation was subsequently amended to allege a violation of 30 C.F.R. § 75.220(a)(1), i.e., that the operator had failed to follow its approved roof control plan, which mirrored the essence of the initially cited regulation by specifying in diagrams that the distance between the centerline of the last row of permanent roof supports and the face "shall not exceed 5 feet." The diagrams in Respondent's roof control plan depicted a typical face by use of a straight line at right angles to the sides of the entry. The distance between that line and the parallel centerline of the closest row of roof bolts was designated as "x" and a note specified that the "[d]istance 'x' shall not exceed 5 feet." Neither the diagrams nor the text of the plan specifically addressed offsets or any other type of irregularity in a face.

The entries in the mine were 20-24 feet wide and crosscuts were 20 feet wide. The continuous miner makes a cut approximately 12 feet wide and, consequently, extends an entry or crosscut by making a series of cuts generally about 10 feet deep alternating between the left and right side. Under normal circumstances, both sides of an entry will be cut to approximately the same depth, and roof bolts can easily be installed to within 5 feet of the face. Although there is no requirement governing the time within which roof bolts must be installed, promptly bolting to within 5 feet of the face is consistent with generally accepted mining practice because allowing roof to go unsupported can result in sagging, making it more difficult to support. Ventilation problems can also result because miners cannot enter an unsupported area to extend ventilation line curtain. In addition, the area cannot be cleaned.

Occasionally, one side of an entry may not be cut to the same depth as the other, leaving an irregular or offset face. Offsets may result from operator error, a breakdown of the continuous miner, a shift change, or adverse roof conditions. Offsets should exist only temporarily. The respective sides of the face should be at least roughly evened out when the miner is repaired, the subsequent shift begins production or adverse roof conditions are properly addressed. If roof bolts are installed while the offset face condition exists, bolts may not be able to be installed to within five feet of the face. Some roof bolting machines, including those used by Respondent, cannot enter the narrower cut of an offset, which prevents bolts from being installed in the offset or deeper side of the face.

The offset in the #2 entry was created on July 12, 1999. Roof bolts were installed to within approximately 5 feet of the face on the right side, but were only within 10 feet of the face on the left side.¹ The offset in the #3-#2 crosscut was created on July 13, 1999, when the continuous miner became inoperable. It was bolted during the evening shift on July 13, 1999. Bolts were installed within approximately 2 feet of the right side of the face, but were 7 feet from

¹ The offset in the #2 entry also was not cut to full height, which also would have prevented the installation of roof bolts.

the left side of the face.² Respondent's Exhibit 1 (Exhibit R-1) accurately depicted the conditions of the faces and roof bolts at the time the citation was issued, 10:30 a.m., on July 14, 1999.

MSHA's acting field office supervisor, Kenneth Ely, recognizing that there may be a legitimate reason why a face may be temporarily offset resulting in bolts not being installed to within 5 feet, testified that an inspector should attempt to ascertain the reason for the offset. If the second side of the cut was not made because a shift ended, for example, it should be completed when the next shift engaged in production of coal commences work. If due to a breakdown of the continuous miner, the cut should be completed when production resumes after the miner is repaired. If there is no viable excuse for failing to make the cut to even out the face, and roof bolts, consequently, are not installed within 5 feet of the deeper side of the face, a citation should be written for the violation.

Inspector Norris did not undertake a detailed investigation of the reasons for the offset faces in the areas cited. He did know, however, that the continuous mining machine had been inoperable about the time that the crosscut was being made, which could explain the failure to bolt to within 5 feet of the face at that location. It would not, however, explain the failure to even the face in the #2 entry and resultant failure to bolt within 5 feet of the deeper side of that face. He placed considerable significance on the fact that there were two offset faces, which indicated to him that no effort had been made to even out the faces so that roof bolts could be properly installed.

Respondent called one witness, Phillip Sumpter. Sumpter had not been identified as a witness on Respondent's prehearing report. His testimony was intended to substitute for that of Carl Harless, the foreman on the day shift on July 13 and 14, 1999, to explain the circumstances surrounding the offset faces. Harless had been listed as a witness on the prehearing statement, but had been allowed to take vacation and was not present for the hearing. Sumpter was allowed to testify over the Secretary's objection on the condition that the Secretary could use testimony given by Harless in a previous hearing to impeach Sumpter.³ Harless' prior testimony regarding the offset faces was also admitted as substantive evidence during the Secretary's rebuttal case.

² Roof bolts cannot be installed within 2 feet of the face because they would be torn out by the continuous miner when it started the next cut.

³ Harless had been called to testify on August 23, 2000, at a hearing in a discrimination case brought under the Act. *Secretary o/b/o McGill v. U.S. Steel Mining Co., L.L.C.*, Commission Docket No. SE 2000-39-DM.

The record was held open to allow submission of the parties' respective designations of additional portions of Harless' testimony deemed necessary to place the admitted portion in proper context.⁴

Sumpter was a continuous miner coordinator, and he observed the continuous miner around 1:30 p.m. on July 13, 1999. It had been backed out of the #3-#2 crosscut into the #3 entry and was not capable of mining due to a burst water hose and insufficient hydraulic fluid because of a leak in the packing of a hydraulic jack. He arranged for the evening shift to install roof bolts in the unfinished #3-#2 crosscut and for repairs to be made to the continuous miner. The repairs were completed during the midnight shift on the 14th and the miner was ready to continue mining on the day shift of the 14th. By 10:30 a.m., however, when the citation was written, neither offset condition had been corrected. Subsequently, the crosscut was cut through and bolted and a production cut was taken in the #2 entry, thereby abating the violations.⁵ Sumpter believed that the conditions cited by inspector Norris were not violations of the roof control plan because bolts had been installed within 5 feet of the shallower side of the faces. Sumpter believed that the offset in the #3-#2 crosscut was attributable to the breakdown of the continuous miner. He had no explanation for the existence of the offset in the #2 entry.⁵

Excerpts from the prior testimony of Carl Harless, the day shift foreman, indicate that the continuous miner became inoperable due to leakage of hydraulic fluid around 10:30 a.m. on July 13, 1999, after mining the #3-#2 crosscut to the offset condition. It was backed out of the crosscut into the #3 entry, which is where Sumpter saw it. After Sumpter had left the area, however, Harless was able to temporarily restore the miner to operation for the remainder of the shift by adding 40 gallons of hydraulic fluid. Rather than returning to the #3-#2 crosscut to even off the face, he directed that cuts be made in the #4 entry. The reason for doing so was because he could claim no more production if he evened up the crosscut face, but could if he mined in the #4 entry. Since he was rated on how much production, i.e., how many feet of entry he mined, he chose to get credit for more production, leaving the crosscut face offset.

⁴ On October 31, 2000, Respondent designated pages 350-75 of the transcript of Harless' prior testimony as being necessary to place the previously admitted portions in proper context. On November 2, 2000, the Secretary counter-designated pages 340-49 and 369-403. While Respondent objected to admission of the testimony, neither party challenged the propriety of the other's designations.

⁵ Sumpter had stated at one point in his testimony, in response to a question about the #2 entry, that the offset was due to the continuous miner's breakdown. However, that testimony occurred while he was being questioned about the #3-#2 crosscut and I find that his testimony was, in fact, in reference to the #3-#2 crosscut. On cross examination he was specifically asked about the #2 entry and clearly stated that he had no idea how or why that offset came into existence.

The Secretary contends that Respondent's approved roof control plan requires that permanent roof supports be installed to within 5 feet of the entire width of the face; that there was no justification for creating or failing to eliminate the offsets in the #2 entry and the #3-#2 crosscut; and, the failure to install roof bolts within 5 feet of the sides of the faces in question constitutes a violation of the roof control plan.

Respondent contends that it cannot be found to have violated its roof control plan based upon a condition that is not specifically referred to in the plan. Alternatively, it argues that bolts were placed as close as possible to the face under the circumstances and, thus, it should not be found to have violated the provision.

Conclusions of Law

I conclude that the conditions observed by inspector Norris violated Respondent's roof control plan. There was no justification for creation of the offset in entry #2 and no justification for failing to correct the offset in the #3-#2 crosscut once the continuous miner became temporarily operational at the end of the day shift on July 13, 1999. Had the offset faces been eliminated timely, roof bolts could, and likely would, have been installed within 5 feet of the faces.

The plan's depiction of the 5 foot minimum distance between the roof bolts and the face is clear and unambiguous. The face, the exposed surface of the coal deposit in the working place where mining is proceeding,⁶ is depicted by use of a line and the reference to the required 5 foot minimum distance between the centerline of the closest row of roof bolts and the face, applies to each point on that line, i.e., the entire surface or face. Portions of the face that are further than 5 feet from the centerline of the nearest row of roof bolts are not in compliance with Respondent's roof control plan. There is no indication that the diagram was intended to refer only to a face consisting of a single plane surface, no doubt a rare occurrence due to the difficulty of precisely controlling the depth of cuts with a continuous mining machine. The fact that the plan contains no specific reference to, or depiction of, an offset or irregular face, or that neither Respondent, nor MSHA, sought to create an exception in the plan for offsets or other irregularities, cannot inure to Respondent's benefit.

Respondent's argument, that there is no violation where roof bolts have been installed as close to the face as possible, is also unavailing. While it is true that the roof bolting machine used by Respondent could not enter the relatively narrow offsets, those conditions were created by Respondent. As found above, there was no justification for creation of the offset in the #2

⁶ See, American Geological Institute, *A Dictionary of Mining, Mineral and Related Terms* 198 (2d ed. 1996).

entry and there was no justification for maintaining the offset in the #3-#2 crosscut after the continuous miner was made temporarily operational at the end of the day shift on July 13, 1999, prior to the installation of roof bolts in the crosscut. It was, therefore, entirely possible for Respondent to have eliminated the offsets and bolted to within 5 feet of the faces.

The Appropriate Penalty

Inspector Norris assessed the probability of injury as "unlikely," the operator's negligence as "moderate" and determined that the violation was not significant and substantial. The operator demonstrated good faith in rapidly abating the violation within the time specified. Accordingly, the violation was assessed as a single penalty assessment of \$55.00. *See*, 30 C.F.R. § 100.4. Respondent is a large business with an apparently unremarkable history of violations. The proposed penalty would not affect its ability to continue in business. Having no disagreement with Inspector Norris' determinations, and upon consideration of the factors in § 110(i) of the Act, I find that the proposed penalty of \$55.00 is appropriate.

ORDER

Based upon the foregoing, Citation Number 7664934 is **Affirmed** and Respondent is **Ordered** to pay a civil penalty of \$55.00 within 30 days.



Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

January 12, 2001

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2001-2-D
on behalf of Steven Feagins, <i>et al.</i> ,	:	Denv 2000-2
Complainant	:	
v.	:	
DECKER COAL COMPANY,	:	Mine ID No. 24-00839
Respondent	:	Decker Coal Mine

DECISION
GRANTING MOTION TO DISMISS

Before: Judge Schroeder

INTRODUCTION

This case is before me upon the complaint by the Secretary of Labor, on behalf of Steven Feagins and all similarly affected employees of Decker Coal Company. The Respondent, Decker Coal Company, filed a Motion to Dismiss. The Secretary filed a Reply to the Motion to Dismiss and Decker Coal Company filed a Response to the Reply. Neither party has requested an opportunity for oral argument. For the reasons given below, I have concluded the Motion to Dismiss should be granted without prejudice to filing a new complaint consistent with the conclusions reached below.

The complaint alleges discrimination by Decker Coal Company in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(1), against all of its miner employees at the Decker Mine in Big Horn County, Montana. The complaint seeks (1) a finding of discrimination, (2) a civil penalty in the amount of \$8,000, (3) an award of damages for all affected employees for lost wages, and (4) other appropriate relief, including interest and costs.

Motion to Dismiss

A Motion to Dismiss is an attack on the formal sufficiency of the complaint. The moving party bears the heavy burden of showing that it is not possible to establish facts within the four corners of the complaint which would be a legal basis for relief to be ordered. Stated in different terms, for a Motion to Dismiss to succeed, the moving party must show there is no legal authority for granting relief, even assuming all the facts alleged in the complaint are true, including any inferences which could reasonably be drawn from the facts alleged when viewed in the light most favorable to the complainant. F.R.Civ.P. 12(b)(6). *Haines v. Kerner*, 404 U.S. 519 (1972).

Facts From the Complaint

According to the complaint, Decker Coal Company has operated a mine in Big Sky County, Montana since at least 1992. The mine is subject to the requirements and limitations in the Federal Mine Safety Act. It employs approximately 244 miners. Since 1992, miners at Decker have been paid under a compensation plan that appears to divide each miner's pay into a fixed portion and a bonus portion. The bonus portion is calculated monthly based on productivity of the mine. It is alleged that in the past few years the bonus portion has averaged approximately \$600 per month per miner. In November, 1999, the method of computing compensation for miners at Decker was changed. While the details of the changes are not totally clear because of the failure to put all the details in writing, it is not disputed that a change was made which relates the bonus portion of each miner's pay to accident experience at the mine.

Under the amended plan, the bonus portion is subject to reduction or elimination in any particular month based on the accident experience at the mine. More particularly, the bonus portion of every miner's pay employed at Decker is reduced (a) by 50 percent in any month the mine experiences one recordable injury, (b) by 100 percent in any month the mine experiences more than one recordable injury, and (c) by 100 percent in any month the mine experiences one or more lost time accidents. Implementation of the plan has resulted in at least two months (January and April, 2000) in which bonus payments were reduced by 50 percent. Assuming an average monthly bonus of \$600 and an average payroll of 244 miners, this indicates a reduction in expected compensation of approximately \$146,400. It is not alleged that the 1999 amendment to the compensation plan made any overt changes in the requirements for miners to report accidents or to report situations with a risk of accidents. It seems a fair inference, however, that the bonus plan, as amended, could create strong economic incentives for both failure to report accidents whenever possible and as well as proactively to report situations with a risk of accident which could be avoided with remedial steps. The complaint does not allege specific facts upon which one could reasonably infer the actual motive and purpose of management for making the 1999 change in the compensation plan. *Briehl v. General Motors Corp.*, 172 F.3d 623 (8th Cir. 1999).

The Secretary contends, on behalf of the miners employed by Decker, that the 1999 amendment to the Decker compensation plan constitutes discrimination on its face by Decker in violation of Section 105(c) of the Act.

Legal Standard Under Section 105(c)

The inquiry in this case must begin with the statute. The critical language appears in section 105(c)(1) 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, [. . .] in any coal or other mine subject to this Act because such miner, [. . .] in any coal or other mine subject to this Act because such miner, [. . .] 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, [. . .] is the subject of medical evaluation and potential transfer under a standard published pursuant to section 101 or because such miner, [. . .] 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, [. . .] on behalf of himself or others of any statutory right afforded by this Act. (Emphasis added)

Controversy as to the purpose, meaning and scope of these words has occupied the Commission's attention on many occasions over the years since their enactment. Respondent has correctly identified the cases decided by the Commission which express the basic principles used in applying the statute to particular situations. The key Commission decision is *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201 (1994) which incorporates important earlier decisions in *Secretary on behalf of Paula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (1980), rev'd on other grounds sub. nom. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d. Cir., 1981) and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (1981). The Commission upheld as not discriminatory the "chronic injury" disciplinary plan challenged in the *Swift* case.

The Secretary, in response to the Motion to Dismiss, argues first that these cases support the claim of discrimination against Decker in its bonus compensation plan, and then argues that if these cases do not support that claim the cases represent incorrect application by the Commission of the controlling law. The Secretary cites as authority for this proposition the cases of *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967); *Local 702 v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000); *International Paper Co. V. NLRB*, 115 F. 3d 1045 (D.C. Cir. 1997); *Forest Products Co. v. NLRB*, 888 F2d 72 (10 Cir. 1989); and *NLRB v. American Can Co.*, 658 F2d 746 (10 Cir. 1981).

The Commission follows a sequential analysis which can easily be mapped to the analysis used by the Supreme Court in the *Great Dane Trailer* case. The first inquiry by the Commission is whether the challenged action overtly imposes negative consequences to a person for the exercise of a right created or protected by the Act. This is equivalent to the *Great Dane Trailers* inquiry as to whether the action challenged is "inherently destructive" of union member rights. The key concept at this stage of the inquiry is causal relationship, i.e. discrimination is present *prima facia* only when the exercise of a protected rights is the acknowledged cause of damage to the person attempting to exercise the protected right. The burden of a person complaining of discrimination is to allege facts demonstrating that cause and effect relationship.

If the answer to either form of this question of *prima facia* cause is no, the complainant is still entitled to go on to allege and prove that the challenged action was taken with the intent to damage or deny rights assured under the Act even if there is no overt causal connection between the damage suffered and the exercise of a protected right. If a showing is made that a protected right has been damaged by the challenged action, the respondent may then still undertake the task of showing that the challenged action was motivated or caused, at least in part, by nondiscriminatory reasons which would be sufficient by themselves to justify the action taken. *Swift, supra*, at 208. A virtually identical sequence of analysis is sanctioned by the Supreme Court in *Great Dane Trailers* and related cases.

Evaluation of Decker Plan

While the Decker bonus plan as amended in November, 1999 does involve significant adverse action by the operator toward miners in the event of one or more reportable accidents¹, it does not appear to involve miner's rights created or protected by the Act. The Commission in the *Swift* case makes the specific distinction between the right of a miner to report an injury or a risk of injury on the one hand and the event of incurring or causing an injury on the other. While it would be discrimination without proof of intent for an operator to reduce the pay of a miner for the action of reporting an injury or a risk of an injury, that is not the case before me. Here, the pay consequence of the occurrence of an injury to a miner at the Decker mine does not fall specifically on the miner who reported the injury or who reported the risk of injury prior to the event. The pay consequence falls, rather, on all the miners working at the mine during the month the injury occurred regardless of any involvement in the events which produced the injury.

The lack of a causal relationship between reduction in bonus pay and exercise of a protected right is clearest in looking at the right to report hazardous conditions, including the right to refuse to work under hazardous conditions. It appears that miners at Decker can report hazardous conditions every day without any consequences for their bonus pay. Likewise, a miner's bonus pay could be reduced for an accident of which the miner had no knowledge and hence no opportunity to make a report.

¹ MSHA regulations, 30 C.F.R. Part 50, distinguish between "reportable" accidents and "first aid." Not every injury suffered at a mine is a "reportable accident."

I cannot find a provision of the Act or the implementing regulations which would prevent a mine operator from establishing a compensation plan of this kind or which would prevent a miner from agreeing to work under this kind of compensation plan. Nothing in the plan as described in the papers filed at this stage of this case suggests that the responsibilities of either miners or management for the reporting or preventing of accidents has been diminished in any way. The Secretary's speculation that the plan will lead miners to fail to report accidents is not an inference compelled by any of the facts currently alleged in the complaint. The sentence in the complaint which is the key to the Secretary's argument appears in paragraph 9. The Secretary alleges "[t]he potential financial losses faced by all miners under the basic operation of the bonus reduction policy plainly interfere with the protected activity of reporting accidents and injuries to management." That an incentive plan will produce this result is, at this time, pure conjecture by the Secretary.

The Secretary makes several attempts to distinguish the Decker plan from that contested in the *Swift* case. First, the Secretary points out that the plan in *Swift* resulted in negative consequences only to injured miners while the Decker plan affects all mine workers equally. Second, the Secretary notes the *Swift* plan included remedial counseling as well as punitive measures while the Decker plan appears to be only punitive. These distinctions between the two plans may be accurate but they miss the critical point. The issue is not the strength or harshness of a particular action taken by a mine operator but rather the nature of the interest affected by the action. The question to be asked under both *Swift* and the *Great Dane Trailer* cases is what right of the employee is damaged by the employer's action. Unless the right damaged is a right which is protected under the relevant statute, it makes no difference whether the right is only slightly bruised or is totally crushed.

