JANUARY 2004

COMMISSION DECISION

ADMINISTRATIVE LAW JUDGE DECISIONS

JANUARY 2004

No cases were filed in which Review was granted during the month of January

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

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

January 16, 2004

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. EAJ 2002-2
GEORGES COLLIERS, INCORPORATED	: :	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

DECISION

BY: Duffy, Chairman; Beatty, Suboleski, and Young, Commissioners

This case involves an application for an award of attorney's fees and other expenses by Georges Colliers, Inc. ("GCI"), pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504 et seq. GCI's application followed the decision in *Georges Colliers, Inc.*, 23 FMSHRC 1346, 1392-1416 (Dec. 2001) (ALJ), in which Administrative Law Judge David Barbour assessed penalties of $72,298 for numerous violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 801 et seq. (1994) ("Mine Act" or "Act"). The Department of Labor's Mine Safety and Health Administration ("MSHA") had proposed penalties of $332,701. Thereafter, GCI filed an application for fees and expenses on the grounds that the penalties proposed by MSHA were substantially in excess of the penalties assessed by the judge and unreasonable when compared to the judge's decision. The application for fees and expenses was denied by the administrative law judge. 24 FMSHRC 572, 578 (June 2002) (ALJ). For the reasons that follow, we vacate the judge's decision and remand this proceeding for further consideration consistent with our analysis.

I.

Factual and Procedural Background

A. The Mine Act Proceeding

GCI began operations when it took over the three eastern Oklahoma coal mines of two financially troubled companies, P&K and HMI. 23 FMSHRC at 1352. P&K and HMI had sought financial assistance from a Chicago investment firm, Heller Financial, Inc. *Id.* Heller acquired the assets of P&K and HMI and formed GCI to own and operate the mines that were formerly owned by the companies. *Id.* In 1998, Craig Jackson, whom Heller had hired to help in improving GCI's profitability, became its president. *Id.* at 1352-53.

Between 1998 and 2000, MSHA issued to GCI approximately 550 citations and orders. In addition, there were nine civil penalty assessments issued against three agents of GCI who were charged under section 110(c), 30 U.S.C. § 820(c), for knowingly violating the Mine Act. *Id.* at 1351. Ultimately, more than 50 dockets were consolidated in the Mine Act proceeding.

With the exception of the dockets involving liability of the individual agents under section 110(c), the Secretary and GCI stipulated to all issues other than whether the amount of the proposed penalty assessments would affect GCI's ability to continue in business.[1] *Id.* Thereafter, a three-day hearing was held on the citations and penalties under section 110(c) and on the issue of whether the proposed penalties arising from the citations and orders issued to GCI would affect its ability to continue in business. *Id.* at 1350-51. The judge found the three individuals liable under section 110(c) for most of the violations charged. *Id.* at 1355-86. The judge reduced their proposed penalties from $18,900 to $3,300. *Id.* at 1395-98.

With regard to GCI, the judge noted that the operator presented extensive evidence on the effect of the proposed penalties on its ability to continue in business. *Id.* at 1389. The judge

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[1] Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act, including the operator's ability to pay the proposed penalty and stay in business:

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

30 U.S.C. § 820(i) (emphasis added). *See Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

relied on the testimony of GCI's president, Craig Jackson, whom the judge found to be "an articulate and forthright witness," and documentary evidence submitted at trial. *Id.* at 1389-90. The judge found that, by the second quarter of 1997, it became apparent that GCI was unable to meet principal and interest payments on its loan to Heller. *Id.* at 1389. The judge further noted that, in 1998, the amount of Heller's loan to GCI was $13.5 million, while the book value of its assets was between $8 and $9 million. *Id.* Finally, he found that, by July 2000, GCI was no longer actively involved in mining and had cut back its work force from 50 miners to between 12 and 15 miners who performed reclamation work so Heller could avoid incurring a significant environmental liability. *Id.* Based on these findings, the judge concluded that GCI's condition was "precarious" and that imposition of the proposed penalty assessments would adversely affect its ability to continue in business. *Id.* at 1390. After weighing all the penalty criteria, the judge assessed penalties totaling $72,298, reduced from the Secretary's proposed penalties of $332,701. *Id.* at 1398-1416.

Neither GCI, the Secretary, nor the section 110(c) agents appealed the judge's decision to the Commission.

B. The EAJA Proceeding

On January 28, 2002, the Commission received from GCI an Application for Fees and Expenses on behalf of itself and its agents requesting reimbursement in the amount of $45,019.36.[2] GCI Appl. at 9, GCI Amended Appl. at 1. In support of its application, GCI asserted that the Secretary's demands were excessive, resulting in 77 to 80 percent reductions by the judge in the Secretary's proposed penalties. GCI Appl. at 5-6. GCI further alleged that the Secretary failed to consider that the company was small and insolvent and that the proposed penalties would affect its ability to continue in business. *Id.* at 7-9.

The Secretary opposed the application, stating that GCI did not submit financial information during the penalty assessment phase of the proceeding. Sec. Opp'n to Appl. at 1-2. The Secretary stated that, during subsequent settlement negotiations, GCI requested either complete revocation of penalties or imposition of nominal penalties, neither of which were permitted under the Mine Act. *Id.* at 2-3. The Secretary further argued that GCI committed willful violations of the Mine Act and acted in bad faith. *Id.* at 5-8. Finally, the Secretary argued that penalties were not unreasonable when compared with the judge's decision and that the demands were not substantially in excess of the penalties assessed. *Id.* at 8-17.

In ruling on the application, the judge reviewed the different bases for recovery under the EAJA. He noted that an EAJA application may be granted "where the government's demand is 'substantially in excess' of the relief awarded, that is where the demand is unreasonable when

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[2] GCI initially sought fees and expenses totaling $72,495, GCI Appl. p. 9, but submitted an amended application with reduced fees and expenses because it had included fees arising out of a separate proceeding, *Georges Colliers, Inc.*, 23 FMSHRC 822 (Aug. 2001).

compared with the relief awarded." 24 FMSHRC at 574 (citations omitted). In examining MSHA's proposed penalties, the judge stated that they represented the agency's ultimate position prior to litigation. *Id.* He found that the proposed penalties were the result of applying the regulations governing assessments, and that there was nothing in the record to indicate that in computing the penalties the Secretary did anything other than "faithfully follow and properly apply the regulations." *Id.* at 574-75. In responding to GCI's contention that the Secretary did not properly consider the effect of the proposed penalties on its ability to continue in business, the judge found that the record did not reveal that during the penalty proposal process GCI brought to MSHA's attention all of the financial documents and the statements of its president that the judge found persuasive during the hearing. *Id.* at 575. Further, the judge found that the proposed penalties did not seem excessive when compared to the statutory limits in the regulations. *Id.* Therefore, the judge concluded that MSHA's proposed penalties issued to GCI and its agents were substantially justified. *Id.*

The judge next addressed whether MSHA's litigation positions were reasonable. *Id.* at 576-77. He noted that it is the judge's duty to assess penalties de novo based on statutory criteria and that the amounts ultimately assessed reflect the exercise of his discretion. *Id.* at 576. Here, the judge found that he had reduced the proposed penalties between 77.5 and 80.84 percent. *Id.* He rejected the parties' invitation to review their settlement discussions, determining rather to judge the reasonableness of the Secretary's position by whether what was revealed at trial was known, or reasonably should have been known. *Id.* at 577. The judge concluded that it was not unreasonable for the Secretary to pursue the proposed penalties and that she could not have anticipated his credibility determinations. *Id.* The judge, therefore, denied the EAJA application. *Id.* at 578.

C. Petition for Review

On June 14, 2002, the administrative law judge issued his decision on the EAJA application. *Id.* at 572. GCI filed a petition for review with the Commission on July 19, 2002, some 35 days after issuance of the judge's decision. The Secretary filed an opposition to the petition, arguing that the Commission had no authority to accept a petition filed beyond 30 days after the judge's decision, or to extend the time for filing a petition. Sec. Opp'n to PDR at 3-7.

In response, counsel for GCI stated that she received mail at her home office in a bank of mail boxes and that it was possible "that the letter was miss-directed [sic] to another mailbox." GCI Reply to Sec. Opp'n to PDR at 1-2. GCI further argued that due process required timely notice of the judge's decision and that the problem could have been avoided if the decision had been sent by certified mail.[3] *Id.* at 3.

[3] Judges' decisions generally are sent via certified mail, but the judge's decision in this proceeding was sent by regular mail.

On July 24, 2002, the Commission voted to grant GCI's petition for review, with one commissioner voting to deny the petition because it was untimely.

II.

Disposition

GCI initially argues that the judge applied the substantial justification test instead of the two-prong test of whether the government's demand is substantially in excess of the relief awarded and unreasonable when compared to that relief. GCI Br. at 7-8. GCI further argues that, under the Secretary's penalty assessment regulations, it cannot be required to submit financial information prior to receiving the proposed penalty assessment or within 30 days of a proposed assessment prior to filing a notice of contest. *Id.* at 8-10. GCI next argues that the Secretary, in considering the penalties in this proceeding, should have been aware of GCI's financial records submitted in the record of other Mine Act proceedings. *Id.* at 10-11. GCI then contends that the amount of the proposed assessments was excessive when compared to the judge's decision. *Id.* at 11-12. Finally, GCI asserts that the Secretary's proposed assessments were unreasonable when compared to the judge's decision.[4] *Id.* at 12-14.

The Secretary reiterates her position that GCI's petition for review was filed late and that the Commission has no authority to accept it. Sec. Br. at 6-11. The Secretary further argues that, because GCI's petition for review failed to challenge the judge's findings that the proposed penalties were not substantially in excess of those assessed, the Commission must affirm the judge. *Id.* at 12-13. The Secretary challenges GCI's assertion that the judge applied the incorrect test for making an award and that, if he did apply the incorrect legal standard, it was harmless error. *Id.* at 13-16. The Secretary argues that the judge properly found that the Secretary's proposed penalties were not excessive when compared with those assessed by the judge. *Id.* at 16-18. The Secretary further argues that the proposed penalties were not unreasonable when compared with those assessed by the judge. *Id.* at 24-35. Finally, the Secretary argues that the Commission should deny GCI an EAJA award because it committed willful violations of the Mine Act, committed over 500 violations, frequently endangering the health and safety of miners, and acted in bad faith during the litigation of the case. *Id.* at 35-38.

A. Timeliness of GCI's Petition for Review

The time limit for filing an appeal from a judge's decision in an EAJA proceeding is

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[4] Although GCI referred to the section 110(c) agents in its petition, PDR at 2, GCI made no argument in its brief to the Commission regarding the individuals. Accordingly, it has abandoned its appeal with regard to those individuals. *See RNS Services, Inc.*, 18 FMSHRC 523, 526 n.6 (Apr. 1996). Thus, in the event that the judge finds that an EAJA award to GCI is appropriate, the charges related to counsel's preparation of her defense of those individuals must be separated from the legal fees submitted by GCI.

governed by Commission Procedural Rule 308(b), 29 C.F.R. § 2704.308(b) (hereafter "EAJA Rule"). That provision states, "[t]he party seeking review shall file a petition for discretionary review so as to be received by the Commission . . . within 30 days of the issuance of the . . . decision by the administrative law judge." 29 C.F.R. § 2704.308(b).

In the instant proceeding, contrary to the Commission's usual practice, the judge's decision was not sent by certified mail. GCI's counsel stated that she did not receive the judge's decision until July 17, 2002, some 33 days after it was issued. GCI Reply to Sec. Opp'n to PDR at 1. Counsel stated that she received mail at a bank of mailboxes at her residence where mail was often incorrectly delivered. *Id.* at 2. GCI's petition was received by the Commission 35 days after issuance of the judge's decision.[5]

The Secretary filed an opposition to GCI's petition for review, arguing that the Commission had no authority under the Mine Act to grant the late-filed petition. Sec. Opp'n to PDR at 3-7. In her brief, the Secretary reiterates her position that the Commission has no authority under the Mine Act to grant a late-filed petition in an EAJA proceeding and, therefore, should vacate its direction for review. Sec. Br. at 6-11.

We disagree with the Secretary's position. At the time that the petition for review was filed, the Commission reviewed the Secretary's arguments and the circumstances surrounding the issuance of the judge's decision. Included in this review was the Commission's inadvertent failure to use certified mail, and the mail delivery problems recounted by GCI's counsel. We note further that section 113 of the Mine Act, 30 U.S.C. § 823, upon which the Secretary relies in large measure to argue that the Commission has no authority to accept the petition (Sec. Opp'n to PDR at 4-7), governs the procedures for filing a petition for discretionary review of a judge's decision in a Mine Act proceeding. This, however, is an EAJA proceeding that is governed by Commission EAJA Rule 308(b). In light of the foregoing, we decline the Secretary's request to vacate the Commission's direction for review.[6]

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[5] GCI's argument that, under Mine Act Rule 8, 29 C.F.R. § 2700.8, it had an additional five days to file because service of the judge's decision was by mail, is incorrect. As Mine Act Rule 7(a), 29 C.F.R. § 2700.7(a), makes clear, service pertains to the obligation of a party to deliver documents to another party when filing with the Commission. EAJA Rule 308(b), as well as Mine Act Rule 70(a), 29 C.F.R. § 2700.70(a), upon which EAJA Rule 308(b) was modeled, is clearly pegged to the judge's "issuance of the decision," rather than a party's filing and service of documents. *Compare* EAJA Rule 301, 29 C.F.R. § 2704.301 (an application for an award or a petition for discretionary review shall be filed and served on all parties).

[6] We do not suggest that in future proceedings we may not strictly apply the time limits specified in the Commission's EAJA rules. We merely hold that, in light of the Secretary's arguments and the unique factual circumstances of this proceeding, we decline to do so here.

B. The EAJA Claim

Section 504(a)(1) of EAJA, which was enacted in 1982, provides that an eligible prevailing party may be awarded attorney's fees and expenses in an adversary proceeding brought by the United States unless the government's position is "substantially justified" or special circumstances make an award unjust. 5 U.S.C. § 504(a)(1). The 1996 amendments to EAJA expanded the basis for recovering fees and expenses to include certain adversary proceedings against private parties where the government's "demand" leading to the proceedings was excessive and unreasonable. EAJA Amendments of 1996, Pub. L. No. 104-121, 110 Stat. 862. Section 504(a)(4), the pertinent portion of EAJA, as amended, provides:

> If, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement, the demand by the agency is *substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision*, under the facts and circumstances of the case, the adjudicative officer shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. . . .

5 U.S.C. § 504(a)(4) (emphasis added). The term "demand" is defined in part as "the express demand of the agency which led to the adversary adjudication." 5 U.S.C. § 504(b)(1)(F).

The legislative history of the 1996 EAJA amendments is meager. However, the committee report published following the passage of the amendment explains that a party would not be required to prevail in the agency adversary proceeding in order to be eligible to recover fees under section 504(a)(4):

> This subtitle amends the EAJA to allow small entities to recover the fees and costs attributable to a demand by the agency which is excessive and unreasonable under the facts and circumstances of the case. The small entity would not be required to prevail in the underlying action; the final outcome must be, however, to require payment of an amount substantially less than what the agency sought to recover.

H.R. Rep. No. 104-500, at 2 (1996). Floor comments accompanying the passage of the EAJA amendments provide additional guidance in evaluating the government's demand:

> This test should not be a simple mathematical comparison. The Committee intends for it to be applied in such a way that it identifies and corrects situations where *the agency's demand is so far in excess of the true value of*

> *the case, as demonstrated by the final outcome*, that it appears the agency's assessment or enforcement action did not represent a *reasonable effort to match the penalty to the actual facts and circumstances of the case.*

Joint Managers Statement of Legislative History and Congressional Intent, 142 Cong. Rec. S3242, S3244 (Mar. 29, 1996) (emphasis added) ("*Joint Statement*").

The Commission has implemented the requirements of EAJA through its special EAJA rules in 29 C.F.R. Part 2704. The standards to be applied in addressing EAJA claims are set forth in 29 C.F.R. § 2704.105. Commission EAJA Rule 105(a) applies to claims of prevailing parties brought under section 504(a)(1) of EAJA, and Rule 105(b) applies to claims that the Secretary's demand was excessive and unreasonable under section 504(a)(4) of EAJA.

This proceeding is the second that has come before the Commission involving a claim for attorney's fees and expenses under the 1996 amendments to the EAJA.[7] *See L & T Fabrication & Constr., Inc.*, 22 FMSHRC 509 (Apr. 2000). In *L & T Fabrication*, the Commission described the 1996 EAJA amendments as establishing a two-part test for determining whether fees should be awarded under 5 U.S.C. § 504(a)(4). "The first prong is largely quantitative, focusing on whether . . . the Secretary has proposed a penalty that is 'substantially in excess of' the penalty ultimately assessed by the Commission. . . . [T]he second prong is qualitative, and presents the issue of whether the Secretary has acted reasonably in proposing a particular penalty." *Id.* at 514. In order for an applicant to recover fees and expenses, both prongs of the test must be met. *Id. See also* Commission EAJA Rule 105(b), 29 C.F.R. § 2704.105(b) ("[t]he burden of proof is on the applicant to establish that the Secretary's demand was substantially in excess of the Commission's decision; the Secretary may avoid an award by establishing that the demand was not unreasonable when compared to that decision.").

Here, the Secretary's proposed civil penalties are the government's "demand" that must be analyzed. Although the judge generally recognized this class of claims under the 1996 amendments (". . . an EAJA application may be granted where the government's demand is 'substantially in excess' of the relief awarded, that is where the demand is unreasonable when compared with the relief awarded . . . " 24 FMSHRC at 574), his decision treats the EAJA application as if it were made by a prevailing party pursuant to 29 C.F.R. § 2704.105(a). GCI did not prevail in the Mine Act proceeding and claimed only that the Secretary's demand was excessive and unreasonable. Absent from the decision is the legal framework that the Commission established in *L & T Fabrication* for analyzing cases brought under section 504(a)(4) of EAJA. *Id.* at 574-77. Instead, the judge examined the Secretary's position prior to and during

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[7] In prior Commission EAJA cases brought by prevailing parties, the issue was whether the Secretary's position was substantially justified under section 504(a)(1) of the statute. *See Black Diamond Constr., Inc.*, 21 FMSHRC 1188 (Nov. 1999); *James Ray, empl'd by Leo Journagan Constr. Co.*, 20 FMSHRC 1014 (Sept. 1998); *Contractors Sand and Gravel, Inc.*, 20 FMSHRC 960 (Sept. 1998), *rev'd*, 199 F.3d 1335 (D.C. Cir. 2000).

litigation to determine whether her position was "substantially justified." *Id.* at 574-76. *See, e.g., Black Diamond*, 21 FMSHRC at 1194 ("EAJA provides that a prevailing party may be awarded attorney's fees unless the position of the United States is substantially justified."). Because the judge did not apply the standard set forth in Commission EAJA Rule 105(b) and the legal framework set forth in *L & T Fabrication*, the case should be remanded to him.

