

JANUARY 2005

COMMISSION DECISIONS AND ORDERS

01-12-2005	Secretary of Labor, MSHA on behalf of Mark Gray v. North Star Mining, Inc., et al.	KENT 2001-23-D	Pg. 1
01-24-2005	Marfork Coal Company, Inc.	WEVA 2004-208	Pg. 18

ADMINISTRATIVE LAW JUDGE DECISIONS

01-11-2005	Secretary of Labor, MSHA, on behalf of Aaron Randolph v. Christy Minerals Co.	CENT 2005-68-DM	Pg. 21
01-12-2005	Drummond Company, Inc., and Michael Earl Employed by Drummond Company, Inc.	SE 2004-106	Pg. 23
01-21-2005	Leeco Incorporated	KENT 2004-65	Pg. 39
01-26-2005	Eighty Four Mining Company	PENN 2004-184	Pg. 60
01-27-2005	Robert R. Tolley v. Moab Salt, LLC.	WEST 2004-165-DM	Pg. 62

ADMINISTRATIVE LAW JUDGE ORDERS

01-10-2005	Baylor Mining, Inc.	WEVA 2004-36	Pg. 82
01-12-2005	National Cement Company of California	WEST 2004-182-RM	Pg. 84
01-14-2005	David R. Coleman employed by Lodestar Energy, Inc.	EAJ 2004-02	Pg. 104

JANUARY 2005

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

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

Stanley Quackenbush v. Kentucky-Tennessee Clay, Docket No. SE 2003-83-DM. (Judge Feldman, December 8, 2004)

A petition for Reconsideration was denied in:

Secretary of Labor on behalf of Mark Gray v. North Star Mining, Inc. and Jim Brummett, Docket No. KENT 2001-23-D. The Commission decision is included in this volume.

COMMISSION DECISIONS AND ORDERS

January 12, 2005

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
on behalf of MARK GRAY

V.

Docket No. KENT 2001-23-D

**NORTH STAR MINING, INC.,
and JIM BRUMMETT**

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

DECISION

BY: Duffy, Chairman; Suboleski and Young, Commissioners

This proceeding involves a discrimination complaint filed by the Secretary of Labor on behalf of Mark Gray under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 815(c)(2) (2000) (“Mine Act” or “Act”), against North Star Mining, Inc. (“North Star”) and Jim Brummett.¹ Administrative Law Judge Jacqueline R. Bulluck determined that Gray was not constructively discharged and dismissed the discrimination complaint against the respondents. She also concluded that Brummett did not unlawfully threaten Gray, as alleged, and consequently set aside a settlement agreement between the Secretary and Brummett. 25 FMSHRC 198, 199, 217 (Apr. 2003). The Secretary appealed the judge’s conclusion that Brummett did not threaten Gray, and the Commission granted review. For the reasons that follow, we vacate the judge’s decision and remand the case for further consideration.

¹ Mike Caudill, who was joined with North Star in the original complaint, is not involved with the remaining issues on appeal, and the parties have dropped him from the case caption in their pleadings.

I.

Factual and Procedural Background

North Star, a contract mining company, operates the No. 5 and 6 mines, underground coal mines located about one quarter mile apart in Leslie County, Kentucky. 25 FMSHRC at 199. Mike Caudill was superintendent of the two mines, and Thomas ("Eddie") Spurlock was assistant superintendent at the No. 5 mine. *Id.* Jim Brummett was a section foreman at the No. 5 mine until May 1, 2000, when he became assistant superintendent at the No. 6 mine. *Id.*

Mark Gray, the complainant, began his employment at North Star on December 21, 1999, as a roof bolter at the No. 5 mine on the second shift, which ran from 3:00 p.m. to 11:00 p.m. *Id.* Brummett, a friend and co-worker of Gray from prior jobs, had referred Gray to the job at North Star. *Id.* Gray's "pinning partner" on the roof bolter was Ray Young, with whom he commuted when they worked together. *Id.* at 199-200. In July 2000, Gray had the opportunity to move from the second shift to the first shift, which ran from 7:00 a.m. to 3:00 p.m., when roof bolter Terry Roark was injured. *Id.* at 199.

In May 2000, MSHA special investigator Gary Harris interviewed Gray at his home concerning alleged smoking, ventilation, and roof support violations at the No. 5 mine. *Id.* at 200. Ray Young was also interviewed. *Id.* As a result of the investigation, MSHA referred the matter to the office of the United States Attorney for the Eastern District of Kentucky, where it was assigned to Assistant U. S. Attorney ("AUSA") Davis Sledd. *Id.* On July 22, Gray and Young received subpoenas to testify, on July 27, before a federal grand jury in London, Kentucky. *Id.* They were the only miners from North Star who were subpoenaed in July; however, several other miners were later subpoenaed and testified on August 31. *Id.*

At the end of the shift following their receipt of the subpoenas, Gray and Young went to Superintendent Mike Caudill's office at the No. 5 mine. *Id.* Also present were Assistant Superintendent Eddie Spurlock and another miner. *Id.* Gray and Young requested permission for leave to testify on July 27. *Id.* In response to the miners' inquiries about the subpoenas, Caudill telephoned AUSA Sledd, who was identified at the bottom of the subpoena. *Id.* Caudill either identified himself as Gray or stated that he was inquiring about the nature of Gray's subpoena. *Id.* Sledd responded that the grand jury was investigating unsafe mining practices at North Star's No. 5 mine. *Id.*

On July 27, Gray and Young reported to the courthouse in London, Kentucky. *Id.* There they met with MSHA investigator Harris and AUSA Sledd. *Id.* Young testified first before the grand jury while Gray remained outside the courtroom. *Id.* At the conclusion of Young's testimony, Sledd concluded that Gray's testimony would be essentially the same as Young's and decided not to call him as a witness. *Id.*

When Gray returned to work after the grand jury proceeding, other miners asked about the investigation, but he declined to say anything about what occurred. *Id.* Sometime later, Assistant Superintendent Spurlock told Gray that Brummett wanted to talk to him at the No. 6 mine at the end of his shift.² *Id.* However, Gray went home with Young without seeing Brummett. *Id.*

When Gray arrived at his home, he had a telephone message to call Brummett at the No. 6 mine. *Id.* Gray then called Young to come to his house. *Id.* at 200-201. When Young arrived, Gray set up a tape recorder to record his conversation with Brummett when he returned the call.³ *Id.* at 201. During the conversation, Brummett repeatedly asked Gray about the grand jury proceeding in London and whether Gray or Young had testified against him. *Id.* Gray told Brummett that he had not said anything about him. *Id.* At one point during the conversation, Gray told Brummett that he "[didn't] want no hard feelings over it." *Id.* Brummett responded, "No, they ain't no hard feelings, unless you put the screws to me, then I'll kill you." *Id.* The remark was followed by laughter. *Id.* at 212. The conversation concluded with Brummett asking Gray to come by the No. 6 mine with Young the next day and assuring Gray that he should not worry about losing his job. *Id.* at 201, 213-14.

The next day, after they completed their shift, Gray and Young went to the No. 6 mine to see Brummett. *Id.* at 201. Two MSHA investigators were in the mine office investigating a recent roof fall at the mine, and Gray and Young spoke with Brummett outside the office in the mine yard. *Id.* at 201, 215. Brummett spoke to Young and Gray separately. *Id.* at 215. Brummett sought assurances from Gray that Young had not testified against him. *Id.* at 201. Brummett further stated that "if anyone had laid the screws to him that he would whip their ass." *Id.* Gray did not respond to, or question, Brummett about the remark. *Id.* at 215. At the conclusion of the meeting, Gray and Young left, and Gray did not see Brummett again until the hearing in this proceeding. *Id.* at 201. Several days after the meeting, either Caudill or Spurlock told Gray that he was being transferred back to the second shift because Roark, the injured miner whom Gray had replaced, was returning to the roof bolter position on the first shift. *Id.* On August 16, after returning to the second shift for one day, Gray left his job at North Star, without notifying anyone, and went to work for another mining company. *Id.*

Superintendent Caudill and Brummett subsequently were criminally indicted by the U.S. Attorney's office. *Id.* Each of the men entered into plea agreements. On July 13, 2001, Caudill pled guilty to knowingly and willingly violating a health and safety standard by failing to follow the ventilation plan at the No. 5 mine. *Id.*; Gov't Ex. 6. He received probation and was nominally fined. 25 FMSHRC at 201. On October 25, 2001, Brummett pled guilty to violating a

² As the judge noted, there were inconsistencies in the witnesses' testimony regarding the precise date of this event. *Id.* at 200 n.4.

³ Both the tape of the conversation, Gov't Ex. 9A, and a transcript of the taped telephone conversation, Gov't Ex. 4, were introduced as exhibits at trial. 25 FMSHRC at 208-214.

health and safety standard by knowingly and willingly failing to follow the ventilation plan at the No. 5 mine. 25 FMSHRC at 201; Gov't Ex. 5. He received one-year probation, was fined \$250, and was prohibited from directly supervising miners while on probation. 25 FMSHRC at 201-202; Gov't Ex. 5. Both plea agreements required Brummett and Caudill to fully cooperate with the government and to testify truthfully in any related proceedings. 25 FMSHRC at 202; Gov't Exs. 5, 6.

On August 31, 2000, Gray filed a discrimination complaint with MSHA stating that he "was forced to quit because of constant harassment and required to go to second shift because of [his] Grand Jury involvement in an MSHA investigation." Gov't Ex. 2. On November 20, 2000, the Secretary filed a complaint with the Commission, pursuant to section 105(c)(2) of the Mine Act,⁴ alleging that North Star constructively discharged Gray because he had been subpoenaed to testify before a grand jury and that Brummett threatened Gray on two occasions. Compl., ¶ 9. Thereafter, a hearing was held before Commission Administrative Law Judge Bulluck.

In its brief to the judge, North Star argued that in the telephone conversation Brummett had used a figure of speech when he threatened to kill Gray and that in the conversation at the No. 6 mine Gray could not have felt threatened or he would have reported it to the MSHA inspectors who were present. N.S. Post-Trial Br. at 5-6. The Secretary argued that both conversations included impermissible threats for which Brummett and North Star were responsible. S. Post-Hear'g Br. at 12-14, 20, 22.

In her opinion, the judge examined Gray's allegation of harassment, including his charge that Brummett had threatened him. 25 FMSHRC at 207-16. In reviewing Brummett's telephone call to Gray, the judge noted that it was important to view the alleged threat in the context of the broader conversation. *Id.* at 208. The judge stated, "The question presented . . . is whether Brummett meant the literal meaning of the words, 'I'll kill you,' or whether he was speaking figuratively, as in, 'I'll *really* be upset with you.'" *Id.* at 214 (emphasis in original). The judge further noted that Brummett testified that he never meant to threaten Gray, although Gray "*believed* Brummett had threatened him." *Id.* at 215 (emphasis in original). The judge examined Gray's concerns, which he told Brummett about, in being subpoenaed to testify before the grand

⁴ Section 105(c)(2), 30 U.S.C. § 815(c)(2), provides in pertinent part:

Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person . . . may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. . . . Upon receipt of such complaint, the Secretary . . . shall cause such investigation to be made as he deems appropriate. . . . If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . . and propose an order granting appropriate relief.

jury. *Id.* She further noted that Brummett, in response to Gray's concerns, reassured him that he was not in danger of losing his job. *Id.* The judge concluded that, because of Brummett's protective behavior toward Gray and because of interspersed laughter during the telephone call, "Brummett's statement amounted to no more than an exaggerated expression, commonly used between friends who expect loyalty from one another." *Id.*

With regard to Brummett's statement to Gray on the following day at the No. 6 mine, the judge generally discredited Brummett's testimony. *Id.* She was persuaded that the comment ("if [he found] anybody laid the screws to [him] . . . [he'd] whip their ass") was directed at Young, rather than Gray, and that "it was no more than an exaggeration like the telephone 'threat,' rather than an intent to harm anyone." *Id.* at 215-16. The judge added that, as with the telephone conversation, Gray believed that he had been threatened. *Id.* at 216.

Based on these credited facts, the judge, noting that the issue of Brummett's alleged threats was fully litigated, concluded that "no threat occurred." *Id.* at 217. The judge further concluded that Gray was not constructively discharged. *Id.* She, therefore, dismissed the section 105(c) complaint against North Star, Mike Caudill, and Jim Brummett. *Id.*

The Secretary filed a petition for discretionary review limited to the dismissal of the complaint against North Star and Brummett because the judge concluded that Brummett did not harass or threaten Gray. PDR at 1-2. The Commission granted the Secretary's petition. Subsequently, the Commission issued an order directing the parties to address "whether the issues contained in the Secretary of Labor's Petition for Review were sufficiently raised before the judge to allow review by the Commission." Unpublished Order dated July 1, 2003.

II.

Disposition

The Secretary asserts that the judge had an opportunity to pass on the issue raised before the Commission, i.e., whether Brummett's threats to Gray violated section 105(c)(1) of the Act.⁵ S. Br. at 27-29. In support, the Secretary asserts that she presented two separate theories regarding a violation of section 105(c)(1) to the judge: the first involving Brummett's threats to Gray and the second involving the threats that led to Gray's constructive discharge. *Id.* at 29.

⁵ Section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), provides in pertinent part:

No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such a proceeding

The Secretary further argues that the judge's decision specifically addressed Brummett's threats when she disapproved the settlement agreement and stated that "no threat occurred." *Id.* at 31-32. With regard to the merits, the Secretary argues that the Commission has long recognized that coercive interrogation and harassment constitute prohibited interference under section 105(c)(1) of the Act. *Id.* at 12. The Secretary further contends that the judge erred when she examined Brummett's intent in making the statements at issue, and, moreover, even if she properly examined his intent, the statements were inherently coercive. *Id.* at 13-16. The Secretary continues that Brummett's statements should be examined under a "totality of the circumstances," an approach largely developed under the National Labor Relations Act. *Id.* at 16-19. The Secretary argues that the judge erred when she failed to apply that test, and that under the test the record evidence compels the conclusion that Brummett's statements would tend to have a coercive effect. *Id.* at 21-27. The Secretary contends that the Commission should hold that North Star and Brummett violated section 105(c)(1) of the Mine Act, reverse the judge's disapproval of the settlement agreement, approve that agreement, and remand the case to the judge to assess an appropriate penalty against North Star. *Id.* at 35-36.

North Star does not address whether Brummett's threats to Gray were properly before the Commission on review. Nevertheless, in its brief to the Commission, North Star repeats a notice argument, which was made to the judge, that the discrimination complaint did not give fair notice that Gray was claiming a threat of physical violence as a result of Brummett's phone call. N.S. Br. at 5-7. With regard to whether Brummett's threat to Gray violated the Mine Act, North Star asserts that Gray did not perceive that he had been threatened, that the use of the word "kill" was a figure of speech, that Brummett's subsequent threat of physical retaliation was made in the proximity of mine inspectors, and that, if Gray had felt threatened, he would have reported it then. *Id.* at 13-14. North Star further states that the judge's comment in her decision regarding the "comradery" between Brummett and Gray exhibited at the hearing was a consideration that had to be weighed in evaluating Brummett's threat. *Id.* at 14.

A. Whether the Issue Before the Commission Was Adequately Raised Below

Section 113(d)(2)(A)(iii) of the Act provides, "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge has not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii). The Commission has eschewed an application of this section that would produce a "procedural straitjacket." *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1320 (Aug. 1992). "However, a matter must have been presented below in such a manner as to obtain a ruling in order to be considered on review." *Id.*

The complaint filed by the Secretary against North Star alleged that Gray had been constructively discharged as a result of having been subpoenaed to testify before a grand jury. Compl., ¶ 9. The complaint alleged that prior to and after the grand jury proceeding Gray had been harassed and intimidated by Mike Caudill and Jim Brummett. *Id.* Finally, the complaint also alleged: "Additionally, Jim Brummett threatened to kill Gray on two separate occasions if

Gray had testified against Brummett during the grand jury proceedings.” *Id.* In his separate answer to the complaint, Brummett denied the allegations of discrimination in the complaint and also responded that “at no time herein did he threaten, intimidate, or harass . . . Mark Gray” Answer, ¶ 2. Caudill and North Star jointly answered the complaint and generally denied the allegations of discrimination and harassment and further stated that any “wrongful conduct” that may have occurred at the hands of other individuals was done without their knowledge or consent. Answer, ¶ 3, 4.

Gray and Brummett both provided testimony at trial concerning the threats, and the tape and transcript of Brummett’s telephone conversation with Gray were introduced into evidence. Gov’t Exs. 4, 9. Both the Secretary and North Star submitted post-trial briefs that addressed the threats. S. Post-Hear’g Br. at 12-15, 22, 26, 32; N.S. Post-Trial Br. at 4-8; N.S. Reply Br. at 4-6. Finally, and perhaps most significantly, the judge separately addressed the threat allegations in her decision. Thus, the judge thoroughly analyzed Brummett’s remarks and their impact on Gray. 25 FMSHRC at 207-216. In addressing the Secretary’s settlement agreement with Brummett, the judge stated: “The issue of Brummett’s alleged threats was fully litigated in the Secretary’s claim against North Star, and I have found that no threat occurred.” *Id.* at 217.

In sum, the record indicates that the issue of whether Brummett’s statements were impermissible threats or harassment in violation of section 105(c)(1) was litigated by the parties, decided by the judge, and is properly before the Commission on review.

B. Whether the “Threats” Violated Section 105(c)(1) of the Mine Act

Section 105(c)(1) of the Act states that “[n]o person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner.” The report of the Senate Committee on Human Resources, which largely drafted the bill that became the 1977 Mine Act (*Sec’y of Labor on behalf of Bennett v. Emery Mining Corp.*, 8 FMSHRC 1391, 1395 (Aug. 1983)), states that “[i]t is the Committee’s intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion . . . , but also against the more subtle forms of interference, such as promises of benefits or threats of reprisal.” S. Rep. 95-191 at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Resources, *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978) (hereafter “*Leg. Hist.*”).

In addition to the broad protections offered against adverse actions, the scope of miner rights protected by the Act is equally broad. Section 105(c)(1) extends the protection of the Mine Act to any miner who “has instituted or caused to be instituted any proceeding under or related to [the] Act or has testified or is about to testify in any such proceeding.” 30 U.S.C. § 815(c)(1) (emphasis added). The report of the Senate committee provides:

The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends to include not only the filing of complaints seeking inspection under Section [103(g)] or the participation in mine inspections under Section [103(f)], but also the refusal to work in conditions which are believed to be unsafe or unhealthful . . . , or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.

S. Rep. No. 95-181 at 35, *reprinted in Leg. Hist.* at 623. In analyzing this legislative history, the Commission has commented, "[T]he legislative history of the Act makes clear the intent of Congress that protected rights are to be construed expansively." *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 205 (Feb. 1994). Finally, the Commission has noted that "the . . . Mine Act was drafted to encourage miners to assist in and participate in its enforcement." *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2789 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3rd Cir. 1981).

In the seminal case of *Moses v. Whitely Development Corp.*, 4 FMSHRC 1475 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985), the Commission held that an operator's coercive interrogation and harassment violated section 105(c)(1) when such conduct interfered with the miner's exercise of protected rights. *Id.* at 1478-79. The Commission reasoned:

A natural result of such practices may be to instill in the minds of employees fear of reprisal or discrimination. Such actions may not only chill the exercise of protected rights by the directly affected miners, but may also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights. This result is at odds with the goal of encouraging miner participation in enforcement of the Mine Act. We therefore conclude that coercive interrogation and harassment over the exercise of protected rights is prohibited by section 105(c)(1) of the Mine Act.

Id. (footnote omitted).