The right imperiled by the Decker plan is essentially the same as the right in the *Swift* case which the Commission found not protected by the Act. The right was characterized by the Commission as the right to deal with the consequences of injury as opposed to the right to report injury or a risk of injury to people with the responsibility to take corrective action. The right to deal with the consequences of injury is not protected by the Act and hence a curtailment of that right does not form the basis for a claim of discrimination.

The Secretary makes a collateral argument that the plan sanctioned by the Commission in *Swift* contain an overt requirement for miners to report accidents but the Decker plan does not contain such a requirement. The Secretary notes that Decker has been particularly terse in explaining its plan. This terseness suggests to the Secretary an intent to curtail rights.

The simple response to this argument is that miners have multiple existing instructions to report accidents or risks of accident so that it would be unnecessary for the Decker plan to reinforce that requirement. I find no need to speculate further as to motives.

The Secretary makes a final argument to avoid the Motion to Dismiss based on deference to administrative expert knowledge. The Secretary correctly notes that she declined to support a

contention of discrimination in the *Swift* case. The decision by the Secretary to not support the employees in *Swift* was made under the Secretary's responsibility under the Act to monitor and prevent discrimination against miners who assert rights protected by the Act. Because of this long standing responsibility to monitor and prevent discrimination, argues the Secretary, a body of expert knowledge has been accumulated by the Secretary as to what constitutes discrimination. She contends the Commission is obligated to give deference to the application of that expert knowledge to the Decker plan, at least for purposes of a Motion to Dismiss. The mere filing of a complaint, goes the argument, is the expression of an expert opinion by the Secretary as to the presence of discrimination to which the Commission is required to give deference.

To credit such an argument would effectively take the Motion to Dismiss out of the list of options available to a litigator in this forum. It also misses the point of deference normally given to administrative expertise. Deference normally runs to interpretation of an Act where its meaning and purpose is unclear or to the application of a regulation to complex facts peculiarly within expert competence. *Smiley v. Citibank*, 517 US 735, 739 (1996); *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 US 837 (1984). The decision in *Secretary of Labor, on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110 (4th Cir. 1996) does not support the Secretary's position in this case. In *Wamsley*, the Secretary took the position that an award of back wages for a miner damaged by discrimination should not be reduced by the amount of unemployment compensation received by the miner. The Court of Appeals held that the Secretary's position was a reasonable interpretation of the meaning and purpose of the Act which was entitled to deference by the Commission and the Court.

The present case involves neither of these reasons for deference to administrative expert knowledge. The Act has already been interpreted by the Commission to the point of reasonable clarity. The Secretary is not interpreting the Act but rather is interpreting essentially adjudicatory facts. The effect of a bonus plan is not a subject which is so complex as to be uniquely within the special expert knowledge of the Secretary.

I conclude, therefore, that the complaint does not succeed as a matter of pleading at the initial stage of the analysis require by *Swift* and *Great Dane Trailers*, i.e. it has not been alleged as a matter of fact that the Decker bonus plan is discriminatory on its face under Section 105(c) or that it involves consequences which are "inherently destructive" of rights created or protected by the Act. Because the complaint fails to state a claim upon which relief could be granted, it must be dismissed.

Further Pleading

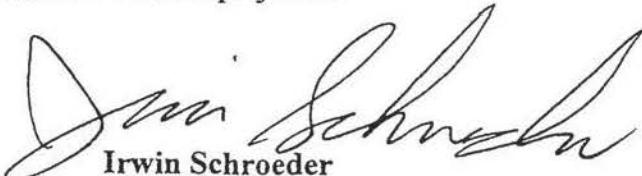
The final sentence of the complaint, paragraph 9, is the following:

Moreover, the bonus reduction policy is so antagonistic to injury and accident reporting, that the Respondent's motive in implementing the policy can only be characterized as discriminatory.

While I conclude this sentence is almost entirely speculative rather than factual in nature, it is apparent the Complainant intended an alternative position challenging the motives of Decker management in the event the bonus plan were to be found not discriminatory on its face. The sentence as it now reads contains insufficient factual allegations to proceed with a determination of whether it was motivated by an unlawful intent to discriminate and has the actual consequence of damaging rights protected by the Act. Because of the importance of the prevention of discrimination related to mine safety, the Secretary should be afforded a reasonable opportunity to decide to file a new complaint making such additional factual allegations as the Secretary finds warranted to support this contention. Therefore, this dismissal is made without prejudice to the filing of a further complaint.

ORDER

For the reasons stated above, I conclude that the Complaint fails to state a claim upon which relief can be granted and that the Motion to Dismiss should be granted with leave to the Complainant to amend the complaint within 15 days following the entry of this Order. Therefore, the complaint is **DISMISSED** without prejudice.



Irwin Schroeder
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 19, 2001

TXI OPERATIONS, LP,
Contestant : CONTEST PROCEEDINGS
v. :
Docket No. CENT 2000-419-RM
Citation/Order No. 7887789; 7/8/2000

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent : Docket No. CENT 2001-24-RM
Citation No. 7897041; 6/20/2000
: Paradise Plant
: Mine ID 41-03253

CONSOLIDATION ORDER AND DECISION

Appearances: Michael T. Heenan, Esq., Heenan, Althen & Roles, Washington, D.C., for the Contestant;
Stephen E. Irving, Esq., Susan Meyercord, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Respondent.

Before: Judge Feldman

These contest matters concern Notices of Contest filed by TXI Operations, LP (TXI), challenging two citations and an imminent danger order issued as a result of a June 19, 2000, fatal railroad crossing accident that occurred at the entrance of TXI's Paradise Plant. The accident site is on property owned by the Union Pacific Railroad (Union Pacific). The accident occurred when the driver of a haulage tractor-trailer who was entering the Paradise Plant attempted to beat a freight train across the railroad crossing. The operator's cab of the tractor was struck by the train killing the truck driver. TXI notified the Mine Safety and Health Administration (MSHA) of the accident the next morning on June 20, 2000, at approximately 9:00 a.m.

As a result of MSHA's accident investigation, 104(a) Citation No. 7887789 was issued citing TXI for violating the mandatory safety standard in 30 C.F.R. § 56.9100(a) that requires, in pertinent part, that rules governing right-of-way shall be established and followed at each mine. TXI was cited for violating this mandatory standard because, upon entering and exiting the Paradise Mine, TXI personnel and its customers routinely failed to stop completely at the stop signs posted on both sides of the railroad crossing. Citation No. 7887789 was also issued as an imminent danger order pursuant to section 107(a) of the Mine Safety and Health Act of 1977 (the

Mine Act), 30 U.S.C. § 817(a), as a result of TXI's practice of not ensuring that vehicles entering and exiting its mine stopped completely before traversing the railroad crossing.

A contest hearing concerning 104(a)/107(a) Citation and Imminent Danger Order No. 7887789 was conducted on October 11, 2000, in Decatur, Texas. Subsequent to the hearing, on December 20, 2000, the contest proceeding in Docket No. CENT 2001-24-RM was assigned to me for disposition. CENT 2001-24-RM concerns TXI's contest of 104(a) Citation No. 7897041 for an alleged violation of the accident notification provisions of 30 C.F.R. § 50.10 that require mine operators to notify the local MSHA District or Subdistrict Office immediately after an accident occurs.

During a post-hearing telephone conference, the parties agreed to consolidate the contest in CENT 2001-24-RM with the 104(a)/107(a) contest in CENT 2000-419-RM. To facilitate disposition of the issue in CENT 2001-24-RM concerning TXI's alleged failure to timely notify MSHA of the fatality, on December 28, 2000, the parties filed joint stipulations related to the facts surrounding TXI's notification of the accident. Accordingly, Docket Nos. CENT 2000-419-RM and CENT 2001-24-RM **ARE HEREBY CONSOLIDATED**.

I. Findings of Fact

TXI's Paradise Plant, a medium size sand and gravel mine with approximately 22 employees, is located in a remote area in the vicinity of Chico, in Wise County, Texas. The Paradise Plant is situated on the north side of Union Pacific's mainline railroad tracks that run in an east-west direction. State Highway 114, the exclusive route used for traveling to and from the Paradise facility, also running in an east-west direction, is adjacent and parallel to the Union Pacific right-of-way, on the south side of the railroad tracks. Thus, Union Pacific's tracks are located between State Highway 114 and the entrance to the Paradise facility. To enter the Paradise Plant requires a ninety degree turn from Highway 114 to traverse the railroad tracks that are situated directly in front of the Paradise Mine entrance.

Two to four freight trains pass along the Union Pacific tracks adjacent to the Paradise Plant entrance each day. The track bed in front of, and in the general vicinity of, the Paradise Mine is straight and level. The visibility down the tracks in both the east and west direction is unlimited. Union Pacific freight trains can consist of one hundred or more cars. The freight trains travel at approximately 40 miles per hour. The speed limit on State Highway 114 is 65 miles per hour.

Because TXI has no control over Union Pacific's mainline tracks, it had to negotiate a license agreement with the railroad whereby Union Pacific granted permission for TXI's personnel and customers to cross from Highway 114 over Union Pacific's tracks to the Paradise Plant. Thus, in accordance with the terms of a 1983 license agreement, Union Pacific, pursuant to TXI's request, constructed a crossing from Highway 114 to TXI's mine property. (TXI Ex. 4). The terms of the license agreement provided, with specified exceptions not relevant here, that

TXI would indemnify Union Pacific for any liability incurred as a result of injuries or death to persons occurring at the railroad crossing. (*Id.*). Construction of the crossing was performed by Union Pacific in accordance with its own specifications.

Union Pacific established rules for its track crossing by means of posted signs. Specifically, a white railroad crossing sign, a yellow railroad crossing sign, and a stop sign, were posted on both the highway and mine entrance sides of the track. Section 56.9104, 30 C.F.R. § 56.9104, governs the traffic controls that are required at designated railroad crossings. The Secretary does not contend that the stop signs and railroad crossing signs posted at the railroad crossing are inadequate. In fact, the Secretary characterized the railroad crossing and stop signs as "conspicuous" in 104(a)/107(a) Citation/Order No. 7887789. (Gov. Ex. 9).

In 1987, independent of its license agreement granting the right to cross the Union Pacific tracks, TXI entered into a lease agreement for a relatively small portion of Union Pacific land across from the Paradise Plant entrance on the Highway 114 side (south side) of the tracks.¹ (TXI Ex. 5). TXI used this property to install a flower box and signs that were visible from Highway 114 to identify the location and entrance of the Paradise Plant. TXI also constructed a foundation area used for a rolling fence that could be extended parallel to, and in front of, the highway side of the tracks to prevent vehicles from crossing the track when the Paradise facility was closed.

To access the Paradise Plant, the Union Pacific tracks are crossed approximately 500 times each day by company, vendor, contractor and visitor traffic. Photographs admitted in evidence reflect virtually unlimited visibility down the track with regard to trains approaching from the east or west. (TXI Exs. 2,3). When a train approaches the crossing, the train engineer blows the train whistle loudly and continuously. In fact, the train can be heard long before it can be seen. Vehicles traveling east or west on Highway 114 that turn into the railroad crossing would pass trains traveling in the same direction on the parallel track, or, face trains that were approaching the railroad crossing from the opposite direction. (TXI Ex. 1).

On June 19, 2000, a multi-ton truck pulling double haulage trailers operated by Farris Concrete Company (Farris), a TXI customer purchasing sand, was traveling west on State Highway 114. The truck driver had been employed by Farris for approximately six months, and he had averaged four trips per day to and from the Paradise Plant, passing through the Union Pacific railroad crossing.

As noted, the speed limit on Highway 114 is 65 miles per hour. Based on the

¹ TXI's 1983 license agreement, and its 1987 lease agreement concerning the railroad crossing were with the Oklahoma-Kansas-Texas Railroad Company, and the Missouri-Kansas-Texas Railroad Company, respectively. While the relationships between Union Pacific and these railroad companies are unclear, apparently Union Pacific Railroad is bound by the terms of these agreements.

observations of Texas State Trooper Mike Wiley who witnessed the accident, it is apparent that the driver of the Farris truck traveling in a westerly direction on Highway 114 passed a freight train that was also traveling west at approximately 40 miles per hour on the tracks parallel to the highway. State Trooper Wiley, who was traveling east on Highway 114 observed the Farris truck driver turn right off Highway 114 as the truck approached the railroad crossing to enter the Paradise Plant. Wiley concluded the truck driver was intent on driving through the stop sign in an attempt to beat the approaching train across the railroad crossing. Tragically, as a consequence of down-shifting and slowing to negotiate the right turn off Highway 114, the truck driver miscalculated the speed of the approaching train and the time required to clear the train crossing. The freight train struck the cab of the tractor-trailer killing the driver.

TXI's Safety Manager Dana Glover-Smith, who was not at the Paradise mine site on the day of the accident, was notified of the accident on the following day on June 20, 2000. The Safety Manager was not aware that the accident had occurred on Union Pacific rather than TXI property. Therefore, upon learning of the accident, she reported the incident to MSHA on June 20, 2000. TXI asserts it was not required to notify MSHA of the accident because the accident site was not on mine property. Consequently, TXI argues the railroad crossing is not subject to Mine Act jurisdiction.

Upon being notified of the accident, MSHA Supervisory Inspector Charles Sisk and MSHA Inspector Wyatt Andrews were sent to the Paradise Plant on June 20, 2000, to perform an accident investigation. Shortly after arriving at the mine on June 20, 2000, Andrews issued 104(a) Citation No. 7897041 citing a violation of the provisions of 30 C.F.R. § 50.10 that require a mine operator to immediately notify MSHA of an accident. The citation noted that although a fatal accident occurred on June 19, 2000, MSHA was not notified until 9:05 a.m. of the following morning.

During their accident investigation on June 20, 2000, Sisk and Andrews observed at least 20 vehicles crossing the Union Pacific tracks to enter and leave the mine site. The inspectors did not observe any of the vehicles come to a complete stop at the stop signs. At the time these vehicles were observed, there were no freight trains in the vicinity of the railroad crossing.

On June 27, 2000, from approximately 9:30 to 10:30 a.m., Sisk sat in his vehicle outside the mine site and once again observed that vehicles entering and exiting the mine site were not coming to a complete stop at the railroad crossing at times when there were no trains in sight. From approximately 10:00 to 10:30 a.m., Sisk observed approximately 36 vehicles and he recorded notes for every vehicle he observed. (Gov. Ex. 7). Although most vehicles slowed at the stop sign, Sisk observed only two to four of the 36 vehicles come to a complete stop at the stop signs. At no time during Sisk's surveillance did he see a train approaching the railroad crossing.

On July 6, 2000, Andrews observed and recorded vehicles entering and exiting the mine. (Gov. Ex. 8). Andrews observed approximately twelve vehicles during a 25 minute period.

Only one vehicle came to a full stop at the railroad crossing stop sign. Once again, there were no trains crossing the railroad crossing during the period of Andrews' observations. Thus, during the course of the MSHA inspectors' observations of vehicles crossing the train tracks on June 20, June 27, and July 6, 2000, the inspectors did not observe any motorist fail to yield right-of-way to a train approaching the crossing.

David Nelson, TXI's Paradise Plant Manager, testified TXI has established and it enforces rules governing speed, right-of-way and direction of movement on mine property. In this regard, there is a 20 mile per hour speed limit sign posted on mine property. (Gov. Ex. 5(a)).

Nelson readily admitted he was aware that drivers frequently did not come to a complete stop when crossing the tracks when no trains were in sight. (Tr. 205). Nelson explained that a driver of a haulage truck weighing over 30,000 pounds can more quickly clear the tracks when no trains are coming by slowing down rather than completely stopping at the stop sign and shifting to start movement again. (Tr. 193-94). Although Nelson knew drivers frequently did not fully stop when no trains were seen, Nelson testified that TXI had no reason to believe that drivers were traveling over the railroad crossing at excessive speeds, or that they were otherwise failing to yield the right-of-way to approaching trains. (Tr. 204-05).

At the hearing MSHA Supervisory Inspector Sisk was requested to consider the significance of drivers coming to a rolling stop, rather than a complete stop, in instances when there was no train in sight of the railroad crossing. Sisk was asked:

Court: . . . Well, as a matter of fact, if we assume for the sake of arguing in this hypothetical that it's clear that there's no train on the tracks in the vicinity of the mine entrance in any direction, either east or west, can you testify with reasonable certainty that all MSHA inspectors came to a complete stop before entering and exiting the mine under those circumstances?

Sisk: Well, I wish I could, but not being with them, I would hope that they did. The inspectors that I've been with did.

Court: All right. But would you agree with me that it's human nature if the visibility is unobstructed and you're crossing a railroad track, that people frequently won't come to a complete stop?

Sisk: Yes.

(Tr. 87-88).

Based on MSHA's observations of the traffic entering and exiting the mine, on July 6, 2000, more than two weeks after the accident, Andrews issued 104(a)/107(a) Citation and Imminent Danger Order No. 7887789 citing a violation of 30 C.F.R. § 56.9100(a). This mandatory safety standard provides, in pertinent part, that "rules governing . . . right-of-way . . . shall be established and followed at each mine." Specifically, Citation/Order No. 7887789 stated:

Traffic "right-of-way" rules are not being enforced by management at the railroad crossing near the mine entrance. Numerous over-the-road haul trucks and passenger vehicles have failed to come to a complete stop before proceeding through the railroad crossing. Conspicuous stop signs and two sets of railroad crossing signs are present at the site. Five previous instances have been reported where trains have struck haul trucks or trailers at the crossing because the vehicles failed to stop. On June 19, 2000, one instance caused fatal injury to a truck driver. *Failing to stop completely at the crossing is a past and current practice at the mine and constitutes an imminent danger.*

(Emphasis added). (Gov. Ex. 9).

Although the Citation/Order No. 7887789 made reference to five previous instances of "trains [striking] . . . haul trucks or trailers at the crossing because the vehicles failed to stop," the Secretary has failed to present any evidence of previous accidents, or the cause of such accidents, with the exception of testimony that the prior incidents occurred in 1987, 1988, 1997 and 1998. (Tr. 37-38). Nor are there any allegations of injuries or deaths occurring as a result of any previous incidents.

To abate the imminent danger order, TXI was required to provide a flagman "at the crossing to insure that vehicles are aware when a train is approaching the crossing from either direction." (Gov. Ex. 9).

II. Further Findings and Conclusions

A. Jurisdiction

As a threshold matter, TXI challenges MSHA's jurisdiction because the fatal accident occurred outside the entrance to the Paradise mine on Union Pacific property. In this regard, TXI argues that a finding of MSHA jurisdiction in this case would be "tantamount to an award of MSHA jurisdiction over an offsite mainline railroad — a step not contemplated by the Mine Act . . ." (TXI Proposed Findings, p.16). However, here MSHA is not seeking jurisdiction over an offsite railroad line. Rather, MSHA seeks enforcement authority over a railroad crossing that provides TXI's customers with the exclusive access to TXI's Paradise

Mine. Moreover, TXI is a licensee and lessee of this area; TXI has fenced in this area to prevent mine access when its mine is closed for business; and TXI has assumed, with specified exceptions not relevant here, to indemnify Union Pacific for any liability for any injury or death arising out of any incident at the railroad crossing.