Further, in addressing whether the proposed penalties were "substantially in excess"[8] of the penalties finally assessed, the judge stated that he did not find the proposed penalties against GCI excessive "when measured against the statutory limit of $50,000 [per violation]."[9] 24 FMSHRC at 575 (citations omitted). However, the judge erred when he compared the proposed penalties to the maximum permissible penalty. The benchmark should have been the penalties that the judge finally imposed – a figure that was substantially lower than the dollar amount that he used. *See L & T Fabrication*, 22 FMSHRC at 514-15. A comparison of the proposed penalties, $332,701, to the amount that the judge finally assessed, $72,298, indicates a 78 percent reduction.[10]

There is minimal guidance in the legislative history of the EAJA amendments in determining whether the government's demand is excessive. In a floor comment to the bill, Senator Bumpers stated that, if the Government sought $1 million to settle the case and the judge or the jury awarded, for example $10,000 or $50,000, the defendant should be able to recover his fees. 142 Cong. Rec. S2148-04 (March 15, 1996) (Statement of Sen. Bumpers). The Commission's decision in *L & T Fabrication* established some general principles that are instructive. There, a Commission majority eschewed an approach of evaluating penalties that would have led to the conclusion that proposed penalties were excessive whenever they were more than 50 percent of those imposed. 22 FMSHRC at 514-15 & n.6. Nevertheless, the

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[8] The Secretary argues that GCI did not raise in its petition for review the issue of whether her demand was excessive when compared with the judge's decision. However, in its petition for review, GCI stated that the standard for recovery of fees under EAJA is "whether the Secretary [sic] demand is substantially in excess of the decision and whether or not the demand is unreasonable" (PDR at 3). The rule governing petitions for review in EAJA proceedings provides, "Each issue in dispute shall be plainly and concisely stated, with supporting reasons set forth." 29 C.F.R. § 2700.308(b). We conclude that GCI's petition adequately preserves the issues for review.

[9] The maximum penalty that could be assessed per violation at the time of the judge's decision was set in the Secretary's regulations at $55,000. 30 C.F.R. § 100.3(a) & (g) (2000). The maximum penalty has recently been increased to $60,000. 68 Fed. Reg. 6609, 6611 (Feb. 10, 2003).

[10] Later in his decision, when the judge compared the proposed penalties to the penalties actually assessed, he did so in the context of examining the reasonableness of the Secretary's litigation position. 24 FMSHRC at 576.

Commission did not have to decide whether the proposed penalty was excessive because it held that the proposed penalty was reasonable and, therefore, dismissed the EAJA claim. *Id.* at 515-17.

United States v. One 1997 Toyota Land Cruiser, 248 F.3d 899 (9th Cir. 2001), is the only court of appeals case decided under the EAJA amendments that is pertinent to disposition of this issue. In a drug seizure proceeding, the government sought forfeiture of a vehicle that was estimated to be worth $40,000. *Id.* at 902. Ultimately, the government settled the matter for $1,000 and up to $4,000 in costs incident to the seizure. *Id.* at 902, 906. In determining that the government's demand was substantially in excess of the judgment obtained, the court concluded that "the disparity between the demand and the final settlement is substantial." *Id.* at 906. The court further concluded that the government's demand was also unreasonable because it valued the litigation at $40,000 but quickly lowered its claim to $1,000 plus costs, following the government's loss on summary judgment. *Id.* The court remanded the case to the lower court to determine whether the applicant committed a willful violation or acted in bad faith, or special circumstances made an award unjust. *Id.*

The disparity (78 percent reduction) between the proposed fines and the penalties assessed in this proceeding is greater than that in *L & T Fabrication* (50 percent reduction) but less than that in *One 1997 Toyota Land Cruiser* (88 percent reduction) and *Secretary of Labor v. Wolkow Braker Roofing Corp.*, 2000 WL 1466087 at 3-4 (OSHRC 2000) (93 percent reduction of proposed fine from $61,000 to $4,000) (attached to GCI's Br. as Ex. 5).[11] Further, it is not apparent from the record that the Secretary proposed an onerous penalty in order to extract a speedy settlement, one of the agency practices that the EAJA amendments were designed to redress. *See One 1997 Toyota Land Cruiser*, 248 F.3d at 906. On remand, the judge should weigh these considerations in making a determination as to whether the proposed penalties were excessive.[12]

In addition to addressing whether the proposed penalties were excessive, on remand the judge must properly analyze the reasonableness of the proposed penalties under the 1996 EAJA amendments. While the judge analyzed whether the proposed penalties were reasonable, his

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[11] *Wolkow Braker Roofing Corp.* is a decision by an administrative law judge at the Occupational Safety and Health Review Commission ("OSHRC") that was not appealed. If a judge's decision is not appealed to OSHRC, it becomes a final order after 30 days. 29 C.F.R. § 2200.90(d). OSHRC rules appear to be silent on the precedential value of judges' decisions that are not appealed. *Compare* Mine Act Rule 72, 29 C.F.R. § 2700.72 ("An unreviewed decision of a Judge is not a precedent binding upon the Commission.").

[12] Because an EAJA award requires that the government's demand be both unreasonable *and* excessive, the judge need not decide whether the proposed penalties are excessive if he again concludes that the proposed penalties are not unreasonable. As noted above, in *L & T Fabrication*, the Commission did not determine whether the Secretary's proposed penalty was excessive, because it concluded that it was reasonable. 22 FMSHRC at 515.

analysis was in the context of treating GCI as a prevailing party and evaluating whether the Secretary's pre-litigation and litigation positions were substantially justified. 24 FMSHRC at 574-77. The Commission's decision in *L & T Fabrication* again is instructive in the analysis that the judge should follow in addressing whether the government's demand was unreasonable when compared to the judge's decision in the Mine Act proceeding.

In *L & T Fabrication*, the Commission examined the Petition for Assessment of Penalty to ascertain the reasonableness of the proposed penalty. 22 FMSHRC at 515-16, *quoting Joint Statement* at S3244 ("Clearly, the Secretary made 'a reasonable effort [here] to match the penalty to the actual facts and circumstances the case.'"). In this proceeding, the file in each docket contained several documents relating to how MSHA determined the assessed value of the citations.[13]

However, in weighing the reasonableness of the Secretary's proposed penalties, the primary issue is whether the Secretary sufficiently considered GCI's evidence of its ability to continue in business when that information was submitted. The judge largely rejected GCI's argument that the Secretary failed to consider this information, stating ". . . the record does not substantiate this claim." 24 FMSHRC at 575. Therefore, the issue before us is whether substantial evidence supports the judge's finding.[14]

Neither party disputes the fact that GCI submitted financial information to MSHA. *See* GCI Br. at Ex. 1; Sec. Br. at 25. Indeed, the parties discussed lower penalties prior to trial in light of this information. However, neither GCI's submissions nor the parties' subsequent negotiations resulted in the Secretary revising her proposed penalties. Before the Commission, both GCI and the Secretary argued at length over the timing of the submission of GCI's financial documents. The Secretary argues that she cannot be charged with knowledge of GCI's financial condition because the information was not submitted until after the penalty proposals had been issued in the

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[13] In each docket, the Secretary filed a Petition for Assessment of Penalty. Attached to the Petition was the Proposed Assessment; a sheet listing the citations, the penalty criteria and points assigned to each violation, the maximum penalty based on total penalty points, and the proposed penalty (which, in all cases, was less than the maximum penalty allowed in the Secretary's regulations); and the underlying citations. *See, e.g.,* Pet. for Assessment of Penalty, dated April 23, 1999, Docket No. CENT 99-179. In addition, many of the files had a Proposed Assessment Data Sheet, which contained information regarding the nature of GCI's operation, past violations, and number of inspection days.

[14] "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)). The Commission in *Contractors Sand & Gravel,* 20 FMSHRC at 966-67, 978, held that the substantial evidence test is the appropriate standard of review for a judge's factual determinations in an EAJA proceeding.

vast majority of citations. Sec. Br. at 25. GCI contends that requiring it to submit financial information and argue that it is unable to pay penalties prior to their issuance violates due process. GCI Br. at 9. GCI further contends that even requiring it to submit financial information during a 30-day period after issuance of proposed penalties is inadequate. *Id.*

While the regulations do not specifically address the timing of submission of financial data (30 C.F.R. § 100.3(h)),[15] the Secretary's *Program Policy Manual* does.[16] Part 100.3(h) provides:

> Within 30 days of receipt of a proposed assessment, an operator may submit a written request to the District Manager for review of its financial status. . . . Upon receipt of such request, MSHA will suspend processing of the case until a determination is made as to whether a financial reduction is warranted.

III MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 100, at 46 (2001) ("*PPM*").[17] The *PPM* further provides that the District Manager will forward the information submitted along with a memorandum to the Office of Assessments, which decides whether any penalty adjustment should be made. *Id.* Finally, the *PPM* specifies that the Office of Assessments "will notify the

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[15] The Secretary's regulation, 30 C.F.R. § 100.3(h), provides, in pertinent part:

> The operator may submit information to the District Manager concerning the business financial status to show that payment of the penalty will affect the operator's ability to continue in business. If the information provided by the operator indicates that the penalty will adversely affect the ability to continue in business the penalty may be adjusted.

[16] The Commission has long held that the *PPM* is not binding on the Secretary or the Commission. *See D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996), *quoting King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981). Nevertheless, the *PPM* is a policy statement that, in this instance, complements the Secretary's regulation and fills in a significant gap regarding the timing of the submission of financial data and the nature and timing of the Secretary's response. *See* 30 C.F.R. § 100.3(h). Moreover, in weighing the reasonableness of the Secretary's position in a prior EAJA proceeding involving a prevailing party, the Commission relied on "the clear language of the *PPM*." *See Black Diamond*, 21 FMSHRC at 1195, 1198 (referring to *PPM*'s definition of "construction work" that is exempt from Mine Act coverage).

[17] The section of the *PPM* cited was issued on July 3, 2001. Prior to that date, the procedure for submitting financial data was included in a Program Policy Letter issued by MSHA. P99-III-5 (1999) ("PPL"). The procedure specified in the PPL was identical to that in the *PPM*. *Id.*

operator of the final decision via certified mail" and the operator will have 30 days to pay the proposed penalty or notify MSHA of its intention to contest the proposed penalty. *Id.*

Consistent with the procedures outlined in the *PPM*, in a letter dated June 27, 2000, and addressed to MSHA's district manager, GCI's attorney requested "pursuant to § 100.3(h) of the Act, a review of its financial status" and submitted financial information for review in relation to three identified citations "and all other outstanding proposed assessments." GCI Resp. to Opp'n to Appl., Ex. 4. Following the hearing on the proposed penalties in the Mine Act proceeding, GCI argued to the judge that the *PPM* provided a procedure by which it could submit financial records to MSHA's Penalty Assessment Office, that it had regularly done so, but that it had never received a response, contrary to the requirements of the *PPM*.[18] GCI Post Hr'g Br. at 30, Docket No. CENT 2000-420. In support of this position, GCI's president, Craig Jackson, testified at trial that GCI had submitted to MSHA the financial documents that were exhibits at trial and heard nothing in response. Tr. 579-80.

Finally, in a Commission order involving a docket that was subsequently consolidated in the underlying Mine Act proceeding, there is further evidence of GCI's adherence to the procedures in the *PPM*. In *Georges Colliers, Inc.*, 22 FMSHRC 939, 939-40 (Aug. 2000), GCI requested the Commission to reopen two penalty assessments that had become final orders after the proposed penalty assessments had been misplaced. In the order remanding the matter to the judge, the Commission noted that GCI had asserted that it submitted financial documents to MSHA's Compliance Office and that it "was indirectly notified that that office notified the Regional Solicitor's Office that [GCI] was entitled to financial hardship consideration." *Id.* at 939. The Secretary did not respond to GCI's assertion.

In its brief to the Commission, the Secretary dismisses the effect of GCI's June 27 letter, stating that GCI submitted the letter *after* all but seven of the 559 penalty proposals had been issued. Sec. Br. at 25. The Secretary concluded that she cannot be "charged with any knowledge of GCI's financial condition" or that its penalty proposals were unreasonable because she "did not consider GCI's financial condition in issuing them." *Id.* However, the Secretary's position ignores the procedures in the *PPM* that would have, at the least, generated a response from MSHA *after* issuance of the proposed assessments but *prior* to the issuance of penalty petitions.

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[18] It is not apparent from the record in the Mine Act proceeding that, in every docket, GCI submitted financial data within the 30-day period from issuance of the proposed assessment. In most dockets, following issuance of proposed penalties, GCI moved to stay proceedings pending consolidation with the lead cases. Thus, the 30-day period for filing financial data (or an opposition to the penalty assessment) was interrupted in many of the dockets. Clearly, GCI submitted financial data in some of the dockets that were consolidated with other dockets. Further, given the absence of record evidence indicating *any* response from the Secretary to GCI's submission of financial data, GCI's strict adherence to the 30-day period over the two-years during which penalty assessments issued would have been futile.

In short, the record evidence and the *PPM* indicate that there was a procedure for submitting financial data that GCI followed in at least some of the cases. But there is an absence of record evidence indicating that the Secretary ever responded to GCI's submission. Indeed, the Secretary now takes the position that she had no obligation to consider the financial data once the proposed penalties were issued.[19] Accordingly, we find no substantial evidence in the record to support the judge's rejection of GCI's claim that the Secretary did not consider the effect of the proposed penalties on its ability to continue in business (24 FMSHRC at 575).[20] On remand, the judge should reconsider his finding in light of this analysis. He should address the effect, in any, of the Secretary's consideration of and response to GCI's financial data after the issuance of proposed penalties, given the procedures in the *PPM*.[21] Specifically, he must consider the significance of the Secretary's apparent failure to respond to GCI's submission of financial data, either in writing (as provided for in the *PPM*) or by modifying the penalty amounts, in determining whether she made "a reasonable effort [here] to match the penalty to the actual facts and circumstances of the case." *L & T Fabrication*, 22 FMSHRC at 515-16 (citation omitted).

As a final matter on the issue of reasonableness of the Secretary's demand, the judge noted that his conclusion that the Secretary's proposed penalties would affect GCI's ability to remain in business was based on documentary evidence submitted at trial and his crediting GCI's president, Craig Jackson. 24 FMSHRC at 577. The Commission in *L & T Fabrication* commented on the

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[19] Notwithstanding the guidance in the *PPM*, the Secretary's regulations do not require adjustment of penalties based on the operator's financial status. *See* 30 C.F.R. § 100.3(h) ("If the information provided by the operator indicates that the penalty will adversely affect the ability to continue in business the penalty *may* be adjusted.") (emphasis added). The *PPM*, however, states that MSHA's Office of Assessments will notify an operator of its "final decision" on any penalty adjustment via certified mail. *PPM*, Part 100 at 46.

[20] GCI's argues that, in the event of a remand, it should have the opportunity of a evidentiary hearing. GCI Br. at 13. GCI further requests that it be allowed to move to compel production of documents and to depose an MSHA official. *Id.* at 13 n.18. If the parties believe that the judge needs to order further proceedings, they should make their request to the judge in accordance with EAJA Rule 306(d), 29 C.F.R. § 2704.306(d) ("A request that the judge order further proceedings . . . shall specifically identify the information sought . . . and shall explain why the additional proceedings are necessary to resolve the issues.").

[21] The judge was understandably reluctant "to delve into [the parties'] settlement discussions," particularly given the lack of "an undisputed, fully documented settlement proposal." 24 FMSHRC at 577 & n.1. As the court stated in *One 1997 Toyota Land Cruiser*, 248 F.3d at 905, "The EAJA defines 'demand' as a static concept and not one that metamorphoses over the course of settlement negotiations." Accordingly, the lack of any written revised penalty assessments from MSHA dictates that the judge only consider the proposed penalty assessments issued by MSHA. *See* 5 U.S.C. § 504(b)(1)(F) (defining "demand" in part as "the express demand of the agency which led to the adversary adjudication.").

unique role of its judges under section 110(i) to assess penalties de novo based upon the statutory criteria and the record evidence developed during the course of a hearing. 22 FMSHRC at 516. For that reason, the Commission concluded that it was not unusual that a judge would reduce a proposed penalty because he determined to give greater weight to certain of the penalty criteria. *Id.* That rationale is, of course, applicable to the instant proceeding, and the judge should consider it in his determination of whether the Secretary's demands were reasonable.[22] However, the Mine Act does not preclude the Secretary from considering facts relevant to the penalty criteria because final authority to assess penalties lies with the judge. Indeed, the Secretary's regulations and the *PPM* provide an opportunity for MSHA to consider GCI's ability to continue in business in light of proposed penalties and that, in no way, detracts from the central role of the judge.

Before the Commission, the Secretary argues that GCI should be denied attorney's fees because EAJA, 5 U.S.C. § 504(a)(4), precludes an award if GCI committed willful violations or acted in bad faith, or because special circumstances make an award unjust. Sec. Br. at 35-36. In support, the Secretary argues that GCI committed 559 violations that repeatedly endangered the lives and safety of miners, including 272 violations stipulated to be significant and substantial (S&S), and that it committed 39 violations as a result of its unwarrantable failure. *Id.* at 36-39 & n.13. If, on remand, the judge concludes that the Secretary's demand was excessive and unreasonable, he should consider whether an exception to the grant of an award exists. 29 C.F.R. § 2704.307. *See One 1997 Toyota Land Cruiser*, 248 F.3d at 906. In the present record, there are no findings from the judge on these issues. Given the judge's extensive involvement with the parties over a period of years in the underlying Mine Act proceeding, he should make findings in these areas in the first instance.

In sum, on remand, the judge must use the appropriate analytical frame work, established in the Commission's *L & T Fabrication* decision, for determining whether the Secretary's proposed penalties were excessive and unreasonable. Further, the judge must address GCI's submission of financial data and the Secretary's response, in light of section 100.3(h) and the *PPM*. Finally, in the event that the judge determines that the Secretary's proposed penalties were excessive and unreasonable, he should proceed to address whether GCI committed willful violations or acted in bad faith, or whether special circumstances make an award unjust.