Whether an operator's question or comments concerning a miner's exercise of a protected right constitute coercive interrogation or harassment proscribed by the Mine Act "must be determined by what is said and done, and by the circumstances surrounding the words and actions."⁶ *Id.* at 1479 n.8. A judge's findings with respect to the coercive nature of a mine

⁶ The Commission's approach to the analysis of operator statements stands in contrast to its analysis of discrimination against miners who have exercised their rights under the Mine Act. In analyzing allegations of employment discrimination, the Commission has generally examined: (1) whether the miner was engaged in protected activity under the Mine Act; and (2) whether the

operator's statements are reviewed under a substantial evidence standard,⁷ and, if these findings are supported by credibility resolutions, they will not be disturbed on review. *Id.* at 1479.

The Commission's test for evaluating operator statements that was formulated in *Moses* has its genesis in section 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1), which makes it unlawful for an employer "to interfere with, restrain, or coerce" an employee's protected rights.⁸ The National Labor Relations Board ("NLRB") has stated the following test for determining whether a section 8(a)(1) violation has been committed:

interference, restraint, and coercion under Section 8(a)(1) of the [NLRA] does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the [NLRA].

American Freightways Co., 124 NLRB 146, 147 (1959), quoted in *THE DEVELOPING LABOR LAW*, at 82 (Patrick Hardin & John F. Higgins eds., 4th ed. 2001). See *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964) ("Over and again the Board had ruled that section 8(a)(1) is violated . . . despite the employer's good faith . . ."). Further, under the NLRA, it is generally a violation for an employer to threaten an employee with reprisal for engaging in union and other concerted activity protected by the NLRA. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). "[I]n determining whether a statement is an impermissible threat . . . language used by the parties . . . must not be isolated nor analyzed in a vacuum, but must be considered in light of the circumstances existing when such language was spoken." *TRW, Inc. v. NLRB*, 654 F.2d 307, 313 (5th Cir. 1981); accord *Standard-Coosa Thatcher Carpet Yarn Div. v. NLRB*, 691 F.2d 1133, 1137 (4th Cir. 1982) (the Board, in making this decision, considers whether "the conduct in

adverse employment action was motivated in any part by the miner's protected activity. *Swift v. Consolidation Coal*, 16 FMSHRC at 204-205. This latter analysis is generally referred to as the *Pasula-Robinette* test. See *Pasula*, 2 FMSHRC at 2797-800; *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

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

⁸ The Commission has previously looked to the case law interpreting analogous provisions of the NLRA for guidance in construing Mine Act provisions. See *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1368-69 & n.11 (Dec. 2000).

question had a reasonable tendency in the totality of the circumstances to intimidate.”). Finally, as the Supreme Court noted, in approving a “bargaining order” to remedy an employer’s unfair labor practices that had made an NLRB-conducted election impossible, an evaluation of employer speech must “take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.” *Gissel Packing Co.*, 395 U.S. at 617.

Here, the judge analyzed Brummett’s statements primarily from the perspective of what he intended. “The question presented . . . is whether Brummett meant the literal meaning of the words, ‘I’ll kill you,’ or whether he was speaking figuratively, as in, ‘I’ll *really* be upset with you.’” 25 FMSHRC at 214 (emphasis in original). With regard to both the telephone conversation with Gray and the threat to kill, and the face-to-face conversation with Gray at the No. 6 mine and the threat of bodily or other harm, the judge concluded that the statements were exaggerated expressions, rather than threats. *Id.* at 215-16. She arrived at this conclusion based on Brummett’s intent. *Id.*

We conclude that the judge examined Brummett’s statements too narrowly by considering largely, if not exclusively, Brummett’s intent or motive in making the statements. In the judge’s words, the presence or absence of a violation of section 105(c) of the Mine Act turned on whether Brummett literally intended by his words to cause physical harm to Gray or any other miner who testified against him during the grand jury investigation. However, rather than considering only Brummett’s intent, the judge should have analyzed the totality of circumstances surrounding Brummett’s statements to determine whether they were coercive and violative of section 105(c) of the Mine Act. *See Moses*, 4 FMSHRC at 1479. *See also Brown & Root, Inc. v. NLRB*, 333 F.3d 628, 634-37 (5th Cir. 2003) (propriety of employer’s statement under section 8(a)(1) of the NLRA is based on an examination of the circumstances surrounding the statements). Brummett’s statements could be coercive, even if he did not mean to literally kill or cause physical harm to Gray or other miners who testified against him. Indeed, the Commission’s decision in *Moses* makes it clear that threats of reprisals or of employment discrimination can be coercive and in violation of section 105(c). Given Brummett’s supervisory position and his ability to impact the employment relationship of Gray (whom Brummett assisted in getting a job at North Star), Young, and other miners who might testify against him, the judge should have considered the effect of Brummett’s statements in this broader context and what other meanings could be reasonably inferred from them, rather than limiting her consideration to their literal meaning and what Brummett intended.⁹

⁹ The Commission has held that “the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence.” *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). The Commission has emphasized that inferences drawn by the judge are “permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred.” *Id.*; *accord Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2153 (Nov. 1989).

Among the judge's findings that the Commission found relevant in determining the coercive nature of the operator's statement in *Moses* were the "persistence with which the subject" of the miner's protected activity was raised and the "accusatory manner in which it was done." 4 FMSHRC at 1479. As the Commission stated in *Moses*, its consideration of those factors led it to conclude that a miner would have logically feared reprisal and would be reluctant to exercise his rights in the future. *Id.* In the circumstances of this case, both of these factors may be pertinent and should be considered by the judge in determining the legality of the statements under section 105(c)(1) of the Act.

In addition to those factors surrounding Brummett's statements, there are other considerations that should be weighed in determining whether the statements were coercive. Those circumstances include where the statements were made (an at-home telephone call and a meeting outside the mine office);¹⁰ the nature of Brummett's and Gray's relationship (the two were friends and Brummett helped him secure a job at North Star, and Brummett was a supervisor at North Star);¹¹ the fact that the statements were made along with inquiries about Gray's and Young's testimony in a confidential grand jury investigation into alleged criminal actions at the mine,¹² and the fact that, on each occasion when Brummett spoke to Gray, he apparently sought to isolate him and talk to him one-on-one.¹³

¹⁰ See, e.g., *House of Raeford Farms, Inc.*, 308 NLRB 568, 571, 141 LRRM 1057, 1060 (1992) (locus of supervisor's remarks considered in determining whether they were violative), *enf'd*, 7 F.3d 223 (4th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994).

¹¹ The judge has previously noted the "comradery" between Gray and Brummett. 25 FMSHRC at 207. However, in an NLRB case on appeal involving a violation of section 8(a)(1) of the NLRA, a reviewing court has indicated that "[t]he fact that these statements were made during a private conversation between . . . close personal friends outside of work, is not determinative of whether the statements were . . . coercive." *Tellespen Pipeline Servs. Co. v. NLRB*, 320 F.3d 554, 564 (5th Cir. 2003). Compare *TRW*, 654 F.2d at 313 (court could not sustain finding of violation that a statement was a threat of reprisal for engaging in union activity where the statement "was merely one . . . in a chain reflecting the continuing hostility between the two men").

¹² See also *NLRB v. Brookwood Furniture, Div. of U.S. Indus.*, 701 F.2d 452, 461 (5th Cir. 1983) (in enforcing an NLRB order, court considered interrogations as well as an employer's opposition to unionization in determining whether a conversation was coercive).

¹³ The judge considered it significant that Brummett's "whip ass" statement to Gray at the No. 6 mine was directed at Young, rather than Gray. 25 FMSHRC at 215-16. However, that fact is not determinative of whether, under the circumstances, the statement may have tended to coerce Gray in the exercise of his Mine Act rights. See *Moses*, 4 FMSHRC at 1478.

In light of the judge's application of the incorrect legal test to Brummett's statements, we remand this matter to her for further consideration of the facts and circumstances surrounding the statements to determine if they were coercive under section 105(c)(1) of the Mine Act. This is a determination that the judge should make in the first instance. See *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 22 FMSHRC 298, 307-308 (Mar. 2000) (issue of whether miner's cursing, including an alleged threat, was remanded to judge to view them "in their totality" to determine whether they were within the leeway accorded employees whose behavior is provoked); accord *Sec'y of Labor on behalf of McGill v. U.S. Steel Mining Co., LLC*, 23 FMSHRC 981, 992 (Sept. 2001) (issue of whether miner's conduct that was grounds for discharge was provoked by operator in response to miner's protected activity must be viewed in "their totality").

Finally, we note that, in the Secretary's complaint initiating this proceeding, both Superintendent Caudill and Brummett were each separately named as an "operator" under section 3(d) of the Act, 30 U.S.C. § 802(d). The complaint did not designate either Caudill or Brummett as "agents" of North Star under section 3(e), 30 U.S.C. § 802(e). In their answers to the complaint, Caudill and Brummett did not dispute being designated as operators. However, in her post-hearing brief to the judge, the Secretary generally alleged that "[t]he hostile actions and animus toward Gray of . . . assistant mine superintendent Brummett are attributable toward North Star." S. Post-Hearing Br. at 20. Similarly, both in her petition and brief to the Commission, the Secretary specifically requests the Commission to reverse the judge's decision, "hold that North Star and Brummett violated Section 105(c)(1), . . . and remand the case to the judge to assess an appropriate civil penalty against North Star." PDR at 21; S. Br. at 35-36.

Based on the record, it is not clear what is the Secretary's theory of liability against North Star. In light of the Secretary's complaint, it appears that North Star may have no further liability, even if Brummett's statements were found to be coercive. The Mine Act does provide "that an operator, though faultless itself, may be held liable for the violative acts of its employees, agents, and contractors." *Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354, 1359-60 (Sept. 1991). However, assessing the employer's liability in this context is complicated by the fact that Brummett was facing individual criminal and civil penalties. He therefore had an interest in Gray's appearance before the grand jury independent of, and perhaps even in conflict with, North Star's interests.

While the pleadings are not dispositive on this issue, the Secretary charged Brummett as an "operator."¹⁴ Furthermore, the record does not seem to indicate the sustained prosecution of

¹⁴ The Secretary's complaint separately named Brummett as an operator, rather than an agent of North Star. We need not address whether Brummett was appropriately charged as an operator, because his potential liability arises from the specific language of section 105(c)(1) of the Mine Act, which provides that "No person shall . . . interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has testified or is about to testify in such a proceeding . . ." 30 U.S.C. § 815(c)(1) (emphasis added). The Secretary's theories of liability

an agency theory imputing liability to North Star. Indeed, the Secretary dropped Caudill from the case on appeal, conceding that he had no further liability in the proceeding in the absence of the constructive discharge allegation. It would appear that North Star's liability ceases for the same reason, i.e., the abandonment of the constructive discharge claim on appeal. Thus, given the constraints of the Secretary's complaint and the limited basis on which she has appealed, the judge should determine whether North Star continues to be a party in this proceeding in the event Brummett's statements are found to be violative.

III.

Conclusion

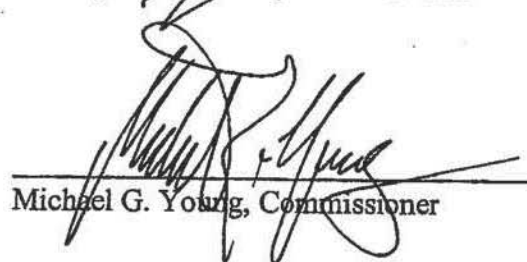
Based on the foregoing, we vacate the judge's decision and remand this proceeding for further consideration consistent with our analysis.



Michael F. Duffy, Chairman



Stanley C. Supoleski, Commissioner



Michael G. Young, Commissioner

seem to preclude treating Brummett as an agent of North Star because he was charged as an "operator."

Commission Jordan, concurring:

I agree with the majority that the question of whether Jim Brummett threatened Mark Gray in violation of section 105(c)(1) of the Mine Act should be remanded to the judge. However, I disagree with the majority's analysis regarding the potential liability of North Star, and thus write separately to address that issue.

It appears from my colleagues' opinion that they have already decided that North Star cannot be liable in this case, even if the judge finds that Brummett threatened Gray. Slip op. at 12-13. This seems to be based solely on the manner in which the Secretary's complaint was drafted – because she named Brummett as an “operator” under section 3(d) of the Mine Act and failed to explicitly designate Brummett as an agent of North Star under section 3(e). *Id.* The majority, citing no authority and providing no explanation, states that the theories of liability included in the complaint appear to preclude treating Brummett as North Star's agent because he was instead charged as an “operator.” *Id.* at 12 n.14.¹

My colleagues recognize, however, that in *Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354, 1359-60 (Sept. 1991), the Commission ruled that the Mine Act's scheme of liability provides “that an operator, although faultless itself, may be held liable for the violative acts of its employees, agents, and contractors.” Slip op. at 12. In the complaint, Brummett was described as a foreman (Compl., ¶ 5), a designation that North Star admitted. Answer of North Star Mining, Inc. and Mike Caudill, ¶ 5. I thus frankly fail to see how Brummett cannot be either an “employee, agent or contractor” of North Star.² I note further the majority's acknowledgment (slip op. at 12) that in her post-hearing brief to the judge, the Secretary stated that “[t]he hostile

¹ The judge did not need to reach the issue of whether Brummett was in fact an operator, and the majority chooses not to address it, stating that Brummett's “potential liability arises from the specific language of section 105(c)(1).” *Id.* This refers to language in that section which provides that “[n]o person shall . . . interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has testified or is about to testify in any such proceeding. . . .” 30 U.S.C. § 815(c)(1). It appears that the majority believes that Brummett's liability, if any, stems from Brummett's status as a “person” under section 105(c)(1), and not from his status as an operator. If this is the case, I fail to see why simply naming Brummett as an operator in the complaint – when his ultimate liability does not appear to hinge on that designation – automatically prevents North Star's liability on an agency theory. In any event, with no explicit findings in the record as to whether Brummett was acting as an agent for North Star or on his own individual behalf, it appears premature to discount an agency theory of liability at this point.

² My colleagues speculate that Brummett's potential individual liability under section 110(c) might have placed him in such conflict with North Star's interests so as to preclude an agency relationship. Slip op. at 12. Instead of suggesting that North Star be absolved of liability, the Commission should permit the judge, in the first instance, to make findings on this question. See *Dacotah Cement*, 26 FMSHRC 461, 468 (June 2004).


actions and animus toward Gray of . . . assistant mine superintendent Brummett are attributable toward North Star.” S. Post-Hearing Br. at 20. This appears to allege an agency relationship between the two. In any event, I am reluctant to create a new standard hinging an operator’s liability on the specificity of the section 105(c) complaint’s allegations. This would be particularly difficult for the many pro se complainants who seek relief under section 105(c)(3) of the Mine Act. 30 U.S.C. § 815(c)(3).

The Commission’s decision in *Bryant v. Dingess Mine Service*, 10 FMSHRC 1173 (Sept. 1988), demonstrates the importance of examining the actual relationship between parties working at a mine site, which I believe is the proper course in this case as well. In *Bryant*, the judge held a contractor, Dingess Mining Service (“Dingess”), liable for discriminatory actions in violation of section 105(c), but found no liability against Mullins Coal Co. (“Mullins”), the lessee of the coal at the mine, nor against Winchester Coals, Inc. (“Winchester”), the lessor of the mining equipment and machinery. *Id.* at 1173-83. The Commission determined that Dingess’ status as an independent contractor existed in name only and that in fact his relationship was akin to being an on-site, supervisory agent for Mullins and Winchester. *Id.* at 1180. Reversing the judge, the Commission found Mullins and Winchester liable under section 105(c) for Dingess’ discriminatory acts. *Id.* In so finding, the Commission acknowledged that the judge did not expressly rule that Dingess was acting as an agent, but stressed that the factual findings that he did make led inevitably to this conclusion. *Id.* at 1179. We emphasized that Dingess worked as a manager and supervisor on behalf of the operators, and that our disposition “turn[ed] upon an examination of the true nature of the relationship existing between the parties.” *Id.* at 1178. We stated that:

Mullins and Winchester were in actual control of the mine at which Bryant worked. As a result, this case is not unlike the more typical situation where a mine foreman or supervisor is endowed with a certain degree of responsibility in the operation of a mine, but whose sphere of control is always subject to the operator’s ultimate right to direct the supervisor’s work performance in order to ensure compliance with the requirements of the Mine Act. Within this latter framework, it has been consistently held that mine operators are liable for the discriminatory acts of their agents under section 105(c)(1) of the Act. *See e.g., . . . Moses v. Whitley Development Corp.*, 4 FMSHRC 1475 (1982) *aff’d sub nom. Whitley Development Corp. v. FMSHRC*, 770 F.2d 168 (6th Cir. 1985) (operator held liable for foreman’s illegal discharge of miner)

Id. at 1179-80 (footnote omitted).

Accordingly, I would remand this case to the judge to determine the nature of the relationship between Brummett and North Star and to ascertain North Star's liability, if any, if Brummett's statements are found to be coercive.



Mary Lu Jordan, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 24, 2005

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

v.

MARFORK COAL COMPANY, INC.

Docket No. WEVA 2004-208
A.C. No. 46-08315-33802

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

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On October 21, 2004, Chief Administrative Law Judge Robert Lesnick issued to Marfork Coal Co., Inc. ("Marfork") an Order to Show Cause for failure to answer the Secretary of Labor's petition for assessment of penalty. On December 20, 2004, Chief Judge Lesnick issued an Order of Default dismissing this civil penalty proceeding for failure to respond to the show cause order.

On December 29, 2004, the Commission received from Marfork a petition captioned "Petition for Reconsideration" stating that it did answer the Secretary's petition for assessment of penalty and respond to the judge's show cause order. Pet. at 1. Marfork states that it filed an answer on October 28, 2004, a copy of which was submitted to the Commission on December 28, 2004. *Id.*; Answer. Marfork asks the Commission to reconsider the judge's default order. Pet. at 1. The Secretary has not taken a position on Marfork's request to reopen.

The judge's jurisdiction in this matter terminated when his decision was issued on December 20, 2004. 29 C.F.R. § 2700.69(b). This precludes reconsideration of the default order by the judge under Rule 78 of our procedural rules. Nevertheless, under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance,

it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). We construe Marfork's petition to be a timely filed petition for discretionary review, which we grant.

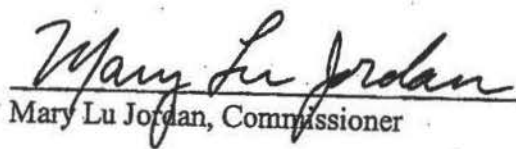
In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Highlands Mining & Processing Co.*, 24 FMSHRC 685, 686 (July 2002). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Marfork allegedly submitted an answer in October to the Secretary's petition for assessment of penalty. However, the Commission did not receive Marfork's answer at that time. Accordingly, the judge entered a default judgment against Marfork. Based on the present record, we are unable to determine whether Marfork timely submitted its answer, and if so, why it was not received.

Having reviewed Marfork's request, in the interest of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Marfork's failure to timely respond to the judge's show cause order, and for further proceedings as appropriate.



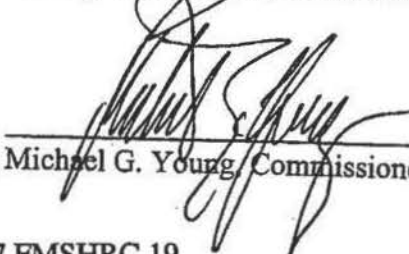
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

January 11, 2005

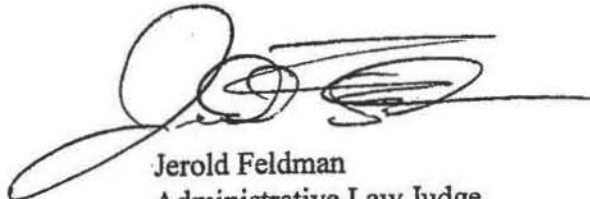
SECRETARY OF LABOR, MSHA,	:	TEMPORARY REINSTATEMENT
on behalf of AARON R. RANDOLPH,	:	PROCEEDING
Complainant	:	
	:	Docket No. CENT 2005-68-DM
	:	SC-MD 2005-04
v.	:	
	:	
CHRISTY MINERALS COMPANY,	:	Mine ID 23-01545
Respondent	:	Christy Minerals Plant

ORDER OF TEMPORARY REINSTATEMENT

This case is before me based on an Application For Temporary Reinstatement filed on December 28, 2004, by the Secretary of Labor on behalf of Aaron R. Randolph pursuant to section 105(c)(2) of the Federal Mine and Safety Health Act of 1977, 30 U.S.C. § 815(c)(2). Christy Minerals Company (Christy) requested a hearing that was scheduled for January 13, 2005. During the course of a January 10, 2005, telephone conference with the parties, Christy's counsel withdrew its request for a hearing and represented that Christy was not contesting Randolph's temporary reinstatement.