Although the above circumstances are indicia of the requisite mine operator responsibility and control warranting a finding of Mine Act jurisdiction, ultimate resolution of the jurisdictional question requires application of traditional rules of statutory construction that start with a reading of the language of the statute. If a statute is clear and unambiguous, effect must be given to its language. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 842-43 (1984); *Energy West Mining Co. v. FMSHRC*, 40 F. 3d 457, 460 (D.C. Cir. 1994).

As a predicate for Mine Act jurisdiction, the statutory definition of “a mine” in section 3(h)(1), 30 U.S.C. § 802(h)(1), is “broad,” “sweeping” and “expansive.” *Marshall v. Stoudt’s Ferry Preparation Plant Co.*, 602 F.2d 589, 591-92 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980). In this regard, the legislative history of the Mine Act clearly states “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 . . . coverage of the Act.]” S. Rep. No. 95-181, 95th Cong., 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).

Turning to the statutory language, Section 3(h)(1)(A) provides that “a mine” is, “an area of land from which minerals are extracted” Clearly, the Paradise Plant is a mine because it is an area of land from which sand and gravel is extracted. Section 3(h)(1)(B) provides that “a mine” includes, “private ways and roads appurtenant to such area[s][from which minerals are extracted].” Without question, the Union Pacific railroad crossing is a “private way or road” that is “appurtenant,” if not an integral part, of the Paradise Mine. But for TXI’s Paradise Plant, no motorists would be exposed to the subject Union Pacific railroad crossing. Surely, given the express legislative intent to broadly construe the meaning of a mine, Congress intended the Mine Act to protect individuals from potential hazards that are incidental to entry into a mine, even if the potential hazards are not located on land owned by the mine operator.

In fact, the Commission has recently recognized that, in appropriate circumstances, a finding of Mine Act jurisdiction in cases where there is a lack of mine operator ownership is consistent with established precedent. *Justis Supply & Machine Shop*, 22 FMSHRC 1292, 1297 (November 2000), *citing W. J. Bokus Industries, Inc.*, 16 FMSHRC 704, 707-08 (April 1994). In *Justis Supply*, the Commission noted, there is a jurisdictional basis, irrespective of ownership, when the cited conditions would affect miners. *Id.* Here, the conditions at the railroad crossing affect virtually everyone entering the mine. Accordingly, the Union Pacific railroad crossing, located at the mine entrance, is a “a mine” as contemplated by section 3(h)(1)(B) of the statute, and, as such, the railroad crossing is subject to Mine Act jurisdiction.

B. Imminent Danger

Imminent Danger Order No. 7887789 was issued pursuant to section 107(a) of the Mine Act. The condition cited in Order No. 7887789 as constituting an imminent danger was TXI's "past and current practice" of not ensuring that vehicles entering the mine "stop completely at the crossing." Section 107(a) provides:

If, upon any inspection or investigation of a coal or other mine which is subject to this act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in Section 104(c), to be withdrawn from, and to be prohibited from entering, such area *until* an authorized representative of the Secretary determines that *such an imminent danger and the conditions or practices which caused such imminent danger no longer exist*. The issuance of an order under this subsection shall not preclude the issuance of a citation under Section 104 or the proposing of a penalty under section 110. (Emphasis added).

In *Wyoming Fuel Company*, 14 FMSHRC 1282 (August 1992), the Commission stated the appropriate analysis for determining the validity of an imminent danger order is whether the preponderance of the evidence shows "... that the condition or practices, as observed by the inspectors, could reasonably be expected to cause death or serious physical harm, before the conditions or practices could be eliminated." 14 FMSHRC at 1291. In *Wyoming Fuel*, the Commission noted that there must be a degree of imminence to support a 107(a) order noting that the word "imminent" is defined as "ready to take place: near at hand: impending . . . : hanging threateningly over one's head: menacingly near." *Id.* at 1290 *citing Utah Power & Light Co.*, 13 FMSHRC 1617, 1621 (October 1991).

In view of the potential imminence of danger, the Commission has repeatedly recognized that an inspector must be accorded considerable discretion in determining whether to issue a 107(a) withdrawal order because "an inspector must act with dispatch to eliminate conditions that create an imminent danger." 14 FMSHRC at 1291 (citations omitted). However, although far reaching, an inspector's discretion to issue 107(a) orders is not unfettered. Rather, the apparent imminence of danger is a prerequisite to empowering the inspector with the broad discretion to issue 107(a) withdrawal orders.

Analyzing whether the requisite condition or practice that poses an imminent danger is present requires identification of the purported extremely hazardous condition or practice. Here, the Secretary relies on both the purported practice of failing to yield right-of-way at the railroad crossing, as well as the admitted practice of failing to stop completely when no trains are in sight.

A motorist's obligation to come to a complete stop at a stop sign is independent of a motorist's obligation to yield right-of-way to traffic approaching an intersection. The flaw in the Secretary's case is that she fails to distinguish the practice of failing to yield the right-of-way to an approaching freight train, from the practice of treating a stop sign as a yield sign by coming to a rolling stop when the railroad track is deserted. In relying on the lack of strict stop sign compliance to support the imminent danger, the Secretary equates a motorist's failure to completely stop at a deserted railroad track as an act exposing the motorist to the possibility of imminent death or serious injury. Obviously, there is an essential element missing from the Secretary's doomsday scenario -- an approaching train.

The fact that MSHA inspectors Sisk and Andrews observed only six to eight vehicles out of approximately 68 vehicles come to a complete stop illustrates that these were not reckless drivers engaging in self-destructive behavior. On the contrary, they were doing what people normally do at a deserted intersection -- ensuring that nothing was approaching from either direction and then proceeding with caution. In reaching this conclusion I am not trivializing the importance of full stops at stop signs under normal circumstances. However, the circumstances in this case are not normal. The subject Union Pacific railroad crossing is in a remote area of Texas located in an area with unlimited visibility.

As noted above, to support an imminent danger order, the imminence of danger must be "menacingly near." In this regard, section 3(j) of the Mine Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm *before such condition or practice can be abated . . .*" 30 U.S.C. § 802(j) (emphasis added). The fact that Sisk and Andrews observed the purported imminent danger for 16 days from June 20 until July 6, 2000, before Andrews issued Imminent Danger Order No. 7887789 demonstrates the lack of any impending threat to safety.

Finally, the fatal accident had nothing to do with the "past and current practice" cited in Imminent Danger Order No. 7887789 of "failing to stop completely at the crossing." According to the eyewitness account, the victim tried to beat the train across the train crossing. Such isolated conduct is not evidence of "a practice" of failing to yield right-of-way to trains approaching the railroad crossing. Moreover, such conduct is unrelated to the common practice of coming to a rolling stop, rather than a complete stop, when visibility is unlimited and the railroad crossing unquestionably is deserted. Accordingly, Imminent Danger Order No. 7887789 shall be vacated.

C. Enforcement of Right-Of-Way Rules

104(a) Citation No. 7887789 cites a violation of section 56.9100(a) that requires that rules governing right-of-way shall be established and followed. In addressing the merits of 104(a) Citation No. 7887789, it is important to note that a fatal accident at mine site is not always attributable to a mine operator's violation of a mandatory safety standard. *ASARCO, Inc.*,

14 FMSHRC 941, 951 (June 1992); *Dynatec Mining Corporation*, 20 FMSHRC 1058, 1065 (September 1998) (ALJ Manning).

Here, the linchpin of the Secretary's case is the fatal accident. In this regard, Citation No. 7887789 alleges: "Traffic 'right-of-way' rules are not being enforced by management at the railroad crossing near the mine entrance. . . . On June 19, 2000, one instance caused a fatal injury to a truck driver." Thus, the Secretary contends that TXI's admitted failure to take actions to ensure strict compliance with the railroad crossing stop signs evidences a failure to enforce "right-of-way rules." Not so fast. As previously discussed, stopping completely at a stop sign, and yielding to traffic in an intersection, are separate responsibilities. After stopping at a stop sign, a motorist can still fail to yield the right-of-way by proceeding into an intersection into the path of approaching vehicles. Conversely, a motorist cannot fail to yield to traffic if, as in the present case, there is no traffic in sight.

Thus, to prevail, the Secretary must show by a preponderance of the evidence that TXI failed to enforce right-of-way rules. The Secretary cannot satisfy her burden of proof by simply bootstrapping an alleged practice of failing to enforce right-of-way rules based on an isolated accident onto TXI's admitted failure to ensure that individuals visiting the mine strictly complied with stop signs at a deserted railroad intersection. Significantly, the Secretary concedes that fully stopping under such circumstances is contrary to human behavior. (Tr. 87-88).

Although TXI's lack of effort to ensure strict adherence to the stop signs may evidence a technical violation of section 56.9100(a) that would be unlikely to result in serious injury, to support the cited significant and substantial (S&S) violation of section 56.9100(a) in Citation No. 7887789, the Secretary has elected to prove that TXI failed to enforce right-of-way rules, and, that such failure somehow contributed to this tragic accident.² The Secretary has failed on both fronts. There is no evidence that TXI had any knowledge that its employees, patrons or contractors were failing to yield to oncoming trains. In fact, with the exception of this accident, there is no specific evidence of any motorist failing to yield right-of-way. Nor is there any evidence that TXI's failure to ensure strict compliance with the railroad crossing stop signs encouraged individuals to race oncoming freight trains across the crossing. Accordingly, Citation No. 7887789 shall be vacated.

Although Citation No. 7887789 has been vacated, I am concerned about the previous incidents that occurred at this railroad crossing. However, in the absence of specific evidence concerning the nature of those incidents, there is an inadequate basis for concluding that TXI should have been on a heightened state of awareness, or that it should otherwise have anticipated the reckless behavior that contributed to this accident.

² A violation of a mandatory safety standard is properly characterized as S&S if it is likely that the hazard contributed to by the violation will result in an event, i.e., an accident, resulting in death or serious injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984).

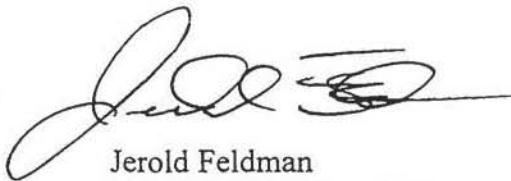
D. Accident Notification

Citation No. 7897041 cites a non-S&S violation of the mandatory standard in section 50.10. It is undisputed that TXI did not notify MSHA of the fatality until June 20, 2000, the day after the accident. Such a delay violates the requirements of section 50.10 that requires notifying MSHA immediately after an accident. While TXI's delay may have been attributable to confusion concerning whether the accident was reportable given the fact that it occurred outside mine property, the Mine Act is a strict liability statute. *Wyoming Fuel Company*, 19 FMSHRC 19, 21 (January 1994). Although TXI could be held liable even in the absence of negligence, the circumstances of this case reflect, as alleged in Citation No. 7897041, that, as a licensee and lessee of the accident site, TXI's failure to immediately notify MSHA is indicative of moderate negligence. While the violation appears to be serious in gravity because the purpose of immediate notification is to enable MSHA to determine that the hazards that contributed to an accident no longer pose risks to mine personnel, the Secretary has designated the cited section 50.10 violation as non-significant and substantial. Accordingly, Citation No. 7897041 citing a non-S&S violation of section 50.10 shall be affirmed.

ORDER

Accordingly, **IT IS ORDERED** that TXI's contest in Docket No. CENT 2000-419-RM **IS GRANTED**, and 104(a)Citation/107(a) Order No. 7887789 **IS VACATED**.

IT IS FURTHER ORDERED that TXI's contest in Docket No. CENT 2001-24-RM **IS DENIED**, and 104(a) Citation No.7897041 **IS AFFIRMED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 24, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. KENT 2000-187
	:	A. C. No. 15-11506-03543
R B COAL COMPANY, INC., Respondent	:	
	:	Verda Tipple

DECISION

Appearance: J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee, on behalf of Petitioner; Richard D. Cohelia, Manalapan Mining Company, Inc., Brookside, Kentucky, on behalf Respondent.

Before: Judge Melick

This case is before me upon a Petition for a 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 R B Coal Company Inc. (RB) with three violations of mandatory standards and proposing civil penalties of \$2,400.00, for those violations. The general issue before me is whether RB 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.

Respondent has agreed to pay the proposed penalties for Citations No. 7495831 and 7495832, in full, and the Secretary has agreed to accept this amount in settlement of the citations. I have considered the representations and documentation submitted with respect to those citations and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act. An order directing payment of the agreed amounts will be accordingly incorporated in this decision. Citation No. 7495833 remains at issue.

Citation No. 7495833 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 48.31.¹ Following the Secretary's latest amendment the citation now charges that "[h]azard training has not been given to any of the approximately 30 customers hauling coal from the tipple site."

The cited standard, 30 C.F.R. § 48.31, provides as relevant hereto that:

(a) Operators shall provide to those miners, as defined in § 48.22(a) (2) (Definition of miner) of this subpart B, a training program before such miners commence their work duties. This training program shall include the following instruction, which is applicable to the duties of such miners:

- (1) Hazard recognition and avoidance;
- (2) Emergency and evacuation procedures;
- (3) Health and safety standards, safety rules and safe working procedures;
- (4) Self-rescue and respiratory devices; and,
- (5) Such other instruction as may be required by the District Manager based on circumstances and conditions at the mine.

There is no dispute that RB did not provide the hazard training set forth in the cited standard. It argues that, pursuant to the Secretary's Program Policy Manual (Volume III, Part 48, pgs. 26-27), hazard training is not required if there is no exposure of customers to mine hazards. It has indeed been stipulated that the hazard training regulations at 30 C.F.R. § 48.31 are applicable to customer truck drivers only if they are exposed to mine hazards. The issue before me then is whether the cited customers were in fact exposed to mine hazards.

According to Respondent the customer trucks (18 wheel tractor-trailers) enter mine property along a gravel road to a scale house where they are weighed. They then proceed 100 to 200 yards to the stockyard and park while waiting to be loaded. The drivers at this time exit the trucks to untarp the truck beds and sometimes stretch their legs while waiting. They then pull up to be loaded by an RB employee and return to the scale house for re-weighing. The drivers then exit their trucks and enter the scalehouse to pick up their weigh tickets and pay for the coal. They also retarp their trucks at this time.

Inspector Alex Sorke, Jr., of the Department of Labor's Mine Safety and Health Administration (MSHA), testified that he was at the subject mine on February 23, 2000, when he observed customer trucks on mine property. He credibly described a number of hazards he perceived by the presence of the untrained drivers, including traffic hazards presented to other

¹ The citation was twice amended at hearings and, following hearings, was again twice amended -- the last time after Respondent's brief had been filed. While in technical compliance with the procedural rules, this clearly is no way to prosecute a case. In light of these amendments, the issues to be briefed as described at hearings are no longer relevant.

trucks and to pedestrians, objects falling from conveyors, potential ignition of diesel fuel by smokers near the diesel fuel tanks and exposure to electrocution from contact with low hanging overhead power lines.

I find within the framework of this credible testimony that the customer truck drivers were indeed exposed to hazards at the cited tipple and that, accordingly, such customer truck drivers were required to have hazard training under Part 48 of the Secretary's regulations. Since the drivers did not have such training the violation is accordingly proven as charged. While Respondent suggests that these alleged hazards were remote, based primarily on a lack of a history of accidents and citations, I disagree and find, in particular, based on the undisputed evidence a high likelihood of serious or fatal injuries from electrocution.

The Secretary also maintains that the violation was "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 Powder 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 credible evidence clearly supports a finding that the violation was "significant and substantial" even considering only the electrocution hazard. It is undisputed that various overhead power lines carried electrical charges sufficient to cause electrocution. Moreover, at the scale house, the wires were, according to the credible evidence, hanging as low as fifteen feet above ground level. According to Inspector Sorke, the truck drivers would manually elevate

metallic arms, some as much as twenty feet above ground, when covering their loads with tarps in the vicinity of the scale house near the Number 3 power line. I agree that it was reasonably likely for such metallic arms to contact the power lines and for drivers standing on the ground in contact with these metallic arms to thereby suffer electrocution. The violation herein was accordingly "significant and substantial" and of high gravity.

I disagree however with the Secretary's conclusion that the violation was the result of high operator negligence. Mine foreman Gregory McKnight testified that he had been the scale house person for nine years at the Verda Tipple. McKnight testified without contradiction that the tipple had been the subject of up to five inspections per year and had never been cited for the failure to provide hazard training. He noted that, on average, about thirty customer trucks arrive at the tipple each day. McKnight was unaware of the requirement to provide hazard training for his customers. It is also noted that the regulation at 30 C.F.R. § 48.22(a)(2) which the Secretary cites as the basis for the requirement that customers are required to have hazard training does not specifically mention the word "customers." Under the circumstances, I find that McKnight could reasonably and in good faith have believed that customers were not required to have hazard training within the meaning of Part 48. The violation herein was accordingly the result of moderate to low negligence.

Civil Penalty

Under Section 110(i) of the Act, the Commission and its judges must consider the following criteria in assessing a civil penalty: the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect of the operator's ability to continue in business, the gravity of the violation and demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The record discloses that the operator had a history of 27 violations during the period February 23, 1998 through February 22, 2000. This is a moderate history of violations. The parties have stipulated that the operator's size was 2,097,447, "total annual production tons or hours per year" in the 12 months preceding the violation. The operator is therefore relatively large. There is no evidence that the operator did not demonstrate good faith in attempting to achieve rapid compliance after notification of the violation. The operator has the burden of proving that a particular civil penalty would effect its ability to remain in business. *Broken Hill Mining Company*, 19 FMSHRC 673 (April 1997). In the absence of specific proof that the penalties herein would effect the operator's ability to continue in business it is presumed that there would be no such adverse effect. See *Sellersburg Stone Company*, 5 FMSHRC, 287 (March 1983), aff'd 736 Fd.2 1147 (7th Cir. 1984). Negligence and gravity have previously been discussed with respect to the violation. Under the circumstances I find that a civil penalty of \$1,000.00, is appropriate.

ORDER

Citations No. 7495831, 7495832, 7495833, are hereby affirmed and RB Coal Company Inc., is directed to pay civil penalties of \$317.00, \$655.00 and \$1,000.00, respectively, for the violations charged therein within 40 days of the date of this decision.



Gary Melick
Administrative Law Judge

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January 24, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 2000-155-M
	:	A. C. No. 04-00111-005527
	:	Docket No. WEST 2000-156-M
	:	A. C. No. 04-00111-05528
v.	:	Docket No. WEST 2000-157-M
	:	A.C. No. 04-00111-05529
	:	Docket No. WEST 2000-158-M
	:	A.C. No. 04-00111-05531
	:	Docket No. WEST 2000-159-M
	:	A.C. No. 04-00111-05532
SAN BENITO AGGREGATES, INC., Respondent	:	Docket No. WEST 2000-160-M
	:	A.C. No. 04-00111-05533
	:	Mine: San Benito Aggregates

ORDER DENYING REQUEST TO REOPEN
ORDER OF DISMISSAL

This case is before me pursuant to order of the Commission dated May 11, 2000.

On February 7, 2000, the operator filed a request to reopen the above-captioned penalty assessments which had become final orders of the Commission in accordance with section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

The Secretary opposed the request, stating that the operator had failed to establish that there was a potentially meritorious claim, which, she argued, is a prerequisite for relief under Fed. R. Civ. P. Rule 60(b), and that the operator did not establish conduct amounting to "excusable neglect" pursuant to Rule 60(b). Rule 60(b) states in pertinent part: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a

final judgement, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect."