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[22] We note that GCI's president Craig Jackson's trial testimony was limited to describing Heller's involvement with GCI and authenticating and describing GCI's financial statements, including a flow of funds chart and security agreement (Resp. Ex. 6), a balance sheet (Resp. Ex. 8), cash flow analysis (Resp. Ex. 9), a letter from Heller concerning default of loan agreement (Resp. Ex. 10), and GCI's 1999 federal income tax return (Resp. Ex. 11). *See* Tr. 570-633. Thus, there was no competing witness or conflicting set of documents that had to be evaluated by the judge in determining what weight to give GCI's financial circumstances in assessing penalties.

III.

Conclusion

Based on the foregoing, we vacate the judge's decision and remand this proceeding for further consideration consistent with our analysis.

Michael F. Duffy, Chairman

Robert H. Beatty, Jr., Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

The Commission's Equal Access to Justice Act ("EAJA") regulations require a party to file a petition for discretionary review of a judge's EAJA decision within 30 days of the issuance of that initial ruling. Commission Procedural Rule 308(b), 29 C.F.R. § 2704.308(b). Georges Colliers, Inc. ("GCI") filed its petition 35 days after the underlying decision was issued. Because the petition was untimely, the Commission should not review this case.

The operator asks the Commission to excuse the late-filing of the petition because its attorney received the judge's decision on July 17, 2002, 33 days after it was issued. GCI Reply to Sec. Opp'n to PDR at 1. Claiming that "[i]t is possible that the letter was miss-directed [sic] to another mailbox," the operator's counsel explained that she

> has a home office that receives mail at a residential bank of twenty (20) mailboxes located approximately one-half (1/2) block from counsel's residence. Mail is frequently miss-boxed and is either placed in an outgoing slot, placed on top of the mail-box, or eventually hand delivered to the residence by the incorrect receiver of said mail.

Id. at 1-2.[1]

Under even a relatively lenient standard,[2] the excuse offered by the operator's counsel would not suffice. *See, e.g., Gibbs v. Air Canada*, 810 F.2d 1529, 1537-38 (11th Cir. 1987) (holding that default caused by failure to establish minimum procedural safeguards for determining that action in response to summons and complaint was being taken does not

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[1] She also argues that she erroneously believed that Commission procedural rules permitted five additional days for filing because the judge's decision was sent by mail. *Id.* at 2-3. My colleagues properly reject this argument. Slip op. at 6 n.5.

[2] The majority rightly leaves for a future case the question of how strictly the Commission should construe its regulation governing the time limits for filing a petition for discretionary review in an EAJA matter. Slip op. at 6 n.6. I note, however, that if the operator had failed to file the initial EAJA application on time and offered the same excuse to the administrative law judge that it provided to the Commission in this case, the EAJA application would have been rejected. *See Long Island Radio Co. v. NLRB,* 841 F.2d 474, 477 (2d Cir. 1988) (holding that 30-day time limitation in 5 U.S.C. § 504(a)(2) for filing an initial application for attorney's fees for agency proceedings under EAJA is jurisdictional). Similarly, a court of appeals would have refused to accept this excuse upon the late filing of a petition for review of this agency's EAJA adjudication. *See Howitt v. United States Dep't of Commerce*, 897 F.2d 583, 584 (1st Cir. 1990) (recognizing that the circuit courts have unanimously agreed that the statute's 30-day time limit for appealing agency EAJA decision to court of appeals is jurisdictional).

constitute default through excusable neglect, and claim that mail clerk must have misplaced the complaint is not a sufficient excuse), *reh'g and reh'g en banc denied*, 816 F.2d 688 (11th Cir. 1987). Her claim that she does not have the ability to receive mail in a timely fashion is a hollow one, given the fact that she practices law and must often receive time-sensitive material. In this case, she should have known that the judge's EAJA decision was pending, and that she would need to meet a deadline to file a petition for review to the Commission if her client chose to appeal. Nonetheless, she failed to establish a mechanism to ensure that she would routinely receive mail when it was delivered. The Commission should not reward such a lackadaisical approach by excusing her late-filed petition.[3]

For the foregoing reasons, the operator's petition for review should not be accepted by the Commission. Accordingly, I respectfully dissent.

Mary Lu Jordan, Commissioner

[3] Unlike my colleagues in the majority, slip op. at 6, I fail to see how the fact that the judge's decision was not sent by certified mail is relevant. The operator does not claim that the Commission failed to mail the judge's decision in a timely manner. In fact, there is no evidence indicating that the judge's decision was received late due to any failure by the Commission. The only reason offered by the operator for the late receipt of the decision (and thus the late-filed PDR) is its attorney's inadequate system for receiving mail.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

January 5, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2002-224-M(A)
Petitioner	:	A. C. No. 04-01299-05542
v.	:	
	:	Docket No. WEST 2002-226-M
ORIGINAL SIXTEEN TO ONE MINE,	:	A. C. No. 04-01299-05544
INCORPORATED,	:	
Respondent	:	Sixteen To One Mine

DECISION

Appearances: Christopher B. Wilkinson, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, on behalf of the Petitioner;
Michael M. Miller, President, Original Sixteen to One Mine, Incorporated, Alleghany, California, on behalf of the Respondent.

Before: Judge Melick

These cases are before me upon Petitions for Civil Penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1994) the "Act," charging Original Sixteen to One Mine, Incorporated (Sixteen to One) with violations of mandatory standards and proposing civil penalties for the violations. The general issue before me is whether Sixteen to One violated the cited standards and, if so, what is the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act. Additional specific issues are addressed as noted.

During hearings, the Secretary vacated Citation No. 7982709 and the parties agreed to settle Citation Nos. 7982708 and 7982710. (Tr. 248-249). With respect to the latter citations the Respondent agreed to pay the proposed penalties in full. The proposed settlement is acceptable considering the criteria under Section 110(i) of the Act and a corresponding order directing payment will be incorporated herein.

Citation No. 7995404

Citation No. 7995404, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 57.9306 and charges as follows:

> A miner was fatally injured at this mine on November 6, 2000, while operating a Mancha locomotive on the 1700 level when his head struck a

protruding ore chute causing it to become wedged between the battery compartment of the locomotive and the chute. The chute extended into the drift to the mid point of the train rails at approximately the same height as the locomotive operator's head. Warning devices had not been installed in advance of the ore chute to indicate restricted clearance nor had the chute been conspicuously marked, nor marked at all, to warn and remind miners of the restricted clearance.

The cited standard provides that "[w]here restricted clearance creates a hazard to persons on mobile equipment, warning devices shall be installed in advance of the restricted area and the restricted area shall be conspicuously marked."

The allegations in the citation are undisputed and clearly support the violation as charged. Indeed, Michael Miller, Sixteen to One's President and CEO, acknowledged that there was no warning device and that "it was a tremendous hazard" (Tr. 284). In addition, whether or not the particular violation herein was a causative factor in the cited fatal injuries, the violation was also clearly "significant and substantial" and of high gravity.

A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984), the Commission explained:

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

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

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

The undisputed evidence shows that Mark Fussell, the deceased, was operating the cited locomotive on the 1700 level of the mine when his head struck a protruding ore chute and became wedged between the battery compartment of the locomotive and the chute. The chute extended into the drift to the midpoint of the train rails at approximately the same height as the locomotive operator's head. There was only a two-inch clearance between the top of the locomotive and the bottom of the ore chute. From the position in which Fussell was seated on the locomotive there was therefore insufficient clearance for his head to pass beneath the extended chute. The failure under these circumstances to have provided any advance warning or any marking on the chute itself, to warn of the deadly consequences presented by the protruding chute was clearly a "significant and substantial" violation warranting a finding of high gravity. As previously noted, Miller himself acknowledged that "it was a tremendous hazard" (Tr. 284).

The Respondent argues that it was not negligent in committing the violation because the accident was caused entirely by the negligent conduct of the deceased, Mr. Fussell, a rank-and-file miner. While the Secretary agrees that Fussell was highly negligent in failing to ensure that appropriate warnings had been in place, the Secretary argues that Fussell was, under the unique facts of this case, an agent of the operator whose negligence is imputable to the operator. Under Commission precedent, the negligence of a rank-and-file miner is not ordinarily imputable to the operator for purposes of penalty assessment. *Secretary v. Martin Marietta Aggregates,* 22 FMSHRC 633 (May 2000); *Whayne Supply Company,* 19 FMSHRC 447 (March 1997); *Southern Ohio Coal Company,* 4 FMSHRC 1459 (August 1982). The Secretary argues in her post-hearing brief, however, that Fussell was an agent because he was designated as a "Lead Miner" ultimately responsible for the safety and operations of his work group.[1]

In deciding whether a miner is an agent of an operator, the Commission has focused on the miner's functions and not his job title. *REB Enterprises Inc., et al.* 20 FMSHRC 203, 211 (March 1998); *Ambrosia Coal and Construction Co.,* 18 FMSHRC 1552, 1560 (September 1996). In this regard, Michael Miller, President and CEO of Sixteen to One, described Fussell's functions in his opening statement at hearings:[2]

> Mr. Miller: Okay, Mark Fussell was a certified Lead Miner familiar with and trained for his position ... Mark Fussell's heading was to slush loose rocks in an old stope above the 1700 foot level. He chose to prepare the track in the event the use of an electric train would facilitate his job.

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[1] Section 3(e) of the Act defines "agent" as "[a]ny person charged with the responsibility for the operation of all or a part of a coal or other mine or the supervisor of the miners in a coal or other mine."

[2] While these admissions were made in Miller's opening statement, admissions by an attorney or other agent of a party in a formal opening statement are conclusive in the case, unless allowed to be withdrawn. M. Graham, *Federal Practice and Procedure*: Evidence § 7023 (Interim Edition); *McCormick on Evidence*, Fifth Edition, Admissions § 259.

A Lead Miner is the one responsible to identify and fix any safety issues in his heading. Anyone in the mining business will testify that as a Lead miner it was his job to identify and correct any defects in regulations. Mark Fussell was aware of this.

* * * *

Mr. Miller: A Lead Miner is a miner who has been task trained for all of the various jobs required in our particular operation. A Lead miner does not have to have any management or foreman capabilities. He basically would be. In our situation, the person in charge over a Miner II, which we have. And we have a Miner I as well.

The Court: You mean other persons - -

Mr. Miller: Yeah. We started with raw people that have no background in mining at all and have trained them to become Lead miners at the Sixteen to One. So he was in the highest capacity that you could have as a miner at the Sixteen to One.

The Court: He was paid more than regular miners?

Mr. Miller: Yeah. We started with raw people that have no background in mining at all and have trained them to become Lead miners at the Sixteen to One. So he was in the highest capacity that you could have as a miner at the Sixteen to One.

The Court: He was paid more than regular miners?

Mr. Miller: We have a scale, a pay scale. He was paid at the pay scale of a Lead Miner versus a Miner II or Miner I. But we also have experience Levels for Lead miners and others. He was not our highest paid miner. We have miners that are Lead miners that make more money.

The Court: But over the persons he had charge of he was paid higher.

Mr. Miller: Yes.

The Court: He was in charge of other miners?

Mr. Miller: If he was in a heading where he had a Miner I or II under him he would be paid more.

The Court: I see. But at this time he did not have anyone under him?

Mr. Miller: He was the Lead miner, and Vince Kautz was what we call in our business partners. So he was the partner to Mark. I don't know exactly if Vince was paid more or less than Mark.

The Court: But Vince Kautz was above Mr. Fussell?

Mr. Miller: No.

The Court: Who gave the orders to these persons; they would not give orders to each other.

Mr. Miller: They would give orders to each other, because we encourage everyone at the mine to have an opinion. But, however, if there were an ultimate responsibility it would be Mark.

(Tr. 11-13).

Miller further described Fussell's functions in his testimony:

Q. [By Mr. Wilkinson] Was [Fussell] considered a Lead Miner?

A. Yes.

Q. There seems to be some question that I don't quite understand yet about a Lead Miner and management. What was the policies - - what is your understanding of the policies of the Sixteen to One with relationship to Lead Miners I and Miners II as far as responsibilities go?

A. Well, I kind of got to paint the picture a little bit. I'm sticking to the subject here, but you have to understand that the mine is extensive, the workings are in excess of 27 miles. So it's reduced, or it's necessary that you have individuals that are capable of - - multitask oriented individuals who can handle the job that is put before them. No one person can be in all places at all times. Individuals are trained and brought up to have the background, training and ability to maintain a safe working environment while they're training less experienced individuals and making progress in a work area.

When you become a Lead Miner your work area is your responsibility. It doesn't stop there, but on a day-to-day basis the overall responsibility and decision-making is that of the Lead Miner. I think that basically probably could be stipulated as a reality of mining throughout the industry.

Q. Okay. Did the - -

The Court: Do they usually work alone?

The Witness: No, you always work in pairs. Somebody had to be in charge because there's always difference of opinion in how to do things. And so ultimately the responsibility has to ride on one person within each group so that progress can be made.

The Court: So the Lead Miner is the person who would be in charge of that particular work group?

The Witness: That's right. He could have more than one helper, he could have several helpers, but it's still his responsibility. And he reports directly to the underground foreman, if there's one: or if not, the miner manager. In this case I was acting as both. I had both responsibilities.

(Tr. 365-366)

* * * *

There's been testimony that Mr. Fussell was the supervisor or Lead man for Vince Kautz on the day of the accident: Is that correct?

A. No. He is a Lead Miner. Mr. Wilkinson.

Q. He is a Lead Miner?

A. No. He is a Lead Miner, Mr. Wilkinson.

Q. He is a Lead Miner?

A. He is a Lead Miner.

Q. Right. You also have two other miner positions. Mine I and Miner II: right?

A. I believe that right now all of our people are Lead Miners. I don't believe that - - I believe at the time of the accident the individuals that signed the safety sheet would all have been - - there were only like 12 or 14 of them, and I don't think we had any Miner I's or II's. I think they would all fit the requirements of being a Lead Miner.

Q. Didn't you testify - - didn't you in your opening state that, in response to the Judge's questions, that Mr. Fussell would have been - - there were three positions, Miner I, Miner II, and then Lead Miner; wasn't that what you said?

A. That's how we rate our employees.

Q. Right.

A. It's like GS5, 5 and 10.

Q. Right. And you said that Mr. Fussell was a supervisor of the Miner I and Miner II people.

A. I said he was a Lead Miner. I said he was a Lead Miner, and I'll say he is a Lead Miner today. And part of the duties of a Lead Miner are to take authority over your heading and take the responsibility of that heading. It's just like Mr. Cain taking responsibility to Mr. Montoya's work. Someone has to take responsibility.

Q. And that was Mr. Fussell's job at the time?

A. That fell under his job description, sure. I mean under his capabilities. He was a Lead Miner.

Q. Responsible for the area, responsible for safety in that area?

A. Well, yeah.

Q. Responsible for the men working in that area?

A. He's not only responsible, he's required by MSHA Law that only people that can go into headings are the ones that - - it says right in the manuals, is the only people that can go in to clean our abandoned areas or areas that have been barricaded are people that are either designated by the company, the operator, or people that have the talents and capabilities to do that. And Mr. Fussell fully met that criteria.

Mr. Wilkinson: Would you read back my question.

[Whereupon the reporter read back the last question]

Q. Would you answer my question? Was Mr. Fussell responsible for that area?

A. Yes.

Q. Was he responsible for the safety in that area?

A. Yes.

Q. Was he responsible for the men in that area?

A. He would be, yes. (Tr. 459-461).

While Fussell, like the Lead Man in *REB Enterprises,* apparently had no independent authority to hire, fire or discipline other miners, it is generally true that many foremen do not have that authority and those foreman are nevertheless generally considered to be agents of the operator.

In any event, I find this case to be distinguishable from *REB Enterprises.* Fussell in this case had the ultimate responsibility on a "day-to-day" basis over Miners I and II and over other Lead Miners (Tr. 11-13, 365-366). He also had the authority and responsibility for the work group in his heading, including safety and compliance with the law and was responsible for signing the "safety sheets" (Tr. 459-461). It may therefore reasonably be inferred that Fussell was responsible for the on-shift safety examinations and for the recordation of such examinations under 30 C.F.R. § 57.1800(2). These delegated responsibilities are comparable to those of the rank-and-file miner in *Rochester and Pittsburgh*, 13 FMSHRC at 194-196, who had been delegated the responsibility to conduct the weekly shift examinations. Fussell in this case was similarly responsible and I therefore find that he was an agent of the Respondent. Thus, Fussell's admittedly negligent conduct in this case may be imputed to the Respondent for civil penalty purposes.

Citation No. 7995405

Citation No. 7995405 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 57.14100 and charges as follows:

> A miner was fatally injured at this mine on November 6, 2000, when he struck his head on an ore chute protruding into the drift at approximately head level, after he engaged the speed controller of the Mancha locomotive he was operating. The locomotive had a clearly evident mechanical defect which had not been corrected in a timely manner to prevent a hazard to the miner. Alternatively, the locomotive was not taken out of service and placed in a designated area posted for that purpose, nor was the vehicle tagged or other effective method of marking the defective items used to prohibit further use of the vehicle until the noticeable defect was corrected.
>
> This defect was easily detectable during a pre-operational or other similar inspection. It made continued operation hazardous to persons by causing the locomotive to be difficult to control at slow speeds or when power starting from a stopped position. The machine's speed controller first point of power (slow speed) to the drive motor was not functioning as designed; thus, the locomotive would not move until the second point of power was contacted, when it would then jump or lurch forward.

The cited standard provides as follows:

> (a) Self-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift.
>
> (b) Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.
>
> (c) When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.
>
> (d) Defects on self-propelled mobile equipment affecting safety, which are not corrected immediately, shall be reported to, and recorded by, the mine operator. The records shall be kept at the mine of nearest mine office from the date the defects are recorded, until the defects are corrected. Such records shall be made available for inspection by an authorized representative of the Secretary.

The Secretary maintains that the evidence supports separate violations of all four subsections of the cited standard. According to the Secretary, the cited locomotive was defective in that before the accident, a resistor had burned out thereby disabling the first point (first gear) of the locomotive. According to the Secretary this necessitated that the deceased start the locomotive in the second point (second gear), and, by doing so, caused the locomotive to lurch forward and place the decedent's head in position to strike the protruding ore chute.

In support of this scenario, the Secretary called MSHA Electrical Engineer Arlie Massey, as an expert witness. Massey is a graduate electrical engineer and has been employed by MSHA as an electrical engineer since 1975. In this capacity he conducts accident investigations. He is familiar with electric locomotives. In stating his opinion, Massey assumed the following undisputed facts concerning the cited locomotive: (1) that the locomotive's controller itself had no malfunction; (2) that the power connector to the battery was functioning before the accident; and (3) the locomotive had no other broken parts. Massey also examined and considered the electrical schematic diagram for the subject locomotive (Secretary's Exhibit L). Massey further assumed as fact that the power connector had become separated during the accident and it was at that point unable to power the locomotive. This latter assumption is supported by the out-of-court statement of Respondent's employee, Vincent Kautz, as provided to MSHA investigator Steven Cain. Kautz told Cain that he was nearby when the accident occurred and in his attempt to rescue Fussell, was unable to get the controller to work. He therefore physically pushed the locomotive away from the chute to free Fussell. Cain, who was the MSHA supervisory mine inspector in charge of the investigation, had arrived at the mine the day after the accident, and, after inspecting the locomotive, found that the battery connector was bent and broken and had to

be held down to make a connection. The locomotive also "lurched" in both directions because it would not move in the first point but only in the second and third points. Upon further testing it was discovered that the resistor was burned out thereby disabling the first point.