Accordingly, **IT IS ORDERED** that Christy Minerals Company **SHALL IMMEDIATELY REINSTATE** Aaron R. Randolph to his former position at his former rate of pay. Randolph's Christy Minerals Company reinstatement shall be effective no later than the start of business on the day following the date of this Order. Randolph's reinstatement shall include entitlement to all benefits associated with his employment.

Randolph's reinstatement shall not prejudice Christy's right to contest Randolph's discrimination complaint that currently is being investigated by the Secretary. The Secretary should endeavor to complete, as soon as practicable, her investigation so that this matter may proceed to an evidentiary hearing on the merits. If the Secretary, upon investigation, finds that the provisions of section 105(c) have not been violated, she shall file a motion to vacate this Order of Temporary Reinstatement.



Jerold Feldman
Administrative Law Judge
(202) 434-9967

Distribution: (VIA FACSIMILE AND 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, DC 20001
January 12, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. SE 2004-106
Petitioner	:	A.C. No. 01-02901-17315
	:	
v.	:	Docket No. SE 2004-91
	:	A.C. No. 01-02901-17466 A
DRUMMOND COMPANY, INC., And	:	
MICHAEL EARL, Employed by	:	
DRUMMOND COMPANY, INC.,	:	Shoal Creek Mine
Respondents	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Warren B. Lightfoot, Jr., Esq., and John B. Holmes, III, Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama, for Respondents.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Drummond Company, Inc., and Michael Earl, respectively, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege a violation of the Secretary's mandatory health and safety standards and seek penalties of \$6,350.00 against Drummond and \$475.00 against Earl. A hearing was held in Birmingham, Alabama. For the reasons set forth below, I affirm the citation and assess the penalties proposed.

Background

Drummond is the owner and operator of the Shoal Creek Mine in Jasper, Alabama. The mine is located beneath a river and includes two coal seams. The Mary Helen seam is the top seam and ranges from 18 to 24 inches thick. The Blue Creek seam varies from 42 inches to 11 or 12 feet in thickness. In between the two seams is a layer of rock, called the "middleman," which is 12 to 40 inches thick. Developmental entries are mined by continuous mining machines. Once these have been completed, mining is by longwall miner. Both the two seams and the middleman are mined at the same time, so that the mine height ranges between 8 and 19 feet. Entries are up to 22 feet wide.

The mine floor is not always level, but consists of hills and hollows as it follows the coal seams. Since it is located under a river, the mine is often wet and muddy. Because the mine is so spacious, large equipment, such as Wagner 3.5 ton front-end loaders and Hummers, is used in the mine.

Michael Pruitt, an MSHA coal mine inspector based in Pikeville, Kentucky, was detailed to Alabama for 20 days to assist in inspecting the Shoal Creek Mine during March 2003. He conducted his last day of inspections on March 28, accompanied by Edward Sartain, a Drummond Safety Inspector, and Willie Johnson, a union safety committeeman and miner representative. The three men were riding in a Hummer. After entering the B-10 section roadway, they were at about crosscut 30 when they observed a miner riding in the bucket of a 3.5 ton front-end loader. The bucket was in the front of the loader and the loader was traveling forward down the roadway.

Sartain, who was driving the Hummer, started flashing his lights and shaking his cap light in an attempt to get the attention of the loader operator and the miner in the bucket. Sartain remarked that the miner in the bucket was a foreman who knew better than to ride in the bucket when the loader was traveling in a forward direction, that they had gone over that in training and in safety meetings. Johnson asked if there was something wrong with him, saying he must be crazy riding forward like that. Inspector Pruitt asked Sartain if there was not a safeguard that prohibited riding in the bucket when the loader was going forward and Sartain said that there was.

They followed the loader for at least one and one-half crosscuts, about 225 feet, before the loader stopped in crosscut 36. Inspector Pruitt got out of the Hummer and went to the bucket of the loader. He determined that the person in the bucket was Michael Earl, a Drummond foreman. He asked Earl if he knew it was against the law to ride in the bucket in a forward direction and Earl replied that he did but that he just was not thinking. Earl apologized and said it would not happen again.

As a result of this, Inspector Pruitt issued Citation No. 7395288.¹ The citation alleges a violation of section 75.1403 of the Secretary's regulations and states:

No one shall ride in the bucket of any equipment traveling in forward motion. The foreman, Mike Earl, was observed riding in the bucket of a Wagner 3 and ½ ton loader. The bucket was wet and muddy with slick conditions. There was no tie off or safety belt to keep the foreman from falling out and being run over. The loader traveled for 1 and ½ crosscuts before Ed Sartain, Safety Inspector, could get them to stop. Foreman Earl engaged in

¹ The citation was originally issued as an order and subsequently modified to a citation. (Govt. Ex. 2 at 3.)

aggravated conduct constituting more than ordinary negligence. The foreman knew that this is a violation. The foreman stated that he was not thinking. Ed Sartain stated that this is gone over in annual retraining and several times throughout the year in safety meetings. This violation is an unwarrantable failure to comply with a mandatory standard. This safeguard was issued 02-23-98, Citation Number 4473466.

(Govt. Ex. 2.)² Section 75.1403 repeats section 314(b) of the Act, 30 U.S.C. § 874(b), and provides that: "Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided."³

After the hearing, the Secretary filed a motion to amend the citation to conform to the evidence adduced at hearing by adding the following paragraph:

A subsequent safeguard, Safeguard Number 7664815, dated February 12, 1999, was issued which allows a person to travel in the bucket of the front end loader when it is traveling in a forward direction but only when positioning to do work and only at a creep speed. When observed, Mr. Earl was being transported and was not positioning to do work, and the front end loader was not traveling at a creep speed.

(Mot. at 1.) The Respondent opposed the motion "to the extent the Secretary seeks to cover up or extinguish the fact that Inspector Pruitt had no knowledge whatsoever of the exception set forth in Safeguard No. 7664815, dated February 12, 1999, at the time he issued the citation in question." (Opp. at 2.) For the following reasons, the motion is granted.

² The citation originally alleged a violation of section 75.1400, 30 C.F.R. § 75.1400, but was amended later the day it was issued to section 75.1403. Punctuation and grammatical changes have been made in the body of the citation.

³ The procedures by which an authorized representative of the Secretary may issue a citation pursuant to section 75.1403 are described in 30 C.F.R. § 75.1403-1(b):

The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

The Commission has long looked to Rule 15 of the Federal Rules of Civil Procedures in resolving issues relating to the amendment of citations. *See, e.g., Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289-90 (Aug. 1992); *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990); *Magma Copper Co.*, 8 FMSHRC 656, 659 n.6 (May 1986). It has noted that: "The weight of authority under Rule 15(a) is that amendments are to be liberally granted unless the moving party has acted in bad faith, has acted for the purpose of delay, or where trial of the issue will be unduly delayed." *Wyoming Fuel*, 14 FMSHRC at 1290 (citations omitted).

Stating that Rule 15(b) "provides for conformance of pleadings to the evidence adduced at trial, and permits the adjudication of issues actually litigated by the parties irrespective of pleading deficiencies," the Commission amended a citation after the judge had vacated it and remanded the case to the judge to consider the amended citation. *Faith Coal Co.*, 19 FMSHRC 1357, 1362 (Aug. 1997). In this case, all of the evidence adduced at trial went to whether or not Drummond's actions met the exception in Safeguard No. 7664815. There is no evidence that the Secretary acted in bad faith and, of course, there was no delay in the hearing. Accordingly, the motion is **GRANTED** and the citation is amended by adding the proposed second paragraph to the citation.

Findings of Fact and Conclusions of Law

Drummond argues that Earl did not violate the language or the intent of the safeguard. Its position is that: "The intent of the safeguard was to prohibit personnel from being transported throughout the mine at a fast or unsafe rate of speed to prohibit someone from being bounced out and injured, but allow personnel to do necessary work out of the bucket." (Resp. Br. at 13.) Therefore, they argue that although Earl traveled at least 225 feet without performing any work, it was permissible because he intended to work from the bucket when he arrived at the area where water line tubing was to be taken down. Not only is this not a correct interpretation of the safeguard, but the evidence indicates that the requirements of the safeguard, even as interpreted by Drummond, were not being followed.

Meaning of the safeguard.

Safeguard No. 4473466 was the first safeguard issued at Shoal Creek which regulated riding in the bucket of a front-end loader. It was issued on February 23, 1998, because: "An employee was observed riding in the bucket of a Wagner 3.5 loader while being trammed in forward motion in the outby area of South 11 section. There is the danger of a person falling out of the bucket and being run over or the equipment running into something and injuring the rider." (Govt. Ex. 5.) The safeguard went on to state that: "This safeguard is issued to require that no one is to be allowed to ride in the bucket of any equipment traveling in forward motion." (*Id.*)

A second safeguard, No. 4477394, was issued by Inspector William E. Herren on October 7, 1998. It noted that: "An employee was riding on crib block material on the fork lift of a 3.5 diesel front end loader being pushed toward the face in the "C" longwall working section.

Controls were not secured or blocked to prevent accidental activation resulting in injuries to personnel riding the machine." (Govt. Ex. 6.) Consequently, it stated: "Notice to Provide Safeguard: Personnel shall not be allowed to ride mobile diesel forklift equipment."⁴ (*Id.*) Inspector Herren was not aware of Safeguard No. 4473466 when he issued this safeguard.

After issuing the safeguard, Inspector Herren began discussions with other MSHA inspectors and supervisors, as well as Drummond management personnel and union members, to determine how front-end loaders were being used in the mine and to justify the safeguard. On October 15, 1998, Herren sent a memorandum to the District Manager that detailed his findings. Among other findings, he noted that:

5. The 3.5 Wagner diesel front end loader with interchangeable attachments was used as a utility vehicle.
 6. Frequently, the machine was used to set cribs in the longwall working sections, retrieve high voltage power cables and install or remove water lines.
 7. During the above described work, persons may be lifted or ride the bucket or fork lift of the machinery.
 8. Throughout the mine persons perform work from the bucket or on an unsecured platform of the fork of the front end loaders.
 9. On advancing working sections, ventilation tubing, brattice cloth, water lines, communication wires and cables are installed, removed and maintained by persons frequently working from the fork or bucket of the 3.5 diesel front end loaders.
 10. Management stated that persons had been prohibited from riding the front of the machines, except when hanging ventilation curtain and tubing in by the last open crosscut. Personnel could ride and work from the front of the machine traveling forward in a creep or very slow speed toward the face.
- * * *
15. The mine floor was uneven as the coal seam was frequently undulating and pitching throughout the mine with wet, slick floor and accumulations of water in most areas.

⁴ Forklift attachments and buckets are interchangeable on the 3.5 front-end loader used by Drummond. (Tr. 164-65.)

(Govt. Ex. 11.) He went on to recommend:

I believe that the following points should be addressed in a Notice to Provide Safeguards to assure a safer work place for personnel at the mine:

1. When necessary to ride front end loaders to perform work from a raised position, the machine shall be operated at a creep or very slow speed in the reverse direction, except from the last open crosscut to the face or dead-end place when hanging ventilation devices, installing roof or rib control support or other necessary work.
2. The lift or tilt controls shall be locked or secured to prevent accidental or inadvertent movement when persons are being transported or lifted.
3. Persons shall not be allowed to ride front end loaders with fork lift attachments unless the above conditions have been met, and stable work platforms have been provided and secured to the machine.

(Id.)

This memorandum lead to further discussions among MSHA personnel concerning the proposed safeguard. A new safeguard, No. 7664815, was finally issued on February 12, 1999, and presented to Drummond by Inspector Herren. It required:

Notice to Provide Safeguards:

1. Underground personnel shall not be transported in or on a fork lift platform/bucket unless precautions are taken to assure the safety of persons being transported.

[A] The machine shall be operated with the fork lift/bucket in the rear position according to the direction of travel, except for positioning at a creep speed.

[B] A locking device [stiff link or other accepted device] shall be used to preclude the possibility of accidental activation of the hydraulic control levers which control the fork lift attachment-platform/bucket.

[C] Platforms or work decks supported by the fork lift attachment shall be secured to the machine to prevent accidental detachment and kept low to the floor as practical when persons are being transported.

(Govt. Ex. 7.)

Inspector Herren, who retired from MSHA at the end of 2001, testified that he met with Joe R. Estep, the mine's Safety Director, among others, on February 12, 1999, when he gave the company the safeguard. (Tr. 186-87.) He testified that: "[A]s I indicated here [in his notes, Govt. Ex. 10 at 2] and the best of my memory, there was no controversy whatsoever concerning the safeguard" (Tr. 188-89.) He related that he discussed the meaning of the exception and testified that:

I will call your attention to page 2 of Exhibit 10, the notes on the right. I said, "Discussed in detail persons could hang vent tubing in the last open crosscut working from the machine. However, must be under controlled conditions to protect persons being transported. In no way does the safeguard allow a person to ride from the last open crosscut to the face being pushed forward. Must walk to the face, mount the machine, and only ride while performing necessary work of hanging tubing." That was just one of the examples that we discussed at the time that the safeguard was issued. So that is pretty specific to me. That is pretty specific as to what positioning and what we allowed as far as performing work on the machine.

(Tr. 200-01.) This is consistent with his previous finding, set out in the October 15 memorandum, *supra*, that the company only permitted its employees to ride in front of the loader inby the last open crosscut and his recommendation that the bucket had to be in the rear of the loader except inby the last open crosscut.

Herren testified that his recommended language limiting working from the bucket at the front of the loader to inby the last open crosscut was not included in the safeguard to allow miners to work from the bucket at the front of the loader when performing such activities as hanging tubing and pipe throughout the mine. (Tr. 180-81.) He explained that this was not an exception to the procedure for working from the bucket in front of the loader. (Tr. 190-91.) He stated that:

[I]n the case of hanging vent tubing we wanted to allow them to work at one point and creep up at a slow speed, a slow controlled speed to either hang or extend whatever they had to do; or if it were working on pipe, work on one end of the pipe and creep up to

the other end moving in a forward direction and do whatever work there. If they had to move 50 feet or 100 feet, dismount and walk to the next work position and pick up there.

(Tr. 191.) When asked whether the facts of this case came within the exception to the safeguard, Herren replied: "There was no intention to allow personnel to be transported just for transportation purposes. [O]nly to perform the work and to travel 200 feet without performing any work was never intended as part of that safeguard." (Tr. 192.)

Contrary to Herren's explanation, Estep testified that he interpreted the language "except for positioning at a creep speed" to mean "[p]ositioning to me would be what you would be allowed to do by riding in a bucket to perform work." (Tr. 226.) He went on to say: "You could use it as a transportation vehicle if you were utilizing it to position yourself to perform work. You can call it transportation or riding the bucket. As long as you are utilizing it to perform work if you are moving in a forward direction." (Tr. 227.) In other words, as long as one were planning to perform work, as opposed to be transported from one place to another, the exception to having the bucket in the rear of the loader would apply.

With regard to the facts in this case, Estep testified that, after receiving the citation, he conducted his own investigation of the incident. He said that he questioned Ed Sartain and the following colloquy took place: "And I said, 'Was they performing work?' And Mr. Sartain said, 'Mike had the pipe wrenches in his hands and they were going to take down an inch-and-a-half water line during the shift.' I said, 'Long as he was preparing to do work, I don't have a problem with that.'" (Tr. 232-33.)

Not only does this interpretation expand the exception beyond its intent, as explained by Herren, both to the company at the time the safeguard was issued and during his testimony at the hearing, but such an interpretation makes the safeguard unenforceable. Clearly, the exception does not permit someone to ride all over the mine in a bucket in the front of a loader as long as they intend to do some work out of the bucket eventually. Nor should the inspector have to attempt to determine the intent of the miner riding in the bucket when deciding whether or not the safeguard has been violated. The exception was intended to permit riding in the bucket when positioning it within a few feet of the work to be done, or to travel the five or ten feet between hangers when taking down tubing. Herren explained to the company that no one could ride in the bucket in front from the last open crosscut to the face. That is a much shorter distance than the 225 feet that Earl rode in the bucket.

Safeguard violated under the company's interpretation.

Furthermore, even if Drummond's interpretation of the exception put forward at the hearing were correct, the miners involved did not comply with the requirement that the positioning be done at *creep speed*. Driving at creep speed means driving the loader in low, or first, gear. (Tr. 133, 300.) Inspector Pruitt testified that the loader was traveling "faster than a

good fast walk.” (Tr. 48.) Johnson testified that: “It was not in creep speed. It was probably in the next gear.” (Tr. 132.) Eddy Keeton, the loader operator, testified that he “could have been in second gear” and he “might have been going a little faster than I should have been” which was faster than a man can walk. (Tr. 357-58.) Thus, I conclude that the loader was being operated at greater than creep speed with Earl in the bucket in front of it.

Drummond witnesses not credible

In addition, it appears that the Respondent did not arrive at its “theory” of what the exception to the safeguard permits until sometime after the citation was issued. The reactions of the company’s employees at the time of the incident makes it evident that they believed that a violation had been committed. When talking with the inspector and each other after they were stopped, none of them claimed that they were operating within the “exception.” Further, there is no evidence that the Respondent requested a conference on this citation or otherwise presented MSHA with its defense until sometime after the matter was contested and placed on the hearing track.

When Inspector Pruitt, Sartain and Johnson first observed the man in the bucket, Sartain started trying to flag the loader down and said that the guy in the bucket is a foreman and that the foreman “knows better” than to be riding in a bucket in a forward direction. (Tr. 44, 260.) Sartain also confirmed to Pruitt that there was a safeguard prohibiting such conduct. (Tr. 45.) Sartain further stated that they had gone over that in safety meetings, that it was a big discussion at the mine not to be riding in a forward direction. (Tr. 46, 261.) In addition, Sartain told Pruitt that they discussed not riding in the bucket when going forward three to four times a year, that they had just gone over not riding in a bucket a few weeks earlier and he also brought to the inspector’s attention that there had been a fatality at another mine for “this same type condition.” (Tr. 47.) At the same time, Johnson said: “What’s wrong with him? He must be crazy getting in that riding forward like that.” (Tr. 128.) Plainly, both Sartain and Johnson thought that Earl was violating the safeguard.

After the loader was stopped, the inspector went to talk to Earl. He asked Earl “if he knew that it was against the law to ride in a forward direction.” (Tr. 53.) He said that Earl replied: “Yes, but I just wasn’t thinking.” (Tr. 53-54.) Earl told the inspector that he would try to make sure it did not happen again. (Tr. 58, 318.) Earl then went back to the Hummer to talk to Sartain. Sartain told him that he knew better than to ride in the bucket and Earl agreed that he did know better. (Tr. 263, 317.) Again, this is a clear indication that Sartain and Earl thought that the safeguard had been violated.

Moreover, none of the parties at the stop claimed that no violation had occurred because work was being performed. Earl did not explain to Pruitt that he was performing work as permitted by the safeguard. Nor did Earl tell Sartain that he was taking down water line or offer any other defense for his actions when Sartain chastised him. (Tr. 293, 343.) This is certainly

not the reaction one would expect from people who believed that they were not doing anything wrong.