A majority of the Commission remanded these matters for a determination of whether the operator has met the criteria in Rule 60(b).¹ The Commission stated that it appeared the operator had offered an explanation for its failure to timely file hearing requests but had not attached sufficiently reliable documents to substantiate its claim. The Commission also noted that the Secretary had alleged facts in addition to those raised by the operator.

On June 29, 2000, I issued an order directing the operator to submit information to my office, including reliable documentation, detailing why its failure to file on time meets the criteria outlined in Rule 60(b) and to show cause why these cases should be reopened.

The June 29 order was sent by certified mail return receipt requested to the operator, however, no return receipt was received by the Commission. On August 7, 2000, my law clerk contacted the operator by telephone inquiring whether the operator had received the order. My law clerk spoke with David Grimsley who stated that he did not have the order and that once he received the order he would call and advise how long it would take him to respond. The June 29 order was faxed to the operator on August 7.

Having not received a response after faxing the June 29 order to the operator, on November 30, 2000, an order to show cause was issued directing the operator to submit the requested information. On January 16, 2000, the operator filed a response. The operator states that it recognizes it has had problems in the past which led to the current citations and fines. The operator identifies the steps it has taken to try and correct these problems including hiring a retired MSHA inspector. Finally, the operator alleges that the penalties would place a heavy financial burden on its business.

The operator has failed to comply with the orders in these cases. The June 29 and November 30 orders direct the operator to submit information, including reliable documentation, detailing why its failure to file on time meets the criteria in Rule 60(b). The operator has offered no information regarding its failure to timely contest these matters. There are no statements of why the contests were late or reasons why based on Rule 60(b) the matters should be reopened, let alone any documentation supporting such explanations. Rather, the operator has merely set forth the steps it has taken to address the safety violations identified by MSHA and has expressed its view of its financial condition.

¹ On May 15, 2000, the Secretary filed a petition for reconsideration, requesting the Commission to reconsider its order. On June 20, 2000, the Commission issued an order denying the Secretary's request and upholding its previous order.

The operator has been given ample opportunity over the past six months to justify these cases being reopened. It has submitted nothing to justify a finding of mistake, inadvertence, surprise or excusable neglect. In light of the foregoing, the operator's request to reopen these case is **DENIED**.

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



David F. Barbour
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 26, 2001

KINDER MORGAN OPERATING LTD "C", v.	:	CONTEST PROCEEDINGS
Contestant	:	Docket No. KENT 2000-128-R Citation No. 7641076; 2/2/2000
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. KENT 2000-129-R Citation No. 7641077; 2/2/2000
v.	:	Docket No. KENT 2000-130-R Citation No. 7641078; 2/2/2000
	:	Grant Rivers Terminal Mine Mine ID 15-18234
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v.	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 2000-168 A. C. No. 15-18234-03501
KINDER MORGAN OPERATING LTD "C", Respondent	:	Grand Rivers Terminal Mine

DECISION

Before: Judge Hodgdon

These cases are before me on Notices of Contest and a Petition for Assessment of Civil Penalty brought by Kinder Morgan Operating L.P. "C" against the Secretary of Labor, and by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Kinder Morgan, respectively, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815.¹ The company contests the issuance to it of Citation Nos. 7641076, 7641077 and 7641078, which allege violations of the Secretary's mandatory health and safety standards. The petition seeks a penalty of \$187.00 for the three contested citations. For the reasons set forth below, I affirm the citations and assess a penalty of \$187.00.

¹The cases are **CONSOLIDATED** for this proceeding.

The parties have stipulated to the facts in these cases and submitted their positions in briefs. They agree that the sole issue in the cases is whether the Grand Rivers Terminal is subject to the Mine Act. They further agree that if jurisdiction is found, the citations may be affirmed and penalties assessed.

Stipulated Facts

Kinder Morgan operates the Grand Rivers Terminal, a marine terminal located adjacent to Kentucky Lake, near Grand Rivers, Kentucky. The Terminal consists of three separate areas: (1) a rail-to-ground coal unloading and storage facility (GRT-1); (2) a rail-to-barge coal loading facility (GRT-2); and (3) a barge-to-ground coal unloading and ground-to-barge loading facility (GRT-4). The Terminal employs approximately 40 workers on a permanent basis and has 12 temporaries. With the exception of eight administrative employees, the employees, while primarily employed at one facility, work on an as-needed basis at all three facilities.

Kinder Morgan receives approximately 10 million tons of processed coal per year at the Terminal, either by rail or by barge. Ninety-five percent of the coal arrives by rail. Most of the coal arrives by rail from mines in Colorado, Utah and Wyoming. Some comes from the Illinois basin of Kentucky and Illinois, transported by rail or barge. Occasional shipments also come from West Virginia and Virginia.

None of the coal received at the Terminal is owned by Kinder Morgan. Kinder Morgan is a bailee of the coal while it is on the ground at the Terminal. It has no responsibility for the coal until it is unloaded at the Terminal, nor does it have any responsibility for the coal after it has been loaded into barges for shipment to the ultimate user. Coal shipments are processed through the facility in three ways: (1) rail-to-stockpile-to-barge; (2) barge-to-stockpile-to-barge; and (3) rail-to-barge.

More than 95% of the coal received by Kinder Morgan is owned by the Tennessee Valley Authority (TVA), which purchases it for use in its 11 coal-fired plants. The price paid by TVA for the coal is F.O.B. railcar or barge at the producer's or supplier's shipping facility. By the time the coal arrives at the Terminal, it has already been processed by the coal producers to meet TVA's contract specifications, which may differ depending on the particular plant for which the coal is intended. In its contracts with the various coal producers, TVA requires the coal to meet certain specifications such as moisture content, ash content, percentage of volatile matter, heating value (BTU), SO₂ content, grindability and chlorine content. Kinder Morgan is not a party to the contracts and has no responsibility to deliver coal to TVA that meets the contract specifications. No washing, screening, crushing or sizing of coal occurs at the Terminal.

Rail-to-Stockpile-to-Barge

When arriving TVA coal is processed in this manner, it is unloaded from bottom-dump rail cars into a 100 ton hopper at GRT-1. The coal is then fed onto two inclined belts which carry

the coal either to: (a) surface stockpiles (approximately 60% of the coal), or (b) a conveyor belt system that connects GRT-1 and GRT-4. The coal in the surface stockpiles is later moved by dozers and trucks into hoppers which deposit it onto the conveyor belt system to be conveyed to GRT-4. There are up to 18 working stockpiles of TVA coal. Approximately 95% of the coal received by rail is unloaded by Kinder Morgan at GRT-1, the rest being directly loaded into barges at GRT-2.

TVA designates which coal from which supplier will be placed into which working stockpile. While Kinder Morgan personnel work with TVA to monitor the quantity of coal moving into and out of each working stockpile, they may not know the specific qualities of the coal, identifying the source of each stockpile only by supplier and railcar.

When the coal arrives at GRT-4 on the conveyor belt system, it is dumped by chute to a 150 foot inclined belt on a radial stacker. The stacker segregates the coal into separate stockpiles. Since the stacker cannot create all of the required number of stockpiles, some coal is pushed into stockpiles by dozers and some coal is loaded into haulage trucks and dumped into stockpiles.

When the coal is to be loaded into a barge, it is pushed into one of four feeders for the 605 foot draw-off tunnel in the underground coal "layer loading" facility. The feeders are computer controlled to facilitate precise "layer loading" from different surface stockpiles. Each feeder transfers coal at a predetermined rate onto the main tunnel belt. For example, the first feeder may put four inches of coal on the belt, the second six, the third none and the fourth eight, resulting in three layers 18 inches thick. TVA tells Kinder Morgan the individual working stockpiles from which coal is to be removed, and the amount that is to be removed, for the purposes of "layer loading" in the draw-off tunnel and ultimate loading into barges.

After leaving the draw-off tunnel, the coal is transferred onto a portable, rail-mounted belt conveyor. Samples of each coal load are taken at this point by TVA's independent laboratory, which collects, bags and removes the samples on a daily basis and sends them by courier to TVA facilities in Chattanooga for analysis. The conveyor then loads the layered coal into barges for final shipment as fuel to TVA.

Barge-to-Stockpile-to-Barge

Approximately five percent of the coal processed at the Terminal arrives by barge at GRT-4. The coal is unloaded by a crane, which places it in a feeder for a 735-foot inclined belt on a stacker. The coal is then stockpiled, as directed by TVA, until it is "layer loaded" in an identical manner to the coal arriving at GRT-4 from GRT-1 on the conveyor belt system.

Rail-to-Barge

About 20% of the coal arriving at the Terminal by rail is unloaded from bottom-dump rail cars at GRT-2 into a surge bin and then directly loaded onto TVA barges. There is no on-the-ground storage or “layer loading” of coal at GRT-2. Coal is sometimes temporarily stored on the rail cars until time to load the barges.

Non-TVA Coal

Non-TVA coal accounts for less than five percent of the coal received at the Terminal. A portion of the five percent is petroleum coke (petcoke). The non-TVA coal and petcoke is unloaded, stored and loaded at the Terminal by Kinder Morgan in the same manner as is the TVA coal. Alabama Power and West Kentucky Energy have historically delivered and received the non-TVA coal unloaded, stored and loaded at the Terminal by Kinder Morgan.

Conclusions of Law

Section 4 of the Mine Act, 30 U.S.C. § 803, provides that: “Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.” Section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(1), defines “coal or other mine” as:

- (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. . . .

Finally, Section 3(i), 30 U.S.C. § 802(i) defines the “work of preparing coal” as: “[T]he breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing coal as is usually done by the operator of a coal mine.”

The Secretary contends that Kinder Morgan’s Grand Rivers Terminal *mixes, stores and loads* coal, which are all included in the Act’s definition of the “work of preparing coal” and,

therefore, the terminal is a mine subject to the Mine Act. On the other hand, Kinder Morgan maintains that it does not prepare coal *as is usually done by the operator of a coal mine* and, consequently, it is not a mine operator within the meaning of the Act. A review of the case law indicates that the Secretary is correct.

In one of the earliest cases determining jurisdiction under the Mine Act, the Third Circuit Court of Appeals pointed out that Congress intended that “what is considered to be a mine and to be regulated under this Act” was to be given the broadest possible interpretation and that doubts were to be resolved in favor of inclusion of a facility within the coverage of the Act. See S. Rep. No. 181, 95th Cong., 1st Sess. 1, 14, reprinted in [1977] U.S. Code Cong. & Admin. News, pp. 3401, 3414.” *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 592 (3rd Cir. 1979). The court went on to say that “the work of preparing coal or other minerals is included within the Act whether or not extraction is also being performed by the operator.” *Id.*

With this in mind, the Commission, in a case with facts very similar to the ones here, subsequently determined that not all facilities dealing with coal are “mines” subject to the Act. *Oliver M. Elam, Jr., Co.*, 4 FMSHRC 5 (January 1982). Elam owned and operated a commercial dock on the Ohio river which loaded, among other things, coal onto barges. Coal brokers, who were not mine operators, arranged for coal to be delivered by truck to the dock and then to be loaded onto barges for delivery to their customers. Elam was paid to load the coal onto the barges. The coal was delivered to and stockpiled on the property. It was then weighed by the brokers’ employees and loaded into a hopper. If a piece of coal was too big for the hopper, Elam’s employees would break it so that it could pass through. From the hopper the coal was carried on a conveyor to a crusher where it was broken into one size to increase the ease of loading and to allow more coal to be placed on the barges. From the crusher, another conveyor carried the coal to the barge.

Based on these facts, the Commission held that:

[A]s used in section 3(h) and as defined in section 3(i), “work of preparing coal” connotes a process, usually performed by the mine operator engaged in the extraction of the coal or by custom coal preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications. In the present case, although Elam performs several of the functions included in the 1977 Act’s definition of coal preparation (*i.e.*, storing, breaking, crushing, and loading), it does so solely to facilitate its loading business and not to meet customers’ specifications nor to render the coal fit for any particular use. We therefore conclude that Elam’s facility is not a “mine” subject to the coverage of the 1977 Mine Act.

Id. at 8 (footnote omitted).

While there are not any other cases with facts as close to the ones in this case as *Elam*, the interpretation of the meaning of “the work of preparing coal” continued to evolve. Most of the cases concern coal burning utility plants. In *Pennsylvania Electric Co. v. FMSHRC*, 969 F.2d 1501, 1503 (3rd Cir. 1992) (*Penelec*), the court held, after setting out the language in sections 3(h)(1) and 3(i), that: “Under the functional analysis we are to employ when giving the ‘broadest possible’ scope to mine Act coverage . . . the delivery of coal from a mine to a processing station via a conveyor constitutes coal preparation ‘usually done by the operator of a coal mine.’” Later, in a concurring opinion, Commissioner Doyle stated that in referring to a “functional analysis,” the *Penelec* court had “concluded that each of the activities listed in section 3(i) . . . as part of the ‘work of preparing the coal,’ wherever and by whomever performed and irrespective of the nature of the operation, subjects anyone performing that activity to the jurisdiction of the Mine Act.” *Air Products & Chemicals, Inc.*, 15 FMSHRC 2428, 2435 (December 1993).

Although not specifically saying so, this seemed to be the same reasoning of the Fourth Circuit Court of Appeals when it stated:

We think it irrelevant that United Energy is transporting and delivering the coal to the power plant it operates, rather than to another consumer of coal. The statute sets forth a functional analysis, not one turning on the identity of the consumer, and United Energy’s activities meet the functional test. Although delivery of coal to a consumer after it is processed usually does not fall under the coverage of the Mine Act, United Energy’s activities occur a step earlier in the overall process. They involve the transportation of coal to the preparation facility and thus are part of the “work of preparing coal.”

United Energy Services v. MSHA, 35 F.3d 971, 975 (4th Cir. 1994).

Whether or not the court's interpretation of the Act was as sweeping as Commissioner Doyle's, by 1997 the Commission had unhesitatingly adopted her conclusion that *each* activity listed in section 3(i) subjects the performer of that activity to the jurisdiction of the Act. *RNS Services, Inc.*, 18 FMSHRC 523, 529 (April 1996), *aff'd*, 115 F.3d 182 (3rd Cir. 1997).

If this were the state of the law, the case would be fairly easy to resolve. Whether one concluded that the Commission had effectively overruled *Elam* by the adoption of the functional analysis set forth in *RNS*, or whether *Elam* is still good law, the results would be the same in this case. The Grand Rivers Terminal is a “mine” within the meaning of the Act.

Since the terminal performs three of the functions set out in section 3(i), *storing, mixing* and *loading*, it is doubtlessly subject to the Act under the functional analysis. As in *United Energy*, the delivery of the coal in this case is a step earlier than delivery to the consumer after it is processed. And regardless of whether the coal is “layered” to be loaded onto barges at TVA’s

directions or at the Terminal's directions, it is clearly the Terminal employees who are doing the "layering." Consequently, this facility is performing the work of preparing coal within the meaning of the Act.

In addition, the facts in this case are distinguishable from those in *Elam*. In *Elam*, the Commission found that the section 3(i) activities performed by the company were done solely to make easier the loading of the coal. Here there is no such claim. Indeed, it would appear that the "layer loading" would make the loading process more difficult. Furthermore, the Commission held that Elam's activities were not performed to meet customer's specifications or to render the coal fit for any particular use. Here, the "layer loading" is obviously being undertaken to meet TVA's specifications and to render the coal fit for TVA's particular use. Thus, unlike Elam, Kinder Morgan is preparing coal as usually performed by a mine operator or custom preparation facility.

What seemed clear, however, has been confused by a recent decision of the Eighth Circuit Court of Appeals. In that case, relied upon by the Contestant, the court held that an electric utility plant that purchased crushed coal from two mines, then removed debris from, and further crushed, it at its facility, so that it could be burned in its generator units, was not a mine under the Act. *Herman v. Associated Elec. Coop., Inc.*, 172 F.3d 1078 (8th Cir. 1999). While the court covered most of the Commission and court decisions discussed above, it did not mention "functional analysis." Instead, it concluded that the Act "was designed primarily to protect miners, not employees of coal purchasers such as electric utilities and steel mills." *Id.* at 1082. It apparently based this conclusion on the dissenting judge's opinion in *Penelec*. *Id.* Finally, it held that "after a mine delivers processed, marketable coal to a utility any further operations to prepare the coal for combustion are not subject to MSHA jurisdiction." *Id.* at 1083.

It is possible that this decision is the law only in the Eighth Circuit as there do not appear to be any subsequent decisions following it. In fact, the Fifth Circuit has already stated that: "We do not entirely agree with the majority opinion of the Eighth Circuit in *Herman* . . ." *In re: Kaiser Aluminum & Chem. Co.*, 214 F.3d 586, 593 (5th Cir. 2000). Nevertheless, even if the holding is applicable in this matter, the facts in this case are distinguishable. No matter how the facts are arranged, it remains indisputable that the coal in this case is delivered to Kinder Morgan, not to TVA, the utility, and that the further operations, "layer loading," to prepare the coal for combustion are performed by the Kinder Morgan, not TVA.

Accordingly, I conclude that Kinder Morgan does perform the "work of preparing coal" as is "usually done by the operator" of a coal mine. As such it is a "mine" within the meaning of the Act and subject to the Act's jurisdiction.

Civil Penalty Assessment

The Secretary has proposed a civil penalty of \$187.00 for the three violations in this case. However, it is the judge's independent responsibility to determine the appropriate amount of

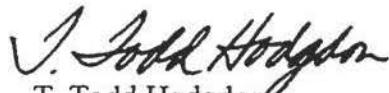
penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the criteria, the parties have stipulated that Kinder Morgan demonstrated good faith in attempting to achieve rapid compliance after notification of the violations, that the penalty will not affect Kinder Morgan's ability to continue in business and that Kinder Morgan is a large-size operator. As might be expected, the Assessed Violation History Report indicates that these are the first violations charged to the company. I find that the company's negligence in all three instances was "moderate." Finally, I find in connection with Citation No. 7641076 that the gravity of the violation was not serious, but that with respect to Citation Nos. 7641077 and 7641078 the violations were fairly serious.

Taking all of this into consideration, I conclude that the proposed penalties of \$55.00 for Citation No. 7641076 and \$66.00, each, for Citation Nos. 7641077 and 7641078 are appropriate.

Order

Citation Nos. 7641076, 7641077 and 7641078 are **AFFIRMED** and Kinder Morgan Operating L.P. "C" is **ORDERED TO PAY** a civil penalty of **\$187.00** within 30 days of the date of this decision.



T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 26, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 99-280-M
	:	A.C. No. 05-00344-05502 RGE
v.	:	Docket No. WEST 99-376-M
	:	A.C. No. 05-00344-05503 RGE
WATKINS ENGINEERS AND CONSTRUCTORS, Respondent	:	Lyons Cement Plant

DECISION

Appearances: Edward Falkowski, Esq., and Lydia Tzagoloff, Esq., Office of the
Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Carl B. Carruth, Esq., and Jason M. Bradley, Esq., McNair Law Firm,
Columbia, South Carolina, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the
Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”),
against Watkins Engineers and Constructors (“Watkins”), pursuant to sections 105 and 110 of the
Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (“Act” or “Mine Act”).
A hearing was held in Denver, Colorado. The parties presented testimony and documentary
evidence and filed post-hearing and reply briefs.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

In January 1999, Watkins was constructing a bag house at the Lyons Cement Plant (the
“plant”) owned by Southdown, Inc. The plant is in Boulder County, Colorado. Jefferson B.
Davis, an employee of Watkins, was seriously injured when he fell 70 feet onto a concrete pad
while he was attempting to enter the bag house from a Snorkel man-lift basket. Following an
investigation, MSHA issued a citation under section 104(a) of the Act; and one citation and two
orders under section 104(d)(1) of the Act. The Secretary proposes a total penalty of \$90,500 for
the alleged violations. Watkins duly contested each item and its associated civil penalty.
Watkins also contends that MSHA was without jurisdiction to issue the citations and orders.