It is noted that Kautz also told Cain that he manually pushed the locomotive a few feet to free Fussell. Kautz also told Cain that when Stephen Shappert (who did not testify at the hearing) showed up they were able to get the locomotive started. Steven Cain also testified that Shappert told him in an interview that there was trouble with the connector after the accident. Kautz also testified that he manually pushed the locomotive in an attempt to rescue Fussell and acknowledged that the battery connector had broken free from its mount. While Kautz believed that the resistor burned out after the accident when the locomotive became jammed under the ore chute thereby stopping its movement, he did not hear wheel spinning on the locomotive.

Under all the circumstances it is more reasonable to believe, and I find credible, that the power connector had in fact been damaged in the accident sufficient to make the locomotive inoperative. Accordingly, Massey's assumption that the power connector had been separated during the accident and that it was at that point unable to power the locomotive, is the more credible and the appropriate assumption to make. I therefore accept Massey's conclusion that the resistor was defective before the accident and was the defect causing the locomotive to lurch forward when it was put in the second point.

Within this framework of evidence, I find that the burned out resistor constituted a defect which made continuing operation of the locomotive hazardous. Since the locomotive was not taken out of service there was a violation of the cited standard as charged.

The violation was also clearly "significant and substantial" and of high gravity. It is reasonably likely that the lurching of the locomotive caused by the necessity to start the locomotive in second point (gear) could have caused a whip-lashing of the operator's head or the striking of persons in front of the locomotive. It may also reasonably been inferred that the accident here at issue was caused by the lurching motion of the locomotive thereby preventing Mr. Fussell from ducking beneath the exposed and protruding ore chute.

For the reasons already stated with respect to the prior violation, I also find that Fussell's negligence in failing to take the locomotive out of service was negligence imputable to the operator.

Citation No. 7992100

Citation No. 7992100, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 48.5 and charges as follows:

> Bob Hale, a "newly employed inexperienced miner" hired on or around 12/28/99 was working underground. Joe Barquilla, a "newly employed

inexperienced miner" hired on or around 3/31/00 was working underground. They had not received all of the MSHA required forty hour new miner training prior to assuming the underground work duties. The mine operator was aware of the Part 48 requirements. Mr. Hale and Mr. Barquilla had no previous mining experience. The operator is hereby ordered to withdraw Bob Hale and Joe Barquilla from the mine until they have received the required training. The Federal Mine Safety and Health Act of 1977 declares that an untrained miner is a hazard to himself and to others.

The citation accordingly charges two violations of the cited standard in that two miners, Bob Hale and Joe Barquilla, were alleged to not have had completed the required forty-hour new miner training. The cited standard, 30 C.F.R. § 48.5, provides in part that "each new miner shall receive no less than forty hours of training as prescribed in this section before such miner is assigned to work duties." That standard also sets forth the specific courses of training.

I find that the Secretary has indeed proven the violations as charged. Curtis Petty was, on September 21, 2000, a mine inspector for the Department of Labor's Mine Safety and Health Administration. According to the undisputed testimony of Petty, the training forms required to be maintained by the mine operator, *i.e.,* MSHA Form 5000-3, that were produced on September 21, 2000, for his examination showed that the training for the two-cited miners had not covered all of the subjects required by the cited standard. Indeed, mine manager Farrell, in effect, admitted to the violation when he told Inspector Petty that he thought that he was permitted under the cited regulation to complete the required training over a period of time and after the miners actually commenced work

I also find that the violations were "significant and substantial" and of high gravity. It is noted that the violation was cited on September 21, 2000, and that Hale had been working in the Sixteen to One Mine since December 1999, without having completed the required training. In addition, the evidence shows that Barquilla had been working at the mine since March 2000, without having completed the required training. In reaching these conclusions I have not disregarded the operator's testimony that the miners at issue had, in effect, actually been fully trained. In the face of its own contradictory records however, I can give such testimony but little weight.

I also find that the violation was the result of high operator negligence. I find from his own statement to Inspector Petty that Mine Manager Jonathan Farrell knew miner training had to be completed before these miners commenced work and that he knew that the cited miners had not completed their training by September 21, 2000, at the time the citation was issued.

In evaluating operator negligence I have not disregarded the inspector's testimony that he found only "moderate" negligence, accepting as mitigation mine manager Farrell's statement that he believed that new miner training could be provided gradually over a period of time. This statement by Farrell constitutes an admission that he knew these miners had not completed their

training. I also find that the cited regulation is unambiguous in requiring that such training must be received "before such miner is assigned to work duties."

I also note in this connection that Farrell himself testified at hearings that he received all of his own new miner training before he started working. Moreover, it is noted that one of the new miners, Bob Hale, had not completed his training even after nine months on the job and that the other miner, Joe Barquilla, had not completed his training even after six months on the job. Even a lay person would understand that the failure to train the new miners regarding the serious hazards inherent in underground mining for six months or more would be extremely dangerous.

Citation No. 7987759

Citation No. 7987759 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 57.15004 and charges as follows:

> The mine manager failed to wear safety glasses, goggles, or face shields, or other suitable protective devices while driving nails into timbers with the back of a pipe wrench. This occurred in the south end of the 1700 level. Flying steel chips could easily cause permanently disabling eye injuries. Discussions had been held with the mine manager on previous inspections about the requirements for the use of eye protection.

The cited standard, 30 C.F.R. § 57.15004, provides that "all persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or a plant where a hazard exists which could cause injury to unprotected eyes."

There is no dispute that on September 21, 2000, mine manager Farrell, in the presence of MSHA Inspector Bruce Allard, drove a nail or screw into a piece of wood with a wrench without wearing eye protection. The issue is whether this was a hazard within the meaning of the cited standard. I find that it was a hazard based on the credible testimony of Inspector Allard. In this regard Allard testified that striking a rusty nail with a pipe wrench could result in a piece of the nail breaking off and injuring one's eye.

I do not however find that the violation was "significant and substantial" or of high gravity, nor do I find that the mine manager was seriously negligent in his failure to use eye protection on this occasion.

In reaching these conclusions I have not disregarded Respondent's argument that the "nail" inspector Allard referenced in his citation was actually a "screw." I find no legal significance to the distinction inasmuch as the so-called "screw" was being hammered as if it were a nail. It is not therefore a crucial allegation in the citation. I accept however the testimony of mine manger Farrell that the screw was not rusty and that it was hammered into soft rotten wood and that he merely gave the screw a "slight tap." Farrell was in the best position to know

the condition of the screw and wood. Farrell also testified that in his judgement and based on his many years of mining experience there was no hazard to his eyes in the procedure he was following. I note that mine president Miller also confirmed that the wood into which the roofing screw was being nailed was "rotten."

Civil Penalty Analysis

In assessing a civil penalty under Section 110(i) of the Act, the Commission and its judges must consider 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 affect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve compliance after notification of the violation. Sixteen to One does not have a serious history of violations. It is a small size business and achieved rapid compliance after notice of the violations herein. Gravity and negligence have been previously discussed. Sixteen to One President, Miller, testified and presented documentary evidence with respect to the effect of the proposed penalties on Sixteen to One's ability to continue in business.

Evidence of an operator's financial condition is relevant to the ability to continue in business criterion. *Unique Electric*, 20 FMSHRC 1119, 1122-23 (October 1998). In this regard Miller testified that Sixteen to One was "technically insolvent" (Tr. 440). He acknowledges, however, that the company is unable to provide an independent audit of its financial condition (Tr. 441). In-house financial statements were provided instead (Respondent's Exh. T). Such unaudited statements do not, of course, have the assurance that they are consistent with fact or presented in accordance with sound accounting principles. The record also shows that the operator has continued to do business and has contracted with five miners to do so. The operator also retains significant assets, including a gold nugget worth about $44,000 and a gold collection worth about $1.5 million (Tr. 458-459).[3]

I have considered the evidence of the Respondent's financial condition along with the other statutory factors and conclude that the civil penalties ordered herein are appropriate. The reduced penalties take into consideration the Respondent's financial condition but also the significant gravity and negligence associated with Citation No. 7995404 and 7995405.

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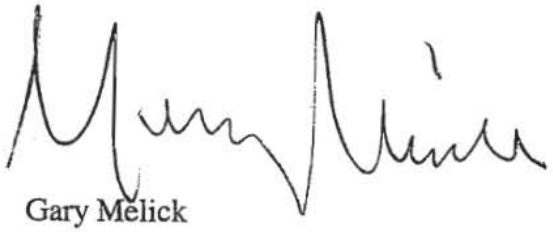
[3] The affidavit of Allen Watson, submitted by the Secretary post hearing was not admitted as evidence and therefore is not considered as evidence herein.

ORDER

Citation No. 7982709 is vacated. Citation Nos. 7982708, 7982710, 7995404, 7995405, 7992100 and 7987759 are affirmed and Original Sixteen to One Mine Incorporated, is hereby directed to pay civil penalties of $55.00, $55.00, $12,000.00, $7,500.00, $50.00 and $100.00, respectively for the violations charged therein within 40 days of the date of this decision.



Gary Mèlick
Administrative Law Judge

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

January 14, 2004

MARTIN COUNTY COAL CORPORATION,	:	CONTEST PROCEEDINGS
Contestant	:	Docket No. KENT 2002-42-R
	:	Citation No. 7144401;10/17/01
v.	:	
	:	Docket No. KENT 2002-44-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH	:	Citation No. 7144403; 10/17/01
ADMINISTRATION (MSHA),	:	Docket No. KENT 2002-45-R
Respondent	:	Citation No. 7144404; 10/17/01
	:	
	:	Preparation Plant
	:	Mine ID No. 15-05106
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH	:	CIVIL PENALTY PROCEEDINGS
ADMINISTRATION (MSHA),	:	Docket No. KENT 2002-261
Petitioner,	:	A.C. No. 15-05106-03570
	:	
v.	:	Docket No. KENT 2002-262
	:	A.C. No. 15-05106-03571
MARTIN COUNTY COAL CORPORATION,	:	Preparation Plant
Respondent.	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH	:	CIVIL PENALTY PROCEEDING
ADMINISTRATION (MSHA),	:	Docket No. KENT 2002-251
Petitioner	:	A.C. No. 15-05106-03501 WNH
v.	:	
	:	
GEO/ENVIRONMENTAL ASSOCIATES,	:	
Respondent	:	Preparation Plant

DECISION

Appearances: Melanie J. Kilpatrick, Esq., Marco Rajkovich, Esq., Wyatt, Tarrant, & Combs, LLP, Lexington, Kentucky, for Martin County Coal Corporation;

Mark E. Heath, Esq., Spilman, Thomas & Battle, PLLC, Charleston, West Virginia for GEO/Environmental Associates;
James B. Crawford, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Secretary.

Before: Judge Schroeder

INTRODUCTION

These cases are before me as a result of citations written following the failure of a processing plant impoundment at the Martin County Coal mine near Prestonsburg, Kentucky. Of the seven dockets, three were filed as contests of the citations and the four remaining were Petitions for the Assessment of Civil Penalties. The impoundment failure occurred on October 11, 2000. GEO/ENVIRONMENTAL ASSOCIATES is a consultant hired by Martin County Coal to inspect the impoundment and to prepare certifications of compliance with regulatory requirements.

PROCEDURAL HISTORY

The seven dockets heard in a combined proceeding involve a total of eight citations. After completion of discovery, the hearing was scheduled in two parts. The majority of the fact witnesses were heard during the week of June 9, 2003, and the expert witnesses along with the remainder of the fact witnesses were heard during the week of August 4, 2003. [1] At the conclusion of the Secretary's case in chief (except for expert witnesses), I granted a motion to dismiss two of the eight citations for a failure of proof. A summary of my ruling on that motion is attached as Appendix A to this Decision. The Secretary's motion to reconsider my dismissal was denied. The reasons for my denial of that motion are summarized in Appendix A.

After the completion of testimony and presentation of documentary evidence, the parties were given time to submit written arguments. I have considered all of this material with some care and reached the conclusions stated below.

FINDINGS OF FACT

Jurisdictional Findings

The parties have stipulated to the facts essential to jurisdiction in this case. (Tr. 5) Martin County Coal Corporation (hereafter MCCC) is a large operator of both surface and underground mine in eastern Kentucky. It is sufficiently large that the Civil Penalties proposed by the Secretary would not hinder the ability of MCCC to stay in business. GEO/Environmental

[1] Because of the split in hearing schedule the record of the June hearing will be cited as (Tr. June Session, pg nn) while the August hearing will be cited as (Tr. August Session, pg nn).

Associates (hereafter GEO) is an independent contractor providing engineering services to MCCC in connection with the operation of the mine refuse impoundment that is the genesis of this case. GEO is sufficiently large that the Civil Penalties proposed by the Secretary would not hinder the ability of GEO to stay in business.

Big Branch Impoundment History

This case is about a fairly large impoundment created at the headwaters of Big Branch Creek by MCCC in the early 1980s. With the agreement and assistance of all counsel, I had the opportunity to visit the impoundment at the conclusion of the first day of testimony in the hearing.

Any impoundment is designed and built to contain liquids. What is striking about the MCCC impoundment is that it was not designed and built to contain water, but rather to contain a combination of water and wastes from the coal processing plant used by MCCC to get mined coal ready to ship to market. This storage is an alternative to dumping these wastes into nearby streams, an alternative obviously not acceptable in current society. The impoundment also serves as a supplemental source for water to be used by the processing plant. To that extent, the coal processing system is an example of both recycling and safe waste disposal. All of those positive sentiments, however, are dependent upon the impoundment working as it was designed to work. At least twice in its history the impoundment failed and large quantities of waste laden water were released into the surrounding community.

This kind of impoundment has another important difference from the typical water impoundment. In this impoundment the water enters the impoundment at the downstream end and is removed from the upstream end. This is the opposite of a flood control impoundment, for example, where silt laden water enters the impoundment at the upstream end and somewhat clarified water exits the dam at the downstream end. This difference has important consequences on the operation and maintenance of the impoundment. When water flows into the upstream end of most impoundments it begins to drop silt to form a delta. Most of the silt has been removed by the time the water has reached to containment structure. Water penetration and leakage are an issue of adequate design and maintenance of the dam. When water flows into the downstream end of a coal refuse impoundment it begins to drop first the big pieces and then the smaller pieces of material. The big pieces are used to heighten and expand the dam. The dam grows as the water level becomes higher. The water level becomes higher as silt fills the storage capacity of the impoundment. Since water is being removed from the upstream end of the pool, fine silt is eventually deposited on the upstream edges of the pool. To the extent the water level fluctuates, the deposited silt covers an area of the banks of the impoundment that is over the water level. The water near the upstream end of the pool is clearer and more capable of penetrating porous rock in the banks.

In 1994, the Big Branch Refuse Impoundment was operated in the general manner described above. It was known that the impoundment rested against banks which covered

underground mines that had been abandoned but which honey-combed the hills. A portion of the bank "subsided" into the abandoned mines and the pool began to flow through the mine and out the other side. This leak was contained by pushing rock and coal refuse into the "subsided" hole until the water flow stopped.

It was obvious that the impoundment needed some corrective measures to both permanently close the leak and to attempt to prevent leaks in the future. An engineering consultant prepared a plan that was submitted to MSHA for review and approval. Ogden Environmental & Energy Services, a geotechnical engineering consulting firm hired by MCCC, prepared a report with remedial measures. This became an Impoundment Sealing Plan that was approved by MSHA on October 20, 1994. (Gov. Exh. 1, page 11; Gov. Exh. 2, 2a, 2b, & 5; June Tr. 56). The plan called for the construction of a "seepage" barrier around the perimeter of the impoundment except for those portions which did not have mine works below. The barrier was constructed of material that needed to be moved to surface mine another coal seam in the impoundment area. The material was primarily blasted sandstone of random sizes and slate, both pushed into the impoundment and leveled by dozer. The plan contemplated that fine refuse material would be deposited by the water on the barrier to decrease permeability of the barrier. The plan also included the construction of underground seals to limit the flow of water into active areas of the mine.

In the plan, some portion of the work was labeled "short term" and the remainder was characterized as "long term." Included in the discussion of "short term" measures is a requirement to monitor the flow of water from the South Mains Portal as to both color and quantity. The monitoring would be initially on a daily basis and later on a weekly basis as part of regular impoundment inspections. The parties profoundly disagree on whether weekly monitoring was intended to be a part of the Impoundment Sealing Plan as approved in 1994 or was simply prudent management by MCCC. The critical language appears only in the Plan as it was submitted the day after the impoundment failure, May 23, 1994. (Exh. MCC A1 at page MCC 12303). The text reads as follows:

> 4) Flow from the South Mains entry will be monitored daily until remedial work at the seepage point is completed. Monitoring will be done during regular impoundment inspections <u>after that</u>. Any unusual change in flow quantity or quality that would indicate possible impoundment leakage will be reported immediately to MSHA and the appropriate mine management. All necessary remedial measures will be implemented. (Emphasis added)

The critical phrase is "after that." After what? Obviously, after the completion of remedial work at the seepage point. That completion of work is the end of the short term measures. After the short term measures came the long term measures. Hence, monitoring of the flows at the South Mains entry on a weekly basis is a part of the long term measures. Since the monitoring requirement has never been removed from the Impoundment Sealing Plan, the requirement is still present. The requirement for weekly monitoring of the flow from the South

Mains Portal is, and has been since 1994, a part of the Big Branch Impoundment Sealing Plan. Almost without interruption between Summer 1994 and Fall 2000, the flows from the South Mains Portal was monitored, recorded and reported as a part of the weekly impoundment inspection.

Construction of the seepage barrier was promptly completed and the underground seals were built shortly thereafter. The record indicates that MSHA, for reasons best described as ease of administration, made these two elements of the Impoundment Sealing Plan the responsibility of two different units of its District Office for purposes of routine inspection. The underground seals construction and operation was made the responsibility of underground inspectors while the seepage barrier and related structures were made the responsibility of the impoundment inspector. The parties disagree on the legal significance of this division of responsibility. It is clear that the operator and its consultant understood this action as a reduction in the scope of the Impoundment Sealing Plan. Annual certifications of compliance with the Impoundment Sealing Plan by MCCC and GEO did not include evaluations of the underground seals.