Finally, the testimony of Estep, Earl, Sartain and Keeton was evasive and self-serving. For instance, on cross-examination Estep was asked several times if, under the safeguard, the only exception to going with the bucket in the rear is positioning at creep speed. (Tr. 238-40.) The question clearly called for a "yes" or "no" answer. Yet Estep gave the following responses: (1) "The safeguard is basically talking about when you're traveling with a bucket in the rear and then with the bucket while you are traveling in a forward direction." (Tr. 238.) (2) "When your intentions are to perform work and not to utilize it as a transportation vehicle. The intent of both safeguards that led up to this final safeguard was to prohibit people from riding in a bucket or on the forks of a 3.5 at a high rate of speed. That was the intentions of all the safeguards was to prohibit people from riding it in a high rate of speed and unsafe." (Tr. 239.) (3) "To perform work. It says underground -." (Tr. 239.) (4) "If you are in a bucket of a 3.5 or if you are on the forks of a 3.5." (Tr. 240.)

The following dialogue took place between Earl and the judge:

Q. Mr. Earl, the first person you talked to after you got stopped was Mr. Sartain?

A. No. I met Mr. Pruitt and Mr. Johnson coming out of the bucket. One of them - I don't know whether it was Mr. Pruitt or Mr. Johnson. One of them asked me or told me you know better than to get in that bucket. And I said yes, I do. Or to ride in it. I didn't think I was riding.

Q. Why did you say yes, I do, if you didn't think you were doing anything wrong?

A. Because it pertains to riding in it. I didn't think I was riding in it. I was getting ready to work out of it.

Q. Well, if somebody tells you you know better than to do something, aren't they telling you you did something wrong?

A. I didn't look at it like that, no.

Q. You didn't?

A. I was just answering his question.

Q. Why did you tell Mr. Pruitt you would never do it again?

A. I said that when he was walking back to the man trip. I was trying to make conversation with him.

Q. Why did you tell him you would never do something again if you hadn't done anything wrong?

A. Just something that come out at that time.

(Tr. 342-44.)

On the other hand, Inspector Pruitt's testimony was very credible. It was corroborated in many respects by the admissions of Johnson, Sartain, Earl, and Keeton. It was also consistent with his notes which he made contemporaneously with the occurring events. (Govt. Ex. 3 at 2-3, Tr. 48)

Company's other arguments not persuasive.

The Respondent has also alleged that Inspector Pruitt did not "issue the citation in accordance with mandatory standards" because he relied on the first safeguard rather than the third one, that he did not inform Drummond of the violation in a timely fashion, that he did not tell Earl to stop what he was doing, that he did not "red tag" the loader and that he did not instruct the other miners not to ride in the bucket. (Resp. Br. at 12-13.) For these reasons, the company apparently believes that the citation should be vacated.

These arguments are without merit. In the first place, Drummond has not cited any mandatory standard governing the issuance of citations with which it believes the inspector did not comply. In the second place, while the inspector admitted that he had relied on Safeguard No. 4473466 in issuing the citation, the citation has been amended to cite the correct safeguard and the inspector testified that he believed that the company violated that safeguard as well. (Tr. 62-66.) In the third place, the inspector furnished the citation to the company when he completed his inspection. Finally, there was no reason to tell Earl explicitly what he had told him implicitly, or to red tag the loader or to tell the other men not to ride in the bucket, and, even if there were, it would not affect the issuance of the citation.

Conclusion

In conclusion, I find that the company's self-serving interpretation of the safeguard was incorrect, but that even if it were correct, the safeguard was violated because the loader was being operated at faster than creep speed. Furthermore, Drummond's witnesses were not credible on this issue, while the inspector was. Accordingly, I conclude that the Respondent violated the safeguard as alleged.

Significant and Substantial

The inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission enumerated four criteria that have to be met for a violation to be S&S. See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghioghery & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

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

Inspector Pruitt testified that he considered the violation to be S&S because the bucket was slippery with mud and water in it, Earl was not tied-off while riding in the bucket, the mine had dips and hills throughout, the bucket was elevated and Earl could have been thrown out of the bucket and run over. (Tr. 71-75.) Keeton, the loader operator, confirmed that the bucket was wet, muddy and slippery. (Tr. 405.) Robert Jones, who was driving a man trip that followed the loader and Hummer down the entry, testified that they went down a hill before the loader was stopped. (Tr. 439-40.) In addition, the loader was being operated at greater than creep speed.

Applying the *Mathies* criteria to the facts in this case, I make the following findings: (1) the Respondent violated Safeguard No. 7664815; (2) the violation of this safeguard contributed to a distinct safety hazard, that of falling in the bucket or falling out of the bucket and being run over; (3) there was a reasonable likelihood that falling in or out of the bucket would result in an injury; and (4) there was a reasonable likelihood that serious injuries such as broken bones or death would result. Accordingly, I conclude that the violation was "significant and substantial."

Unwarrantable Failure

This violation was also charged as resulting from the “unwarrantable failure” of the company to comply with the regulation.⁵ The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987); *Youghioghenny*, 9 FMSHRC at 2010. “Unwarrantable failure is characterized by such conduct as ‘reckless disregard,’ ‘intentional misconduct,’ ‘indifference’ or a ‘serious lack of reasonable care.’ [Emery] at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991).” *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (Aug. 1994); see also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test).

Inspector Pruitt testified that he found this violation to be an unwarrantable failure because a foreman had committed the violation. (Tr. 70.) In addition, the evidence is uncontroverted that when Earl got in the bucket of the loader, the loader operator started to turn around so the bucket would be in the rear and Earl signaled him to go forward with the bucket in the front. (Tr. 127, 135-36, 366, Govt. Ex. 13 at 2.) Plainly, Earl made a conscious decision to violate the safeguard.

The Commission has stated that foremen are held to a heightened standard of care regarding safety matters. *S & H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995); *Youghioghenny*, 9 FMSHRC at 2011. In this case, not only was Earl present when the violation occurred, he was the one who committed it. Furthermore, it is apparent from his actions in telling the operator to go forward, that Earl intentionally violated the safeguard. Accordingly, I find that the violation was an unwarrantable failure to comply with the safeguard.

Earl’s 110(c) Liability

The Secretary seeks to hold Earl personally liable for this violation. Section 110(c) of the Act, 30 U.S.C. § 820(c), provides that: “Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties . . . that may be imposed upon a person under subsections (a) and (d).”

The Commission set out the test for determining whether a corporate agent has acted “knowingly” in *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff’d*, 689 F.2d 623 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983), when it stated: “If a person in a position to protect safety and health fails to act on the basis of information that gives him knowledge or reason to

⁵ The term “unwarrantable failure” is taken from section 104(d)(1) of the Act, which assigns more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.”

know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.” See also *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 363-64 (D.C. Cir. 1997) (approving Commission’s definition of “knowingly”). The commission has further held that to violate section 110(c), the corporate agent’s conduct must be “aggravated,” i.e. it must involve more than ordinary negligence. *Wyoming Fuel*, 16 FMSHRC at 1630; *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992); *Emery*, 9 FMSHRC at 2003-04.

I have already found that Earl intentionally violated the safeguard. Clearly, this intentional conduct comes within the meaning of “knowingly” and involves more than ordinary negligence. Consequently, I conclude that Earl is liable for the violation under section 110(c).

Civil Penalty Assessments

The Secretary has proposed penalties of \$6,350.00 against the operator and \$475.00 against Earl for this violation. However, it is the judge’s independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(I) of the Act, 30 U.S.C. § 820(I). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (Apr. 1996).

The Company’s Penalty

In connection with the penalty criteria, the parties have stipulated with regard to Drummond that it is a large company, that it demonstrated good faith in attempting to achieve rapid compliance after notification of the violation and that the penalty will not affect its ability to continue in business. (Tr. 15-19.) Accordingly, I so find. I further find, from its Assessment History and the allied documents in the file, that the company has a average history of previous violations. (Govt. Ex. 1.) Finally, I find that the gravity of this violation was serious and that, commensurate with my conclusions that the company unwarrantably failed to comply with the safeguard and that Earl intentionally violated it, the level of negligence involved in the violation was “high.”

Accordingly, taking into consideration all of these factors, I find the penalty of \$6,350.00 proposed by the Secretary to be appropriate for this violation.

Earl’s Penalty

With regard to the application of the penalty criteria in 110(c) cases, the Commission has stated that:

Commission judges must make findings of each of the criteria as they apply to *individuals*. . . . In making such findings, judges should thus consider such facts as an individual’s income and

family support obligations, the appropriateness of a penalty in light of the individual's job responsibilities, and an individual's ability to pay. Similarly, judges should make findings on an individual's history of violations and negligence, based on evidence in the record on these criteria. Findings on the gravity of a violation and whether it was abated in good faith can be made on the same record evidence that is used in assessing the operator's penalty for the violation of the underlying section 110(c) liability.

Sunny Ridge Mining Co., Inc., 19 FMSHRC 254, 272 (Feb. 1997).

Applying these criteria, I make the following findings. Since there is no evidence that Earl has a history of any previous violations, I find that he has a good history of previous violations. For the same reasons that I found that the operator's negligence was "high," I find that Earl's negligence was "high." Similarly, I find that the gravity of the violation was serious and that it was abated in good faith. I further find that the proposed penalty is appropriate in view of Earl's responsibilities as a section foreman.

Finally, there is no evidence concerning Earl's income and family support obligations or his ability to pay the proposed penalty. However, the Commission has held with respect to operators that "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, *it is presumed that no such adverse [e]ffect would occur.*" *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983) (emphasis added), *aff'd* 763 F.2d 1147 (7th Cir. 1984); *accord Broken Hill Mining Co.*, 19 FMSHRC 673, 677 (Apr. 1997); *Spurlock Mining Co.*, 16 FMSHRC 697, 700 (Apr. 1994). There does not appear to be any reason that the same presumption should not apply in 110(c) cases. Consequently, there being no evidence to the contrary, I find that Earl's income and family support obligations will not be adversely affected by the penalty and that he has the ability to pay it.

Taking all of these factors into consideration, I find that the \$475.00 proposed by the Secretary is appropriate for this violation.

Order

In view of the above, Citation No. 7395288 in Docket No. SE 2004-106 and the civil penalty petition in Docket No. SE 2004-91 alleging that Michael Earl knowingly carried out the violation in the citation are **AFFIRMED**. Drummond Company, Inc., is **ORDERED TO PAY** a civil penalty of **\$6,350.00** and Michael Earl is **ORDERED TO PAY** a civil penalty of **\$475.00** within 30 days of the date of this order.



T. Todd Hodgdon
Administrative Law Judge

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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 21, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2004-65
Petitioner	:	A. C. No. 15-17497-07578
	:	
v.	:	
	:	
LEECO INCORPORATED,	:	
Respondent	:	No. 68 Mine

DECISION

Appearances: MaryBeth Zamer Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Melanie J. Kilpatrick, Esq., Wyatt, Tarrant & Combs, LLP, Lexington, Kentucky, on behalf of Leeco Incorporated.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalties filed by the Secretary of Labor ("Secretary"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 ("Act"). The petition alleges that Leeco Incorporated ("Leeco") is liable for two violations of the Secretary's regulations applicable to underground coal mines, and proposes the imposition of civil penalties totaling \$10,500.00. A hearing was held in Hazard, Kentucky, and the parties filed briefs after receipt of the transcript. For the reasons set forth below, I find that Leeco committed the violations and impose civil penalties totaling \$7,000.00.

Findings of Fact - Conclusions of Law

Leeco operates a large underground coal mine, Mine No. 68, in Perry County, Kentucky. As depicted in Leeco's roof control plan, coal is recovered from a 36-inch-thick seam, the "amburgy seam." Ex. Jt-2 at 2. Immediately above the coal seam is a layer of shale, and above that is the main roof of sandstone, typically 20 feet thick. The thickness of the shale layer above the coal seam varies considerably throughout the large mine, and in some places it is non-existent. Below the coal seam is a layer of fire clay and sandy shale.

The Act requires that underground coal mines be inspected at least four times each year. 30 U.S.C. § 813(a). At issue in this case are two citations issued by mine inspectors employed by the Department of Labor's Mine Safety and Health Administration ("MSHA") during inspections

conducted in July and December of 2002. Each citation was issued pursuant to section 104(d)(1) of the Act, and alleges that the violation was significant and substantial, and the result of the operator's unwarrantable failure. The alleged violations are discussed below in the order that they were presented at the hearing.

Citation No. 7479106

Patrick Stanfield, who was certified as an MSHA inspector in 2000 and has 29 years of mining experience, participated in an inspection of Leeco's No. 68 mine that commenced on July 1, 2002, at which time the mine was in production. Mining operations continued until July 5, when miners started a vacation period that extended to July 15. Some maintenance operations continued during the vacation period, as did MSHA's inspection. On July 2, Stanfield had issued citations for conditions on the mine's 007 section. He returned to the 007 section on July 10, to continue the inspection and determine whether the previously cited conditions had been abated. He was accompanied by Lonnie Pennington, normally Leeco's second shift foreman on the 004 or 006 sections. Jerry Hensley, another foreman was also present at various times.

The Secretary's mandatory safety standards for underground coal mines require that mine operators "develop and follow a roof control plan, approved by the [MSHA] District Manager, that is suitable for the prevailing geological conditions, and the mining system to be used at the mine." 30 C.F.R. § 75.220(a)(1). Before commencing the inspection, Stanfield reviewed Leeco's roof control plan, the mine's inspection history, and various other documents. The roof control plan contains a number of specific requirements for mine roof support that are at issue here. Roof bolts must be installed on four-foot centers and within four feet of faces and ribs, such that there is a minimum of one bolt for each 16 square feet of exposed roof. Ex. Jt-2 at 14. Roof bolts must be installed with suitable bearing plates. Ex. Jt-2 at 10. Entries cannot be wider than 20 feet, except that the belt entry can be 22 feet wide with bolts installed within three feet of the ribs. Ex. Jt-2 at 14, 16. Test holes must be drilled into the roof at each intersection, and in crosscuts when entry centers are more than 55 feet apart. Ex. Jt-2 at 8, 13.

Stanfield observed a number of conditions in the 007 section that he determined were in violation of Leeco's roof control plan. He issued Citation No. 7479016, which alleges that Leeco violated 30 C.F.R. § 75.220(a)(1). Alleged instances of non-compliance with plan requirements were itemized in the "Condition or Practice" section of the citation, which reads:

The operator failed to comply with the approved roof control plan (Dated 06/25/2001) on the 007/MMU, in that:

- (1) #6 entry (or #5 kick-back) at the 22nd crosscut, the 48" resin bolts were not installed to within 4' of the coal rib. The installed roof bolts measured 54" and above from bolt to the coal rib.
- (2) At same location, in off-set, installed roof bolts measured over 64" from the coal rib at three locations.

- (3) At same location, installed roof bolts measured 60" between rows.
- (4) At 23rd crosscut, #5 right crosscut, 3 roof bolts had bearing plates missing, that had not been replaced. Draw rock of substantial size and weight was present in the area. Reflectors were installed to prevent travel in area.
- (5) At 24th crosscut, from five right to #6, no roof drill test hole could be found, a distance of approximately 90 feet.
- (6) #4 right adjacent to spad #12811, at four locations the installed roof bolts measured over 50" from the coal rib.
- (7) #3 right crosscut, 20 feet inby spad #12816, along the left rib installed roof bolts measured 60" from the coal rib.
- (8) #3 entry in the area of spad # 12817 the entry measured 25.5' wide. This condition extended to exceed approved plan by measured distance of 22'. This is the belt entry. The operator's plan allows for 22' belt entry, but when it is utilized, the installed roof bolts cannot exceed 3' from coal rib. Inby to face and outby for distance of four crosscuts the roof bolts have not been installed to within 3' of coal rib.
- (9) The #3 entry, from the second crosscut outby to the face, a roof drill test hole could not be found.
- (10) #2 entry, at spad # 12813, both inby and outby side of the right crosscut had corners clipped, creating an opening measuring 30' wide.
- (11) At same location, the right (outby corner clip) had not been bolted, creating an area measuring 10' x 10' that was not supported in any manner. Reflectors were hung to prevent travel in the area. This area had been scooped and rockdusted. A miner could easily advance beyond supports in this area.
- (12) The operator's approved plan allows both corners to be clipped, only in the far right and far left entries. This is in the #2 entry, and is not one of the outside entries.
- (13) #2 entry, at spad #12812, at six different locations roof bolt bearing plates were sheared off, and not replaced. Draw rock, measuring 6' x 3' x 6" was pulled in the area.
- (14) #2 left crosscut, adjacent to spad # 12812, along the left rib, installed roof bolts measured over 52" at four locations.
- (15) #1 entry, at spad #12814, three roof bolt bearing plates had been sheared off, and not replaced.
- (16) #1 push-up was not bolted to within 4 feet of the coal. From the last bolt to the face measured 10'. No obstructions prevented the area from being supported. Reflectors were installed to prevent travel in the area.
- (17) #3 entry, at the 21st crosscut, a roof drill test hole revealed a crack at 43". This area is supported with 48" resin bolts. Additional supports are need[ed] to maintain safe travel in the area. This area was dangered off until additional supports can be installed.
- (18) #3 entry from the tailroller, outby along the length of the low-low, roof bolt bearing plates were damaged, missing, and not firm against mine roof, due to

sloughing of mine roof.

Additional supports are need[ed] in cited area to maintain safe travel and protect miners from hazards associated [with] falls of roof in the areas listed above.

The above cited condition is extensive and obvious. The operator has just recently received similar violations. The cited conditions create a high degree of risk to miners working in the area. This condition has existed for a significant amount of time - since at least 07/05/2002. This area is required to be examined on three shifts daily. The operator displayed a serious lack of reasonable care, by exposing miners to these conditions. By allowing this condition to exist, the operator displayed conduct constituting more than ordinary negligence.

Ex. Jt.-1.

Stanfield determined that it was highly likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that five persons were affected and that the violation was due to the operator's high negligence. The citation was subsequently amended to specify that one person was affected. As noted previously, the citation was issued pursuant to section 104(d)(1) of the Act, based upon Stanfield's determination that the violation was the result of the operator's unwarrantable failure to comply with the mandatory safety standard. The Secretary has proposed a civil penalty of \$5,000.00 for this violation.

The Violation

In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd*, *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987).

It is largely undisputed by Leeco that the roof control plan was violated. Its arguments are directed at the extensiveness of the violation, and the alleged gravity and negligence. Leeco offered limited evidence on the specific conditions cited. To the extent that its evidence addressed deviations itemized in the citation, it largely confirmed Stanfield's descriptions. Tr. 170-72, 187. I accept Stanfield's un rebutted testimony regarding missing and damaged bearing plates, numerous instances of excessive bolt spacing, the absence of test holes,¹ the

¹ Test holes must be drilled into the roof at each intersection. They are left open to allow monitoring of roof conditions, typically by insertion of the end of a tape measure. If shale begins to separate from the main roof, the clip on the end of the tape measure will catch in the crack, and the condition can then be addressed. While there is no specific requirement as to the frequency of monitoring during normal mining operations, Pennington testified that it would

unaddressed presence of a crack or pocket in one test hole, unbolted areas and excessive entry width.

Leeco challenges some of Stanfield's assessments of excessive bolt spacing, relying upon a provision in The Coal General Inspection Procedures Handbook recognizing that reasonable tolerances in bolt spacing are permitted. The provision reads, in part:

"an occasional inadvertent deviation that slightly increases the spacing of roof bolts but does not detrimentally affect support performance may not constitute a violation. Typically, roof bolt spacings that occasionally exceed the approved spacing pattern by less than 6 inches at intermittent locations and do not create a specific hazard should not be cited."

Ex. Jt-5, item 7.

The handbook does not include definitions of "occasional" or "intermittent," and MSHA inspectors receive no instruction on their meaning. Tr. 101. Nevertheless, I agree with the testimony of Steven Sorke, MSHA's roof control and impoundment supervisor, that the spacing deviations noted by Stanfield went beyond occasional and intermittent. Tr. 112-13. Many of the spacings were in excess of six inches beyond the 48-inch standard.² They were often grouped together, e.g., an entire row of bolts in the #6 entry, at least four, had been installed 60 inches from the adjoining row. Tr. 27-28. While the improperly spaced bolts represented only a small percentage of the thousands of roof bolts installed in the overall area, they were not occasional deviations at intermittent locations, and they detrimentally affected roof support performance. Leeco's challenge to the roof bolt spacing deviations is unavailing.