The plant produces portland cement and the bag house being constructed by Watkins is
an integral part of the plant. The plant is near a quarry owned by Southdown. Limestone and

shale mined at the quarry are transported to a primary crusher which is at the quarry site. Once it is crushed, the rock is carried on a two-mile long conveyor belt to the plant where it is stockpiled. Quartz is mined at a second quarry in the area. After it is mined, the quartz is transported by truck to the same primary crusher. The crushed quartz is also transported to stockpiles at the plant via the conveyor belt. All of the material that is transported to the stockpiles at the plant is used in the production of Portland cement. (Tr. 39).

The stockpiled material is then taken into the plant where it goes through various operational steps in the production of cement. The material is crushed, ground up into a powder, preheated to 1,900 degrees Fahrenheit, and heated to 2,500 degrees in a kiln where it undergoes a chemical reaction to form chunks of crystalized cement known as "clinker." The clinker is cooled and stored for later use. The clinker is then ground into a fine powder in the finish mill. The fine powder is drawn by vacuum into the bag house. The bag house contains large bags that collect the fine powdered cement, which is then pumped to finished cement storage silos for sale.

This description of the process is a simplification of a more complex process. For example, other material, such as gypsum, is added and coarse material is recirculated back through the process at several steps. The key fact is that all of the material that enters the plant is used in the finished product. No waste material is created from cement production at the plant other than carbon dioxide that is released from the limestone in the kiln.

Prior to the construction of the bag house by Watkins, mechanical devices were used to separate the fine cement powder from coarser material. The bag house is a high-efficiency separator that can handle more material and produce better cement. (Tr. 31). The accident that gave rise to the citations and orders at issue occurred during the construction of the bag house. The plant has been operating for at least 26 years under several owners. MSHA has continuously inspected the plant for the Secretary of Labor since MSHA was created in 1978.

A. Jurisdiction

1. Summary of the Parties' Arguments

The Secretary contends that MSHA had jurisdiction to inspect the construction of the bag house at the plant under the Act. She argues that she has consistently interpreted the Act to include cement plants under the jurisdiction of MSHA. The term "coal or other mine" is defined in section 3(h)(1) to include the milling of minerals. That section also provides that, in making a determination of what constitutes mineral milling, the Secretary shall give due consideration to the convenience resulting from delegating to one Assistant Secretary all safety and health authority employed at one physical establishment. Thus, the Secretary contends that she was delegated the authority to determine where mineral milling ends and where post-milling operations that are not subject to MSHA jurisdiction begin.

In 1979, MSHA entered into an interagency agreement with the Department of Labor's Occupational Safety and Health Administration ("OSHA") to provide some guidance to the regulated community on the jurisdiction of these two agencies ("Interagency Agreement"). The Secretary relies on paragraph B(6)(a) of the Interagency Agreement which states that MSHA jurisdiction includes cement plants. She maintains that MSHA has been inspecting cement plants throughout the country since the Act was passed and that her interpretation is entitled to deference.

Watkins argues that MSHA does not have jurisdiction over this matter because no mineral milling occurs at the plant. It contends that mineral milling is the separation of valuable minerals from waste constituents. For example, mineral milling occurs when various processes, such as crushing, are used to separate a metallic mineral from the host rock. If, on the other hand, these same processes are used only to change the physical nature of the material, without any separation of waste material, mineral milling is not taking place. Watkins argues that at the Lyons Cement Plant, the various processes are used to manufacture cement. Watkins maintains that mineral milling does not take place at the plant because there is no segregation of waste material. It contends that OSHA has jurisdiction at the plant, not MSHA.

Watkins argues that MSHA's exercise of jurisdiction over the plant is an abuse of its discretion under the Act. To the extent that there is no abuse of discretion, then it maintains that the grant of power to the Secretary to construe the word "milling" is an unconstitutional delegation of legislative power.

2. Discussion

For the reasons explained below, I find that MSHA has jurisdiction to inspect the Lyons Cement Plant under the Mine Act. The starting point for an analysis of Mine Act jurisdiction is the definition of the term "coal or other mine," in section 3(h)(1). A coal or other mine is defined, in pertinent part, as "(A) an area of land from which minerals are extracted ..., (B) private ways and roads appurtenant to such area, and (C) lands, ... structures, facilities, equipment, machines, tools, or other property ... on the surface or underground, used in, or to be used in ... the work of extracting minerals from their natural deposits, ... or used in ...the milling of such minerals...." 30 U.S.C. § 802(h)(1). The Senate Committee that drafted this definition stated its intention that "what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and ... that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (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 602 (1978) ("Legis. Hist."); see also *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D. C. Cir. 1984). The final sentence of this definition states that in "making a determination of what constitutes mineral milling ..., the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all the authority with respect to the health and safety of miners employed at one physical establishment."

The phrase "the milling of such minerals" and the word "mineral milling" are not further defined in the Act, but the word "milling" is defined in the Interagency Agreement. (44 Fed. Reg. 22827 (April 17, 1979), amended by 48 Fed. Reg. 7521 (February 22, 1983)). This agreement provides, in Appendix A:

Milling is the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated.

This definition is supported by Dr. Baki Yarar, professor of mining engineering at the Colorado School of Mines. He stated that the separation of unwanted parts of the extracted crude from the wanted parts is a critical component in the definition of mineral milling. (Tr. 329-31). To be considered mineral milling, there must be a separation of the "worthless" from the "valuable." *Id.* If any of the milling-type processes are used for other purposes, mineral milling is not taking place. Thus, if materials from the earth are being crushed, but there is no separation of the valuable from the worthless, it is not mineral milling. For that reason, Dr. Yarar believes that the Lyons Cement Plant is a cement manufacturing facility. Minerals are not being milled at the plant.

For purposes of this decision, I accept the definition of "mineral milling" in the Interagency Agreement and the testimony of Dr. Yarar on this subject. My finding in this regard does not end the matter, however, because section 3(h)(1) of the Act specifically grants the Department of Labor the authority to determine "what constitutes mineral milling." Although section 3(h)(1) does not grant the Secretary unfettered discretion, it does allow the Secretary to take into consideration "the convenience of administration" when drawing the line between MSHA and OSHA jurisdiction. Congress recognized that this line is somewhat fuzzy and it did not require the Secretary to follow precise engineering principles when drawing this line. Congress authorized the Secretary to take a practical approach and that "doubts be resolved in favor of inclusion of a facility within the coverage of the Act." (*Legis. Hist.* at 602). The line drawn by the Secretary is a legal boundary, not a scientific or technical boundary.

Paragraph B(2) of the Interagency Agreement provides that the Act gives MSHA jurisdiction over lands, structures, facilities, and equipment used in or to be used in mineral milling, including the construction of such facilities. Paragraph B(3) states that Appendix A to the Interagency Agreement provides more detailed descriptions of the kinds of operations included in milling. This paragraph further states that there will remain areas of uncertainty especially in operations near the termination of the milling cycle and the beginning of the manufacturing cycle. In Paragraph B(4), the Interagency Agreement provides that the "scope of the term milling may be expanded to apply to mineral product manufacturing processes where these processes are related, technologically or geographically, to milling." This paragraph also provides that the term milling "may be narrowed to exclude from the scope of the term processes

listed in Appendix A where such processes are unrelated, technologically or geographically, to mineral milling.”

Paragraph B(5) states that the following factors will be taken into consideration when determining whether MSHA or OSHA has jurisdiction: “the processes conducted at the facility, the relation of all processes at the facility to each other, the number of individuals employed in each process, and the expertise and enforcement capability of each agency with respect to the safety and health hazards associated with the processes conducted at the facility.” Then, in a pivotal provision of the Interagency Agreement, Paragraph B(6) provides, in part, as follows:

Pursuant to the authority in section 3(h)(1) to determine what constitutes mineral milling considering the convenience of administration, the following jurisdictional determinations are made:

(a) MSHA jurisdiction includes salt processing facilities on mine property; electrolytic plants where the plants are an integral part of mining operations; stone cutting and stone sawing operations on mine property where such operations do not occur in a stone polishing or finishing plant; and alumina and *cement plants*.

(b) OSHA jurisdiction includes the following, whether or not located on mine property: brick, clay pipe and refractory plants, ... concrete batch, asphalt batch, and hot mix plants.... OSHA jurisdiction also includes salt and cement distribution terminals not located on mine property....

(emphasis added). Thus, the Secretary made these “jurisdictional determinations” after considering all of the relevant factors thereby eliminating the need to resolve jurisdictional issues at these facilities on a case-by-case basis. All cement plants are to be inspected by MSHA, while cement distribution terminals that are not on mine property and all concrete batch plants are to be inspected by OSHA. I conclude that, as a consequence, further analysis of the processes used within the facilities listed in Paragraph B(6) is both unnecessary and unwarranted.

Appendix A of the Interagency Agreement contains “a list with general definitions of milling processes for which MSHA has authority to regulate...” under the heading “Milling - MSHA Authority.” It is noteworthy that this list is specifically made “subject to Paragraph B6 of the Agreement.” I interpret that language to mean that the determinations made in Paragraph B(6) take precedence over the provisions of Appendix A.

It is also instructive to note that most facilities are made subject to MSHA jurisdiction under Paragraph B(6)(a) only under certain circumstances. Electrolytic plants, for example, are

subject to MSHA jurisdiction only if they are an integral part of mining operations. There are no qualifications for cement plants, however. All cement plants are subject to MSHA jurisdiction no matter what processes are used at the facility or where they are located. Thus, the fact that the Lyons Cement Plant uses all of the materials in its stockpiles of mined rock in the final product does not defeat MSHA jurisdiction. MSHA jurisdiction at cement plants does not depend upon whether the processes within the plant separate valuable parts of the earth's crust from the worthless parts. Under paragraph B(6)(a) of the Interagency Agreement, the Secretary defined mineral milling to include all activities at cement plants.

It is significant that Dr. Yarar testified that, at some cement plants, waste products must be separated from the valuable limestone to remove contaminants from the final product. (Tr. 336-37). He stated that mineral milling is taking place at these plants. On this basis, Watkins argues that if MSHA exercised jurisdiction over such a cement plant it would "arguably be a proper use of the Secretary's discretion because the plant might ... be viewed as either engaging in a milling process or a manufacturing process." (Watkins Br. 25). This may be one of the distinctions that the Secretary was attempting to avoid when she determined that all cement plants shall be inspected by MSHA. Under Watkins' theory, some cement plants must be inspected by OSHA while others could or should be inspected by MSHA, depending on the purity of the limestone entering the plant. The safety and health hazards at these cement plants would not be any different. I conclude that the fact that some cement plants do engage in "mineral milling," as that term is used by Dr. Yarar, supports the Secretary's position in this case. Although some cement plants do not, in an engineering sense, engage in mineral milling, the Secretary determined that she will exercise her jurisdiction through MSHA rather than OSHA at all cement plants as an administrative convenience. By making this determination in the Interagency Agreement, the Secretary avoids having to analyze each cement plant on a case-by-case basis to determine whether "mineral milling" is occurring at that particular plant at the time of the inspection.

The next issue is whether the Secretary abused her discretion when she determined that all cement plants engage in mineral milling thereby making them subject to MSHA jurisdiction. Watkins argues that the Secretary abuses her discretion when she interprets the Act to allow MSHA to inspect the cement plant in this case because her interpretation contravenes the plain language of the Act and the definitions contained within the Interagency Agreement. Watkins contends that the Secretary has arbitrarily construed the processes at the plant to be mineral milling despite her own definitions and those applied by the mine engineering community. It further states that "[t]o the extent that the [Interagency Agreement] specifically places cement manufacturing under MSHA's jurisdiction, pursuant to the Secretary's ability to define mineral milling, such a determination is unexplained and is therefore inadequate, in addition to being irrational, and not entitled to deference." (Watkins Br. 25). It argues that MSHA cannot impermissibly "bootstrap" itself into an area in which it has no jurisdiction.

I find that the Secretary did not abuse her discretion when she determined that cement plants are to be inspected by MSHA rather than OSHA. The line between the two agencies can

be logically drawn in a number of places. In the cement industry, she chose to draw it between cement plants and concrete batch plants. She also chose to include all cement plants under MSHA's jurisdiction not just those that have a milling circuit that separates the constituent parts from waste materials. There has been no showing that the general processes, much less the safety and health hazards, would be any different in cement plants that must separate waste material in the milling circuit as compared to those that do not. The same operations and hazards would be present in each instance, except that materials would be segregated at some point along the line in the former. Having a different Assistant Secretary conduct safety and health inspections at cement plants that include a circuit that separates waste material from the product stream is illogical.

It is true that there is no information as to how the Secretary came to this determination, other than the fact that cement plants are generally located near limestone quarries. I do not know if most cement plants must separate out waste material or whether the Lyons Cement Plant is more typical. The Secretary did not introduce any evidence on this issue but this is not a crucial question. Congress granted the Secretary broad power to decide what constitutes mineral milling. There is no indication that Congress wanted the Secretary to adhere to a technical engineering definition. Congress stated that "what is considered to be regulated under this Act be given the broadest possible interpretation, and ... that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." (*Legis. Hist.* 602). This language and the final sentence in section 3(h)(1) "gives the Secretary discretion, within reason, to determine what constitutes mineral milling, and thus indicates that [her] determination is to be reviewed with deference both by the Commission and the courts." *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984). "In this highly technical area deference to the Secretary's expertise is especially appropriate." *Id.* at n. 9.

A recent court of appeals decision closely parallels the present case. In *In re: Kaiser Aluminum and Chemical Co.*, 214 F.3d 586 (5th Cir. 2000), *petition for cert. filed*, 69 USLW 3366 (Nov. 13, 2000)(No. 00-770), Kaiser challenged MSHA jurisdiction at its alumina plant. The employer argued that the alumina production process used at its plant was not mineral milling. As in the present case, the employer relied upon engineering concepts and Appendix A to the Interagency Agreement in making its arguments. Kaiser argued that, unlike other alumina plants, its facility did not crush or grind the bauxite. Thus, it attempted to distinguish its plant from other alumina plants based on definitions and examples set forth in Appendix A. The court concluded that "the [Interagency] Agreement could not be more clear that '[p]ursuant to the authority in section 3(h)(1) to determine what constitutes mineral milling ... MSHA jurisdiction includes ... alumina and cement plants.' " *Id.* at 592 (footnote omitted). The court concluded that "MSHA's statutory interpretation of milling" was reasonable under the concepts developed in *Chevron v. NRDC*, 467 U.S. 837, 843 (1984). *Id.* at 591. The same logic applies to the facts in this case.

It is also important to note that the Secretary's interpretation has been consistently applied for a lengthy period of time. The Interagency Agreement was first published in the Federal

Register in April 1979. MSHA has inspected cement plants throughout the country since that time. Indeed, the Lyons Cement Plant has been inspected by MSHA without challenge since MSHA was created.

Finally, I conclude that Congress's grant of authority to the Secretary to construe the word "milling" is not an unconstitutional delegation of legislative power. Congress may not delegate its legislative powers to the executive branch. Congress must lay forth an intelligible principle that will guide and direct the executive branch in its delegated tasks. (Watkins Br. 27). Watkins argues that the final sentence in section 3(h)(1) merely delegates to the Secretary the "authority to give jurisdiction to an entire plant to MSHA, even if only part of that plant is engaged in mineral milling." *Id.* at 30. Watkins makes the following argument:

[The Secretary] interprets the phrase "convenience of administration" to allow MSHA to exercise jurisdiction over the Lyons Plant even though ... the uncontested testimony proves that nowhere in the plant is there any sort of mineral milling process as defined both by the Secretary and by the mining and metallurgical industries. Other than being patently contrary to the plain language of the Mine Act and Congress's intent in passing the Mine Act, ... such an interpretation would force the Mine Act to be read in a manner that is unconstitutional.

Id. at 31. Watkins argues that under the Secretary's interpretation, the phrase "convenience of administration" offers no objective guidance or limitation on the Secretary's power to define milling. Instead, it is "a positive grant of power to the Secretary to extend MSHA's jurisdiction without limit." *Id.* I disagree with Watkins' reasoning.

Cement plants are closely associated with the quarries from which limestone is obtained. For the reasons discussed above, the Secretary's interpretation of the language in section 3(h)(1) to allow her to include all cement plants under MSHA jurisdiction is not unreasonable. The language of that section specifically delegates to the Secretary the power to define mineral milling so as to give one Assistant Secretary "the authority with respect to the health and safety of miners employed at one physical establishment." But, as the D.C. Circuit stated, that language "gives the Secretary guidance concerning *one criterion* to be employed in exercising [her] discretion." *Donovan* at 552 (emphasis added). The Secretary may consider other factors in exercising her discretion to determine what constitutes mineral milling. Her interpretation of her authority under section 3(h)(1) with respect to cement plants is not so far afield as to approach an unconstitutional delegation of legislative powers to the executive branch.

In making this argument, Watkins relies on *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980), in which the Supreme Court vacated OSHA's health standard that lowered the exposure limit for benzene. I find that this reliance is misplaced. Under the OSHA statute, a safety or health standard must be "reasonably necessary or

appropriate to provide safe or healthful employment and places of employment.” 29 U.S.C. § 652(8). The Supreme Court interpreted this requirement to mean that the Secretary, when promulgating a health standard, must determine that the standard is “reasonably necessary and appropriate to remedy a significant risk of material health impairment.” *Id.* at 639. It is clear that Congress wanted the Secretary to establish a scientific basis for exposure limits before promulgating health standards under the OSHA statute. It is equally clear that Congress directed the Secretary to take a practical approach when dividing jurisdiction between OSHA and MSHA. There is no indication that Congress intended that the Secretary be constrained by engineering definitions when determining what constitutes mineral milling. I find that the Secretary established that MSHA had jurisdiction over the work that Watkins was performing at the Lyons Cement Plant.

Based on the foregoing, I find that MSHA had jurisdiction to inspect the Lyons Cement Plant, including Watkins’ bag house construction project. All of the other arguments made by Watkins concerning jurisdiction in its brief and reply brief are rejected.

B. Citations and Orders

1. Citation No. 7923622

Citation No. 7923622 alleges a violation of 30 C.F.R. § 56.11012, as follows:

Contract employees were exposed to a fall hazard at the bag house level, on both ends of the dust collector. The openings were approximately five feet wide and 70 feet from the ground level. The openings were located approximately five feet from the access doors for the east and west bag houses. The openings were also being used by contract employees as a means of accessing the bag house level from a man lift.

MSHA Inspector Richard Laufenberg determined that the violation was of a significant and substantial nature (“S&S”) and was a result of Watkins’ high negligence. The citation was issued under section 104(d)(1) of the Act. Section 56.11012 provides, in part, that “[o]penings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers.” The Secretary proposes a penalty of \$2,000 for this alleged violation.