The flow of water from the South Main Portal, both in terms of quantity and quality, was measured on a weekly basis from 1965 to the day of the 2000 impoundment failure. GEO/Environmental, the engineering consultant to MCCC, had an inspector visit the impoundment each week and complete a data form that included water flow amount and color. On most occasions the inspector was Mr. Eddie Howard, whose training to perform this function is an issue in this case. Mr. Howard testified he followed a standard routine in his inspections, making observations are defined points and delivering the resulting form to MCCC officers. He also returned a copy of his report to GEO where he summarized the contents for his supervisor. The information in these reports was quickly available to MCCC and GEO engineers for analysis as to any change in the condition of the impoundment.

The construction of the underground seals was the subject of testimony by several witnesses. [2] The Secretary relied on the testimony of Mr. Betony (Tr. June Session pg. 408) while MCCC relied on the testimony of Mr. Hatfield (Tr. June Session pg 1249) and Mr. Branham. (Tr. August Session pg. 516). The witnesses agreed on all significant points except the intended spacing of anchor bolts into the floor and top. They agreed the seals were constructed of cement block covered with gunite and laced with steel reinforcing bars. The seal wall was notched into the rock of the ribs. The wall was anchored to the floor and top with steel bolts driven a foot into the rock. The spacing of anchors was given as four- foot on centers in the floor and five- foot on centers in the top. The issue dividing the parties was where such an instruction required the anchors be placed. Mr. Betony testified that in his experience an instruction to place anchors at four- foot on centers required the first anchor to be two- feet from the rib. Mr. Branham testified that in his experience the instruction required the first anchor to be placed four feet from the rib.

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[2] There is no evidence the underground seals survived the October 11, 2000, impoundment failure or even made any difference in how the released waters flowed from the mine.

The purpose of an "on center" specification is to define the maximum unsupported length of load bearing member. This maximum unsupported length is calculated from the maximum expected load the member is intended to support. The specification of four- foot on center defines a maximum unsupported length of two feet. Under the MCCC approach to this specification, the sealing wall has a four foot span from rib to floor anchor. That would be consistent with the design specifications for the sealing wall only if the inset of the sealing wall into the rib creates another anchor point at the edge of the rib. I find nothing in the testimony or the written record that supports a conclusion that an anchor point is created by an inset of the sealing wall. Since the holding strength of the rib is difficult to calculate, and the point of most engineering calculations is to rely upon ascertainable values to determine structural sufficiency, I conclude the edge of the rib is not an appropriate anchor point. Therefore, the underground sealing wall was not constructed in accordance with the approved specifications.

Three other subjects need to be discussed in the context of events which occurred in the period between the approval of the Impoundment Sealing Plan and the second impoundment failure: (1) changes in water flows from the South Mains Portal; (2) rainfall data for the period; and (3) the training program for the impoundment inspector, Eddie Howard.

The Impoundment Sealing Plan requires the weekly monitoring of water flows from the South Mains Portal but does not specify how the monitoring should be conducted. The decision on the method of monitoring was apparently made by GEO/Environmental, the original author of the Plan. GEO supplied the person that conducted the monitoring and designed a form upon which the result was recorded. At least until the second impoundment failure, MSHA acquiesced in the monitoring and data recording methods.

The amount of water outflow from the South Mains was determined by examining a small erosion control pond constructed at the foot of the South Mains Portal. The pond collects water from the mine entrance as well as the small hollow in which the South Mains Portal is situated. The pond has a weir to allow water to exit after sediment has settled. The GEO inspector made a weekly visit to that weir and recorded the depth of water in the outflow stream using a ruler. He recorded the flow in inches even though all other water flows from the impoundment were measured and recorded in gallons per minute. During the course of the hearing I rejected an attempt by the Secretary to recalculate gallons per minute from the weir depth readings. I concluded the recalculation was irrelevant to the issue of compliance with a regulation that contemplates reporting of unusual water flows based on the available information. The South Mains Portal water flow data was not available in gallons per minute at the critical times. Mr. Howard also carefully measured the elevation of the surface of the impoundment.

The Secretary did present a graphic representation of the available information on water flows from the South Mains Portal during 1995 to 2000. This graph included the usual spikes and dips but showed-particularly given the limited scale of the data based on the units of measurement used-a portentous increase in flow roughly a year before the second impoundment failure. It is significant that there was no change in the water quality, i.e., no coal refuse fines

were being transported by the increased water flow. All the witnesses testified that a significant increase in the number of transported fines would have indicated a major failure was likely.

The parties disagreed at great length as to the significance of the changes in South Mains Portal water flows, particularly in light of changes in rainfall patterns. The choice of rain gauge, the probable lag time between fall and flow, and similar issues consumed a great deal of energy. It is my conclusion that while a prudent mining engineer reviewing the South Mains Portal water flow data should have considered the influence of rain data from the general vicinity, such a prudent engineer would not have given controlling importance to rainfall data regardless of source in deciding whether an impoundment failure was a sufficient risk to alter the method of operation of the impoundment to investigate that risk.

The source of much of the data in controversy in this case originated with Eddie Howard, the impoundment inspector employed by GEO/Environmental. Mr. Howard testified as to his activities. (Tr. August Session pg. 214 *et seq.*) Mr. Howard is not an engineer, he is a field technician. His function is to observe and collect data that he reports to others. He began visiting the Big Branch impoundment in 1996 to do inspections and continued on a weekly basis after that until 2001. Mr. Howard testified he was certified by MSHA as an impoundment inspector in 1991. (Tr. August Session pg 233). He received refresher training on impoundment inspection in subsequent years but the documentation as to when, by whom and for how long he received refresher training was very confused. Attempts to clarify the record by testimony did not make the precise amounts and sequence of refresher training very clear. It is clear, on the other hand, that he took some classes and received some on-the-job training in impoundment inspection from engineers working for his employer.

Mr. John Grabeel testified as an impoundment inspection trainer employed by GEO/Environmental. (Tr. August Session, pg. 644 *et seq.*) He stated he had provided training for Mr. Howard. He indicated the refresher training took the form of an eight hour class day supplemented with on-the-job field trips. Of the eight hours in class, four hours were devoted to impoundment inspection and four hours were devoted to surface mining and safety issues, including the proper operation of a nuclear density gauge. (Tr. August Session, pg 651).

Impoundment Failure in October 2000

The second failure of the Big Branch Coal Refuse Impoundment occurred in the dark of night with few people close enough to observe the events. A maintenance worker noticed the increased flow of water and went to alert others. As others came to the scene a swirl of escaping water was seen in the impoundment. The escaping waters were black with refuse fines. Equipment was rushed to the assumed site of the break through and soil was pushed into the hole. Within a few hours the hole was plugged, but in that time more than three hundred million gallons of silt laden water had rushed out of the impoundment and down adjacent streams toward the Ohio River. No lives were lost. Recovery from the failure was still in progress when I visited the impoundment more than two years later.

A team of investigators was assembled by MSHA and sent to the scene. The report of their investigation is included in the record. (G.E. 1).

Theories of Impoundment Failure

It is important to note at the outset that the precise cause of the October 11, 2000, impoundment failure is not an issue in any of the citations before me. I am not required to determine the cause of the failure and I do not propose to make a determination of that question without necessity. The relevance of the testimony on various theories of the cause of the failure is to evaluate the risk posed by the impoundment in terms of potential failure. My responsibility is to evaluate Respondents' prudent mining decision making in the face of these risks.

Piping

The MSHA investigators concluded that the cause of the impoundment failure was a process known as piping. Engineers have known for some time that piping occurs under certain circumstances. Piping is a process of erosion that occurs in water permeable materials. Permeability allows water to transit the permeable zone carrying materials from the zone. The route followed is the connected area of maximum permeability. The route over time becomes the pipe.

Shear Failure

Mr. Barry Thacker, the President of Respondent GEO/Environmental, presented a theory under which the impoundment failure was the result of water pressure in the impoundment punching a hole in the natural cover over the abandoned mine works. The hole would cause a sudden cascade of free water into the mine. The place of rupture was the result of natural faults observed in the soil called "hill seams." The theory as presented by Mr. Thacker depends on acceptance of several premises: first, that piping would have occurred, if at all, at the relatively more permeable zone created at the site of the 1994 impoundment failure; second, that the increase in height of the impounded silty water would have caused an increase in flow from the South Mains Portal through the operation of a natural principle known as *Darcy's* Law; third, that the changes in water flows from the South Mains Portal are consistent with short term rain fall that in 1999 included repeated episodes of locally heavy storms. The 1994 impoundment failure is generally acknowledged to have been a small shear failure in an area where the cover over the abandoned mine was particularly thin or fragile. Shear failure is a well recognized risk in impoundment operations as pressures from depth of water increase. The risk of failure, and hence, the need for careful monitoring of conditions, obviously increases as the depth of water increases.

Mine Seal Failure Under Pressure

Mr. Christopher Lewis (Tr. August Session, pg. 788 *et seq.*) testified as to another

possible sequence of events to explain the impoundment failure. His theory posits that the permeability of the seepage barrier is sufficient that water pressure in the impoundment is transmitted through the natural soil into the wet silt that completely fills the abandoned mine to the first set of mine seals. These seals are in place for ventilation control, not water control as are the seals that are the subject of one of the citations in this case. That means that a relatively small amount of water pressure will cause failure of the seals. When the seals fail, under this theory, the wet silt in the abandoned mine will flow out and leave the natural soil roof of the mine works unsupported. The water pressure in the impoundment will then cause the roof to collapse and water will then flow into the abandoned mine. (Tr. August Session, pg. 815). The theory articulated by Mr. Lewis is well supported in the engineering profession and should be assumed to be understood as a risk by an prudent mining engineer.

Dr. Donald Joseph Hagerty (Tr. August Session, pg 930 *et seq.*) testified as to an expert analysis of possible piping sequences and found that the most probable result was a sudden small breakthrough that would result in rapid dewatering of the impoundment without catastrophic failure of the impoundment integrity. This analysis was offered to rebut the testimony offered by the Secretary as to piping being the cause of the impoundment failure. But the testimony by Dr. Hagerty complements that of Mr. Lewis in the sense that it shows how impoundment water pressure could have been transmitted to the ventilation seals in a relatively sudden manner with the consequences described by Mr. Lewis.

CONCLUSIONS OF LAW

With this much disagreement among the parties as to the facts, it is indeed fortunate that as to the applicable law there is a great deal of agreement. It is appropriately agreed that the Commission does have jurisdiction over these contested citations. It is agreed that the Secretary has the initial burden of proof as to all elements of the claims for recovery. It is also agreed that the violations as alleged require the Secretary to show the violations were "significant and substantial" as well as showing that the violations were "unwarrantable." These terms have been interpreted by the Commission numerous times over the years. That the parties cite different cases with different facts does not establish a disagreement over the applicable legal standard. The Commission has been very clear that the conclusion is fundamentally a question of fact in particular cases.

I have looked to the following cases to guide my application of the facts in this particular case. I read with some care the decision in *Secretary of Labor v. Virginia Crews Coal Company,* 14 FMSHRC 1691 (October 1992). I also looked carefully at *Secretary of Labor v. Cougar Coal Company,* 25 FMSHRC 513 (September 2003). Neither of these cases involves a coal refuse impoundment. Both of these cases note that the terms in question were used by the Congress in enacting the Mine Safety Act. The cases interpreting these terms were attempts to ascertain the presumed intent of Congress in regard to particular facts.

The cases seem to conclude that little improvement is possible in the four part test for

"significant and substantial" explained by the Commission in *Secretary of Labor v. Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984) as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial [citation omitted] 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.

The term "unwarrantable failure" has long been characterized by the Commission as involving conduct that can be described as "reckless disregard, " "intentional misconduct," "indifference, "or a "serious lack of reasonable care." It is also clear that these descriptors take on different significance when viewed in the light of the risk on injury inherent in the activity. There can be no doubt, for example, that greater care is expected of a person handling explosives that is expected of a person handling signal flares. In deciding this case, I was particularly mindful of the risks associated with gathering a large quantity of industrial fluid at a reasonably great height with limited controls.

It is also agreed that the following regulations are mandatory safety standards applicable to the MCCC operation on Big Creek.

30 C.F.R. 77.216(d)

> (a) Plans for the design, construction, and maintenance of structures which impound water, sediment, or slurry shall be required if such an existing or proposed impounding structure can:
>
> > (1) Impound water, sediment, or slurry to an elevation of five feet or more above the upstream toe of the structure and can have a storage volume of 20 acre-feet or more; or
> >
> > (2) Impound water, sediment, or slurry to an elevation of 20 feet or more above the upstream toe of the structure; or
> >
> > (3) As determined by the District Manager, present a hazard to coal miners.
> >
> > *
>
> (d) The design, construction, and maintenance of all water, sediment, or slurry

impoundments and impounding structures which meet the requirements of paragraph (a) of this section shall be implemented in accordance with the plan approved by the District Manager.

30 C.F.R. 77.216-4(a)(7)

(a) Except as provided in paragraph (b) of this section, every twelfth month following the date of the initial plan approval, the person owning, operating, or controlling a water, sediment, or slurry impoundment and impounding structure that has not been abandoned in accordance with an approved plan shall submit to the District Manager a report containing the following information:

* *

(7) A certification by a registered professional engineer that all construction, operation, and maintenance was in accordance with the approved plan.

30 C.F.R. 77.216-4(a)(2)

(a) Except as provided in paragraph (b) of this section, every twelfth month following the date of the initial plan approval, the person owning, operating, or controlling a water, sediment, or slurry impoundment and impounding structure that has not been abandoned in accordance with an approved plan shall submit to the District Manager a report containing the following information:

* *

(2) Location and type of installed instruments and the maximum and minimum recorded readings of each instrument for the reporting period.

30 C.F.R. 77.216-3(a)(4)

(a) All water, sediment, or slurry impoundments that meet the requirements of §77.216(a) shall be examined as follows:

* *

(2) All instruments shall be monitored at intervals not exceeding 7 days, or as otherwise approved by the District Manager

* *

(4) All inspections required by this paragraph (a) shall be performed by a qualified person designated by the person owning, operating, or controlling the impounding structure

Specific Citations

Citation No 7144401

This citation alleges that MCCC violated 30 C.F.R.§ 77.216(d) by failing to report changes in water flow quantity from the South Mains Portal during September 1999, as required by the Impoundment Sealing Plan approved by the District Manager. The Plan as approved became the regulation applicable to this facility. Everything required by the Plan became a mandatory safety standard. I concluded above that the requirement to report unusual flows to MSHA was a requirement of the Plan. No unusual flows were reported to MSHA. The issue is whether the Secretary has established that in September 1999, the South Mains Portal had unusual flows that should have been reported. Assuming the unusual flows were present, was the failure to report those flows unwarrantable negligence that was significant and substantial?

I begin with what I hope is the undisputed premise that the degree of care demanded of a reasonably prudent mining engineer in management of a mining facility varies with the degree of risk to life and property at the time action is required. Where the lives of hundreds of miners are at risk, a manager must examine the available options much more carefully than the manager would if only the condition of mining equipment might be affected. This premise is particularly important in evaluating over a period of years the actions taken at the Big Branch Refuse Impoundment. In 1991, when the pool level was below the level of the abandoned mine, very little care in management of the impoundment was required. The only risk at that point was a failure of the coarse refuse embankment, through structural failure or a rain event beyond the designed capacity of the embankment and spillway feature. The record does not indicate that these aspects of the impoundment ever posed a problem.

Between 1991 and 1994, the pool level rose over the abandoned mine level and the risk of failure of the walls of the pool increased. In May 1994, the pool experienced a leak from a structural failure that highlighted the increasing risk. The operator, its consultant, and MSHA responded to that increased risk by development of an Impoundment Sealing Plan. The purpose of the Plan was to contain the risk of failure of the pool structure as the pool level increased. The requirement for monitoring the flow of water from the South Mains Portal was included in the Plan for the purpose of alerting the responsible parties to the level of risk posed by the impoundment as time passed.

Following approval of the Impoundment Sealing Plan, mining operations caused the impoundment pool level to rise. The experts seem in agreement that even without flaws in the impoundment seal, the rise in the pool level could be expected to result in increased water flow

from the South Mains Portal. As long as the increases were within reasonable limits, the increases were not evidence of problems with the impoundment but rather were evidence that the impoundment was working as predicted. Some spikes and valleys should also be expected because of variations in rain fall, particularly since the measuring point for the South Mains Portal flow was after collection of runoff water in the settling pond. Weekly and even monthly changes in the flow amount, in the absence of water quality changes or catastrophic increases in quantity, were probably meaningless to the people who reviewed the information. But as the pool level rose the risk of failure rose.

In the context of this increasing risk of impoundment failure, I would expect a reasonably prudent mining engineer to pay increasing attention to warning which might have been derived from the South Mains Portal flow data properly appreciated. While weekly or monthly changes would be meaningless, longer term changes related to other obtainable data could have provided valuable signs. The record is clear that no effort was made by either MCCC or GEO to conduct any of these kinds of evaluation of the data. Of particular significance is the large increase in flow that occurred approximately a year prior to the October 2000, impoundment failure. While I am persuaded by the testimony that the Fall 1999, flow data (even when related to various sources of rain fall information) does not prove that the failure began then or even at any particular time. What could have been derived from a "prudent" look at the data would have been a warning that further study of the condition of the impoundment was warranted. At the very least, the report of the flow changes would have provided MSHA with the opportunity to clarify its intention with respect to the distribution of fine refuse on the upstream edges of the impoundment pool.

The data gathering and analysis requirements of the Impoundment Sealing Plan that form the foundation for this citation were not carefully drafted to articulate these concepts. The authors of the Plan were relying on the professional training and good sense of the people that would be managing the Impoundment as the years went on. I am persuaded that while the technical area of predicting impoundment failure is still in the development stage, much more could and should have been done here. I am also persuaded that the failure to take advantage of available opportunities to evaluate the South Mains Portal flow data contributed in some measure to the magnitude and timing of the impoundment failure. On the other hand, I am not persuaded that the failure to take advantage of these opportunities was an unwarrantable failure in the sense of wanton or reckless disregard for the risks to life and property. I would assess the negligence as moderate. The Civil Penalty proposed by the Secretary, $55,000.00, seems to me to be excessive under the circumstances.