Leeco also challenged Stanfield's determination that the clipping, or rounding off, of two corners in the same intersection violated the plan, pointing out that the notes to the sketch on page 17 of the plan state that "corners of pillars may be rounded off." Ex. Jt-2 at 17. Pennington testified that it was his understanding that the plan permitted two corners in an intersection to be

probably be done during a preshift inspection. Tr. 162. He confirmed the existence of a crack or pocket at a depth of 43 inches in one test hole, which indicated that the 48-inch roof bolts did not have the required 18 inches of anchorage in stable strata. Tr. 187. That void may have been a pocket in the sandstone, rather than a sagging shale layer. However, the nature of the condition had not been determined, and additional roof supports should have been installed.

² Stanfield testified, consistent with the citation, that the bolt spacing deviations specified were the smallest among a particular grouping. However, the notes that he took during the inspection do not indicate that only the smallest measurement was recorded. His explanation for the inconsistency was that he didn't have time to write down all of the individual deviations. Tr. 79. I find that the deviations itemized were typical of those that existed. It is unlikely that Stanfield would have failed to record any significantly longer spacings.

clipped, emphasizing the use of the word "corners" in the note. Tr. 168-69. Similarly, Patrick Schoolcraft, Leeco's safety supervisor, testified that he understood the plan to allow clipping two corners in an intersection, provided that limitations on the overall width of the entry were not exceeded. Tr. 191-99. He also testified that two intersection corners were frequently clipped in the belt entry, and that such conditions had not been cited by MSHA as violations unless overall width limitations were exceeded. Tr. 212-15. The mine map appears to support his testimony that two corners have been clipped in belt entry intersections. Ex. R-3.

The Secretary countered, through Sorke, that the plan's sketch showed only one clipped corner in an intersection, and that use of the plural was simply to recognize that one corner can be clipped in multiple intersections. Tr. 116. He also explained that in other roof control plans, where the clipping of two corners in an intersection is allowed, the reference sketch shows two corner clips. Tr. 117. The Secretary also argues that shortly before the issuance of the citation, Leeco submitted a proposed amendment to its roof control plan that would have allowed clipping of two corners, but that the proposed amendment was denied. Tr. 132-37; ex P-7. However, Leeco introduced evidence that the proffered reason for the denial was the fact that the proposed sketch had not been scaled properly, and when it checked with MSHA, it was advised that no amendment of the plan was necessary to allow clipping of two corners in an intersection. Tr. 190-91.

If clipping of two corners in the intersection were the only alleged deviation from the plan, I would be inclined to hold that the Secretary's interpretation could not be enforced in this instance because of lack of notice to Respondent.³ However, all of the other deviations itemized in the citations have easily been established by a preponderance of the evidence. Therefore, Leeco failed to follow its approved roof control plan, in violation of 30 C.F.R. § 75.220(a)(1).

Significant and Substantial

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

The Commission has explained that:

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

³ See *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694 (July 2002); *Island Creek Coal Co.*, 20 FMSHRC 14, 24 (Jan. 1998).

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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The fact of the violation has been established. Violation of the roof control plan contributed to a discrete safety hazard, i.e., exposure to roof falls. Any injury suffered from a roof fall would be serious. The focus of the S&S analysis for this violation is the likelihood that the hazard would result in an injury.

Stanfield testified that he determined that the violation was S&S because he believed that it was highly likely that a miner would be seriously injured by falling shale or draw rock, which he identified as a leading cause of injuries. Tr. 50-53. He also noted that there have been fatal accidents caused by draw rock falling between roof bolts and that the greater the span of roof, the greater the tendency for shale to break loose and fall. Tr. 51, 54. The absence of test holes prevented monitoring for sagging shale in some places and the unbolted areas, which had not been dangered off to prevent travel, were particularly troubling.⁴ The unbolted corner clip, item

⁴ As noted in the citation, reflectors were hung in such areas to prevent travel. However, that was done only after the condition had been identified as a violation. Tr. 29, 37, 47.

11 in the citation, was in an area that was highly likely to have been traveled by miners, and had been cleaned and rock-dusted so that persons would assume that it had been bolted. Tr. 37. Areas where bolts had been installed too far from the rib were, in his opinion, subject to roof falls and rib rolls. Tr. 55. His determination that an injury was highly likely was based upon the nature of the conditions, and the fact that they were present throughout the working section. Tr. 56. Of particular concern, were areas where bearing plates had been sheared off or damaged. Draw rock was present at those locations, and a large piece of loose, dangerous draw rock was pulled down in the #2 entry.

Sorke testified that he was familiar with roof conditions at the mine through his review of roof control plans, reports of accidents, and citations for violations of roof control plans.⁵ It was his experience that Leeco's mine # 68 experienced a "lot of roof falls and a lot of injuries from draw rock." Tr. 105. The Secretary introduced three reports of injuries to Leeco miners who had been struck by falling draw rock from April 15 to June 26, 2002. Ex. P-3, P-4, P-5. However, Sorke was unable to state where in the mine the subject incidents had occurred. Tr. 111. Sorke had never been in the 007 section of the mine, and had no personal knowledge of the roof conditions in that area. Tr. 140. His knowledge of accidents and injuries was derived solely from his review of reports. Tr. 140-41. Sorke also concurred with Stanfield's determination that the violation was S&S, based upon the number of deviations from the plan and the mine's history of roof falls and injuries. Tr. 119.

Leeco introduced evidence, through Schoolcraft, that the incidents in the accident and injury reports relied on by the Secretary had occurred in other sections of the mine. Tr. 184-85. Schoolcraft also testified that roof conditions varied in the different sections of the mine, and that there was more shale in the 004 and 006 sections in the upper end than in the 007 section, which had harder slate and sandstone with very little draw rock. Tr. 185. Dr. Kot Unrug, a professor at the University of Kentucky, testified as an expert on rock mechanics, roof strata and roof fall protection. He had visited the 007 section of the mine in September 2002, and testified that the vast majority of the mine roof was comprised of a thick layer, some 27 feet, of grey sandstone that had no laminations or stability problems. Tr. 230. With reference to a chart plotting the time that unsupported mine roof remains stable, as functions of the rock mass rating and the span of the roof, he explained that the sandstone roof of the mine was extremely stable and likely would remain so, even without roof support. Tr. 233-34, 242-43; ex. R-12. He also testified that the roof conditions varied in different sections of the mine, and that the diagram of the geological

⁵ Pursuant to 30 C.F.R. Part 50, mine operators must report all accidents and occupational injuries to MSHA. The regulatory definition of "accident" includes "An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage." 30 C.F.R. § 50.2(h)(8). The term "occupational injury," includes "any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job." *Id.* § 50.2(e).

strata included in the roof control plan, showing 2-12 feet of shale above the coal seam, was not indicative of the conditions in the 007 section. Tr. 236, 241-43. However, he also stated that there were pockets of shale in the mine roof. Tr. 230.

Dr. Unrug also explained the significance of notations on the mine map that indicate the amount of material that had been removed from above and below the coal seam. Ex. R-3. The notations in question are sets of three numbers enclosed in circles, approximately 1/2 inch in diameter, and are printed in blue. The top number indicates the number of inches of material above the coal seam that was removed, the middle number is the thickness of the coal seam, and the bottom number is the number of inches of material removed from below the coal seam. In the area where the roof control plan violations were noted, the map indicates that no material was removed from above the coal seam. Dr. Unrug concluded that that is an indication that there was very little shale above the coal seam, because miners would typically opt to remove it. He also stated, however, that although there was not much fire clay below the coal seam, miners would tend to remove it because it becomes mud when exposed to the mine's moist conditions. Tr. 241.

Of the numerous notations on the map, some have only two numbers, and the top number of every three-number set is zero. Ex. R-3. Under Dr. Unrug's theory, this would indicate that there was no shale present in the entire area depicted on the map, a clearly erroneous conclusion. Dr. Unrug, himself, testified that there were pockets of shale in the mine roof. Tr. 230. I conclude that the map notations at issue have virtually no probative value on the issue of the presence of shale or draw rock in the area in question.

Stanfield described the roof as "primarily sandstone, but it also had slate. And in the transition [areas] where it was changing back and forth from slate to sandstone, the slate was wanting to break away from the sandstone." Tr. 26. He specifically identified the areas where bearing plates had been sheared off or damaged as locations where draw rock was present, and noted that in the citation. Tr. 26, 44, 65-66, 94-95; ex. Jt-1. He described having to bar down a large, loose and dangerous piece of draw rock. Tr. 44, 64. Pennington confirmed that event. Tr. 171-72. As noted above, Dr. Unrug agreed that there were pockets of slate in the area. Although Pennington had little recollection of draw rock or sloughing of the roof in the subject area, he did not normally work on that section and apparently had little familiarity with the actual conditions of the roof. Tr. 156-57, 166, 170, 179.

The main mine roof, comprised of a thick layer of sandstone, was undoubtedly extremely stable, as Leeco contends. I also credit Leeco's evidence that the roof conditions in the 007 section are more stable than in other areas of the mine, where miners had been injured by roof falls. In that Sorke's opinion of the dangers presented was based, in part, upon such injury reports, I discount it to that extent. However, I accept Stanfield's description of the particular

conditions that he cited, and find that shale and draw rock was typically present in the area cited.⁶ Cumulatively, the numerous instances of non-compliance with the roof control plan subjected miners working or traveling in the area to a significant risk of serious injury, i.e., being struck by falling shale.

Leeco contends that the cited conditions existed only five days, during which all but a skeleton crew of miners were on vacation. Consequently, it argues, the conditions did not present a significant risk because of the absence of miners who might have been injured, and its failure to discover and correct the conditions is not evidence of high negligence or unwarrantable failure. However, the 007 section was a working section, in production, through July 4, typically with a crew of five miners. Tr. 56. The conditions cited by Stanfield did not all spring into existence the instant the miners left for vacation. Rather, they were created over the July 3-4 period, when the area was being mined. Even during the vacation period, some maintenance work was being performed, which required that a preshift examination be conducted at least once per day in most of the areas where deficiencies were noted. Tr. 57. On July 10, two persons were working on a continuous miner, and a scoop operator and foreman were also present. Tr. 24-25. While there may have been little reason for anyone to travel in the areas that were the subjects of items 1, 2, 3 and 15 after July 5, miners working and traveling in that area on July 3 and 4, and in other areas up to July 10, were exposed to a significantly increased risk of serious injury due to roof falls, particularly in the area of the unbolted corner clip. Tr. 37.

The judgment of MSHA's inspector is an "important element" in determining whether a violation is S&S. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Mathies Coal Co.*, 6 FMSHRC 1, 5 (Jan. 1984). I find that the Secretary has carried her burden of proving that the violation was S&S.⁷

Unwarrantable Failure

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated

⁶ A proposed supplement to Leeco's roof control plan was rejected in January 2002, based upon the results of an investigation that concluded, in part, that "Draw rock is common throughout this coal seam in layers from a few inches thick to as much as two feet in thickness." Ex. P-6.

⁷ The fact that there were two corner clips in the intersection at the #2 entry, at spad 12813, was not considered in making the S&S finding.

conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("R&P"); see also *Buck Creek [Coal, Inc. v. FMSHRC]*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol.*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

Stanfield testified that his determination regarding unwarrantable failure was based upon his assessment that the conditions cited were obvious, extensive, and presented a high risk of danger. In addition, they had existed for several days and were similar to conditions that he had cited in the same section only a few days earlier. Tr. 64-70. Stanfield had inspected the 007 section on July 2, 2002, and found several instances of non-compliance with the roof control plan, including excessive bolt spacing, missing bearing plates, and excessive entry widths. He issued Citation No. 7479088, which was not contested by Leeco. Ex. P-2. When Stanfield returned to the section on July 10, he found that those conditions had been abated. However, he found numerous similar conditions that were the subject of the instant citation. The conditions that he cited on July 10 were new violations, in areas that had been mined on July 3 and 4, after his earlier visit. Tr. 70.

The fact that Leeco had been put on notice, by issuance of the July 2 citation, that greater efforts were necessary for compliance in the 007 section with essentially the same provisions of the roof control plan, is particularly significant. *Eagle Energy, Inc.*, 23 FMSHRC 829, 838 (Aug.

2001) (prior citation, even if not designated as unwarrantable, places operator on notice that greater compliance is required); *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 488-89 (March 1997), citing *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010-11 (Dec. 1987) (unwarrantable failure premised upon the fact that inspector issued a citation for similar violation in the same area). The violations, for the most part, were obvious and extensive, and should have been apparent to Leeco's supervisors. Stanfield testified that they should have been discovered by the section foreman and corrected no later than the next mining cycle. Tr. 65. Despite the fact that the cited conditions had been created on July 3 and 4, they continued to exist on July 10.

These facts are largely uncontested. Leeco's challenge to this citation is directed more to the dangerousness of the conditions. However, I have found that the violation was S&S, i.e., that it was reasonably likely that it would result in a serious injury, and have rejected Leeco's efforts to establish the absence of draw rock and minimize the significance of the excessive bolt spacing. For all of the foregoing reasons, I find that the violation was the result of Leeco's unwarrantable failure.

Citation No. 7479336

Operators of underground coal mines are obligated to "develop and follow a ventilation plan, approved by the [MSHA] district manager." 30 C.F.R. § 75.370(a)(1). Leeco's approved ventilation plan contains a drawing of a typical layout of the 004 section of the No. 68 mine, showing 5 entries, crosscuts and the location of required ventilation controls, including check and line curtains. Ex. Jt-4 at 7B. Ventilation air actually flows in a direction opposite to that shown in the drawing, because Leeco uses an exhaust ventilation system. Air is channeled across the face of the #1 entry, and successively through the most inby crosscuts to the #2, #3, #4 and #5 entry faces. After sweeping the #5 face, the air flows out the return entries, #4 and #5. Improperly installed, or missing, check curtains, particularly on the return side, can seriously impair face ventilation because the air will "short circuit," i.e., take the shortest path, to the return entries, rather than being channeled inby across the #3, #4 and #5 entry faces. Notes to the drawing specify that "Permanent stoppings shall be maintained to and including the fourth connecting crosscut outby the working face," and that 17,000 CFM (cubic feet per minute) of ventilation must be maintained. Only 12,000 CFM is required if stoppings are maintained to and including the third crosscut.

The Secretary's regulations require that the volume of ventilation air be measured in the "last open crosscut of each set of entries or rooms on each working section The last open crosscut is the crosscut in the line of pillars containing the permanent stoppings that separate the intake air courses and the return air courses." 30 C.F.R. § 75.360(c)(1). As the 004 section was being operated at that time, that line of pillars consisted of those separating the #3 and #4 entries.

Citation No. 7479336 was issued by MSHA inspector Kevin Bruner on December 9, 2002, and alleged that Leeco had not followed its approved ventilation plan because it failed to maintain the required volume of ventilation in what he determined to be the last open crosscut of

the 004 section. Leeco contends that the cited location was not the last open crosscut because, due to incomplete roof-bolting, it was not travelable. In the alternative, Leeco contends that it did not have fair notice of the Secretary's interpretation of the regulation.

Bruner had been an MSHA inspector for four years as of the time he testified. Prior to becoming an inspector, he had worked for Leeco for 21 years, performing a variety of jobs, including that of assistant safety director. On December 9, 2002, he was conducting a dust survey in the 004 section of Leeco's No. 68 mine.⁸ He was accompanied by an inspector trainee and Ricky L. Campbell, the mine's superintendent. They traveled up the #1 and #2 entries, the intake side, collecting samples of coal/rock dust. As they approached the face area, Bruner observed that a permanent stopping had not yet been constructed in the fourth open crosscut on the intake side between the #2 and #3 entries. He issued Citation No. 7479332, which charged Leeco with failing to follow its approved ventilation plan. He determined that the violation was unlikely to result in an injury because a check curtain had been installed, which allowed ventilation to be maintained. Ex. P-11, P-8 at 6. That citation was not contested by Leeco. Ex. P-14.

When Bruner crossed over to the return side, entries 4 and 5, he discovered significant ventilation deficiencies. Check curtains were not present in the #3 and #4 entries, and no check curtain had been installed in the second crosscut outby the face between the #3 and #4 entries.⁹ At approximately 12:10 p.m., he issued Citation No. 7479335, charging that the failure to install and maintain those ventilation controls violated the approved roof control plan. Ex. P-12. That citation also was not contested by Leeco. Ex. P-14.

Because there was no check curtain in the second crosscut outby the face between the #3 and #4 entries, there were two crosscuts through which ventilation air could pass between those entries. With the absence of a curtain across the #4 entry, the vast majority of the air coming from the intake side was taking the shortest route to the #4, return entry, i.e., through that second crosscut, rather than flowing through the first crosscut which was angled 30 degrees inby toward the face of the #4 entry. Roof-bolting had not been completed in the most inby crosscut because a rock had fallen. A triangular area of the crosscut's roof, two legs of which consisted of the

⁸ Dust surveys are conducted to determine the combustibility of coal/rock dust mixtures. Samples, collected every 300 feet in the entries, are analyzed to assure that adequate amounts of rock dust are being applied to minimize the risk of unintended ignition and combustion.

⁹ Bruner testified that there was no check curtain in the third crosscut outby the face between the #3 and #4 entries, and indicated that fact on a drawing of the section. Ex. P-9. He drew ventilation controls that were in place in black, and used a purple marker to depict controls that were installed later to abate violations. Pennington testified that there was a check curtain in the third crosscut, labeled with the number "1" in a circle, drawn in red. Ex. P-9. I credit Pennington's testimony on that issue, because Bruner did not cite the absence of a check curtain in that crosscut when he issued Citation No. 7479335.

extension of the rib of the #4 entry and the first 11 feet of the inby crosscut rib from its intersection with the #4 entry, remained to be bolted. The approximately 35 feet of the crosscut closest to the #3 entry had been bolted. A scoop had been brought up to remove the fallen rock, but it had broken down and was located in the #4 entry near the face, its rear portion extending almost to the outby rib of the crosscut.

Bruner entered the roof-bolted side of the most inby crosscut between the #3 and #4 entries and was unable to discern any air movement. He determined that that crosscut was the "last open crosscut," and that it did not have the required 17,000 CFM of ventilation. At approximately 12:15 p.m., he issued Citation No. 7479336, charging Leeco with failing to follow its approved ventilation plan. The "Condition or Practice" section of the citation described the alleged violation as follows:

The operator was not following his ventilation plan, approved July 12, 2002. There was no perceptible air movement in the last open crosscut between the No. 3 and 4 entries on the 004 MMU. The miner was cutting in the No. 2 entry and there was methane detected in the No. 3, 4, and 5 entries. There was approximately 0.5 percent methane in the No. 3 and 4 entries and 0.3 percent methane in the No. 5 entry. The section foreman was present at the time and after adjustments were made to the ventilation control an air reading of 3,641 CFM was obtained at 12:40 PM by use of a smoke tube and 0.2 percent methane was detected in the last open crosscut. The mine foreman stopped mining until ventilation could be restored. Any reasonable person would have known that there was not sufficient ventilation on the section at the time. This shows a serious lack of reasonable care on the part of the operator to maintain the required ventilation to protect persons from hazards related to methane accumulations on the 004 MMU. Ventilation could not be restored in a reasonable amount of time and it took extensive effort to get the required amount of ventilation. There were numerous air readings taken in the last open crosscut to evaluate the efforts to get the required amount of ventilation, which is 17,000 CFM with 3 open crosscuts. It took the operator 2 hours and 15 minutes to obtain the minimum required amount of ventilation. The citation is being issued in conjunction with 2 additional citations for ventilation control on the 004 MMU.

Ex. Jt.- 3.