There is no dispute that the cited openings were not protected by railings, barriers, or covers. The issue is whether such protection was required by the standard in this instance. Watkins was constructing a bag house for the plant, which was a separate building within the plant. The building was comprised of two large compartments, which were to contain the collecting bags called “socks.” There were openings at each end of this building that were about 70 feet above the ground. The openings were four- to five-feet wide and were used to gain

access to the large compartments during construction of the bag house via a man-lift. There were no barriers at these openings. The two openings were connected by what Watkins refers to as a "breezeway" that ran between the two compartments. To enter the compartments, Watkins' employees stepped onto the man-lift at ground level, were lifted to the opening at the north end of the building, exited the man-lift into the breezeway through the opening, traveled a few feet down the breezeway, and entered the compartments via doors along the sides of the breezeway. The floor of this breezeway was the top of a heating duct. This configuration existed only during construction of the bag house. When completed, metal stairs were attached to the outside of the bag house to provide access to the opening, which was equipped with doors. Flooring was also installed in the breezeway.¹

The Secretary contends that this breezeway was a travelway that was included within the protections of the standard. Watkins argues that the Secretary failed to establish a violation. First, it argues that the breezeway was still under construction and was not used on-a regular basis. In addition, it states that its employees were not walking "on a 'travelway,' but were instead walking on top of a heating duct." (W. Br. 36). Further, Watkins contends that the evidence establishes that workers were required to be tied off at all times while working in the bag house.

Watkins maintains that there was no danger of falling through the opening because it had work procedures in place to protect its employees. The long side of the man-lift basket was required to be placed flat against the wall of the bag house. The employee would then lift the center bar on the basket, crawl under the top bar, and enter the breezeway. The basket more than covered the opening on the bag house. In addition, the employee was required to be tied off at all times. It contends that there was no danger of falling if the proper procedures were used because whenever anyone was in the breezeway the basket of the man-lift acted as a barrier. The fact that the employee was tied off at all times provided additional protection.

As discussed in more detail below, these procedures were not all being used when Jefferson Blaine Davis fell from the opening. The short end of the man-lift basket was positioned adjacent to the opening, leaving a gap to one side. In this instance, Mr. Davis disconnected his safety line from the support structure on the basket before he climbed over the top rail into the breezeway. He lost his footing and fell about 70 feet to the ground.

The issue is whether this opening was required to be protected by railings or barriers. I find that the breezeway was a travelway as that term is used in the safety standard. During the several days that the "socks" were installed in the two compartments of the bag house, workers had to travel through the breezeway to get to their place of work. The fact that the area was under construction or that the floor of the breezeway was the top of a heating duct is irrelevant. I also reject Watkins' argument that the breezeway was not a travelway because workers were

¹ The witnesses at the hearing used different terms for the breezeway. For consistency, I use the term "breezeway" throughout this decision .

traveling through the area for only a few days. I find that while Watkins' employees were installing the socks, the breezeway was a travelway. The Secretary defines "travelway" as "a passage, walk, or way regularly used and designated for persons to go from one place to another." 30 C.F.R. § 56.2. The breezeway fits within this definition. The cited opening was immediately adjacent to this travelway.

The next issue is whether "persons or materials" could reasonably be expected to fall through the opening. The Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

Allied Products, Inc., 666 F.2d 890, 892-93 (5th Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i). I believe, however, that this safety standard requires the Secretary to establish that the cited condition created a safety hazard.

I find that a safety hazard was created by the cited condition. First, even if the proper procedures for entering and exiting the bag house were followed, there is a chance that a person or materials could fall. For example, if a worker were trying to get down from the area, he might get too close to the edge of the breezeway before the lift basket was in place. Even if he were hooked up to a safety line, he could be injured by the short fall. More importantly, a worker could make errors of judgment when entering and exiting the breezeway. This safety standard is, in large measure, designed to protect against such errors of judgment. As the Commission stated, "[e]ven a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions...." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

The condition was abated by attaching angle iron to the edges of the opening to provide a partial barrier and then attaching chains across the remaining opening. (Ex. P-6). Although no method of abatement would be foolproof, this barrier provided significant protection against falls. The fact that the chains would have to be removed when workers were entering and exiting the breezeway is not a defense.

Inspector Laufenberg determined that the violation was very serious and S&S. An S&S violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a ... 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." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988).

The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete 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 in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

Inspector Laufenberg based his S&S determination on the fact that, unless the long side of the basket of the lift were present, there was nothing to prevent a worker from falling from the opening. He believed that the metal braces across the top of the air duct presented a tripping hazard to employees walking between the doors to the bag house compartments and the cited breezeway openings. (Tr. 195). It had been snowing and raining during January 1999 and light snow had accumulated in the breezeway. (Tr. 195; Ex. P-6). He was also concerned about the number of times employees entered and exited the area, as well as the sheer 70-foot drop to the concrete below.

I find that the Secretary established that this violation was S&S. A discrete safety hazard was contributed to by the violation. There was also a reasonable likelihood that the hazard contributed to would result in an injury. The cited openings were the only means of access to the bag house compartments. Watkins' employees were installing the socks in the bag house compartments. The testimony establishes that workers were entering and exiting the bag house via the man-lift about eight times a day. They would enter the bag house at the beginning of the day, exit during breaks, and exit for lunch. Two or more employees were working in the bag house during this period. Except during those brief periods that the basket for the lift was present, there was no protection whatsoever. The presence of snow and the braces on top of the air duct increased the tripping and slipping hazard.

I also find that it was reasonably likely that an injury would be of a reasonably serious nature. The fact that employees were required to wear safety lines when entering and exiting the opening lessened the risk of a fatal injury, but the risk of a serious injury remained. If a worker were to fall out of the opening while wearing a safety line, he could sustain serious injuries.

Inspector Laufenberg also determined that the violation was caused by Watkins' unwarrantable failure to comply with the safety standard. He believed that Watkins exhibited

high negligence because the violation was obvious; the condition existed for a period of time; the opening was 70 feet above the ground; and employees had to enter and exit the breezeway frequently each day. (Tr. 196).

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991). The Commission stated that “a number of factors are relevant in determining whether a violation is the result of an operator’s unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator’s efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance.” *Mullins and Sons Coal Co., Inc.*, 16 FMSHRC 192, 195 (February 1994)(citation omitted).

I find that Watkins’ failure to protect the openings at the bag house with railings or barriers constituted an unwarrantable failure to comply with the safety standard. I agree with the inspector that the violation was obvious. Employees walked along the breezeway to get to their place of work in the bag house and, in doing so, they traveled close to and through this opening. Anyone working at or around the bag house could see the openings, including Watkins’ management. The condition had existed for a number of days. Prior to using the man-lift, employees were entering the breezeway via a ladder on the south side of the bag house. This practice was halted by Watkins management because of the hazards presented by snow and wind. Throughout this period, workers traveled in proximity to the two openings. The height of the openings above the ground and the fact that employees had to travel through the area more than a few times a day also demonstrate Watkins’ high negligence.

For the reasons set forth above, this citation is **AFFIRMED**. Taking into consideration the penalty criteria in section 110(i) of the Act, I assess a penalty of \$2,000 for this violation.

2. Order No. 7923623

Order No. 7923623 alleges a violation of 30 C.F.R. § 56.14205. After briefs were filed, the Secretary moved to vacate this order because she “concluded that the evidence is insufficient to support a violation of the standard.” Watkins does not oppose the motion. For good cause shown, the motion is granted and this order is **VACATED**.

3. Order No. 7923625

Order No. 7923625 alleges a violation of 30 C.F.R. § 56.11001, as follows:

A non-fatal, serious accident occurred at the mine site on 01/21/99 at approximately 3:30 pm when a contract laborer fell while

climbing out of a man lift basket he had been riding in. The laborer fell approximately 70 feet, landing on a concrete pad. He unhooked his lanyard, used the railings of the basket to climb out, slipped, lost his grip and fell. The contract operator's failure to ensure that a safe means of access was provided and being used by their employees is an unwarrantable failure to comply with a mandatory standard.

MSHA Inspector Laufenberg determined that the violation was S&S and was a result of Watkins' high negligence. The order was issued under section 104(d)(1) of the Act. Section 56.11001 provides that "[s]afe means of access shall be provided and maintained to all working places." The Secretary proposes a penalty of \$50,000 for this alleged violation.

Ordinarily, employees would enter and exit the breezeway via a staircase from the ground. At the time of the accident, this staircase had been partially constructed but it had not been installed on the south side of the building. (Tr. 244). Until about three days before the accident, Watkins' employees entered and exited the breezeway via a ladder at the south end of the bag house. The opening to the breezeway at the south end was also very high off the ground. Because of the snowy conditions and wind, Watkins' management determined that using a ladder to access the bag house breezeway presented safety hazards. Insulation panels were being installed on the outside of the bag house building at this time by a subcontractor, Mountain States Engineering ("Mountain States"). Mountain States had leased the Snorkel man-lift in question for use in installing the insulation panels. Watson made arrangement with Mountain States to use this man-lift to transport Watkins' employees to the opening in the bag house building.

During the accident investigation, Inspector Laufenberg testified that Walter J. Brannan, foreman for Mountain States, advised him that Anthony Perez, a sheet-metal worker for Mountain States, was the individual who operated the man-lift for Mountain States. (Tr. 185; Ex. P-8, p. 23-24). Laufenberg also testified that Brannon told him that it was his understanding that Perez would operate the lift whenever a Watkins employee needed to be taken up to the breezeway. *Id.* Perez was advised to place the long end of the man-lift basket against the building whenever anyone was transported to or from the breezeway. *Id.*

Mr. Perez told Inspector Laufenberg that he was instructed by Mr. Brannon to take only one Watkins employee up at a time and to always place the long end of the man-lift basket against the bag house. (Ex. P-8, p. 24). Perez also told Laufenberg that he was instructed to make sure that the Watkins employee was tied off in the basket and that the employee exited the basket by lifting the middle railing rather than climbing over the railing. *Id.* Perez told Laufenberg that he always followed this procedure.

During his investigation, Inspector Laufenberg also interviewed Jeffery Bochette, the general foreman for Watkins. Bochette told him that he never discussed with Watkins'

employees the proper procedure for getting to and from the breezeway via the man-lift. (Tr. 185; Ex. P-8,

p. 26). He also told the inspector that he was not aware that Jeremy Boyette, an hourly employee for Watkins, was operating the lift to get employees in and out of the bag house. (Ex. P-8, p. 25).

Mr. Boyette told Laufenberg that he operated the man-lift about 10 to 15 times. (Ex. P-8, p. 14-15). He also told Inspector Laufenberg that he never saw anyone place the long end of the lift basket against the bag house when transporting employees to the breezeway. *Id.* Boyette had operated man-lifts at other job sites, but he was not given any specific instructions on how to transport employees up to the breezeway. (Ex. P-8, p. 4-5).

The basket on the man-lift is about 7.5 feet long and 2 feet 2 inches wide. The basket is equipped with a 5- to 6-inch kick plate, a middle rail and a top rail. (Tr. 162-63; Ex. P-5, p. 5). The top rail is about 3.5 feet above the floor of the basket. (Ex. P-8, p. 3). The controls for the lift are at the back of the basket adjacent to where the basket is connected to the boom. The rails along the front of the basket, opposite the controls, are supported by four posts, one at each corner and two in the middle. Thus, the front railing is divided into thirds. The middle third of the middle rail slides up to the top rail. Apparently, both Mountain States and Watkins agreed, prior to the use of the lift to transport employees to the breezeway, that the proper way to enter and exit the basket at the breezeway is to lift the middle rail and crouch under the top rail. In order to enter and exit the basket in that manner, the long end of the basket must be positioned against the bag house building.

On January 21, 1999, Mr. Davis was assigned to work inside the bag house compartments. Mr. Davis testified that he had been working in the bag house installing the socks in the days prior to the accident. He said that he entered the breezeway eight to ten times a day during that period. (Tr. 100). Davis said that a Hispanic gentleman with the insulation contractor operated the lift most of the time and that Jeremy Boyette operated it other times. (Tr. 101-02). Davis testified that at the time of the accident, Boyette was operating the lift and that there was a third person on the lift as well. In addition, he testified that there were about four panels of insulation on the lift. (Tr. 110). During his investigation, Inspector Laufenberg measured these insulation panels. Each panel was about 22 inches wide, 48 inches high, and 4 inches thick, and weighed between 19 and 20 pounds. (Tr. 163; Ex. P-8, p. 5).²

Davis testified that every time he was taken up to the breezeway in the lift, the lift basket was positioned so that the short end was up against the opening to the breezeway. (Tr. 103). The operator of the lift would attempt to place the floor of the lift basket even with the bottom of the breezeway. To exit the basket, he climbed over the top rail on the short end of the basket and stepped into the breezeway. (Tr. 106). The middle rail does not lift on the short ends of the basket. He also stated that he was always protected by his safety belt and line when he followed

² The photographs at Exhibits P-5 and P-6 generally depict the configuration of the breezeway, the man-lift basket, and the insulation panels.

this procedure. He did not unhook his lanyard from the railing of the basket until he was in the breezeway. The opening to the breezeway was about five feet wide and the short end of the basket was about two feet two inches wide. Consequently, the opening for the breezeway was almost three feet wider than the end of the basket.

Davis testified that at the time of the accident the basket was on the right (west) side of the opening so that the three foot "gap" was on the left (east) side of the basket. (Tr. 112-13). Davis testified that when Boyette took him up to the breezeway at the time of the accident, there were four insulation panels on the end of the basket that he had to climb out of. Davis further testified that he did not attempt to move the insulation panels, but used his arms to pull himself up on top of the insulation panels using the top rails for support. He sat on top of the panels with his feet facing the building. He then began pushing himself across the top of the insulation panels towards the building. At this point, he was above the height of the top rail on the basket. (Ex. P-5, p. 5). When he reached the top rail of the end of the basket next to the building, he placed one foot on the middle rail. (Tr. 112) He testified that he had to unhook his safety line from the railing of the basket at this point because that was "as far as I can go." (Tr. 112). He implied that the safety line was not long enough for him to enter the breezeway while it was still connected to the railing of the basket. (Tr. 112, 139). He did not attempt to retie the lanyard to the rail that he was sitting on. He testified that he did not do so because he was going to tie off on the "structure," meaning the bag house building. (Tr. 139). There were several metal components on the bag house at the entrance of the breezeway that can be used. (Ex. P-6, p. 1).

As Davis was sitting on the top rail with one foot on the middle rail, he placed the other foot on the entrance to the breezeway. Davis testified that his forward foot slipped, he fell backwards, hit the left corner of the basket, and fell through the three-foot gap between the left corner of the basket and the left side of the opening to the breezeway. (Tr. 112). He fell approximately 70 feet to a concrete pad below.

Inspector Laufenberg testified that he issued this order because he believed that Watkins had not provided a safe means of access for its employees to enter the bag house compartments. (Tr. 186). He stated that he issued the order because the short end of the man-lift basket was being positioned against the opening to the breezeway and Watkins' employees were climbing over the top rail of the basket to enter the breezeway. (Tr. 186-87). He believed that this means of access was unsafe, even if employees were tied off at all times. A safety belt and line do not provide fall protection, they just keep a worker from falling all the way to the ground. *Id.* An employee falling from the breezeway while tied off would still be likely to sustain injuries as a result of the fall. (Tr. 187-88).

Inspector Laufenberg also testified that it was highly likely that someone would be seriously injured as a result of this condition. (Tr. 189). Finally, he testified that he determined that Watkins was highly negligent for allowing its employees to enter and exit the short end of the basket over the top rail and that the violation was caused by its unwarrantable failure to comply with the safety standard. (Tr. 189-90, 217-18).

Watkins maintains that it did not violate the safety standard because it established a safe means of access. Whenever an employee needed to go up to the bag house compartments, he was to get into the lift basket with Mr. Perez, who would operate the lift. Mr. Perez would position the basket so that the long side was against the building. The Watkins employee would remain tied off at all times. At the top, the employee would raise the center bar of the middle handrail of the basket and crawl under the top handrail. Once the employee was out of the basket, Mr. Perez would unhook the employee's lanyard and the employee would attach it to a structure within the building. Because the lift basket would remain in place until the employee entered the door to one of the bag house compartments, there was no danger of anyone falling. The opening to the breezeway would remain completely protected at all times. Watkins argues that the Secretary presented no evidence that this means of entering and exiting the breezeway was unsafe.

In addition, Watkins contends that Mr. Davis's testimony as to the events of the day of the accident should not be credited. It notes that he has a civil action pending against Watkins in California over this accident. It also notes that Davis is a convicted felon. Watkins raises several factual discrepancies in Mr. Davis's testimony. For example, Davis testified that it would have not been possible to move the insulation panels to the other side of the basket. Boyette, the basket operator, told Inspector Laufenberg that he was starting to move the panels when, without warning, Davis climbed on top of them. In addition, Mr. Bartholomew testified that the safety line on the safety belt that the company provided Davis is six feet long. Watkins maintains that Davis's testimony that he was restrained by his safety line and was forced to unhook it to exit the basket is contrary to the facts.

Another factual inconsistency relates to the statement of an eyewitness to the accident. Donald Busbee, a Watkins hourly employee, saw the accident from the ground. He told Inspector Laufenberg that Davis was standing, not sitting, on the top rail of the basket when he fell. Busbee told Laufenberg that Davis's hands were holding a flange above the breezeway opening at the time of the accident. (Ex. P-8, p. 8 & 17). There was also conflicting evidence as to the number of people in the basket. Finally, Watkins objects to the Secretary's attempt to establish that the base of the lift was located in a position where it would have been impossible to place the long end of the basket against the bag house building at the breezeway. It contends it would have been easy for Mr. Boyette to move the base of the lift in any event.

Watkins argues that the Secretary bases her case, not on any failure by Watkins to *provide* a safe means of access, but because an alleged unsafe method was *used* at the time of the accident. It contends that every possible means of access need not be made safe, only those that are reasonably possible. *Hanna Mining Co.*, 3 FMSHRC 2045, 2046-47 (September 1981). The Secretary failed to show that Mr. Davis's means of entering the bag house was reasonably foreseeable by Watkins. Mr. Bartholomew testified that he had never seen anyone access the bag house by positioning the short end of the basket against the building (Tr. 246, 286-87). It also argues that Mr. Davis knew the correct way to use the man-lift to access the bag house building and that he knew he was required to be tied off at all times. In addition, even if it was

foreseeable that an employee might climb over the top rail, there is no persuasive evidence that he would be injured if he were using his safety line.

I find that the Secretary established a violation. The evidence establishes that Watkins' employees regularly entered the breezeway by climbing over the top rail at the short end of the basket. The testimony of Mr. Davis and the statements of several Watkins' employees support this finding. Both Mr. Boyette and Mr. Busbee told Inspector Laufenberg that they had never seen anyone place the long side of the lift basket against the building. Busbee said that he rode in the lift about 10 times and Boyette said he operated the lift 10 to 15 times.

Two individuals stated that the long end of the basket was placed against the building on a regular basis. Mr. Perez told Inspector Laufenberg that every time he took a Watkins employee up to the breezeway, he followed the proper procedure. (Ex. P-8, p. 24-25). He also said that he took Mr. Bartholomew up several times on the days preceding the accident by placing the long end of the basket against the bag house building. He told Laufenberg that he did not take Bartholomew up on the day of the accident. He also stated that he was not present when anyone else operated the man-lift. *Id.*

Mr. Bartholomew testified that he had never observed anyone enter or exit the breezeway via the short end of the basket of the lift. (Tr. 246, 288). He stated that if he had seen anyone doing that, he would have counseled them about the proper procedure. Bartholomew also testified that he was rarely at the north end of the bag house building, but he did observe the basket being positioned correctly several times. (Tr. 238-39, 247, 287-88). He also stated that Mr. Perez took him up to the breezeway prior to the accident on that same day. (Tr. 274, 285-86). When Mr. Bartholomew heard about the accident, he left his office trailer at the south end of the bag house building and walked to the north end. (Tr. 245). He observed that the short end of the man-lift basket was adjacent to the building. (Tr. 290).