Citation No. 7144403

This citation alleges that the underground mine seals included in the original Impoundment Sealing Plan were not constructed in accordance with the approved plans in violation of 30 C.F.R. §77.216(d). My interpretation of the approved plan for the seals as discussed above would require the first anchor bolt to be set in the floor two feet from the rib and

a similar spacing for the bolt in the roof. The testimony was clear that the actual construction did not meet those requirements. Therefore, the seals were not constructed in accordance with the approved plan. While the difference in placement of the anchor bolt might have significant consequences in some circumstances (generally in situations in which the load on the seals would be in a range such that the seals would fail with one spacing but hold with a closer spacing) there is no evidence in this record that indicates the bolt spacing on the seals contributed to the October 2000, impoundment failure in any way. The change in bolt spacing cannot be said to be anything more than very low negligence. The Civil Penalty appropriate to such a violation would be minimal at best.

Citation Nos. 7144404 and 7144408

These citations allege that the Annual Report and Certification on the Big Branch Impoundment for 1995, did not include reference to the underground seals constructed as part of the Impoundment Sealing Plan in violation of 30 C.F.R. §77.216-4(a)(7). The Annual Report did not include reference to the underground seals construction. MCCC contends the underground seals were not part of the Impoundment Sealing Plan by the time of the construction. GEO contends that not only were the underground seals not a part of the Impoundment Sealing Plan but also that GEO had no responsibility for Certification of the underground seals since it does not perform underground engineering.

That GEO does not work underground is certainly not a reason for excluding underground features of an impoundment plan from an Annual Certification if the features are a part of the plan. The requirement on the impoundment operator is to have a qualified person make the necessary certification, either with its own staff or by hiring someone. A certifying engineer would need to at least note the exclusion of a feature from a submitted certification so that a supplement to the certification by someone else would be appropriate.

There is no evidence in this record that the failure to include the underground seals in the Annual Certification contributed in any way to the October 2000, impoundment failure. The degree of negligence involve was very low at best and the Civil Penalty for the violation should be minimal.

Citation No. 7144410

This citation alleges that the Annual Reports prepared by GEO in 1996 to 1999, failed to include the maximum and minimum readings for the South Mains Portal outflow pipe considered as in instrument in violation of 30 C.F.R. §77.216-4(a)(2). The critical issue here is whether the South Mains Portal outflow pipe combined with a ruler constitutes an instrument for purposes of this regulation. The regulations, and their apparent application to the industry by MSHA, are somewhat confusing on this point. The regulation does not have a clear definition of an instrument. The testimony was clear that not all sources of information about an impoundment are considered instruments. The regulation provides that all instruments must be identified on a

plan view of the impoundment submitted with the Annual Certification. The South Mains Portal outflow pipe was not on the plan view submitted with the Big Branch Impoundment Annual Certifications, much less be identified as an instrument on the plan view. The readings of the flows from the South Mains Portal were taken every seven days as a requirement of the Impoundment Sealing Plan and the regulation requires that all instruments shall be monitored at intervals of not exceeding seven days. It does not logically follow, however, that since all instruments must be monitored every seven days, therefore all things that are monitored every seven days are instruments.

I am persuaded by the testimony, particular that of Dr. Thacker, that the word "instrument" has a unique technical meaning within the professional subgroup of impoundment engineers as a data source identified and designated in a particular document. That a data source is or is not identified and designated as an "instrument" is independent of the question of the importance of the data. As I indicated above, the flow readings from the South Mains Portal constituted important data. But it was not data from an "instrument" for the purposes of 30 C.F.R. §77.216-4(a)(2). This citation must be dismissed.

Citation No. 7144411

This citation alleges that the weekly examinations of the Big Branch Impoundment were performed by an unqualified inspector that had not received required annual refresher training in violation of 30 C.F.R. § 77.216-3(a)(4). There is no question in this case that the inspector, Eddie Howard, was a very experienced inspector who received both classroom and on-the-job refresher training in the period prior to the October 11, 2000, impoundment failure. It is further very clear that no evidence has been offered to connect Mr. Howard's qualifications as an inspector to the occurrence of the impoundment failure. All parties have used his observations and measurements in their presentations without any question as to reliability or accuracy. The issue here is limited to whether Mr. Howard spent the required number of hours in training on the required subjects.

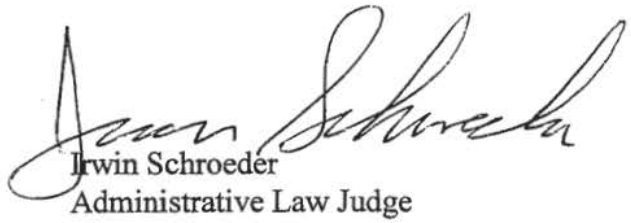
The burden is on the Secretary to establish the record elements of this alleged violation. While the record does cast doubt on the sufficiency of the documentation of Mr. Howard's refresher training, I am unable to conclude that the Secretary has established that Mr. Howard did not receive a total of eight hours of appropriate impoundment inspection refresher training. This citation must be dismissed.

Civil Penalty Amounts

In light of the forgoing discussion, it is my judgement that an appropriate Civil Penalty for the violation in Citation No 7144401, is one-tenth of that proposed by the Secretary or $5,500.00. The remainder of the citations not dismissed require a Civil Penalty of $100.00, against each Respondent.

ORDER

Respondent Martin County Coal Company is directed to pay a Civil Penalty of $5,600.00 within 40 days of the date of this Order. Respondent GEO/Environmental Associates is directed to pay a Civil Penalty of $100.00 within 40 days of the date of this Order. Citation Nos. 7144410 and 7144411 are dismissed.



Irwin Schroeder
Administrative Law Judge

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Appendix A

Summary of Dismissal of Citation

The Secretary alleged MCCC violated 30 C.F.R. §77.216 by failing to comply with a provision of the Impoundment Sealing Plan that requires the operator to "periodically redirect" the coal refuse discharge stream. The Secretary maintained the failure to perform this task resulted in an inadequate seepage barrier which resulted, in turn, in the impoundment failure on October 2000.

This argument requires, for it to be effective, that the phrase "periodically redirecting" had a meaning well understood by prudent mining engineers in 1994 that would require actions by the mine operator as now thought necessary by the Secretary. This is not a question of "notice" of the meaning asserted by the Secretary. Lack of notice would be an affirmative defense by the operator if the Secretary successfully completed a *prima facie* case. My conclusion was that the Secretary never completed a *prima facie* case because the Secretary never established that prudent mining engineers in 1994 would have understood "periodically redirecting" the fine coal slurry discharge to mean the kind of impoundment operation which the Secretary now contends was necessary to prevent impoundment failure in the manner it occurred here.

It is important that the Secretary's theory of how the impoundment failure of October 11, 2000, occurred implies a deficiency in the impoundment seepage barrier. But there was no evidence that anyone was contemplating this particular failure mechanism at the time the impoundment sealing plan was approved. Even the Secretary's impoundment design expert, Richard Almes, testified that the phrase "periodically redirect the slurry discharge" had no technical meaning in 1994 or in 2000. The slurry discharge methods that the Secretary alleges were required under the 1994 plan were far from standard practice in impoundment management. His testimony is consistent with that of the MSHA impoundment inspector. He testified he was familiar with the 1994 plan and had visited the impoundment 3 or 4 times a year between 1994 and 2000. It never occurred to him that the slurry discharge methods used by Martin County Coal Company were insufficient. This testimony represents interpretation of the 1994 plan through conduct rather than an attempt to estop the Secretary as a result of long delay in asserting an argument. The Secretary is not subject to estoppel in her pursuit of public safety. The Secretary failed to adequately establish a violation of those requirements and I have no choice but to dismiss the claim and vacate the Citation.

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

January 21, 2004

MARK POLLOCK,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2003-182-DM
v.	:	RM MD 02-15
	:	
KENNECOTT UTAH COPPER CORP.,	:	Mine I.D. 42-00149
Respondent	:	Bingham Canyon Mine

DECISION

Appearances: Arthur F. Sandack, Esq., Salt Lake City, Utah, for Complainant; James M. Elegante, Esq., Kennecott Utah Copper Corporation, Magna, Utah, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Mark Pollock against Kennecott Utah Copper Corporation ("Utah Copper"), under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). Mr. Pollock alleges that Utah Copper failed and refused to hire him for a position as a truck driver at the Bingham Canyon Mine because of protected activities he initiated while working for Kennecott Barney's Canyon Mining Company ("Barney's Canyon"). An evidentiary hearing was held in Salt Lake City, Utah, and the parties filed post-hearing briefs.

I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND FINDINGS OF FACT

Utah Copper operates the Bingham Canyon Mine, a large open-pit copper mine, in Salt Lake County, Utah. Utah Copper is owned by Rio Tinto, a large, multi-national minerals company. Rio Tinto also owns Barney's Canyon, a surface gold mine located near the Bingham Canyon Mine.[1] Barney's Canyon halted production at the end of December 2001. An "employee rights agreement" was entered into between Utah Copper and the local unions that represented miners at both mines. (Ex. R-1). Under this agreement, employees of Barney's Canyon who did not otherwise have recall rights at Utah Copper were given "first consideration" by Utah Copper for vacancies at the Bingham Canyon Mine. Certain procedures had to be followed by a Barney's Canyon employee if he wanted to take advantage of this agreement. The agreement did

[1] Rio Tinto apparently owns these companies through Kennecott Holdings Company.

not guarantee a Barney's Canyon employee a job at Utah Copper, but such an employee would be considered for a vacancy before anyone from the outside and before anyone on layoff status from Utah Copper.

Mark Pollock started working at Barney's Canyon in April 1989. He was laid off at the end of December 2001 because of the shutdown of the mine. He was recalled to perform reclamation work at Barney's Canyon on March 19, 2002. Pollock was laid off from this position on December 12, 2002. On March 26, 2002, Utah Copper announced open positions for haul truck drivers. Pollock followed the proper procedures under the employee rights agreement to apply for one of these positions. (Ex. C-2). Pollock was interviewed for a haul truck driver position on May 14, 2002. The interview was conducted by Ben Stacy, who was the truck superintendent, and Vedel Welch, a senior employee relations representative at Utah Copper. After the interview, Stacy conferred with Welch and decided that Utah Copper would not offer Pollock a position as a haul truck driver. Pollock was notified of Utah Copper's decision by letter dated June 21, 2002. (Ex. C-6). Pollock filed a complaint of discrimination with the Department of Labor's Mine Safety and Health Administration ("MSHA") on August 7, 2002. By letter dated January 27, 2003, MSHA notified Pollock that it determined that the facts disclosed during its investigation of his complaint did not constitute a violation of section 105(c) of the Mine Act. On February 24, 2003, Pollock filed the complaint in this proceeding.

In his complaint, Pollock alleges that Utah Copper discriminated against him because he was an MSHA miners' representative at Barney's Canyon, he filed hazard complaints with MSHA at Barney's Canyon, and he filed discrimination complaints against Barney's Canyon. Pollock notes that Leonard Wolff, the mine superintendent at Barney's Canyon, had a management position at Utah Copper in the spring of 2002. Pollock believes that Wolff told Utah Copper management not to hire him because of his protected activities at Barney's Canyon. Pollock notes that Wolff testified in a discrimination hearing before me in a case that the Secretary brought against Barney's Canyon on Pollock's behalf. *Sec'y of Labor on behalf of Pollock v. Kennecott Barney's Canyon Mining Company*, 22 FMSHRC 419 (March 2000). Pollock states that 16 former employees of Barney's Canyon who were as qualified as he or less qualified than he were hired as truck drivers at Utah Copper.

Utah Copper denies the allegations in Pollock's complaint and contends that it decided not to hire Pollock for legitimate business reasons having nothing to do with Pollock's protected activities. Indeed, it maintains that Pollock's safety record was viewed by Mr. Stacy as one of Pollock's few strong points. As described in more detail below, Utah Copper states that Stacy decided not to hire Pollock because he had a substantial disciplinary record and he was weak in working with team members and in accepting supervision.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

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

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

A. Protected Activity

I find that Pollock engaged in protected activity when he worked at Barney's Canyon. It is not disputed that Pollock was an MSHA walkaround representative from 1994 to shutdown, that he was on the local union safety committee, that he filed at least 30 safety complaints with MSHA following which citations were issued in many instances, that he complained about safety conditions to mine management, and that he filed several discrimination complaints with the Secretary under section 105(c)(2). At least some of his protected activities were known to Utah Copper management. Whether and to what extent Stacy knew of these protected activities when he decided not to hire Pollock as a haul truck driver is discussed later in this decision.

B. Adverse Action

As an applicant for employment, Pollock was protected from any adverse action taken by Utah Copper as a result of his protected activities. Utah Copper's decision not to hire Pollock constitutes an adverse action for purposes of section 105(c) of the Mine Act. In determining whether a mine operator's adverse action is motivated by the miner's protected activity, the judge

must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991). A key issue in this case is whether Utah Copper's decision not to hire Pollock was motivated in any part by his protected activities at Barney's Canyon.

1. <u>Pollock's Position</u>

Pollock's protected activities were quite extensive. In trying to establish a *prima facie* case, Pollock makes a number of arguments. First, he contends that although there is no direct evidence of discrimination, it is clear that Utah Copper's decision not to hire Pollock was motivated in large part by his protected activities. Although Mr. Stacy made the decision not to hire Pollock, he relied on the poor evaluation provided by Wolff. When Stacy asked Wolff about Pollock before the interview, Wolff replied that Stacy should look at Pollock's record. Pollock believes that this reply was code for "do not hire this employee." (P. Br. 24). Pollock also points to the "Internal Reference Check" provided by Wolff. (Ex. R-5). Wolff, who was aware of Pollock's protected activities, rated him quite poorly and checked the line entitled "Do not hire." Wolff rated Pollock "poor" or "marginal" in all categories except safety and attendance. Under "Safety," Wolff rated Pollock "average" and wrote:

> Active with safety. Was on the safety committee, attended monthly joint safety council meetings, monthly mine safety tours, and participated in mine related accident investigations.

Id. Under "Discipline" Wolff wrote:

> Pollock filed an MSHA discrimination claim against Barney's to get his record expunged. He lost and his record stands. Discipline includes suspension.

Id. Pollock testified that Wolff was hostile toward his protected activities at Barney's Canyon and that their relationship was so tainted by this hostility that Pollock began raising safety issues with Wolff's supervisor, Ray Gottling, after 1999.

Pollock also states that the human resources managers at Barney's Canyon and Utah Copper often conferred and their relationship was intimate. (P. Br. 22). Indeed, some human resources employees moved from one mine to another. He believes that these human resources

departments took a "special interest" in Pollock because of his protected activities. *Id.* Greg Pollock, Mark Pollock's brother, was the president of the local Steelworkers Union at Utah Copper. Greg Pollock was also very active in safety matters. Pollock points to the fact that Welch, who provided assistance to Stacy in making hiring decisions, was biased against Pollock because Welch believed that Greg Pollock "created problems" at Utah Copper. (Tr. 215). Welch testified that "those types of things run among . . . families." *Id.*

Pollock also relies on the fact that Utah Copper refused to hire the other two MSHA miners' representatives from Barney's Canyon, Tony Lopez and Brad Vaughn. Instead, Utah Copper hired individuals from Barney's Canyon who did not make waves. Pollock points to the fact that several of the employees hired had acted as re-rate supervisors at Barney's Canyon.[2] Many of these employees had serious attendance problems or other disciplinary problems. In addition, at least one former Barney's Canyon employee who was hired by Utah Copper had a drinking problem that made him a hazard to other employees.

Pollock believes that he was well qualified for one of the haul truck driver positions and that Utah Copper's failure to offer him a position was directly related to his aggressive stance on safety at Barney's Canyon. Wolff made it clear to Stacy, both in his oral statement to "look at his record" and in the written reference he provided, that Pollock should not be hired because he confronts management on safety issues.[3]

2. Utah Copper's Position

Utah Copper contends that Pollock offered no evidence showing that, in failing to extend an offer of employment to him, Utah Copper was motivated by his protected activities at Barney's Canyon. Pollock relies to a great extent on the evaluation provided by Wolff. Pollock believes that this evaluation was motivated by his protected activities and that, because of that evaluation, Utah Copper failed to offer him employment. Utah Copper argues that Pollock did not offer any evidence to support this theory. It contends Wolff did not take adverse actions against Pollock at Barney's Canyon and that Wolff's evaluation was based on Pollock's unprotected conduct. Finally, it was Stacy, not Wolff, who determined that Pollock should not be offered employment at Utah Copper.

Stacy testified that, although he probably looked at Wolff's evaluation of Pollock, he could not recall doing so. Rather, Stacy testified that he made the employment decision "independently of Mr. Wolff's comments, either verbal or written." (Tr. 315). Stacy testified

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[2] A "re-rate" supervisor is an hourly employee who fills in for a front line supervisor when he or she is absent for that shift.

[3] Utah Copper filed a motion to strike portions of Pollock's brief. I find that the arguments presented are not well taken and the motion is DENIED. I have treated Utah Copper's motion and Pollock's response as reply briefs.

that the key factor in his decision not to extend an offer of employment was Pollock's conduct in the interview. The second factor was the fact that Pollock had "a pattern of insubordination over the years." (Tr. 307; Ex. R-4). Stacy testified that he was especially concerned because, during the interview, Pollock did not articulate how he planned to take action to correct his tendency to engage in insubordinate behavior. (Tr. 308).

Utah Copper maintains that even if Wolff was motivated by Pollock's protected activities when he wrote his evaluation, the evaluation is not adverse action because it is merely an expression of his opinion. Utah Copper did not rely on Wolff's evaluation when Stacy decided not to offer him employment so there is a "causal disjuncture" in Pollock's argument. (UC Br. 6). Utah Copper established that Stacy made his decision based on the interview and Pollock's discipline record, not because of Wolff's recommendation.

Utah Copper contends that the evidence establishes that Stacy decided not to hire Pollock because of his belief that Pollock demonstrated an "undesirable attitude toward teamwork." (UC Br. 7). Stacy testified that he did not review Pollock's personnel record prior to the interview, that he had no knowledge of Pollock's protected activities prior to the interview, and that he did not base his decision on these protected activities. (Tr. 305-06, 320). Instead, Stacy relied on the summary of Pollock's disciplinary record and Pollock's performance during the interview.

3. Analysis

a. Pollock's Interview

I credit Stacy's testimony as to the process he used in making hiring decisions. He did not review any documents prior to the interview. (Tr. 297). He was concerned about Pollock's history of insubordination and the fact that he did not appear to be someone who worked well with management. Stacy and Welch followed a set format when interviewing candidates. They alternated asking questions and they both recorded the responses on the interview sheet. (Tr. 300; Exs. R-7, R-8). Each candidate was asked the same questions. Each interview lasted about 30 to 45 minutes. After each interview, Stacy conferred with Welch and Stacy made a decision whether to offer the candidate a position at Utah Copper. He recorded his decision on an employment interview summary form. With respect to Pollock, Stacy rated him "Good" with respect to "Essential Functions" and "Safety." (Ex. R-6; Tr. 305, 310-12). Essential functions refers to a candidate's experience in performing the essential functions of the job. With respect to safety, Stacy wrote "Clean safety record, no injuries or property damage on file." *Id.* Stacy marked Pollock "Average" with respect to "Initiative" and "Independent."