Bruner determined that it was highly likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that ten persons were affected, and that the violation was due to the operator's high negligence. As noted previously, the citation was issued pursuant to section 104(d)(1) of the Act, based upon Bruner's determination that the violation was the result of the operator's unwarrantable failure to comply with the mandatory safety standard. The Secretary has proposed a civil penalty of \$5,500.00 for this violation.

The Violation

Thomas Pennington, the 004 section foreman, and Campbell did not consider the first crosscut in the #3 - #4 entry pillar line to be the "last open crosscut" for purposes of ventilation measurement, because it had not been completely bolted and was not completely travelable by miners.¹⁰ Tr. 339-42, 356, 385-86. They testified that, in their collective 35 years of experience, they had never seen an MSHA inspector take an air reading in a crosscut that had not been completely bolted. Tr. 344, 385. Based upon their testimony, Leeco contends that the "last open crosscut" for ventilation measurement purposes was the first completely bolted crosscut, the second one outby the face. Pennington believed that he had the required amount of ventilation air flow in that crosscut.¹¹ No air flow measurements were taken in that crosscut. Tr. 297.

Bruner testified that whether or not a crosscut is travelable has no bearing on whether it is the last open crosscut for purposes of measuring ventilation air currents, i.e., if a crosscut has been cut through and is being used for ventilation, it is an open crosscut for purposes of taking ventilation measurements. Tr. 288, 296. Bruner agreed that if the crosscut had been completely unbolted he could not have entered it to take an air measurement, and may have taken the measurement in the entry, even though it would not have been the proper location. Tr. 290, 292. He also indicated that he might have taken the ventilation measurement in the second crosscut. Tr. 290. However, his testimony on that point was premised upon an assumption that the operator had chosen to use the second crosscut as the primary ventilation air path, i.e., had "curtained off" the unbolted first crosscut such that it was not being used for ventilation purposes. Tr. 292-94.¹²

On December 9, 2002, normal mining operations were interrupted by the rock fall, which prevented completion of the first crosscut's roof bolting. They were further interrupted because of the break-down of the scoop. Both crosscuts were left open for an extended period of time. Under those circumstances, it appears from the testimony of Bruner and Stanfield that whether

¹⁰ References to "Pennington" in the discussion of this citation are to Thomas Pennington, the section foreman. Lonnie Pennington, another foreman who was involved in the roof control violation, played no role in this alleged violation.

¹¹ If the first crosscut is not counted, permanent stoppings would have been maintained through the third crosscut, and the ventilation plan would have required only 12,000 CFM of air. Tr. 386. Pennington believed that there could well have been 12,000 CFM of air passing through that crosscut, because there had been over 14,000 CFM of air on the intake side and there was very little air passing through the first crosscut. Tr. 344, 360.

¹² The transcript is somewhat unclear on this area of testimony because Bruner was referring to locations on exhibit P-9 that are not described accurately in the record. The above description is, in the opinion of the undersigned, the most accurate interpretation of his testimony.

the first crosscut was considered the "last open crosscut" for purposes of measuring ventilation air flow depended upon whether Leeco chose to use it for ventilation or to isolate, or close it off, with line curtains. Tr. 288-94, 407. Since it was left open, and was being used for ventilation purposes, Bruner determined that it was the location specified in the regulation where ventilation air flow was to be measured.

Despite the parties' varying interpretations of the phrase "last open crosscut," I find no ambiguity in the wording of the regulation, as applied to the facts presented. The crosscut, as Bruner found it, was completely open for ventilation purposes. It could be traveled almost in its entirety, and air quality and quantity measurements could be taken in it. I find that the first partially bolted crosscut was the "last open crosscut" within the meaning of 30 C.F.R. § 75.360(c)(1), and was the appropriate place to measure the volume of ventilation air flow.¹³

Leeco contends that it did not have fair notice of the Secretary's interpretation of the regulation, and that it "should not be penalized with a 104(d) citation." Resp. Br. at 24. When "a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express." *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982), quoting *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). To determine whether an operator received fair notice of the agency's interpretation, the Commission applies an objective, "reasonably prudent person" test, i.e., "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990); *BHP Minerals Int'l Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996). In applying this standard, a wide variety of factors are considered, including the text of the regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, whether MSHA has published notices informing the regulated community with "ascertainable certainty" of its interpretation of the standard in question, and whether the practice at issue affected safety. See *Island Creek Coal Co.*, 20 FMSHRC 14, 24-25 (Jan. 1998); *Ideal Cement Co.*, 12 FMSHRC at 2416.

The issue of whether a partially bolted crosscut can be a "last open crosscut" within the meaning of the regulation appears to be one of first impression, at least as far as Leeco is concerned. Pennington and Campbell testified that they had never seen an MSHA inspector take air readings in a partially bolted crosscut. However, they did not claim to have encountered the situation where an inspection was being conducted when a partially bolted crosscut was present in the specified line of pillars, and there is no viable claim that MSHA has enforced its interpretation inconsistently. MSHA has not published any notices addressing the issue, and neither party points to anything in the regulatory history bearing on it. In response to hypothetical questions, it appears that Bruner and Stanfield may have encountered similar

¹³ Neither Campbell nor Pennington protested to Bruner that he was taking the ventilation measurement in the wrong crosscut. Tr. 272, 359.

situations in the past, but that is not clear, and there is no claim that Leeco was aware of any such encounters.

Inspector Bruner testified that there was essentially no ventilation on the return side of the section, which created a significant safety concern, i.e., the accumulation of methane in the #3, #4 and #5 faces ranging from 0.3% - 0.5%. Tr. 257, 277-78. He knew that the mine was subject to ten-day spot inspections, pursuant to section 103(i) of the Act, because it liberated more than 500,000 cubic feet of methane per day. Tr. 278. These considerations led him to conclude that it was highly likely that methane would continue to build up and that an explosion would result. Tr. 279. He originally allowed only 15 minutes for abatement of the condition, but extended that period because Leeco had ceased mining and devoted all efforts to the abatement action. Tr. 286; ex. Jt-3. While Leeco challenged the accuracy of Bruner's methane readings, it offered no evidence to dispute either that methane was present or that there was a virtual lack of ventilation at the return entry faces. Consequently, the practice at issue affected safety.

I hold that Leeco received adequate notice of the Secretary's interpretation of the regulation, because its plain wording would include any crosscut that is left open and being used for ventilation purposes. It is important to recognize that the situation encountered by Bruner did not entail a brief disruption in ventilation air flow in the normal course of mining activities.¹⁴ The citation was issued at a time when two crosscuts had been left open for an extended period of time because of the rock fall and the breakdown of the scoop. When it became evident that roof bolting of the crosscut was going to be significantly delayed, it was incumbent upon Leeco to take some action. If it did not want to use the crosscut for ventilation, it should have placed line curtains to isolate it. If it wanted it to be used for ventilation, a check curtain should have been installed in the second crosscut, which would have substantially increased the flow of air through the first crosscut. In addition, although not required by the ventilation plan, a more effective permanent stopping could have been constructed in the third crosscut, reducing the required volume to 12,000 CFM. Leeco took no action to address the inadequate ventilation flow in the first crosscut, except to pursue the relatively lengthy course of repairing the scoop, so that the rock could be removed and roof bolting and placement of the check curtain could eventually be completed.

¹⁴ It appears that during normal mining operations, there may be relatively short time periods during which it may not be feasible to maintain ventilation precisely in compliance with the approved ventilation plan. As a new crosscut is cut through from the #3 to the #4 entry, air will start to pass through it. However, there will be minimal air flow until a check curtain is installed in the second crosscut, which will not normally be done until roof bolting has been completed in the new crosscut, a process which takes about an hour. Tr. 355-57. It is likely that, with both crosscuts open, neither one will have the required flow. Tr. 405. Moreover, it is doubtful that valid ventilation measurements can or would be taken in the first crosscut during this transition period. Bruner testified that, if a roof bolter is being used in the first crosscut, he would not attempt to take an air reading until it is removed, because the equipment would interfere with his measurements. Tr. 296.

Because Leeco clearly did not have 17,000 CFM or even 12,000 CFM of ventilation air passing through the last open crosscut, it was not in compliance with its approved ventilation plan, and violated the regulation.¹⁵

S&S

Bruner determined that the violation was S&S primarily because he believed that it was highly likely that methane concentrations would "continue to build up," resulting in an explosion. Tr. 279-81.¹⁶ Bruner measured concentrations of methane, ranging from 0.3% to 0.5% at the faces of the #3, #4 and #5 entries, apparently shortly after arriving at that area. He did not take subsequent measurements at those faces. Tr. 298. A bottle sample taken at 1:00 p.m., when Bruner recorded a concentration of 0.2% methane in the last open crosscut, was later analyzed at a lab and found to have a methane concentration of 0.11%. Ex. P-10. Campbell testified that he measured methane near the broken-down scoop and found 0.1%. Tr. 382. Pennington recalled that he had taken one methane reading where Bruner was measuring 0.3%, and his meter gave him a lower reading. Tr. 342. It appears that Bruner's meter was reporting methane concentrations slightly higher than those that actually existed.

There is limited evidence of a time line of methane readings indicating that methane was accumulating at the return entry faces. Preshift examinations had produced readings of 0.0% methane at various points on the section. Ex. R-9, R-10. Methane is liberated in the greatest quantities by the mining process. Tr. 323. Up to the time of Bruner's arrival, mining was occurring in the #2 face on the intake side. Tr. 305. The ventilation air flow would carry any methane from that area toward the #3, #4 and #5 faces and the return entries. It appears that the inadequate flow of ventilation air through the last open crosscut, combined with the absence of ventilation controls that resulted in the issuance of Citation No. 7479335, resulted in very limited ventilation at the return entry faces, and the accumulation of methane in concentrations of less than 0.5%.

¹⁵ Leeco contends that Bruner took his measurement in a location where there was limited air flow, "dead air," and that the disabled scoop restricted air flow in the crosscut. Both of these points have some merit. However, even in the best of circumstances, the majority of the air flow would have proceeded through the second crosscut. As long as that crosscut was allowed to remain open, the limited volume flowing through the first crosscut would not have been more than a fraction of that required.

¹⁶ Bruner was also concerned about dust in the mine's atmosphere. However, while low ventilation air flow may have resulted in more airborne dust in certain areas on the return side of the section, that factor cannot be considered in the S&S analysis. Bruner's concerns were based only upon his visual observations. Tr. 298-99. There is no reliable evidence of the presence or concentrations of harmful, respirable dust, the length of exposure of any miner, or correlation of dust concentrations and length of exposure to harmful physical effects.

Leeco argues that the violation cannot be S&S because none of the methane concentrations approached dangerous levels, i.e., the level of 5% when methane becomes explosive. However, whether a violation is S&S must be evaluated in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. Leeco was actively mining on the intake side of the section, and there is no evidence that repair of the scoop was actively underway, or that the ventilation deficiencies on the return side were actively being addressed. Had Leeco's normal mining operations continued, it is entirely possible that methane would have continued to accumulate in the return faces in sufficient quantities to reach explosive levels.

The violation contributed to a discrete hazard, a build-up of methane in the return entry faces. There was a reasonable likelihood that the hazard would result in an injury. Any injury would be serious. Accordingly, I find that the violation was significant and substantial.

Unwarrantable Failure

The Secretary argues that Leeco's negligence was high because Pennington, a supervisor, was present and was, or should have been, aware of the violation. The involvement of an operator's agent, typically a supervisor, is particularly significant because the negligence of an agent can be imputed to the operator for purposes of unwarrantable failure and civil penalty assessment. *E.g., Capitol Cement Corp.*, 21 FMSHRC 883, 893 (Aug. 1999) (citing *R&P*, 13 FMSHRC at 194-97). "Managers and supervisors in high positions must set an example for all supervisory and non-supervisory miners working under their direction. Such responsibility not only affirms management's commitment to safety but also, because of the authority of the manager, discourages other personnel from exercising less than reasonable care." *Id.* at 892-93 (quoting from *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987)). Bruner determined that the violation was the result of Leeco's unwarrantable failure because the inadequate ventilation was severe, extensive and obvious. Tr. 281-86.

Leeco contends that the condition was not extensive or severe, and that Pennington was working on the intake side of the section, where there were no ventilation air flow deficiencies, and reasonably believed that all required ventilation controls were in place on the return side.

As Bruner conducted the dust survey, traveling inby on the intake side of the section, mining was being conducted at the intake entry faces. A roof bolter was in the #1 entry and a continuous miner was backing out of the #2 entry, as Bruner arrived. Tr. 305, 333, 345. Pennington was working on the intake side, where mining was occurring. Tr. 345, 358. The preshift report, showing proper ventilation air flow, had been called out to him before the start of his shift. Tr. 317-18, 328. He checked and made sure that he had all required ventilation air volume on the intake side and in the working faces. Tr. 327, 360. Bruner had not noted any problems with ventilation air volume on the intake side, and Pennington testified that he had no reason to believe that there was a problem with ventilation until Bruner took his air reading in the first crosscut on the return side. Tr. 331.

While the inadequate ventilation flow in the last open crosscut, combined with the missing ventilation check curtains that resulted in the related citation, had allowed the accumulation of some methane in the return entry faces, the condition was limited to those locations, where no mining was being done. The condition was not so extensive that Pennington, who was on the intake side, should have been aware of it. Moreover, the condition was not as severe as Bruner believed, because actual methane concentrations did not reach 0.5%, well short of a level that would have dictated that mining be interrupted, and less than one-tenth of the concentration that would have made it explosive.

It appears that the condition had existed for, at most, a few hours. The subject crosscut was not cut through until after the shift started. Tr. 322, 365. There is no evidence of when the ventilation controls cited in the companion citation had been removed.¹⁷ It is possible that the missing check curtain in the #4 entry, which allowed air to short circuit out that entry rather than be forced up to the #5 face, was removed to allow the scoop to come up and remove the rock.

As soon as Pennington was notified that Bruner had determined that the flow of ventilation was inadequate, he devoted the crew's efforts to abating the violation – placing, tightening and finally doubling check curtains and constructing a permanent stopping in the fourth crosscut outby on the intake side. The entire process consumed over 2 hours, primarily because of the time required to obtain material for the stopping.

Considering all of these factors, I find that the negligence of Pennington, which is imputable to Leeco, and of Leeco itself, was no more than moderate.

The Appropriate Civil Penalties

Leeco is a large operator. The parties have stipulated that it produced over 1.4 million tons of coal in 2002. Its controlling entity, James River Coal Company, is very large. MSHA's computer database shows that Leeco had paid 850 violations, five of which were specially assessed, over the period December 10, 2000, to December 31, 2002. Ex. P-13. Leeco does not contend that imposition of the proposed penalties would affect its ability to remain in business. The gravity and negligence associated with the alleged violations have been discussed above.


Citation No. 7479106 was affirmed as an S&S violation, and the result of the operator's unwarrantable failure. A civil penalty of \$5,000.00 was proposed by the Secretary. I impose a penalty in the amount of \$5,000.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

¹⁷ In fact, only one of the ventilation controls had been removed. The check curtains across the #3 entry and the second crosscut had not been installed because Pennington believed that the second crosscut was the last open crosscut and it was being used for ventilation purposes.

Citation No. 7479336 was affirmed as an S&S violation. However, it was not the result of Leeco's unwarrantable failure. Rather, Leeco was moderately negligent with respect to this violation. A civil penalty of \$5,500.00 was proposed by the Secretary. I impose a penalty in the amount of \$2,000.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

ORDER

Citation No. 7479106 is **AFFIRMED** in all respects. Citation No. 7479336 is **AFFIRMED**, as modified, and Respondent is directed to pay a civil penalty of \$7,000.00 within 45 days.



Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
801 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

January 26, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2004-184
Petitioner	:	A.C. No. 36-00958-30409
v.	:	
	:	
EIGHTY FOUR MINING COMPANY,	:	Mine 84
Respondent	:	

DECISION

Appearances: Brian Mohin, Esq., and Susan Jordan, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, on behalf of the Petitioner;
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for the Respondent;

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). During hearings the parties reached a settlement agreement. Petitioner vacated Order No. 7061085 and, following hearings, filed a motion to approve a settlement agreement as to the remaining charging documents. Modification of certain charging documents and a reduction in penalty to \$85,000.00, have been proposed. I have considered the evidence at hearings and the representations and documentation submitted in this case and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of \$85,000.00, within 40 days of this order.



Gary Melick
Administrative Law Judge
(202) 434-9977

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 27, 2005

ROBERT R. TOLLEY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
	:	Docket No. WEST 2004-165-DM
	:	RM MD 2003-12
	:	
v.	:	Mine I.D. 42-00155
	:	Cane Creek
MOAB SALT, LLC,	:	
Respondent	:	

DECISION

Appearances: Robert R. Tolley, West Valley City, Utah, pro se;
Laura E. Beverage, Esq., Jackson Kelly, PLLC, Denver,
Colorado, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Robert R. Tolley against Moab Salt, LLC ("Moab Salt"), 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. Tolley alleges that after he engaged in protected activities at Moab Salt he was subjected to discrimination and harassment. He contends that he was constructively discharged from his employment with the company as a result of this harassment. An evidentiary hearing was held in Moab, Utah.

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

Moab Salt, now know as Intrepid Potash-Moab, LLC, operates the Cane Creek plant (the "plant") in Grand County, Utah. Moab Salt engages in a solution process whereby a brine solution of water and salt is pumped underground into a potash deposit. The solution is then pumped to the surface into ponds and a solar process is used to evaporate the liquid leaving salt and potash crystals which are recovered using scrapers. The crystals are processed through flotation cells, separated, packaged and sold. Some of the material is re-used in making brine for injection. Moab Salt sells salt and potash both in bulk and in bags. (Tr. 400). Moab Salt's current owners started operating the plant in February 2000. The plant has existed since 1962. Mr. Tolley started working for Moab Salt in August 1997. During all relevant times, Tolley worked in "rail loadout." (Tr. 18). In that position, he operated a front-end loader to load trucks and railcars.

At all relevant times, Moab Salt was in the process of replacing the steel siding and roof panels (the "siding") on its buildings. It started removing the siding on the conveyor galleries, also known as the inclines, in May 2003. These inclines carried salt and potash from the warehouse to the loadout area. The old siding consisted of large pieces of corrugated steel coated with a tar-based material, known by the trade name "Galbestos." The old siding was deteriorating in many places. Moab Salt replaced the old siding with plastic siding. Tolley testified that, as part of his job, he had to travel inside the inclines along the belts to remove clogs. These inclines are 30 to 40 feet above the ground. (Tr. 21; Ex. R-6).

Moab Salt employees were removing the siding on the conveyor galleries using a rented manlift. The area below was flagged off and an employee was stationed there to keep workers away from the area. Two employees were in the manlift to remove the screws holding the siding in place. After the screws were removed, each piece of old siding was dropped about 30 to 40 feet to the ground. The siding was then stacked along the exterior fence of the plant in an area known as the "boneyard." Tolley was not involved in the removal of the old siding or the installation of the new siding, but he helped move some of the old siding to the boneyard.

On June 5, 2003, Harlan Hawks, an hourly employee in the packaging department, told Tolley that the coating on the siding contained asbestos. Mr. Hawks told Tolley that he overheard two supervisors saying that Moab Salt was going to have to figure out a way to dispose of the old siding because landfills will not take anything that contains more than a minimal amount of asbestos. (Tr. 24, 225). Tolley did not know that the old siding contained asbestos.

When the siding was dropped to the ground, flakes of the tar-based coating sometimes separated from the siding and scattered on the ground. Later that day, Mr. Tolley and Hawks took some of the flakes, put them in a plastic bag and went to talk to Plant Manager Rick York. Tolley believed that, when the siding was new, it did not create any health risks, but that when the siding was dropped to the ground and the coating on the siding flaked off, the asbestos in the coating became friable.¹ (Tr. 26). Tolley testified that, when he told York about the asbestos, York replied that he knew that the coating on the siding contained asbestos but that he did not believe it created a health hazard to employees. (Tr. 27). They walked to the boneyard to look at the stacked siding. When they saw some fibers in the siding, Tolley told York that the company was not handling it properly. (Tr. 365). York told Tolley that he would check on it and get back to him. After this meeting, Mr. Tolley sent two samples of the material he collected to an independent laboratory in Salt Lake City for analysis.