The Secretary established that Watkins' employees were regularly transported to the breezeway in the manner described by Mr. Davis. The short end of the basket was placed against the building at the breezeway and employees climbed over the top rail into the breezeway. The hearsay evidence presented through Inspector Laufenberg shows that Boyette used this procedure on a regular basis and that he had not been trained or advised to follow any other procedure. Hearsay evidence is admissible in Commission proceedings as long as it is relevant. 29 C.F.R. § 2700.63. The testimony and notes of Inspector Laufenberg with respect to this issue corroborate the testimony of Mr. Davis. I credit Inspector Laufenberg's testimony.

Mr. Bartholomew was not in a position to know how Watkins' employees were getting out of the basket at the breezeway. His office trailer was at the opposite (south) end of the bag house building and he rarely was at the north end. Thus, his testimony does not rebut the testimony of Mr. Davis and Inspector Laufenberg that employees were required, on a frequent basis, to exit the basket by climbing over the top rail at the short end. Although there was a safe

means of access to the breezeway, as set forth by Mr. Bartholomew, it is clear that the cited, unsafe method was used on a regular basis.

The Commission's decision in *Hanna Mining Co.* does not support Watkins' position in this case. In that case, the Commission reasoned:

We agree with the Secretary and the judge that the standard requires that each "means of access" to a working place be safe. This does not mean necessarily that an operator must assure that every conceivable route to the working place, no matter how circuitous or improbable, be safe. For example, an operator could show that a cited area is not a "means of access" within the meaning of the standard, by proving that there is no reasonable possibility that a miner would use the route as a means of reaching or leaving a workplace.

3 FMSHRC at 2046. In the present case, the evidence shows that Boyette, a Watkins employee, was regularly taking employees to the breezeway via the unsafe route. Boyette's conduct was neither unforeseeable nor improbable. Mr. Bochette, Watkins' general foreman, told Inspector Laufenberg that he had not been in the bag house since the ladder was taken away and that he never saw anyone operate the man-lift. (Ex. P-8, p. 25). Bochette and Mr. Brannan of Mountain States established a safe procedure to be used when using the man-lift, but Bochette told Laufenberg that he never discussed these procedures with Watkins' employees. *Id.* at 23 & 26. Bochette apparently assumed that only Mr. Perez would be operating the lift because he told Laufenberg that he did not even know that Boyette was operating the lift. The standard requires employers to provide and maintain a safe means of access to all working places. This responsibility is not met by establishing a safe procedure and then failing to advise the affected employees of the procedure and failing to take any steps to see that the safe procedure is being implemented.

One of Mr. Davis's legs was amputated as a result of this accident and he has a civil suit against Watkins pending in California, his home state. (Tr. 121-22, 129). Mr. Davis admitted that, when he was younger, he was convicted of stealing "a car and stuff like that." (Tr. 122). His testimony about the issues before me is consistent with the statements that other employees gave to Inspector Laufenberg. Most of the inconsistencies referred to by Watkins are not relevant in this proceeding and I make no attempt to resolve them. Such inconsistencies include whether Davis was standing or sitting when he fell, the number of people in the basket at the time of the accident, and whether there were physical impediments to placing the long side of the basket against the building.

I also find that the violation was serious and S&S. It was very hazardous for Mr. Davis and other Watkins employees to climb over the top rail of the short end of the basket to enter the breezeway. An employee could slip and fall as Mr. Davis did and, because there was a three-foot

opening that was not covered by the basket, it was reasonably likely that he would be seriously injured. (Tr. 187-89). The fact that employees used safety lines when entering the breezeway does not alter this finding. A serious injury was reasonably likely to employees using safety lines.

Finally, I find that the violation was the result of Watkins' unwarrantable failure to comply with the safety standard. Management did very little to make sure that employees were accessing the breezeway in a safe manner. Management knew that to provide safe access, the long end of the basket had to be positioned against the building at the breezeway. Yet, this fact was not communicated to the employees. The safe procedure was frequently not followed. Thus, there was no follow-through by management to make sure that safe access was being provided. I do not believe that Watkins exhibited "reckless disregard" or "indifference" with respect to the requirement of safety standard or that the violation was the result of its "intentional misconduct." Rather, the violation was the result of its "serious lack of reasonable care." Watkins removed the ladder from the south end of the bag house building because management believed that it did not provide safe access, but it failed to take steps to make sure that the man-lift, as used by its employees, provided safe access.

For the reasons set forth above this order is **AFFIRMED**. Taking into consideration the penalty criteria in section 110(i) of the Act, I assess a penalty of \$40,000 for this violation.

4. Citation No. 7923626

Citation No. 7923626 alleges a violation of 30 C.F.R. § 56.15005, as follows:

A non-fatal, serious accident occurred at the mine site on 01/21/99 at approximately 3:30 pm when a contract laborer fell while climbing out of the basket of a man lift he had been riding in. The laborer fell approximately 70 feet, landing on a concrete pad. Safety belts and lines shall be worn when persons work where there is a danger of falling. The laborer was wearing a safety harness and line at the time of the accident. The line was not tied off during the transfer from the man lift to the work site landing.

MSHA Inspector Laufenberg determined that the violation was S&S and was a result of Watkins' moderate negligence. The citation was issued under section 104(a) of the Act. Section 56.15005 provides, in part, that "[s]afety belts and lines shall be worn when persons work where there is a danger of falling...." The Secretary proposes a penalty of \$35,000 for this alleged violation.

There is no dispute that Mr. Davis was wearing a safety belt and line when he fell from the man-lift. It is also undisputed that he unhooked his safety line before he attempted to get out of the basket. It is clear under Commission precedent that this safety standard is violated if the

employee is wearing a safety belt and line but the line is not properly attached. *See Mar-Land Contractor, Inc.*, 14 FMSHRC 754, 756-58 (May 1992). As stated above, employers subject to the Act are strictly liable for violations of safety standards. Accordingly, a violation was established.

I also find that the violation was S&S. Climbing out of the short end of the man-lift basket 70 feet above the ground without a secured safety line created a reasonable likelihood that the hazard contributed to by the violation would result in an injury of a reasonably serious nature. The three-foot gap resulting from the fact that the breezeway was wider than the basket created a serious falling hazard.

I find, however, that Watkins was not negligent with respect to this violation. The hazard was created because Mr. Davis, on his own initiative, disconnected his safety line before he attempted to get off the basket. Mr. Davis testified that he had no choice but to disconnect his line because he became stuck on the top bar at the end of the basket. (Tr. 110). He stated that his safety line "kept him from going any further." (Tr. 111-12). Mr. Bartholomew testified that the safety lines in use at the plant were about six feet long. I credit Mr. Bartholomew's testimony in this regard. Mr. Davis stated that he tied off on an upright support near the middle of the basket. (Tr. 127). The basket was about 7.5 feet long, so he would have been less than four feet from the position of his tie-off as he was sitting on top of the insulation. Moreover, Mr. Davis gave no reason for not retying his safety line to a railing or upright closer to the end of the basket before he attempted to climb up on the panels. (Tr. 139). He could have done so. (Tr. 241-42). I credit the testimony of Mr. Bartholomew over that of Mr. Davis on these issues.

More importantly, I find that Mr. Davis's method of dismounting from the basket was idiosyncratic and unforeseeable to his employer. As stated above, Davis climbed up on top of the insulation panels, placing himself above the plain of the upper rails of the basket, unhooked his safety line, and attempted to step into the opening of the breezeway. Mr. Boyette, the man-lift operator, told Inspector Laufenberg that he was in the process of moving the insulation panels when Davis climbed up on top of them. (Tr. 214; Ex. P-8, p. 15). Mr. Davis claimed that there was no room in the basket to move the panels. Even if I credit this testimony, he could have insisted that they be moved before he entered the basket, or he could have asked that the basket be taken back down to move them. Davis was well aware of Watkins' safety rule requiring that each employee be tied off whenever anyone was six feet or more off the ground. (Tr. 138). I credit the testimony of Mr. Bartholomew concerning Watkins' training program on that rule. Watkins regularly trained employees to follow this rule at all times. Davis was reminded of this rule when he started working in Colorado and he also knew of this requirement from his previous experience and training with Watkins on other projects in California. (Tr. 235-37).

I reject the Secretary's arguments on this issue. She contends that the evidence establishes that Watkins was lax on the enforcement of this standard, relying upon the fact that it was cited for violating this standard on two previous occasions. (Ex. P-1). She also relies upon the fact that Davis did not attend the safety meeting that was held on January 4, 1999, at which

the 100% tie-off rule was discussed. Davis apparently missed the safety meeting because it was his first day on the job at the plant. These facts do not establish that the company was lax in enforcing its tie off rule, at least on this job.

I find that Watkins could not have anticipated that an employee would climb up on the insulation panels, unhook his safety line, and then step or jump into the breezeway without any fall protection. I credit the testimony of Bartholomew that, up until the time of the accident, Davis had a good record of tying off and following job rules. (Tr. 238). Davis testified that in all previous trips up to the breezeway in the basket he had remained tied off the entire time. (Tr. 109-10). Based on the foregoing and the fact that Davis's conduct was quite idiosyncratic and unforeseeable, I find that Watkins was not negligent with respect to this violation. Consequently, I vacate Inspector Laufenberg's moderate negligence determination. For the reasons set forth above, this citation is **AFFIRMED**, as modified. Taking into consideration the penalty criteria in section 110(i) of the Act, I assess a penalty of \$500 for this violation.

II. APPROPRIATE CIVIL PENALTIES

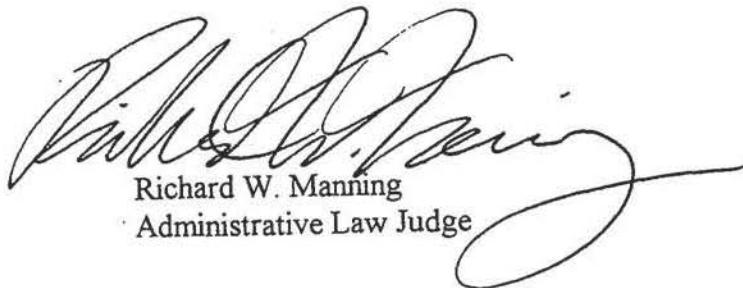
Section 110(i) of the Act sets out six criteria to be considered in assessing appropriate penalties. Watkins performs construction work nationwide and it was issued 32 MSHA citations during the two years prior to this accident. (Ex. P-1). Watkins has about 2,800 employees nationwide and, in 1998, its employees worked about 6.8 million hours. (Tr. 4-5). Watkins demonstrated good faith in abating the citations and orders. *Id.* The penalties assessed in this decision will not have an adverse effect on Watkins' ability to continue in business. My findings with regard to gravity and negligence are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. ORDER

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

<u>Citation/ Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
7923622	56.11012	\$2,000.00
7923623	56.14205	Vacated
7923625	56.11001	40,000.00
7923626	56.15005	500.00

Accordingly, the citations and orders at issue in these cases are **VACATED**,
AFFIRMED, or **MODIFIED** as set forth above, and Watkins Engineers and Constructors is
ORDERED TO PAY the Secretary of Labor the sum of \$42,500.00 within 40 days of the date of
this decision. Upon payment of the penalty, these proceedings are **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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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 29, 2001

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

v.

ROSEBUD MINING COMPANY,
Respondent

ROSEBUD MINING COMPANY,
Contestant

v.

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

: CIVIL PENALTY PROCEEDING
:
: Docket No. PENN 2000-162
: A. C. No. 36-08410-03533
:
: Rosebud No. 2
: Mine ID 36-08410
:
:
:
: CONTEST PROCEEDINGS
:
: Docket No. PENN 2000-109-R
: Citation No. 7058096; 4/5/2000
:
: Docket No. PENN 2000-110-R
: Citation No. 7058097; 4/5/2000
:
: Rosebud No. 2
: Mine ID 36-08410

DECISION

Before: Judge Weisberger

Appearances: John M. Strawn, Esq., U. S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for the Petitioner; Joseph A. Yuhas, Esq., Hastings, Pennsylvania, for the Respondent.

Statement of the Cases

At issue in this consolidated proceeding are (1) a Petition for Assessment of Penalty alleging two violations by Rosebud Mining Company ("Rosebud") of 30 C.F.R. Section 75.523-2(c) on two different pieces of equipment, and a violation by Rosebud of 30 C.F.R. Section 75.1722(b), and (2) Notices of Contest filed by Rosebud challenging the citations referred to in the Secretary's Petition. Pursuant to notice, the matter was scheduled and heard in Kittanning, PA. Subsequent to the hearing which was held on September 21, 2000, the parties each filed proposed findings of fact and a brief.

Findings of Fact

Citation No. 7058098

Prior to the hearing in this matter the Secretary had filed a motion seeking approval of a settlement regarding citation No. 7058098 for which it had previously sought a penalty of \$184.00. The motion seeks approval of a settlement to reduce the proposed penalty to \$131.00. Based on the representations set forth in the Secretary's motion, the documentation in the file, and considering Section 110(i) of the Federal Mine Safety and Health Act of 1977, I find that the proposed settlement is appropriate under the terms of the Act, and accordingly I approve it and grant the motion.

Citation Nos. 7058096 and 7058097 (Violation of 30 C.F.R. §75.523-2)

Inspector Lorenz's Testimony - The Roofbolter

Don W. Lorenz, an MSHA supervisory coal mine and health inspector, was present at Rosebud's Mine No. 2, an underground coal mine, when it was inspected on April 5, 2000. As part of the inspection, a roofbolter was examined. The bolter, when being trammed from one working place to another, is operated from a compartment. In contrast, when the bolter is engaged in bolting at the working face, it is operated from the inch-tram controls located outside a compartment in the center of the bolter. The bolter may be stopped by operating brakes or depressing a start/stop switch. In addition, the bolter is equipped with a panic bar. The bar is three quarters of an inch in diameter, and extends 18 inches above the floor of the bolter. It is readily accessible to the miner operating the bolter from either inside of the compartment, or at the inch-tram controls. The panic bar is designed to de-energize the bolter should a miner push against it or lean his body against it, and it is to be used only in an emergency to quickly de-energize the bolter. According to Lorenz, pressure applied to the panic bar from a horizontal or vertical direction would cause it to de-energize the bolter.

Lorenz testified that Dan Barron, an MSHA inspector whom he assisted, tested, with a gauge, the amount of pressure required to operate the panic bar. The gauge, which had not been calibrated by either Lorenz or Barron prior to its use, is approximately 8 inches long, and one half inch in diameter. If the tip of the gauge is placed against an object, and pressure is applied against the top of the cylinder, the cylinder moves downward and a reading may be taken of the amount of pressure applied.¹ Lorenz indicated that approximately seven readings were taken at various points along the panic bar in the area of the inch-tram controls. Barron held the gauge either vertically, "straight in", or at a 45 degree angle to the panic bar, and pushed it with his palm against the bar. More than 30 pounds was required each time to de-energize the bolter.

¹When pressure is applied to the tip of the gauge, it depresses a spring loaded plunger which slides an "O"ring to a numbered position on the plunger indicating the pounds of applied pressure.

Lorenz indicated that he had told Barron to stop putting pressure on the gauge as soon as the bolter stopped.

On cross-examination Lorenz indicated that the panic bar had moved less than 2 inches in de-energizing, that the gauge does not recognize an application of pressure more than 34 pounds, and that in a situation where only 10 pounds would be required to de-energize the bolter, 30 pounds of pressure could still be exerted against the bar.

A citation was issued to Rosebud alleging a violation of 30 C.F.R. Section 75.523-2(c) which provides as follows :

Movement of not more than 2 inches of the actuating bar or lever resulting from the application of not more than 15 pounds of force upon contact with any portion of the equipment operator's body at any point along the length of the actuating bar or lever shall cause deenergization of the tramsing motors of the self-propelled electric face equipment.

According to Lorenz, the violation was significant and substantial. In this connection he indicated that due to the low height of the roof in the area where the roofbolter operates, i.e. 36 to 38 inches, it is necessary to operate the bolter from a kneeling position at the inch-tram controls. Further, according to Lorenz, since the entries at issue are 18 to 20 feet wide, the bolter operator would be only 4 feet from a rib when bolting the first row of bolts in a sequence, and he might be squeezed against the rib by a sudden movement of the bolter. Lorenz indicated that it is difficult for the bolter operator to see a person stationed along or in front of the bolter. Thus, according to Lorenz, if the roofbolter would not be quickly deenergized, it might hit this person, causing a crushing injury to his legs or pelvis.

Inspector Lorenz's Testimony - The Scoop

According to Lorenz, the panic bar on the scoop essentially functioned like one on the bolter, except that it was hinged at a 45 degree angle, and could be activated by being hit from any direction. In addition, the scoop also could have been stopped by applying its brakes, or pushing a start/stop switch. According to Lorenz, approximately 3 or 4 readings were taken by putting pressure on the gauge against the panic bar on the scoop, and that 24 pounds of pressure was required to move the panic bar sufficiently to de-energize the scoop. A citation was issued alleging a violation of Section 75.523-2(c) supra.

According to Lorenz, the violation was significant and substantial. He explained that due to the low height of the roof, the operator of the scoop would have to stick his head out from the compartment of the scoop in order to operate it, and thus he could get his head caught against a rib or a curtain. He also noted that the travelway was muddy, and contained a lot of rocks, and the scoop would slip from side to side in order to get traction. Also, he indicated that should the operator of the scoop lose control the scoop it could knock out supporting cribs that might be in

the area, causing the roof to fall. In such an event a crushing injury could result.

William C. Beasley's Testimony - The Gauge

William C. Beasley, an MSHA professional engineer, is employed as the chief of the quality engineering branch. Rosebud did not object to the Secretary's proffer of Beasley as an expert in quality certification. According to Beasley, in order to test the accuracy of the gauge at issue, he clamped it and dropped three different weights on the plunger, at differing speeds. Each weight was dropped three times. Beasley indicated that if the weight was dropped very rapidly the readout on the gauge varied by up to 2 pounds. He also indicated that if a weight was applied not directly above the tip of the gauge, the readout on the gauge was reduced by 1 pound. According to Beasley, applying the weights not directly above the center of the gauge but rather off to a side, replicates applying the gauge to a surface at an angle. He also indicated that if the "o" ring should slide up the plunger, it could cause a variation of approximately a pound. Also, if the gauge is applied too quickly, the value can be increased up to two pounds. Beasley concluded that the gauge was reasonably accurate within a range of plus or minus 2 pounds.

Beasley indicated that the tests that he performed were done in September 2000. He said that when the gauges were received by MSHA in January 2000 they came with a certification from the manufacturer, and there was no reason why the gauge would lose its effectiveness from January to April. He indicated that the gauge spring is stable, that there are only a few things that can cause it to go out of calibration, and that no field adjustment is possible. He opined that this particular gauge was suitable to provide good information regarding the release point for the panic bars at issue.

On cross-examination both Beasley and Lorenz conceded that the inner portion of the gauge cylinder containing the spring is not totally sealed, and that it is possible for moisture or dust to get inside the cylinder.

Testimony of Rosebud's Mine Superintendent

Gerald Hefferan, Rosebud's general mine superintendent, was the only witness proffered by Rosebud. He indicated that he had operated the scoop that was cited. According to Hefferan, a person engages the panic bar by pushing in an inward and upward motion. He indicated that to operate the panic bar on the bolter, one needs to apply horizontal pressure. Hefferan opined that force applied to the panic bar in a downward or upward direction would "probably" (Tr. 126) bend the bar or the gauge, but would not de-energize the machine.