Stacy rated Pollock "Poor" with respect to the other two criteria, "Team Player" and "Supervision." Under "Team Player" Stacy wrote:

> Could only reference safety when probed with questions about productivity. Could not give examples regarding Ops & Maint.

(Ex. R-6). Under "Supervision" Stacy wrote, "Would not give specific answers about his ability to interact positively with supervisors." Finally, in the section titled "Interviewer's Thoughts," Stacy wrote:

> Mark is familiar with heavy equipment and has a good record in safety. Weak in area of cooperation and interactions with supervisors.

(Ex. R-6). Under recommended action, Stacy checked "Do not Hire."

I credit Stacy's testimony that, except for what Pollock told him during the interview, he was not aware of his protected activities at Barney's Canyon. (Tr. 305-06). I also credit his concerns about Pollock's insubordination. (Tr. 307-08). The information before Stacy listed his disciplinary record as follows:

Date of Infraction	Description of Infraction	Disciplinary Action
04/20/99	Insubordination, failure to perform	8 days suspension
12/08/98	Insubordination	1 day suspension
04/21/97	Smoking inside building, 2nd offense	Written Warning
07/30/96	Insubordination & disorderly conduct	3 days suspension

(Ex. R-4). Stacy did not seek further information about these disciplinary actions from Barney's Canyon or the Utah Copper human resources department. (Tr. 330-31). Stacy stated that he was concerned that Pollock chose not to comment on his past disciplinary actions. (Tr. 307). Although Stacy admitted that he would rate a candidate poorly if he tried to explain away his past conduct, Stacy expects potential employees with a history of disciplinary actions to "articulate some type of plan or things they've done different to where they would be able to not have them happen again." (Tr. 308). Pollock merely responded that he had "no more to add" and that his record "speaks for itself." *Id.* Stacy testified that he found Pollock's answers to be "one sided to where he would offer a description in his comments of people who would come to him." *Id.* Stacy was concerned that Pollock offered no examples demonstrating "any kind of team-solving skills to where in a group they solve things." (Tr. 308-09). Pollock's examples were "always someone coming to him . . . a one-sided affair. . . ." (Tr. 309).

Stacy testified that he discussed Pollock in a chance meeting with Wolff prior to the interview. (Tr. 312). Wolff simply told Stacy that he "should look at his records." *Id.* Wolff appeared to not want to talk further, so Stacy did not continue the conversation. Stacy testified that Wolff's written evaluation of Pollock was available to him at the time of the interview but that he did not remember the document. (Tr. 315). There was a folder for each candidate provided to Stacy just before the interview. Stacy testified that he probably "breezed through the folder" for Pollock and that it would have contained Wolff's recommendation that Pollock not be hired. (Tr. 314). Stacy stated that he does not believe that Wolff's oral or written statements

influenced his decision not to hire Pollock. (Tr. 315). Stacy stated that he made the decision independently based on Pollock's history of discipline and his responses during the interview. *Id.* Stacy made the final decision not to hire Pollock. He conferred with Welch to make sure that their opinions were consistent, but Stacy made the final decision. Stacy was unaware that Welch had concerns about Pollock because he was Greg Pollock's brother. Stacy testified that he had many dealings with Greg Pollock at Utah Copper in "grievance and hearing procedures" and in safety matters because he was a local union president, but Stacy was not concerned about hiring Mark Pollock because of Greg Pollock's protected activities. (Tr. 333).

b. Pollock's *Prima Facie* Case

The Mine Act protects all miners who engage in protected activities including those who do so in an aggressive manner or in a manner that mine management believes is not helpful or positive. Pollock's relationship with Wolff was strained in part because of the manner in which Pollock pursued safety issues. For example, Pollock would complain to MSHA about safety conditions without first giving Barney's Canyon the opportunity to address the alleged condition. It is clear that this behavior aggravated Wolff. 22 FMSHRC at 433. Stacy had Wolff's evaluation before him during the interview. Although Stacy was not aware of the details of the extent or nature of Pollock's protected activity, Pollock discussed his protected activities during the interview. Pollock believes that he established that Wolff's hostility toward Pollock's protected activities convinced Stacy that he should not hire Pollock.

Pollock also contends that he established a *prima facie* case by showing Utah Copper's disparate treatment of employees who engaged in protected activities at Barney's Canyon. He argues that former Barney's Canyon employees who were not active safety advocates were hired even though they were no more qualified or less qualified for the job than Pollock. Pollock presented 14 examples in his brief. (P. Br. 9-17). For example, one former Barney's Canyon employee who had been a re-rate supervisor had serious attendance problems, but these problems were not fully documented on the attendance discipline log available to Stacy. (Ex. C-7, p. 151). It is not disputed that Pollock had a perfect attendance record at Barney's Canyon. In addition, this same candidate had a number of serious accidents that were not discussed during her interview. (Ex. C-7). Wolff did not mention these accidents on his evaluation. *Id.* at 165.3. Pollock had very few accidents. This former Barney's Canyon employee was hired by Utah Copper for one of the truck driver positions.

Another former Barney's Canyon employee was suspended in 1999 for showing up for work under the influence of alcohol. (Ex C-19). The Utah Copper interview sheet for this candidate mentions this suspension but dismisses it as "No problems - 1 time 3 years ago." *Id.* at 206. All of Pollock's suspensions occurred prior to mid-1999 and, given his 13-year employment history at Barney's Canyon, they all were given in a relatively short period of time, 1996-99. This candidate also had a driving under the influence (DUI) on his record that he did not report on his Utah Copper application for employment. Pollock believes that Utah Copper's explanation that this candidate was not required to report this DUI because it was a misdemeanor

is disingenuous. In addition, this candidate had a number of disciplinary warnings for committing "unsafe acts" at Barney's Canyon. Pollock points to the fact that both Barney's Canyon and the Utah Copper interviewer rated him excellent for safety. (Ex. C-19 p. 201, 203). This candidate was hired by Utah Copper.

Another former employee of Barney's Canyon, Tony Lopez, had been a miners' representative under the Mine Act. He also filed a discrimination complaint against Barney's Canyon in 1998. He interviewed for a position as a utility man at the Utah Copper power plant, but he was not hired. (Ex. C-10 p. 2226). Stacy did not interview or seriously consider Lopez because he had already been interviewed and rejected. Wolff did not give Lopez a very good evaluation. *Id.* at 2240. Pollock believes that Utah Copper did not hire Lopez because of his protected activities.[4]

Pollock cites other incidences where former Barney's Canyon re-rate supervisors with employment records that are not as exemplary as he believes his record to be were hired by Utah Copper. These candidates had serious accidents in their history, extensive disciplinary records, or they only worked for Barney's Canyon a short period of time. (See P. Br. 14-17; Exs. C-9, C-11 through C-17, C-20, C-35). Pollock contends that, taken together, these examples show that those former Barney's Canyon employees who engaged in protected activities, including Pollock, were passed over for positions at Utah Copper while candidates who had not engaged in protected activities, whose personnel records were more problematic than his, were hired.

I conclude that Pollock established a *prima facie* case of discrimination. There is seldom a smoking gun in these cases because direct evidence of a discriminatory motive is rarely encountered. There is evidence to show that there was communication between management and the human resources departments at Utah Copper and Barney's Canyon, Utah Copper was aware of Pollock's protected activities at Barney's Canyon, management at Barney's Canyon was at times hostile to the manner in which Pollock pursued these protected activities, Utah Copper had a motive to be suspicious of Pollock as a result of Greg Pollock's protected activities, and Utah Copper favored former Barney's Canyon re-rate supervisors over other employees who had frequently engaged in protected activities. Taken as a whole, I find that this evidence is sufficient to establish a *prima facie* case.

c. Utah Copper's Affirmative Defense

I find, however, that Utah Copper's affirmative defense overcomes Pollock's *prima facie* case. Pollock's case was built on inferences that he asked me to draw from circumstantial evidence. Although his evidence was enough to establish a *prima facie* case, I find that Utah

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[4] In September 2002, the Secretary of Labor filed a discrimination complaint on behalf of Mr. Lopez. *Sec'y of Labor on behalf of Tony Lopez v. Kennecott Utah Copper Corp.*, WEST 2003-223-DM. By order dated January 5, 2004, I approved the parties' settlement of that case. I draw no inferences in this case from the settlement of Lopez's case.

Copper affirmatively established that Stacy decided not to hire Pollock because of his concerns about Pollock's unprotected conduct. Stacy made the ultimate decision for Utah Copper based on Pollock's unprotected activities. In reaching this conclusion, I am aware of the admonition of Congress that "[w]henever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Legis. Hist.* at 624.

I credit the testimony of Mr. Stacy with respect to the reasons he set forth for his decision not to hire Mr. Pollock. I find that Stacy was a straight-forward, honest witness. He was concerned that Pollock would be a difficult employee to supervise because of his disciplinary history and because he did not give Stacy the impression of being a team player during the interview. I credit Stacy's testimony that he reached his decision independently, based on Pollock's interview and disciplinary record, without serious consideration of Wolff's evaluation. Although some of the friction between Pollock and management at Barney's Canyon was a result of Pollock's safety activities, most of this friction was a consequence of his unprotected activities. Some of this conflict is discussed in my decision with respect to the discrimination complaints filed by the Secretary on behalf of Pollock against Barney's Canyon. 22 FMSHRC 419, 428-39. The record in that case revealed that Pollock often complained about his job duties, refused or was reluctant to perform any duties that were not part of his normal routine, resisted management directives to change the manner in which he performed his work, and sometimes refused to take responsibility for his actions. In one incident a Barney's Canyon supervisor believed that Pollock threatened to make an MSHA inspection "tough" for the company if he disciplined him for watching television at work. Barney's Canyon issued the discipline to Pollock because he refused to admit that he was watching television. In another incident litigated in that case, Pollock was suspended for eight days for refusing a reasonable work assignment. In my decision, I reached the following conclusion:

> I find that most of the hostility that developed between the company and Pollock is a result of his union activities and the perception that he is frequently disrespectful and disobedient to Kennecott's managers. The record shows that he frequently argues with supervisors about work assignment.

22 FMSHRC at 432.

Stacy relied on the disciplinary actions taken against Pollock at Barney's Canyon as summarized in the attendance and discipline log. (Ex. R-4). Pollock's suspensions shown on the log were not given in retaliation for his protected activities. Although Pollock and the Secretary argued that some of this discipline was for his protected activities, I rejected these arguments in my decision in that case. 22 FMSHRC at 437-39. Of course, the fact that Pollock challenged these suspensions in a discrimination case is also protected, but I credit Stacy's testimony that he was not aware of that case at the time he decided not to hire Pollock. (Tr. 306). It was reasonable for Stacy to conclude from Pollock's previous suspensions that he might be a difficult employee to supervise and that he might not be a good team player.

Because Wolff did not testify in the present case, it is not clear how he arrived at his evaluations on the reference form. (Ex. R-5). Pollock asserts, without proof, that Wolff's negative evaluation of him was based on his protected activities. Given Pollock's history of discipline at Barney's Canyon and his rather combative style, it is just as likely if not more likely that Wolff based his evaluation on Pollock's unprotected activities alone. Wolff's notation on the form that Pollock filed a discrimination case to get his record expunged and that he lost the case most likely refers to my decision in Pollock's case against Barney's Canyon.

Stacy testified that he placed a big emphasis on his assessment of a candidate's ability to work with others on a team. Team skills and the ability to work with others is important to Utah Copper when it retains existing employees and hires new employees. *See Sec'y of Labor on behalf of Ondreako v. Kennecott Utah Copper Corp.*, 25 FMSHRC 612, 616 (Oct. 2003). Under "Team Player," the interview form indicates that Utah Copper is looking for candidates who "will pull together with others, share information and ideas, and share solutions to operating and maintenance challenges." (Ex. R-6). Although it may not be a traditional hiring criteria in the mining industry, the ability to work with others on a team is a legitimate business justification for choosing one candidate over another, so long as it is not used in a discriminatory manner.[5] As stated above, Stacy rated Pollock poor with respect to the "Team Player" and "Supervision" criteria.

Stacy characterized Pollock's interview as "one-sided." Stacy was concerned that Pollock talked too much about himself and could not describe how well he interacts and works with others to solve work challenges. Given Pollock's history of suspensions, Stacy was particularly interested in his ability to work and share with supervisors and other employees. In Stacy's opinion, Pollock failed to explain how he had corrected his work behavior since the time of his suspensions. On the interview summary, Stacy noted that Pollock was familiar with heavy equipment and had a good record in safety but that he was "weak in the area of cooperation and interactions with supervisors." (Ex. R-6).

Pollock's evidence about disparate treatment is not convincing. Mr. Lopez was not interviewed by Stacy for a haul truck driver position because he had been rejected for another job at the Utah Copper power plant. The record does not make clear whether Stacy seriously considered Lopez for a truck driver position and why he did not consider him. (Tr. 347). I cannot draw an inference that Stacy refused to consider Lopez because of his protected activities at Barney's Canyon. There is also no evidence in the record to support the supposition that Lopez was not hired at the power plant because of his protected activities.

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[5] A mine operator cannot refuse to hire a candidate because, for example, he complains about safety to MSHA without trying to resolve the matter through his team. A miner's rights under the Mine Act supersedes any arrangement or agreement on how safety disputes should be handled at a mine.

The evidence Pollock presented with respect to other candidates interviewed for truck driver positions is too circumstantial and speculative to be persuasive. Stacy was not aware of many of the issues that Pollock raises about these candidates at the time he decided to hire them. Stacy relied on what the candidate said and the information in the attendance and discipline log. If this log presented information that was incomplete or inaccurate, Stacy was not aware of these discrepancies when he made the hiring decision. Consequently, the fact that a particular candidate had more accidents at Barney's Canyon than Pollock does not help establish disparate treatment if Stacy was not aware of these accidents. The same principle applies to a DUI or attendance problems. Although it is possible to find inconsistencies in the hiring process, I find nothing in the evidence presented by Pollock that convinces me that those candidates who engaged in protected activities while employed at Barney's Canyon were favored over candidates who had not engaged in such activities.[6] The business justification presented by Utah Copper for its decision not to employ Pollock does not appear to be mere pretext to cover its true discriminatory motive. Its decision is consistent with the criteria it used to make these employment decisions. "The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity." *Chacon*, 3 FMSHRC at 2516-17. I find that the evidence presented concerning Utah Copper's employment decisions with respect to the other Barney's Canyon candidates does not help establish a discriminatory motive with respect to Pollock.

Greg Pollock, Mark's brother, was the president of the Steelworkers Local at Utah Copper. As such, he was active in safety matters and had engaged in protected activities. Stacy was aware that Greg had engaged in protected activities at the Bingham Canyon mine. Welch testified that he was concerned about Mark Pollock because Greg "created problems" at the mine. (Tr. 215). Welch further testified that he overcame his concerns about the relationship between Mark and Greg during Mark's interview so that his bias did not affect his thinking about Mark. (Tr. 216). Stacy made the decision not to hire Pollock without knowing about Welch's concerns about the relationship between Greg and Mark. At the conclusion of the interview, Welch shared Stacy's concern about Mark's history of insubordination at Barney's Canyon. *Id.* In any event, the problems Welch had with Greg Pollock appear to stem from his union activities rather than any protected activities under the Mine Act.[7] I reject the arguments made by Pollock that Utah Copper failed to hire him because of the protected activities of his brother.

In conclusion, I find that Utah Copper decided not to extend an offer of employment to Mark Pollock for reasons that are not protected by the Mine Act. In addition, I find that even if

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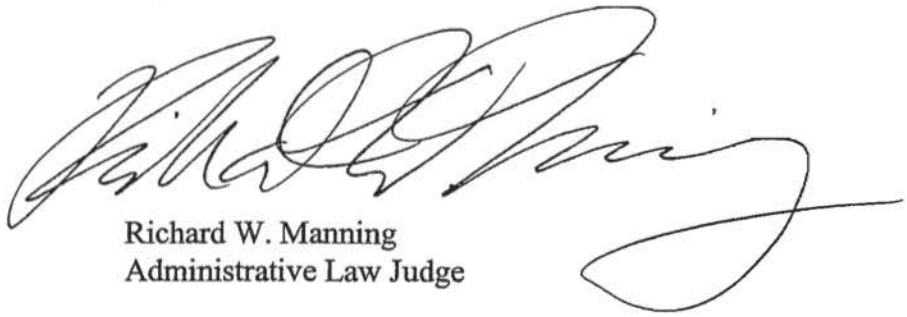
[6] There is no reliable evidence concerning Brad Vaughn's employment status. (Tr. 23). He was the third miners' representative at Barney's Canyon.

[7] Greg Pollock filed a discrimination complaint against Utah Copper in 2000. In my decision in that case, I held that Greg Pollock "was disciplined solely because of his obstructive and harassing behavior at a December 30, 1999 [labor-management] meeting" and I dismissed the case. *Greg Pollock v. Kennecott Utah Copper Corp.*, 23 FMSHRC 676, 683 (June 2001).

Utah Copper's decision not to hire Pollock was motivated in some part by Pollock's protected activities, Utah Copper was primarily motivated by his unprotected activity and would have rejected Pollock's application for employment on the basis of the unprotected activity alone.

III. ORDER

For the reasons set forth above, the discrimination complaint filed by Mark Pollock against Kennecott Utah Copper Corporation under section 105(c) of the Mine Act is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Ave., N.W., Suite 9500
Washington, D.C. 20001

January 28, 2004

DAVID MULLENS, Complainant,	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 2003-155-D
v.	:	HOPE CD 2002-9
	:	
U.S. STEEL MINING COMPANY, LLC, Respondent	:	50 Mine
	:	Mine ID 46-01816

DECISION

Appearances: David Mullens, Pineville, West Virginia, *pro se*,
Michael P. Duff, Esq., U.S. Steel Corporation, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Zielinski

This case is before me on a complaint of discrimination filed by David Mullens pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(c)(3).[1] Mullens alleges that U.S. Steel Mining Company, LLC, ("U.S. Steel") discriminated against him by suspending him for disciplinary reasons on June 6, 2002, as a result of his complaints about safety. A hearing was held in Beckley, West Virginia. For the reasons set forth below, I find that Respondent did not discriminate against Mullens, and dismiss the complaint.