On June 6, Tolley talked to Glenn Hunter, the maintenance supervisor, about the asbestos. When Hunter told him that the asbestos was not friable, Tolley replied that because the old siding is deteriorating, asbestos fibers can get into the air as it is removed. (Tr. 33). Hunter replied that he is "asbestos certified" based on past job experiences and again told Tolley not to

¹ A substance is "friable" if it is "easily broken, pulverized, or reduced to powder." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 223 (2d ed. 1997).

worry about it. He also told Tolley that the asbestos content of the coating was about 12 percent. *Id.* Hunter had supervised the removal of Galbestos from an FMC Chemicals plant in Wyoming. (Tr. 338). The siding was removed at Moab Salt using the same technique Hunter used in Wyoming. Hunter testified that the asbestos on the siding was chrysotile asbestos, which he stated is the least hazardous form of asbestos. Hunter admitted that in some areas, the Galbestos siding had deteriorated over the years and chips of the paint flaked off as it was dropped to the ground. (Tr. 352). He also admitted that there was more asbestos in the siding than he had realized. (Tr. 355).

The analysis of the sample that Tolley took from the area under the conveyor galleries showed that the sample contained 15% asbestos (Chrysotile). (Tr. 29-30; Ex. C-1).² Tolley sent the samples to the lab because he was concerned that there was loose material and chips of the coating all over the ground and employees were sweeping it up without taking any extra precautions. Tolley testified that when Robyn Kurz from the lab called him at home with the lab results on or about June 10, she told him that it was "bad stuff" and that he should not "mess with it." (Tr. 32, 35). Tolley testified that she told him that the asbestos was friable. *Id.* Tolley did not provide Moab Salt with a written copy of the lab results. (Tr. 129).

York contacted an environmental consultant, JBR Environmental Consultants ("JBR Consultants"), on June 10 and asked them to come to the site to evaluate the situation. JBR consultants told York that it would be at the site on June 23, 2003. When York advised Tolley on June 10, Tolley wanted the consultant to come earlier. York called JBR Consultants back and made arrangements for JBR to visit the plant on June 13. (Tr. 367). Tolley told York that he believed that the asbestos was a major problem which should be taken care of immediately.

Because Tolley believed that Moab Salt was not responding to the asbestos problem with the urgency it deserved, Tolley called the Utah Department of Environmental Quality ("DEQ"). Tolley did not divulge his employer or the location of the plant to DEQ representatives. According to Tolley, Mr. Greg Sorenson with the air quality section of DEQ told him that he was "in a bad situation" and that "these people are breaking the law." (Tr. 38). When Sorenson asked for names, Tolley declined to provide such information because he wanted to continue to work with management. *Id.*

Tolley talked with York over the next several days and York told him that he was looking into the matter. Mr. Sorenson told Tolley during subsequent telephone conversations that the company would look better if management called DEQ rather than having DEQ come in as a result of a call from an employee. (Tr. 39). Tolley testified that York refused to call DEQ. The next time Tolley called Sorenson at the DEQ and told him that management was not going to call him, Sorenson again asked for the location of the plant. This time Tolley provided the requested information to Sorenson. (Tr. 40).

² The other sample was taken from material insulating pipes in a different area of the plant. That sample contained about 75% asbestos (Chrysotile). (Ex. C-2).

Bowen Call, a DEQ inspector, visited the mine on June 10, 2003. In his inspection notice, Mr. Call wrote, "complaint had merit and it appears that asbestos materials have been handled improperly." (Ex. C-3). He ordered that no more clean-up work be conducted until a thorough asbestos survey had been completed. When an employee of JBR Consultants arrived on June 10, he did not believe that the material was friable, but he agreed that the company should follow the DEQ's recommendations.

On June 10, 2003, Tolley placed a phone call to Hugh Harvey, one of the owners of Moab Salt. He is an owner and manager of "The Intrepid Companies" in Denver, Colorado, which owns Moab Salt through Intrepid Mining, LLC. When Tolley told Harvey about the asbestos problem, Harvey replied that he was not aware of the asbestos. Tolley testified that Harvey became angry when he told Harvey that he had samples of the material tested by an independent laboratory. (Tr. 42-43). Harvey testified that when he asked Tolley for details about the samples, Tolley refused to answer his questions. (Tr. 282-83). Harvey then called Robert Jornayvaz, another owner/manager with the Intrepid Companies, to tell him about his phone call with Tolley.

Harvey traveled to Moab on June 11 to look into the matter. When he arrived at the site, a reporter and camera crew from KSL TV Channel 5 (Salt Lake City) was there along with Mr. Call from DEQ. Harvey met with Call, toured the plant, and interviewed a number of hourly employees. At that time the old siding on the conveyor galleries had been removed and replaced with new siding. (Ex. R-6; Tr. 286). Jornayvaz traveled to Moab on or about June 12.

York testified that Moab Salt issued a memo to all employees on June 11, 2003, advising them about the asbestos in the siding that was being removed. (Tr. 379; Ex. R-12). It also told employees that, although the company did not believe that the asbestos created a health hazard, it stopped all work on the removal project until the health risks could be assessed.

On the morning of June 13, 2003, York called Tolley at home and asked to meet with him, Harvey, and Jornayvaz for lunch to discuss the asbestos problem. Tolley declined the invitation. (Tr. 45). He did agree to meet with them at work, but only because York required him to. (Tr. 152). When he arrived at the meeting room, Messrs. Harvey and Jornayvaz were present along with an attorney from Salt Lake City. Tolley testified the he wanted Mr. York at the meeting, but he was told that York had other matters to attend to. York testified that he asked Tolley if he would like him to be present at the meeting, but that Tolley replied that he did not think he would need him. York testified that he did not want to attend this meeting in case Tolley wanted to talk to Jornayvaz about York's actions with respect to Tolley's asbestos concerns. (Tr. 375-76).

The parties' interpretation of what transpired at this meeting on June 13 diverges considerably. Tolley testified that he became uncomfortable at the meeting because he believed that Harvey and Jornayvaz were asking the wrong questions. They were not asking questions designed to help solve the problem, but were asking "what evidence" he had and who did he talk

to. (Tr. 46). When he asked to leave the meeting, they told him to stay. When he tried to change the subject by discussing locations on the property that he believed were contaminated with asbestos, they kept asking him who he talked to about the asbestos. They also wanted to know if he had taken any video tapes of the asbestos removal.

Tolley testified that at one point during the meeting Jornayvaz became very agitated and told Tolley that he had put every penny of his money in "this place" and "you're not going to take this from me." (Tr. 48-49). Tolley stated that management never talked about safety issues at this meeting because they were only interested in what evidence he had and who he had talked to. Tolley told Jornayvaz and Harvey during this meeting that he was aware of various hazards at the site and that he had photographs and video tapes of these hazards. (Tr. 148). Tolley admitted that he refused to show them the photographs or tapes. (Tr. 156-57). Hawks was separately interviewed. (Tr. 240).

Jornayvaz testified that he traveled to Moab in June 2003, because Tolley asked Harvey, over the phone, whether he knew that the company "had many and numerous problems, including asbestos" at the plant. (Tr. 246). He stated that he called Tolley and Hawks to the meeting on June 13 to gather information as to the nature and severity of these problems. He testified that he wanted to get any information that he could, including photos and videos, so that any safety problems could be resolved. (Tr. 247). Jornayvaz testified that he did not know that the siding on the conveyor galleries contained asbestos until after he arrived at the site. (Tr. 249). Jornayvaz told Tolley that he had invested a great deal of money into Moab Salt to make it work and he was very much interested in knowing whether there were problems and whether York was adequately addressing these problems. (Tr. 256). Jornayvaz testified that he became frustrated by Tolley's lack of cooperation at the meeting and he raised his voice. Tolley kept telling him that there were numerous safety problems but he would not tell him what the problems were. Tolley kept saying "it will all come out in time." (Tr. 256). Tolley also raised his voice at the meeting and frequently interrupted others. (Tr. 261).

Harvey testified that Tolley had difficulty articulating his safety concerns at this meeting. He mentioned the asbestos in the siding. He gave Harvey the impression that he was aware of many safety problems at the plant which he was not going to discuss. (Tr. 289). Harvey became frustrated because Tolley was quite adamant that there were numerous safety problems that he had documented with samples, photos, and video tape, but he would not discuss these safety issues with them. (Tr. 289-90). As an example, Harvey noted that Tolley provided the Salt Lake City television station with the written results from the independent lab, but he would not give a copy of the results to Harvey. The personnel policies of Moab Salt require employees to tell their supervisor if they discover any unsafe conditions so that the conditions can be corrected. (Tr. 377-78; Ex. R-11). York testified that Tolley refused to provide him with any information about the alleged unsafe conditions in violation of this policy.

After the June 13 meeting, Jornayvaz wrote a letter to Tolley summarizing the meeting. The letter states in part:

[Y]ou repeatedly stated that you have additional information about asbestos hazards at the facility and about other potential health and safety issues at the facility. In spite of our repeated requests, you refused to share that information with us. All you were willing to say was, "There will be a time for everything to come out."

Other than the asbestos issue that we are currently addressing, we are unaware of any other safety-related issues at the facility. If you do have information about potential health or safety issues at the facility, it is crucial that you provide information to us immediately, so we can take appropriate action. Refusing to provide the information puts your co-workers and others at risk if there are in fact health or safety hazards.

(Ex. R-1; Tr. 257-59). Tolley did not respond to this letter.

Tolley also filed a hazard complaint with MSHA and MSHA inspected the plant on June 13. MSHA Inspectors Okuniewicz and Lee believed that the material was not friable until they learned that the DEQ had determined otherwise. (Tr. 373). MSHA conducted personal and area sampling for asbestos on June 17, 2003. On July 9, 2003, MSHA issued to Moab Salt a section 104(a) citation, a section 104(d)(1) citation, a section 104(g) order, and a section 104(d)(1) order. The Secretary's proposed penalties totaled \$8,460.00.

On July 9, 2003, MSHA issued its report which, with respect to asbestos, had this to say:

During a period of time between May 10, 2003, and June 5, 2003, several employees were assigned to remove and replace siding on three transfer conveyors. The siding that was removed was known to contain asbestos. The employees, and employees in the area of the work, had the potential to be exposed to airborne asbestos fibers. The correct personal protective equipment needed for asbestos exposure was not used.

(Ex. C-8). MSHA tested for airborne asbestos but no violation was detected. (Tr. 208). There have been no excursions above the OSHA PEL for asbestos at the plant. The OSHA PEL is a more rigorous standard than MSHA's TLV for asbestos.

On June 20, 2003, Moab Salt issued a memo to all employees concerning asbestos awareness training. (Ex. R-7). All employees were required to attend the training on June 25, 2003. All Moab Salt employees attended this meeting except Tolley and four others. Hawks attended the meeting and testified that it lasted about two hours. (Tr. 233). Tolley serves as a volunteer rescue diver for the Moab Fire Department. On June 22, a boy fell into the Colorado River near Moab. Tolley was diving on the river for several days looking for the boy. Tolley's

shift at Moab Salt started at 4:00 p.m. that week. The asbestos meeting was at 2:00 p.m. on June 25. On most days that week he arrived at work late because of his diving. Tolley testified that he missed the meeting on June 25 because he was diving and the production manager, Rick Klein, did not remind him of the meeting or direct him to be there. (Tr. 59). Tolley testified that he was aware that he was supposed to attend the asbestos meeting at 2:00 p.m. on June 25. (Tr. 168). After Tolley arrived at work at 6:15 p.m. that day, Klein told him that he should not have missed the asbestos safety meeting. Tolley was given a written warning for not attending that meeting. (Tr. 60; Ex. C-5). Company records show that Tolley was given 2.5 hours of vacation time on June 25 because he was diving. (Tr. 63; Ex. C-6). Klein tried to call Tolley at his home on the morning of June 25 to tell him that his attendance at the meeting was mandatory. Klein told Tolley's wife that he had to attend the meeting. (Tr. 170-71).

Rick Klein testified that, on or about June 20, 2003, a notice concerning mandatory asbestos awareness training was posted at the mine. (Tr. 312; Ex. R-7). This asbestos safety class was scheduled at the suggestion of DEQ. (Tr. 253). The course was taught by Rocky Mountain Occupational Health. This contractor also provided more specific training for any Moab Salt employees who would be involved in asbestos cleanup. Klein testified that, on June 24, Tolley asked him if he could come to work late that day so he could continue diving for the volunteer fire department. Klein told Tolley that he could arrive late that day, but Klein testified that he did not give Tolley permission to be late for several days. When Tolley is late to work because of duties with the fire department, vacation time is assigned to missed time so that he will be paid for the missed time. (Tr. 316). Early in the morning on June 25, Tolley left a message on Klein's answering machine at work asking if he could be late again that day. Klein immediately called Tolley's home to remind him of the asbestos training meeting at 2:00 p.m. that day, but Tolley had already left. Tolley was given a written letter of warning for missing the meeting. (Tr. 321; Ex. C-5). Of the other employees who missed the training, two were on vacation, one was recovering from surgery, and another was scheduled to be off that day to take his father to dialysis out of town. (Tr. 333).

When Tolley and Hawks started raising the asbestos issues, rumors started that the plant was going to be closed because of the high cost of asbestos removal. Employees knew that Tolley and Hawks had raised the asbestos issue. On or about June 19, when Tolley went to his vehicle at work, there was a photo of Mr. Hawks on his windshield with a dot drawn on his forehead to look like a bullet hole. (Tr. 52-53; Ex. R-13). Tolley and Hawks showed York the photo. They told York that they felt threatened by the photo. (Tr. 380). York drove to the Sheriff's Office in Moab, Utah, to initiate an investigation into the matter. The sheriff was unable to determine who placed the photo on the windshield. (Tr. 381; Ex. R-13). In response, York issued an anti-harassment memo to all employees. (Ex. C-4). The memo stated that "verbal or physical conduct that denigrates or shows hostility toward an individual, and that creates an intimidating, hostile, or offensive work environment" is prohibited. *Id.* The memo further stated:

Any employee who believes that he/she is being harassed by a co-worker, manager, supervisor, or other individual in the workplace should immediately report the concerns to a supervisor or manager. A prompt, impartial and thorough investigation will occur. If it is determined that prohibited harassment has occurred, appropriate disciplinary action, up to and including termination, will occur.

Id.

On July 8, 2003, Moab Salt posted a notice on various bulletin boards around the plant stating that employees' pay would be increased but that no bonuses would be paid in July. Included in the notice was the following language:

The company has seen increases in the cost of natural gas, petroleum products, bonding/reclamation costs and property insurance. Due to the continued drought, the agricultural potash market has been slower than last year with our prices having dropped from previous years. Further, the company is facing potential fines due to the asbestos concerns raised in June.

(Ex. C-7; Tr. 64). Tolley testified that after this notice was posted, hourly employees started blaming him for the loss of the bonus. Tolley said that a number of employees began harassing him about his asbestos complaint. Louis Lopez would no longer be his partner when he played golf, for example. (Tr. 178). They had a verbal exchange in the change room one day. He also had verbal exchanges with at least two other hourly employees about his asbestos complaint. Tolley testified that York told him that Jornayvaz added the reference to asbestos in the notice. (Tr. 65).

In prior years, memos advising employees about potential bonuses did not set forth any reasons for the company's decision. York testified that Messrs. Harvey and Jornayvaz wanted the reasons that the company was not giving employees a bonus in July 2003 to be included in the memo. (Tr. 382). York testified that when Tolley complained to him that employees were harassing him because of the language about asbestos fines in the July 8 memo, York asked Tolley to tell him which employees were harassing him. York testified that Tolley refused to provide him with that information. (Tr. 383). Tolley testified that York never asked for the names of individuals harassing him but merely stated that there was nothing he could do.

Jornayvaz testified that the language about asbestos was not placed in the memo to discriminate against Tolley or to harass him. Harvey testified that he was involved in the decision to increase wages in July 2003 and he helped draft the notice that was posted at the mine. (Tr. 293). The company had paid a bonus in 2002, so Harvey felt that the employees deserved an explanation as to why no bonus would be paid in July 2003. At the time the notice was written, he did not know how much money it would cost to clean up the asbestos. A bonus

was paid in December 2003 because there had been a turnaround in the potash market and the asbestos cleanup had been completed. (Tr. 294-95). The potash market hit bottom in July 2003.

Tolley also contends that after June 13, 2003, he was no longer given the opportunity to work overtime. (Tr. 68, 85-91; Exs. C-6, C-9). Tolley took vacation the week of June 15 and July 21-23; he also took funeral leave July 1-3. (Tr. 182-83). He testified that he wanted to work more overtime hours, but the company would not give them to him. (Tr. 215).

Klein testified that Moab Salt is a seasonal operation so there is less opportunity for overtime during June, July and August. (Tr. 323). For example, there was no work for the slurry pit operator during those months, so he was available to work in loadout when extra help was needed there. The company tries to assign work to available employees so that it does not have to pay overtime to employees who are already scheduled to work 40 hours during the week. By the end of October 2003, Tolley worked about 325 hours of overtime. (Tr. 327). Klein testified that Tolley turned down overtime one time during the summer and that any lack of overtime hours was totally unrelated to Tolley's complaints about asbestos.

Tolley testified that his shift supervisor, Leroy Snyder, started harassing him after he raised the asbestos issue. Tolley testified that when he needed to travel to other parts of the plant, he usually caught a ride from someone in a company truck. Tolley testified that Snyder became agitated when Mr. Hawks gave him a ride in a company truck. According to Tolley, Snyder told him that because MSHA is being hard on us, "things are going to change with you." *Id.* Tolley was told that he could get rides from other employees, but not from Hawks. Tolley also testified that Snyder told him that he could not leave his work area for any reason and that Hawks was to stay out of his area. (Tr. 76). Hawks also testified that he was told that he could not leave his work area. (Tr. 229). Hawks further stated that his schedule was changed after the asbestos incident so that he was no longer on the same shift as Tolley. (Tr. 229). Hawks also confirmed that after the asbestos incident Snyder became "very rude" in his demeanor. (Tr. 232). Tolley testified that Bill Sanchez, the other employee in loadout, was never told that he could not leave his work area. After Tolley complained to York about Snyder's conduct, Snyder was transferred to another section of the plant where he was no longer Tolley's supervisor. (Tr. 157-62).

Snyder did not testify at the hearing. York testified that he had previously counseled Snyder about his management style. (Tr. 398). He told Snyder that he did not want him cursing at or raising his voice to employees. Hawks was offered a promotion, but he turned it down. (Tr. 399). Klein testified that he changed Hawks' work schedule in late July so that Hawks could work day shift rather than so many swing shifts. He made this change for Mr. Hawks' benefit and Hawks did not complain about this change. (Tr. 332).

Tolley usually brought his lunch to work and put it in the refrigerator in the packaging department, where Hawks worked. Tolley testified that Snyder told Tolley that he could no longer do that. Tolley testified that on July 30, 2003, he put his lunch in the refrigerator in rail

loadout in a Tupperware container that had his name on it. He ate his lunch at about 11:45 a.m. that day. (Tr. 190). That night at home, Tolley became very ill. Tolley testified that he was so sick that he could not walk. (Tr. 80). He refused his wife's offer to drive him to the emergency room. He did not go to work on July 31 and he did not see a physician. (Tr. 190-91). Tolley called "poison control" that day because he believed that he may have been poisoned. Tolley was asked by poison control whether he had been exposed to any chemicals at work. Tolley reported to work the next day, but he still felt sick. He called the county sheriff's office to report that he had been poisoned. Because Tolley's wife had run the Tupperware container through the dishwasher, the sheriff's deputy told Tolley that nothing could be done. Tolley did not tell anyone at work that he believed he had been poisoned. (Tr. 191).