Discussion

Violation of 30 C.F.R. §75.523-2

In essence, it is Rosebud's position that the Secretary has failed to establish that it violated Section 75.523-2 supra. In this connection, Rosebud cites the fact that Barron, who applied pressure to the bar with the gauge, did not receive any training regarding usage of the gauge, nor was it calibrated prior to its use. Further, Rosebud argues inter alia, that "... [Barron] could have inadvertently applied pressure at an improper angle, applied pressure too long, applied pressure too rapidly, misread the position of the "o" ring and got improper readings, or any combination of those errors could have led to the improper readings." (Sic.) Also, it is argued that since there is no direct evidence that the gauge was applied at the correct angle to deenergize the equipment, and since Barron was not called by the Secretary, a finding on the issue adverse to the Secretary might be inferred. For the reasons that follow, I do not find Rosebud's arguments, based on inferences, to outweigh the Secretary's evidence.

Section 75.523-2 supra, requires, as pertinent, regarding panic bars on the equipment at issue, i.e., a bolter and a shuttle car, that a "[m]ovement of not more than 2 inches of the actuating bar ... resulting from the application of not more than 15 pounds of force upon contact with any portion of the equipment operator's body ... shall cause deenergization of the tramping motors of the ... equipment."

Based on the uncontradicted and unimpeached testimony of Lorenz, I find that, on the date cited, an MSHA inspector tested the panic bar of the scoop and bolter at issue at several locations with a handheld pressure gauge, and in each instance the gauge indicated that an application of more than 15 pounds of pressure was required to move the panic bar sufficiently to de-energize the equipment.

I find most significant Lorenz's testimony that after Barron's measurements were taken, the gauge was offered to Mike Green, Rosebud's mine foreman, and Hefferan, and that both "tried it and got basically the same reading" (Tr. 25). Since this testimony was not contradicted by Hefferan, who subsequently testified, I accept it. Accordingly, since actual testing by Rosebud's agents basically confirmed Barron's readings, I reject Rosebud's argument, based only on inferences, that Barron's testing was inaccurate.

Further, I accept the unimpeached and uncontradicted testimony of Beasley that the gauge at issue was verified to be accurate. Also, based on his expertise, I accept his uncontradicted testimony that in testing of the gauge with various weights placed off-center on the gauge, the actions of applying the plunger of the gauge to the surface of a panic bar at an angle would be replicated, and readings would not vary more than 2 pounds. Thus, even if Barron applied the gauge at an angle, his reading would have been accurate within 2 pounds. More importantly, I take cognizance of Beasley's opinion, that was not impeached or contradicted, that the gauge in question was suitable to provide good information regarding the release point for the panic bars at issue. Due to his expertise, I accept this opinion.

For all the above reasons, I find that the weight of the evidence establishes that Respondent did violate Section 75.523-2(c) regarding the panic bars on the cited bolter and

scoop.

Significant and Substantial

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 825 (April 1981).

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

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to 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.

In *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further 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); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

Rosebud did not impeach or contradict the opinion of Lorenz that the violation herein contributed to the hazard of a miner being injured, and that due to the positioning of the operator of the bolter, as a consequence of the low height of the roof and the difficultly of the operator to see a person along the bolter or in front of it, the hazard of a crushing injury, contributed to by the violation herein, was reasonably likely to have occurred. Further, Respondent did not impeach or contradict Lorenz' testimony that such an injury would likely have been a crushed leg or pelvis. Regarding the scoop, Respondent did not impeach or contradict Lorenz' testimony that, in addition to the positioning of the operator which results in limited visibility, the scoop

traveled along a muddy travelway which caused the machine to slip side to side in order to get traction.

Within the above context, I find that both violations were significant and substantial.

Penalty

The parties stipulated that Rosebud demonstrated ordinary good faith in attaining compliance after the issuance of the citations at issue, and that the assessment of a penalty would not effect its ability to continue in business. Taking these factors into account, along with the Respondent's size of Rosebud's business as stipulated to by the parties, and it's history of violations, as stipulated to by the parties, the lack of any evidence to indicate that Rosebud's negligence was more than low, and the gravity of the violation as indicated by the type of injuries that could have resulted, I find that penalties of \$184.00 are appropriate for each of the two violations.

Order

It is **Ordered** that, within 30 days of this Decision, Rosebud pay a total civil penalty of \$499.00.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 29, 2001

WILLIAM C. GREEN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. VA 2000-16-D
	:	NORT CD 2000-1
v.	:	
	:	Guess Mountain Mine No. 2
COASTAL COAL COMPANY, LLC.,	:	
Respondent	:	Mine ID 44-06807

ORDER OF DISMISSAL

Appearance: Julia K. Shreve, Esq., Jackson & Kelly, Charleston, West Virginia for Respondent.

Before: Judge Bulluck

This discrimination case is before me pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3). On January 10, 2001, after due notification, Complainant, *pro se*, failed to appear at the hearing on this matter. By Order of January 12, 2001, Complainant was ordered to provide, in writing, good cause for his failure to appear at the hearing, and was notified that failure to respond within 10 days of the Order would result in dismissal of his discrimination complaint. To date, Complainant has not responded.

Accordingly, it is ORDERED that this case is DISMISSED.

Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 10, 2001

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, on behalf of	:	
DEWAYNE YORK,	:	Docket No. KENT 2001-22-D
Complainant	:	BARB-CD-2000-06
v.	:	
BR&D ENTERPRISES, INC,	:	BR&D #3 Mine
Respondent	:	Mine ID 15-18028
	:	

ORDER GRANTING MOTION TO AMEND COMPLAINT
ORDER DENYING RECONSIDERATION OF ORDER DENYING
MOTION TO DISMISS THE COMPLAINT

This matter is before me on a Complaint of Discrimination filed by the Secretary of Labor on behalf of Dewayne York pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(2). By Order dated December 19, 2000, Respondent's motion to dismiss the complaint was denied. Thereafter, Respondent filed a reply to the Secretary's opposition to its motion to dismiss and included an affidavit in support of a claim of prejudice. The reply will be considered a request to reconsider the Order denying the motion to dismiss. The Secretary has moved to amend the complaint to include a demand for assessment of a civil penalty in the amount of \$7,000.00. Respondent has opposed that motion, in essence on the basis of the previously rejected timeliness argument. For the reasons set forth below, Respondent's request for reconsideration of the denial of its motion to dismiss is denied and the Secretary's motion to amend the complaint is granted.

The Motion to Dismiss the Complaint

Respondent's reply reiterates its position that the Secretary must initially demonstrate good cause for the late-filing of a discrimination complaint, before the issue of prejudice is addressed. The argument is misplaced and is again rejected. The authorities cited by Respondent are administrative law judge decisions dealing with situations where a *miner* has failed to timely file a complaint of discrimination with MSHA¹ or the Secretary did not timely

¹ *Lamas v. Duval Corp.*, 9 FMSHRC 306 (February 1987).

file a civil penalty proceeding.² Those situations are not presented here. Respondent's allegations are directed at delay by the Secretary. As noted in the original order, there is settled Commission precedent to the effect that the Secretary's failure to comply with time limits for filing a complaint of discrimination should not result in dismissal absent a showing of material legal prejudice. *Secretary of Labor on behalf of Hale v. 4-A Coal Co., Inc.*, 8 FMSHRC 905, 908 (June 1986); *Secretary of Labor on behalf of Nance v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2215 (November 1994). The Secretary is not required to demonstrate good cause for the untimely filing of a discrimination complaint before the issue of prejudice is addressed.

Respondent's reply includes a specific claim of prejudice, i.e., that the delay has resulted in additional expenditures in the form of payment of wages to the Complainant pursuant to an economic reinstatement agreement. While Respondent's exposure under the economic reinstatement agreement may have been increased due to the Secretary's delay, its decision to forego performance of work by Complainant was voluntary, and, in any event, the economic detriment claimed does not constitute material legal prejudice to its ability to defend against the allegations.

The Complainant was discharged on May 25, 2000. The Secretary filed an Application for Temporary Reinstatement on behalf of Complainant and on August 29, 2000, following a hearing, a Decision and Order of Temporary Reinstatement was issued directing Complainant's immediate reinstatement to his former position at the same rate of pay and benefits. Complainant did not actually return to work, however, because the parties agreed to economic reinstatement, i.e., the Complainant would receive pay and benefits as if employed, but would not actually return to work. Respondent, therefore, agreed to forego Complainant's actual performance of work until a decision on the merits of his discrimination allegation was made.

The prejudice alleged is that the Secretary's delay of approximately two months in filing the complaint, has caused Respondent to pay more money to Complainant than it otherwise would have. Respondent argues that it "is unconscionable for the Secretary to obtain an order of reinstatement utilizing the *de minimis* standard of 'not frivolously brought,' obtain an order of economic reinstatement for the complainant to the economic detriment of the respondent, and then fail to timely act in the filing of a discrimination complaint * * *."³ While Respondent's argument has legitimate appeal from a fairness standpoint, it fails, both factually and legally, to justify dismissal of the complaint.

² *Secretary of Labor v. Hudgeons*, 22 FMSHRC 272 (February 2000), erroneously cited in the reply as *Secretary o/b/o Hudgeons v. Ash Grove Cement Co.*

³ Reply at p. 3.

Factually, the only order obtained by the Secretary on behalf of the Complainant was an order directing his reinstatement to his former position.⁴ Under that order, Respondent is obligated to pay the Complainant commensurate with his earnings prior to his discharge. Respondent, in turn, was entitled to Complainant's performance of his employment obligations. The Decision and Order of Temporary Reinstatement did not envision any economic or other detriment to Respondent, but, merely the avoidance of economic hardship to Complainant while his complaint was being investigated and resolved.

While the authority relied upon by Respondent, *Farmer v. Island Creek Coal Co.*, 13 FMSHRC 1226, 1231 (May 1991), marginally supports its argument that expenses resulting from delay can be considered in the prejudice analysis, that case makes clear that a demonstration of material legal prejudice sufficient to justify dismissal requires much more than Respondent alleges here. As *Farmer* makes clear, the type of legal prejudice that must be demonstrated to have resulted from "serious" delay is a significant impairment of a respondent's "meaningful opportunity to defend." *Id.* Cited as examples were "tangible evidence that has since disappeared, faded memories, or missing witnesses." *Id.*, quoting from *Schulte v. Lizza Indus. Inc.*, 6 FMSHRC 8, 13 (January 1984).

Respondent's demonstration fails when measured against this standard. First, it is not at all clear that the relatively minor delay of approximately two months has caused increased expenditures for Respondent. While arguable, it is far from certain that the delay in filing of the discrimination complaint will result, or has resulted, in a corresponding delay in its ultimate resolution. It is also unclear whether Respondent could have avoided unanticipated lengthening of the economic detriment that it voluntarily undertook. It might have, for example, sought relief from the economic reinstatement agreement once the theoretical last day for filing the complaint passed.

Even if Respondent suffered its claimed economic detriment, however, it is simply not the type of prejudice that could rise to the level of material legal prejudice justifying dismissal of the complaint.

Accordingly, Respondent's request to reconsider the order denying its motion to dismiss the complaint is **DENIED**.

⁴ By letter dated October 11, 2000, the parties submitted a proposed amendment to the Decision and Order of Temporary Reinstatement, entitled: "Agreed Order on Economic Reinstatement." Because of concerns about jurisdiction that were not addressed in the submission, it was returned to the parties for possible re-filing either with the undersigned or with the Commission itself.

The Secretary's Motion to Amend the Complaint

The original complaint filed in this case included a prayer for "assessment of an appropriate civil money penalty against the respondent for its violation of * * * the Act." Complaint at pp. 3-4. The Secretary has moved to amend the complaint to specify that the amount of the civil penalty proposed is \$7,000.00, and to add allegations addressed to the penalty criteria specified in § 110(i) of the Act. Respondent has opposed the motion, advancing the timeliness argument relied upon in its motion to dismiss.

Under long-standing Commission precedent, the complaint's initial allegations as to the civil penalty were markedly deficient. In *Secretary of Labor on behalf of Hannah v. Consolidation Coal Co.*, 20 FMSHRC 1293, 1301-02 (December 1998), the Commission noted:

In 1983, the Commission held that the Secretary must propose penalties in discrimination cases, and must support such proposals with allegations on each of the criteria. *Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2044-48 (Dec. 1983). * * * *

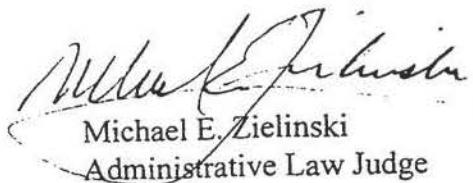
Commission Procedural Rule 44(a) was promulgated to codify this holding. * * * * It requires the Secretary, in connection with any proposed civil penalty for a violation of section 105(c) she alleges in a discrimination complaint, to provide "a short and plain statement of supporting reasons based on the [section 110(i)] criteria." 29 C.F.R. § 2700.44(a). * * * *

The amendments proposed by the Secretary would remedy the complaint's shortcomings with regard to the civil penalty allegations.

Guided by Fed. R. Civ. P. 15(a), motions to amend pleadings in Commission proceedings are to be freely granted unless the moving party has been guilty of bad faith, acted for purposes of delay, or a hearing on the merits would be unduly delayed. Prejudice to the opposing party may also bar an otherwise permissible amendment. *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289 (August 1992); *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990). There are no allegations of bad faith or undue delay here.

As noted in the discussion of Respondent's argument that the complaint should be dismissed, there is also no legally cognizable prejudice that would be occasioned by granting of the motion. Respondent was on notice, even with the cursory allegations of the initial complaint, that it would be subject to a civil penalty of up to \$50,000.00 if it was found to have violated the discrimination provisions of the Act. 30 U.S.C. § 820(a). The proposed amendments merely specify the amount of the civil penalty proposed by the Secretary and add allegations addressing the penalty criteria.

The Secretary's motion to amend the complaint is hereby **GRANTED**. Respondent shall answer the amended complaint within ten days after service-of this Order.



Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
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303-844-3577/FAX 303-844-5268

January 10, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-411-M
Petitioner	:	A.C. No. 45-03224-05515
	:	
v.	:	
	:	
WASHINGTON ROCK QUARRIES, INC.,	:	Champion Pit
Respondent	:	

ORDER DENYING MOTION FOR SUMMARY DECISION

Counsel for the Secretary filed a motion for summary decision in this case. The motion was mailed on January 3, 2001. The hearing in the case is scheduled for January 17, 2001. The Secretary sets forth two grounds for the motion. First, she states that she should be granted summary decision as a matter of law because Respondent exceeded the time required "to contest the citations." Second, she contends that there are no genuine issues of material fact with respect to the merits of the case. Respondent opposes the Secretary's motion or, in the alternative, asks that it be granted an opportunity to respond in full.

The Commission's Procedural Rules provide that a "motion for summary decision shall be granted only if the entire record, including pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) that there is no genuine issue as to any materials facts; and (2) that the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). The Commission's procedural rule further states that a motion for summary decision must be supported. The Secretary attached affidavits of MSHA Inspectors Randy W. Horn and Rick Dance.

With respect to the Secretary's first ground for the motion, I note that the Secretary, on or about August 14, 2000, filed a motion with the Commission's chief administrative law judge requesting a "summary order assessing the proposed penalties as final and directing that such penalties be paid." She based this motion on the fact that an answer to her petition for penalty had not yet been filed. By order dated August 24, 2000, the chief judge denied the motion. In addition, on August 10, 2000, the chief judge issued an order to show cause granting Respondent 30 days from that date to file its answer. Counsel for the Respondent filed his appearance and answer on September 6, 2000, within this 30-day period.

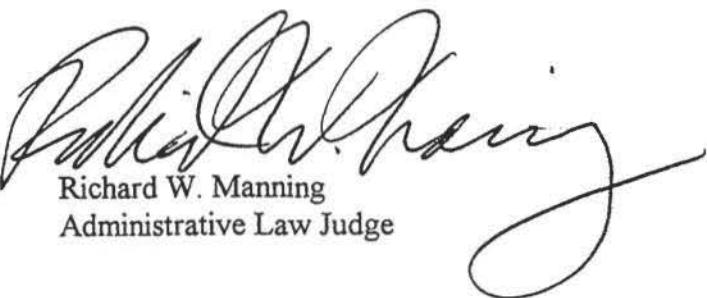
It is clear that Respondent intended to contest the citations and penalties when it filed its notice of contest under 29 C.F.R. § 2700.26. It failed to file an answer to the Secretary's petition for penalty within the time required by 29 C.F.R. § 2700.29. This 30-day requirement is not jurisdictional and the Commission's chief judge, in effect, granted Respondent a 30-day extension of time. The cases cited by the Secretary on page 11 of its motion are not applicable. Those cases concern late-filed *pre-penalty* contests of citations and orders under 29 C.F.R. § 2700.20. This case is a penalty proceeding and concerns a late-filed answer to the Secretary's petition for penalty. Commission law with respect to these distinct issues is not the same. Consequently, I deny this portion of the Secretary's motion.

The Secretary also contends that there is no genuine issue of material fact and that she is entitled to summary decision as a matter of law on the merits of the case. She attached affidavits of the two MSHA inspectors that issued the citations at issue in these cases. These affidavits, which total about seven pages, set forth the observations and conclusions of the inspectors. The affidavits are a summary of what they would testify to at a hearing. Under the Commission's procedural rules, "when a motion for summary decision is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for a hearing." 29 C.F.R. § 2700.67(c). Under rule 2700.10, a party has ten days to respond to a motion. Five days are automatically added to the response time when service is by mail, as it was in this case. 29 C.F.R. § 2700.8. Thus, Respondent has 15 days to file its response to the Secretary's motion for summary decision.

On November 1, 2000, I issued an order setting this case for hearing on January 17, 2001. Because the Secretary did not file and serve her motion for summary decision until January 3, 2001, Respondent's reply is not due until January 18, 2001. Thus, by filing this motion, the Secretary is indirectly asking that I cancel the hearing. Under 29 C.F.R. § 2700.67(a), motions for summary decision must be filed at least 10 days prior to the start of the hearing. Although the Secretary complied with this minimum requirement, I do not believe that she complied with the spirit of the Commission's procedural rules. A party should not be permitted to file a motion for summary decision 14 days before a scheduled hearing so as to require the cancellation of the hearing, at least where the motion simply sets forth the party's evidence to be presented at the hearing. The Secretary's motion does not attempt to narrow or focus the issues. It does not raise issues that are particularly amenable to resolution through summary proceedings.

Granting the Secretary's motion would not "secure the just, speedy and inexpensive determination" of the issues in this case. 29 C.F.R. § 2700.1(c). If I canceled the hearing to allow Respondent the opportunity to reply to the Secretary's motion, it is foreseeable that Respondent will respond with an affidavit that challenges some of the material facts set forth by the Secretary. I would then have to deny the motion and reschedule the hearing for a later date. Consequently, I deny this portion of the Secretary's motion as well.

For the reasons set forth above, the Secretary's motion for summary decision is **DENIED** and Respondent's motion to strike the Secretary's motion is **GRANTED**. Unless the parties settle this case, the hearing will proceed as scheduled on January 17, 2001. The exact courtroom in which the hearing will be held has been changed. The hearing will be in Courtroom 815 on the 8th Floor of the United States Courthouse, 1010 Fifth Avenue, Seattle. The hearing will commence at 9:00 a.m.



Richard W. Manning
Administrative Law Judge

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