Findings of Fact

Mullens is employed as a mechanic by U.S. Steel at its Gary No. 50 Mine, an underground coal mine located in Pineville, West Virginia. He is assigned to the longwall operation, and works the second shift. One of his primary duties is inspecting, calibrating and maintaining carbon monoxide ("CO") monitors. As of May 2002, he had been engaged in what he described as a "long battle . . . for not months but years, trying to get the . . . CO monitoring system in compliance with law." Tr. 16. One issue involved a CO monitor near the tailpiece of the longwall, which is required to be located in the top third of the distance between the floor and

[1] Pursuant to section 105(c)(2) of the Act, a miner may submit a complaint of discrimination to the Secretary of Labor, who must conduct an investigation and file a complaint with the Commission if she determines that the Act has been violated. Section 105(c)(3) provides that, if the Secretary determines that the Act has not been violated, the miner may file an action before the Commission on his own behalf. 30 U.S.C. § 815(c)(2) and (3).

roof of the mine and within a specified distance of the face. Because the height of the coal seam varies and the longwall moves forward rapidly, maintaining the monitor in the proper location can prove difficult.[2]

In early May 2002, Mullens reported to Marvin Cochran, the area manager of the longwall operation, that the location of the monitor was not in compliance with regulations and that he had been noting that fact in the "permissibility book." After some prompting from Mullens, Cochran stated that he would "take care of it." Tr. 16-17. On June 5, 2002, Mullens was preparing to work his normal evening shift, which began at 4:00 p.m., and noticed that the monitor was hanging from the longwall equipment, about 15 inches from the floor, in coal that was about six and one-half feet thick. About 3:45 p.m., as he was passing through a locker room area, he noticed Cochran and "confronted" him about the problem. The longwall had not operated that day and was not expected to operate on the evening shift. Cochran was involved in a discussion with other managers who were trying to address the problems that had interfered with production. Mullens told Cochran that "the [CO] monitor was still out of compliance and that he had not taken care of it" as he had promised to do. Tr. 18.

Cochran responded by instructing Mullens to call down to the day-shift personnel, who were still in the mine, and tell them to fix the problem. Mullens responded that the day-shift men would not listen to him, and that Cochran needed to give the instruction. Cochran replied that it would be better if Mullens just fixed the problem himself. Mullens replied that his immediate supervisor, White Mullins, had already assigned him duties for the day and that Cochran should "run it by" Mullins. Cochran said he didn't have to run it by anybody – that he was telling Mullens what to do and that he was to do it. Mullens stated that he had no problem fixing the monitors, but had to tell his foreman what he was going to do. Cochran told him that he didn't have to tell anyone. Mullens reiterated that he needed to tell his foreman and Cochran repeated that he was Mullens' boss – Mullens countered that his foreman was his boss.[3] The increasingly emotional nature of this exchange resulted in raised voices by both parties.

In the course of the argument, Mullens attempted to move past Cochran toward the door to an adjacent office where his foreman was located. Cochran moved to block his path, and repeatedly did so as Mullens tried to get around him. In the course of insisting that Mullens was

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[2] It is not clear why positioning of the monitor was a long-standing problem. Mullens explained that the preferred solution was to fabricate a bracket to hold the monitor and weld it to the "stage loader." Tr. 36-38. Cochran testified that the problem could have been remedied in a few minutes by hanging the monitor from a roof bolt. Because the longwall face advanced rapidly, it would have to be "moved pretty regular," but it would be in compliance. Tr. 77. Mullens agreed that there were temporary measures that could have been taken, but rejected the roof bolt solution. Tr. 43.

[3] White Mullins was foreman of a crew working on the longwall, and reported to Cochran, the area manager.

to do what he told him to do, Cochran pointed at Mullens with his index finger and twice made contact with Mullens' chest. At the first contact, Mullens backed away and told Cochran not to touch him. After the second contact, Mullens stated, "Marvin, I've done told you once, I'm not telling you no more, you touch me again, I'm going to put you on your ass." Tr. 20.

Cochran then told Mullens to come with him upstairs. Mullens thought that Cochran intended to bring the matter to the attention of the mine superintendent. Cochran, however, told Mullens to sit in his office because he wanted to settle the matter himself. Tr. 20-21, 79. Essentially the same exchange took place – Cochran insisted that Mullens do what he was told and Mullens repeated the warning of what he would do if Cochran touched him again. They then proceeded to the office of Russell Combs, the mine superintendent, where, in the presence of union officials, they related their versions of the controversy. Cochran stated what had happened, followed by Mullens. When Mullens was finished, he asked Cochran if what he had stated was correct, and Cochran replied "That's basically it." Tr. 23. David Tilley, one of the union officials present because of the potential for disciplinary action, corroborated the respective descriptions of events. Tr. 54-60, 109-11. There were few differences in their statements.

There were, however, differences in recollections of one aspect of the confrontation and how the participants reported it during the meeting. Mullens testified that he told Cochran that he would fix the monitor.[4] Cochran recalled that Mullens had stated that it was not his job to fix the monitor. Tr. 19, 28, 73-74. However, Cochran later testified that he wasn't sure if Mullens had said that it wasn't his job. Tr. 87. In his mind, Mullens' insubordination was insisting on going to his foreman's office rather than proceeding to fix the monitor. Cochran explained, "I was instructing him what I wanted him to do . . . . He was refusing a direct order." Tr. 89. Combs' recollection also varied, but he arrived at the same conclusion that Cochran did. He initially thought that Mullens had said that he told Cochran that he wouldn't fix the monitor. However, he later testified that he didn't think Mullens made such a statement – that that was a conclusion he reached. "[W]hat I heard was Mr. Mullens refusing to do the work and he wasn't going to do it with Mr. Cochran telling him, the only way was if his boss came and told him." Tr. 106. I find that Mullens told Cochran that he would fix the monitor. However, he tacitly refused to begin working on it immediately, and insisted on proceeding to his foreman's office.

Because of the emotional state of the two participants, Combs decided that they shouldn't work further that day. He also wanted to consult with company human resources staff on potential courses of action, and to review Mullens' work record. Tr. 98. Cochran had worked the day shift and was departing. Mullens was sent home. The following day, Mullens was given a notice of disciplinary action advising him that he was being suspended for five days. It read, in part:

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[4] Tilley also testified that during the meeting Mullens related that he had told Cochran that he had no problem doing the work. Tr. 54, 109.

> On Wednesday, 06/05/02, you were involved in an incident involving Marvin Cochran, area manager-longwall, in which Mr. Cochran gave you an order to perform certain work, and you refused. You also used abusive and threatening language towards Mr. Cochran. These actions constitute a violation of Mine and Shop Conduct Rule #4 "Insubordination (refusal or failure to perform work assigned or to comply with supervisory direction) or use of profane, obscene, abusive, or threatening language or conduct towards subordinates, fellow employees, or officials of the Company.

Ex. R-2.

On June 10, 2002, Mullens filed a complaint of discrimination with the Secretary's Mine Safety and Health Administration ("MSHA"), alleging that he had been discriminated against when he was suspended on June 6, 2002.[5] He identified Marvin Cochran as the person responsible for the discriminatory action. By letter dated January 16, 2003, MSHA advised that its investigation had been completed and that it had concluded, on behalf of the Secretary, that no discrimination had occurred. Mullens then filed the instant complaint of discrimination with the Commission, pursuant to section 105(c)(3) of the Act.

Conclusions of Law - Further Findings of Fact

A complainant alleging discrimination under the Act typically establishes a *prima facie* case by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. *See Robinette*, 3 FMSHRC at 818, n. 20. If the operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

While the operator must bear the burden of persuasion on its affirmative defense, the ultimate burden of persuasion remains with the complainant. *Pasula*, 2 FMSHRC at 2800; *Schulte v. Lizza*, 6 FMSHRC 8, 16 (Jan. 1984).

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[5] Mullens also filed a grievance through his union, protesting the suspension. That matter went to arbitration and was decided in U.S. Steel's favor. In addition, Mullens initiated a criminal action against Cochran who, after a trial, was acquitted of a charge of battery.

Prima Facie Case

Section 105(c)(1) of the Act prohibits discrimination against any miner who complains to an operator or its agent about "an alleged danger or safety or health violation." 30 U.S.C. § 815(c)(1). Mullens' June 5th complaint about the CO monitor, as well as his prior reports of problems with the CO monitoring system, was activity protected under the Act. Mullens suffered adverse action, a five-day suspension.

The principle issue as to Mullens' *prima facie* case is whether the adverse action was motivated in any part by his protected activity. For the reasons set forth below, I find that the adverse action was not motivated by his protected activity.

Both Cochran and Combs testified credibly that Mullens' protected activity played no part in the decision to discipline him. Tr. 80, 103. The decision to take disciplinary action was made by Combs, who was not involved in, and did not witness the confrontation. He listened to the parties' descriptions of the events and, after consulting with human resources staff and reviewing Mullens' work record, decided to impose a five-day suspension. While Mullens believed that the five-day suspension was an "awful rough penalty," as noted below, there is no evidence that he was treated disparately under U.S. Steel's disciplinary system.

Mullens had engaged in protected activity on numerous prior occasions, none of which resulted in adverse action. His duties included calibration and maintenance of safety equipment, and he had periodically brought issues to management's attention for years. Consequently, he was engaged in protected activity on an ongoing basis. Despite the friction he described, he had never been disciplined for such actions. Tr. 32-33. Mullens brought problems with the CO monitors directly to MSHA's attention "probably six times" prior to June of 2002. Tr. 35. None of those complaints led to any adverse action. Similarly, Mullens' encounter with Cochran in May of 2002, which he described as a "confrontation," did not result in discipline. Tr. 16, 30.

While the confrontation began with Mullens' protected activity, that issue quickly became moot. Cochran directed Mullens to remedy the problem, a task within his duties and responsibilities. Tr. 19, 86, 103. The dispute that followed concerned whether Mullens would immediately address the problem, as Cochran wanted him to do, or go to his foreman's office first. The interaction quickly escalated to a heated exchange, with both participants stepping over the line of reasonable conduct.

Evidence of disparate treatment can be highly probative of unlawful motive, just as evidence of consistent treatment can indicate the lack thereof. *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 23 FMSHRC 924, 929 (Sept. 2001). Here, Mullens introduced no evidence that there were other similarly situated miners that were treated more favorably in the disciplinary process. Respondent presented limited evidence on that issue. Combs testified that he had disciplined "several" miners for violations of Rule #4, suggesting that Mullens' discipline was consistent with established disciplinary practices. Tr. 104.

Even though there is no direct evidence of unlawful motivation, the Commission has recognized that such evidence seldom exists and that discrimination often must be proven through circumstantial evidence. *Sec'y of Labor on behalf of Garcia v. Colorado Lava, Inc.*, 24 FMSHRC 350, 354 (April 2002), *citing Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C.Cir. 1983). Circumstantial evidence of unlawful motivation may include an operator's knowledge of the protected activity, hostility toward the protected activity, coincidence in time between the protected activity and the adverse action, and disparate treatment of the complainant. *Id.*

Here, Cochran was well aware of Mullens' protected activity, and the discipline immediately followed the June 5th complaint. Cochran reacted with hostility toward Mullens, and there had been some friction between the two in the past. Such evidence could justify an inference that the adverse action was motivated in part by protected activity. I decline to draw such an inference here. The significance of the timing of the disciplinary action and Mullens' protected activity of June 5th is largely offset by the fact that Mullens' pattern of protected activity had never resulted in adverse action. Moreover, I find that Cochran's hostility was not directed toward Mullens' protected activity, but was a consequence of their respective personalities.

There had been long-simmering friction between Mullens and Cochran. Tr. 63. Mullens was described by a co-worker as a very thorough person who strived to make sure that operations that were his responsibility were properly and timely performed. Tr. 45-46. He impressed me as a person who approached his job duties with considerable intensity, and who would readily confront supervisors that he viewed as unresponsive to work-related issues. On June 5th, Mullens approached Cochran in a confrontational manner, and he described his encounter a month earlier as a confrontation. Tr. 16, 18, 71. Cochran had a somewhat authoritarian manner of supervising. Tr. 76. Dennis Elswick, a former U.S. Steel employee who witnessed the June 5th incident but did not hear what was said, testified that "the tension between the two was really heated . . . and that's when I thought to myself, this is not going to be good because [Cochran] has a history of not being able to talk to people real well. If they don't do exactly what he says immediately, then, you know, it winds up in a confrontation, but most of the time it don't go this far." Tr. 47. The conflict between Mullens' intensity and confrontational manner and Cochran's intolerance of anything short of complete deference to his instructions produced a predictable result, one that bore no relationship to the subject matter of the interaction.

Mullens' argument on causation is, in essence, that he acted reasonably and with justification, and that his protected activity had to be the reason he was disciplined. As he explained it, "the argument we [were] having was over [protected activity] and at the time I didn't feel that I had done [anything] wrong to deserve the treatment that I received." Tr. 27-28. The disciplinary letter referred to two grounds for the suspension: insubordination and abusive language. Mullens was surprised by the inclusion of insubordination, because he had told Cochran that he would fix the monitor. Tr. 28. As noted above, however, he refused to immediately go and work on the monitor. Cochran and Combs conceded, at least in retrospect,

that it would have been reasonable for Mullens to notify his foreman of his new duties for the shift. Tr. 89, 107. The dispute that precipitated the disciplinary action was actually over when and how that notification would be accomplished. Mullens insisted on going to his foreman's office before he started the work, while Cochran insisted that he immediately depart to do the work. Mullens, somewhat reluctantly, conceded that there was an alternative means of notifying his foreman that would have avoided the conflict with Cochran, i.e., calling from a phone in the mine as he proceeded to the work site. Tr. 118-20. However, he firmly believed that the "best way" to accomplish the notification was to physically proceed to his foreman's office. Tr. 119. Mullens' preferred method of notifying his foreman may well have been quite reasonable. However, his insistence on pursuing that avenue, rather than proceeding toward the work site, required that he ignore Cochran's directive and subject himself to disciplinary action for insubordination.

It is difficult to fault Mullens for reacting as he did to Cochran's touching. Cochran's actions clearly provoked Mullens' threats. Charles E. Ashley, who witnessed the encounter, testified that "if he was doing it to me, I would have poked him in the nose." Tr. 65. The Commission has held that an operator may not rely on wrongfully provoked conduct as a business justification for otherwise discriminatory action. *See Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 23 FMSHRC 924, 936-38 (Sept. 2001), *citing Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1482 (Aug. 1982). However, the "wrongful" provocation that the Commission has found to afford a miner broad leeway in responding has been conduct wrongful under the Act. The complainant in *Moses* reacted to the operator's "unlawful and provocative" attempts to determine if he had reported an accident to MSHA inspectors. *Id.* Similarly, Bernardyn reacted to being ordered to drive faster under highly unsafe driving conditions and his removal from the haulage run for not doing so.

Cochran did not berate Mullens or direct him to ignore the safety problem. Rather, he ordered Mullens to immediately remedy it. Cochran's provocative touching was prompted by Mullens' tacit refusal to immediately embark on the task, and was not motivated by his protected activity. Cochran's conduct may have been unjustified from a personal relation standpoint, but was not unlawful under the Act.

I find that U.S. Steel made the decision to discipline Mullens solely as a consequence of his unprotected activity, i.e., his tacit refusal to do what Cochran had instructed him to do and his use of abusive and threatening language. Accordingly, I find that Complainant has failed to prove a *prima facie* case of discrimination.

Respondent's Affirmative Defense

While I have rejected Mullens' argument on causation, there is no question that his interaction with Cochran, at least initially, involved protected activity. It is also clear that hostility had developed between Cochran and Mullens. I have found that that hostility was a result of a personalty conflict, rather than the subject matter of their interactions. Nevertheless,

the line between Mullens' protected and unprotected activity is very thin. Assuming, for purposes of argument, that Mullens' discipline was in some part the result of his protected activity, it would be necessary to examine Respondent's affirmative defense.

In *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-17 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983), the Commission explained the proper criteria for analyzing an operator's business justification affirmative defense:

> Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was mere pretext seized upon to cloak discriminatory motive.
>
> The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operators's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis . . . , then a *limited* examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. (citations omitted).

The Commission further explained its analysis in *Haro v. Magma Copper Co*, 4 FMSHRC 1935, 1938 (Nov. 1982):

> [T]he reference in *Chacon* to a "limited" and "restrained" examination of an operator's business justification defense does *not* mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intended that a judge, in carefully analyzing such defenses, should not substitute his business judgment or sense of "industrial justice" for that of the operator. As we recently explained, "Our function is not to pass on the wisdom or fairness of such asserted business justifications, *but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.*" (citations omitted).

Respondent, through the testimony of Combs, advanced a credible business justification for suspending Mullens. He was presented with a dispute between a miner and a mid-level manager that continued to be highly emotional at the time of the meeting. Tr. 97-99. He concluded, in essence, that Mullens had refused to commence the work Cochran had directed him to do until he could talk to his foreman. Tr. 103. Mullens freely admitted threatening Cochran. Combs reviewed Mullens' work record, consulted with company human resources personnel, and decided to impose a five-day suspension. The only evidence on the issue suggests that the discipline was consistent with other disciplinary actions taken by Respondent for violations of the subject rule. Mullens had never been disciplined for any of his previous protected activity.

I find that Respondent would have taken the disciplinary action for Mullens' threatening language and tacit insubordination, even if there had been no protected activity involved at the beginning of the confrontation. Respondent, therefore, established an affirmative defense to the charge of discrimination.

While I have found that Mullens' complaint is not viable under the Act, his argument on liability has considerable appeal. He agreed that he would correct the problem with the CO monitor, as Cochran had instructed him to do. His determination to proceed a short distance to his foreman's office to tell him about the change in his job duties may well have been the "best way" to accomplish that task, and his threats were clearly provoked by Cochran's actions. On the whole, he acted no more unreasonably than Cochran did. Nevertheless, the consequences of that unfortunate encounter fell entirely on him, and a five-day suspension does, indeed, seem like an "awfully rough penalty," considering all of the circumstances.

As noted above, however, the Commission's jurisdiction is limited. Commission Administrative Law Judges are not free to impose their views on whether discipline was "just" or "wise." My sole responsibility is to determine whether Respondent violated the Act, and I am convinced that it did not.

ORDER

For the reasons stated above, I find that U.S. Steel's decision to discipline Mullens was not motivated in any part by Mullens' protected activity. Rather, it was based solely upon legitimate business considerations. In the alternative, I find that U.S. Steel would have taken the disciplinary action as a result of Mullens' unprotected activities alone. Accordingly, the Discrimination Complaint is hereby **DISMISSED**.

Michael E. Zielinski
Administrative Law Judge

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