York testified that, on August 6, 2003, Utah poison control called Moab Salt to ask if Tolley was "still alive." (Tr. 384). York immediately called Tolley at home to find out what was going on. Tolley told York that he called poison control the previous week. Tolley told him that after work on July 31 he started feeling bad and he thought he had the flu. (Ex. R-14). When the symptoms did not go away and he developed a rash, he called poison control. Tolley told York that he believed he had suffered from food poisoning. (Tr. 386). York did not understand Tolley to mean that he believed that his food had been deliberately poisoned. York testified that on August 7, Tolley told him that he thought someone had put poison in his food at the plant. (Tr. 386). Tolley asked York if the company could get him a refrigerator that he could control to store his lunch in. York agreed to this request and allowed him to put a lock on it.

Tolley testified that, after this incident, he was afraid to leave his food anywhere. (Tr. 104). Tolley was upset that the company did not investigate this incident. (Tr. 84). York agreed to buy Tolley his own refrigerator for use at work. Tolley testified that it took the company several weeks to provide this refrigerator and that, when he put a lock on it, Snyder told him that he had to pass out keys to his fellow employees. (Tr. 105). When he balked at that, the company agreed that he would not have to share the refrigerator with other employees. York testified that Tolley never told him that Snyder wanted him to give out keys to other people. (Tr. 388-89).

Soon after the DEQ inspected the plant on June 11, JBR Consultants completed their evaluation of what was required to clean up the asbestos. The DEQ required Moab Salt to adopt an operation and maintenance plan ("O&M Plan") to facilitate the removal of any asbestos at the site. (Tr. 347-48). As stated above, the work on the conveyor galleries was completed by early June but siding needed to be removed and replaced in other areas at the plant after that date. Mr. Call of the DEQ required Moab Salt to clean up the asbestos-containing paint chips on the ground in the area of the inclines and to do similar cleaning in other areas of the plant as the old siding was being removed.³ Environmental Abatement, Inc., ("EAI") performed this work for Moab Salt between June 13 and June 25, 2003. This contractor used special precautions when cleaning up the material on the ground under the conveyors. During this cleanup operation,

³ The DEQ also required Moab Salt to perform extensive cleaning in and around the crystallizer building, which contained equipment that had not been used since 1968. (Tr. 372).

employees of the contractor wore Tyvek coveralls and P-100 filters, they wetted the area down to contain any dust, and removed any paint chips. They cleaned the area twice and expanded the area at the request of the DEQ. The cleanup around the galleries was completed by early July. The galleries were shut down during the cleanup operations. Several Moab Salt employees were trained on the proper removal of the siding and cleanup of any chips so that EAI's services would no longer be required.

After the cleanup had been completed in the area around the conveyor galleries, Tolley noticed some flakes on the support structure inside the galleries. During a telephone conversation on the morning of August 7, 2003, Tolley raised this concern with York and Klein. (Tr. 390-91; Ex. R-15). In response, Klein and York traveled through the conveyor galleries and found some chips. York called EAI to clean the galleries more thoroughly on August 8. (Tr. 391). York testified that Tolley seemed satisfied with the company's response. On August 16, Tolley reported additional chips in the galleries. (Tr. 393). York believes that, because the galleries are suspended in the air between buildings, the wind picked up chips hidden in the recesses of the structure. (Tr. 393). Moab Salt told EAI to return and vacuum the beams of the structure so that chips would not reappear.

Tolley asked York whether he could be tested for asbestos exposure under the Utah Workers Compensation Fund ("WCF"). (Tr. 98). York testified that a claim was filed for Tolley with the WCF but that Tolley was not satisfied with the speed at which the process moved. Tolley set up an appointment with a doctor in Salt Lake City on September 9, 2003, and took vacation time to see him. Based on the report of the physician, the WCF entered the following findings:

While squamous cell CA and fibrosis are reported with asbestos exposure, the response dose is related and the current reported exposure is not considered significant for this condition.

The development of mesothelioma is specific to asbestos inhalation and is reported to occur with even brief exposure to asbestos. The incidence would be low, probably under 1% and the time to occur can be 20 years or more.

(Ex. C-12). The WCF agreed to pay for his initial evaluation and for checkups including x-rays every five years for 20 years. After 20 years, the WCF agreed to pay for such checkups every two years "if you feel this is essential for your peace of mind." (Ex. C-12).

In September 2003, Tolley put his house in Moab, Utah, up for sale and started looking for work in the Salt Lake City area. (Tr. 103). He decided that he had to leave his employment with Moab Salt because it was "not willing to do anything about the harassment . . . or to do anything on my behalf." (Tr. 103). He believes that Jornayvaz was angry at him for reporting the asbestos problem and that the company was unwilling to stop the harassment. The

harassment included the food poisoning, the photo of Hawks on his windshield, the memo that essentially blamed Tolley and Hawks for the lack of employee bonuses, and the company's lack of cooperation in getting his concerns addressed. In October 2003, Tolley purchased a house in West Valley City, which is in the Salt Lake City area, and he moved his family there in December 2003. He testified that he sold his Moab house in February 2004 at below market price. (Tr. 106). He obtained employment in the Salt Lake City area in February 2004. (Tr.107).

Tolley called York to resign from Moab Salt on December 23, 2003. York and Tolley agreed to make his resignation effective December 27 so that his son's previously scheduled dental work in Salt Lake City would be covered by the company's health insurance. (Tr. 397; Ex. R-17). York testified that Tolley told him that it was better for him and his family to live in Salt Lake rather than Moab.

Tolley applied for unemployment benefits but Moab Salt challenged his right to these benefits. The administrative law judge who heard the case reviewed the evidence concerning discrimination and harassment. The judge determined that Tolley had been subject to some harassment in June 2003 for his safety activities. He concluded that "[s]ince there were no troubling work related incidents after June 19, 2003, that could be corroborated as something other than the claimant's suspicions, the preponderance of the evidence in this case supports the conclusion that the claimant quit his job in December 2003 to move his family to the Salt Lake City area." (Ex. C-14 p. 4). Tolley was denied unemployment compensation benefits beyond the \$1,865.00 he initially received. Tolley states that the hearing was held over the telephone and that he disagrees with the judge's decision because it is based almost exclusively on the company's account of the events. Tolley appealed the administrative law judge's decision but it was affirmed on appeal. (Tr. 206; Ex. R-4).

Tolley admits that he was not terminated by Moab Salt, but he contends that he was forced to leave because of the continuing harassment. (Tr. 112). He testified that he believed that his "life was at stake." (Tr. 115). Tolley testified that whenever he brought harassment issues to the attention of management, he was told that there was nothing that the company could do. Tolley was particularly disturbed by Moab Salt's lack of response to the harassment and also to his initial concerns about asbestos exposure. Tolley believes that he gave the company every opportunity to correct the asbestos disposal problem but that his concerns were ignored. Fellow employees accused Tolley of taking food off their table because they were scared that his complaint about asbestos was going to cause the plant to be closed. (Tr. 116-17). Although York told Tolley that the plant was not going to be closed, Tolley believes that the company did not do enough to calm the fears of his fellow employees. Tolley described the food poisoning as the "turning point" because, after that, his wife wanted to leave Moab. (Tr. 117).

Tolley filed a complaint of discrimination with MSHA on August 2, 2003. By letter dated January 9, 2004, MSHA advised Tolley that it determined that Moab Salt had not violated section 105(c) of the Mine Act. Tolley filed this case with the Commission on his own behalf under section 105(c)(3). Tolley is seeking the following: pay for the overtime hours he was not

assigned in the summer of 2003; reimbursement for the cost of having the asbestos samples analyzed by the laboratory; the difference between the sale price and market price of the house he sold in Moab; reimbursement for the cost of putting his household furnishings into storage; the costs incurred by his wife related to the shutting down of her business in Moab; the costs associated with relocating his family to the Salt Lake City area; reimbursement for all future medical bills if he gets a disease from his asbestos exposure; back pay for the period between December 27, 2003, and the date he obtained employment in Salt Lake City in February 2004; and the removal of the disciplinary letter from his record for not attending the asbestos awareness meeting on June 25.⁴

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

⁴ Tolley also presented evidence that he worked part time performing towing for Charles Harrison, a contract oil pumper for Intrepid Oil, from time to time. (Tr. 120-22). (Tr. 120-22). Tolley contends that he was not given as much towing work after June 2003. Harvey testified that any reduction in towing that Tolley performed for Mr. Harrison was unrelated to the asbestos issues at Moab Salt. (Tr. 296-97). I find this issue to be irrelevant to this case.

There is no dispute that Tolley engaged in protected activity when he complained to management, MSHA, and the DEQ about asbestos at the mine.

B. Adverse Action

Tolley contends that he suffered adverse action as a result of his protected activities while still employed by Moab Salt. 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.

First, Tolley argues that he was not given as many opportunities as before to work overtime after June 13, 2003, the date of the meeting with Jornayvaz. His proof is almost entirely anecdotal. (Tr. 85-89; Ex. C-9). He cites examples of situations where other employees worked overtime and he did not. *Id.* He testified that he wanted to work more overtime hours, but the company would not give them to him. (Tr. 215). Klein, who was responsible for assigning overtime, credibly testified that there was less overtime available June through August of 2003 because of the seasonal nature of the work. (Tr. 323). He also testified that, because of the lack of work in other areas of the plant during the summer, employees from those areas work in rail loadout as needed, thereby eliminating the need for as many overtime hours. There is no question that Tolley worked overtime hours that summer. I credit Klein's testimony that any reduction in Tolley's overtime hours that summer was totally unrelated to Tolley's complaints about asbestos. As a consequence, I find that Tolley failed to establish that any reduction in his overtime hours after June 13, 2003, was related to his protected activities. Tolley did not establish that he was subject to disparate treatment.

Second, Tolley contends that he was issued the written letter of warning for missing the asbestos awareness meeting because he was the employee who first raised the issue with management. As stated above, the meeting was arranged at the suggestion of the DEQ and was first announced on June 20. I credit the testimony of Klein that the other employees had legitimate reasons for missing the meeting. Two were on vacation, one was recovering from surgery, and another was scheduled to be off that day to take his father to dialysis out of town. (Tr. 333). I find, however, that Tolley likely would have not been disciplined if he had not been one of the employees who raised the asbestos issue. I credit Klein's testimony that when he gave Tolley permission to be late to work on June 24 he did not give him blanket authority to be late other days that week. Tolley knew that he was required to be at the meeting. Nevertheless, given his prior volunteer work with the Moab Fire Department, I find that the company would not have

placed a disciplinary letter in his file if he had not raised the asbestos issue. Thus, I find that this adverse action was taken as a direct result of his protected activity. Consequently, I order that this letter be permanently removed from his record.

C. Constructive Discharge

The remainder of the issues in this case relate to Tolley's contention that he was forced to leave Moab Salt because of the continued harassment he suffered. He agrees that he was not terminated from his employment but argues that he had no choice but to quit. Constructive discharge is established "when a miner engaged in protected activity shows that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign." *Sec'y on behalf of Nantz v. Nally & Hamilson Enters.*, 16 FMSHRC 2208, 2210 (Nov. 1994) (citation omitted). In essence, "[c]onstructive discharge doctrines simply extend liability to employers who indirectly effect a discharge that would have been forbidden by statute if done directly." *Simpson v. FMSHRC*, 842 F.2d 453, 461 (D.C. Cir 1988). In determining whether working conditions were so intolerable that a reasonable person would have felt compelled to resign, each incident or working condition should not be viewed discretely, but rather in the context of the cumulative effect it could have on the employee. *Sec'y on behalf of Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 265, 276 (March 1999) (citation omitted). The incidents or conditions are considered from the perspective of the reasonable employee alleging such conditions. *Id.* Because it is the employer who is ultimately responsible for working conditions, it is the employer's actions that must be closely examined. *Id.* at 280.

Tolley emphasized two concerns at the hearing. First, he believes that Moab Salt did not react quickly enough when he raised concerns about asbestos at the plant. Tolley contends that management was hostile to his protected activities. Second, Tolley contends that Moab Salt failed to take sufficient steps to end the harassment by his fellow employees. I find that the evidence shows that when Tolley raised the asbestos issue, York took his concerns seriously. Moab Salt knew that Galbestos contained asbestos because Hawks overheard Hunter talking about it. York did not believe that the Galbestos created a health hazard, but he accompanied Tolley to the boneyard to look at the stacked siding. When York could see fibers in the coating on the siding, he told Tolley that he would look into the matter. Given that Moab Salt was in the process of removing the old siding, York needed to act quickly to address any problems. On June 10, York contacted JBR Consultants to have them come to the plant to evaluate the situation, which was five days after Tolley first raised his concerns with York. Given the health hazards that asbestos can create, York should have responded more quickly to Tolley's concerns. At Tolley's request, however, York asked that JBR Consultants visit the plant on June 13 rather than the originally scheduled date of June 23.

As stated above, JBR Consultants did not believe that the asbestos-containing coating on the old siding created a health hazard because it was not friable. The DEQ, however, required Moab Salt to adopt an O&M Plan that required the company to treat the asbestos-coated siding as a potential health hazard. If Tolley had not called the DEQ, it is doubtful that JBR Consultants

or Moab Salt would have adopted such a rigorous plan. Tolley's primary concern was to make sure that the project was stopped until a thorough evaluation could be completed. (Tr. 140-41). Tolley's concern was entirely reasonable. It is not clear whether Moab Salt would have stopped the siding replacement project on its own without the intervention of the DEQ. Thus, Tolley's actions helped ensure the safety of Moab Salt's employees. His actions also increased the cost of the siding replacement project. Once the DEQ determined that the company needed to take greater precautions when handling the old siding, Moab Salt acted reasonably and promptly. It stopped all work on the project and, with the assistance of JBR Consultants, developed a plan that satisfied the DEQ's requirements. The evidence establishes that after June 10, 2003, Moab Salt did everything required to make sure that the health of its employees was protected when removing and disposing of the old siding. Indeed, when Tolley discovered additional pieces of the coating in the conveyor galleries in August, the entire area was cleaned thoroughly again to make sure it had all been removed.

Harvey and Jornayvaz traveled to Moab to investigate Tolley's complaints. Tolley did not want to meet with them. It was only after York ordered Tolley to meet with them that Tolley relented. Tolley's reluctance is puzzling because he is the person who called Harvey about the asbestos situation. Tolley told them that he had photos, video tapes, and other evidence of conditions that endangered the health and safety of Moab Salt's employees. Both Harvey and Jornayvaz believed that Tolley was concerned with other hazards as well as the asbestos hazard. Tolley refused to provide any details about his safety and health concerns. Tolley testified that he wanted to leave the meeting because Harvey and Jornayvaz were asking the wrong questions.

Based on my observation of his testimony at the hearing, I find that Tolley is a very difficult person to talk to. When being questioned by me and opposing counsel, he frequently interrupted before he fully understood the question. Tolley interrupted the person questioning him at the hearing more frequently than most other witnesses who have appeared before me. He jumped from subject to subject making his train of thought very difficult to follow. I credit the testimony of Harvey and Jornayvaz that they became frustrated at this June 13 meeting because Tolley did not want to provide much information about the alleged safety and health hazards. I especially credit the testimony of Harvey concerning the events at the meeting with Tolley on June 13, as summarized above. Harvey was a very believable witness. I find that Tolley was not harassed by Harvey and Jornayvaz during this meeting. Taking into consideration the words and actions at this meeting, I find that it was not a coercive interrogation that violated Tolley's section 105(c) rights. See *Moses v. Whitely Development Corp.*, 4 FMSHRC 1475, 1478-79 (Aug. 1982), *aff'd* 770 F.2d 168 (6th Cir. 1985). After the meeting, Jornayvaz wrote a letter to Tolley asking for any information he had regarding safety related issues. (Ex. R-1). Tolley did not respond to this letter.

The first instance of harassment occurred when Tolley found a photograph of Hawks on his windshield. When York was shown the photo, he immediately drove to Moab so that an official investigation could be started. He also issued an anti-harassment memo. The Sheriff's Department was unable to determine who placed the photo on the windshield. Although Moab

Salt could have conducted its own internal investigation into this incident, I find that Moab Salt did not condone this harassment and took steps to try to prevent further harassment.

The memo of July 8, 2003, set forth the concerns raised about asbestos as one of the reasons that a bonus was not being paid to employees. (Ex. C-7). This memo had the effect of causing Tolley to be subject to a significant amount of harassment from fellow employees. Although Moab Salt management stated that it was not their intent to single out Tolley for harassment, that fact is largely irrelevant for two reasons. First, it was readily foreseeable that Tolley would be subject to ridicule and scorn once employees read the memo. The memo made clear that one of the reasons employees were not getting a bonus was the fact that asbestos concerns were raised in June. In addition, when looking at the statement contained in the memo, I must consider all of the circumstances that existed at the time. *See Sec'y of Labor on behalf of Grey v. North Star Mining, Inc.*, 27 FMSHRC _____, slip op. at 9, KENT 2001-23-D (Jan. 12, 2005). The employer's motivation in making the statement is not nearly as relevant as whether the statement would tend to intimidate a reasonable miner or cause him to be subjected to harassment. I find that the July memorandum had the effect of intimidating Tolley because it subjected him to harassment from his fellow employees.

I find that Tolley was also intimidated and harassed by his shift supervisor, Leroy Snyder. I credit the testimony of Tolley that Snyder treated him differently after he complained about the asbestos. Snyder changed the terms and conditions of his employment by prohibiting Tolley from leaving his workplace, prohibiting Tolley from fraternizing with Hawks, and ordering Tolley to provide other employees with keys to the refrigerator that York ordered for him. Hawks's testimony corroborates the testimony of Tolley on this issue. Tolley admitted that Snyder was transferred to another part of the plant after he complained to York, with the result that Snyder was no longer Tolley's supervisor. Although it appears that this transfer was made for other reasons, it had the effect of immediately remedying the situation.

Tolley's actions with respect to the alleged poisoning of his lunch on July 30 are contradictory. He testified that the pains in his stomach were so severe he could not walk, yet he refused to go to the emergency room. Indeed, he never saw a physician as a result of this illness. He called poison control about his stomach illness, rather than a doctor or nurse-practitioner. When poison control asked whether he worked around chemicals, he jumped to the conclusion that he must have been deliberately poisoned. He did not call or tell anyone at Moab Salt about his concern that he had been poisoned, yet he faults the company for failing to conduct a thorough investigation of the alleged poisoning. Tolley had already called the Sheriff's Department by the time he finally advised York on August 7 that he believed he had been poisoned. I find that Tolley did not produce any reliable evidence that he was deliberately poisoned by another employee at Moab Salt. His belief is based on conjecture and speculation. Consequently, because Tolley did not establish that he was poisoned at work, I find that this event did not constitute harassment or intimidation for which Moab Salt can be held responsible. York agreed to purchase a refrigerator for Tolley which he could lock to protect his food.

When Tolley told York in August that he wanted a physician to evaluate his health risk from asbestos exposure, York agreed to file a workers' compensation claim on his behalf. Although York did not respond as quickly as Tolley would have liked, such an examination took place in early September and it was covered by the WCF. As reported by the WCF, Tolley's risk of developing a disease from his exposure to asbestos is quite low. WCF agreed to pay for periodic examinations to monitor his condition. I find that Moab Salt did all that it could to address Tolley's health concerns.

Tolley quit his job at Moab Salt in late December 2003. There is no evidence that Tolley suffered additional harassment at his job after the summer of 2003, except occasional comments from other hourly workers. All employees, including Tolley, received bonus pay on December 13, 2003.

I find that Tolley failed to establish that he was constructively discharged from his job at Moab Salt. The requirement that conditions be "intolerable" to support constructive discharge is not easy to establish.⁵ *Simpson*, 842 F.2d at 463. In December 2003, a reasonable miner would not have felt compelled to resign because of unsafe, unhealthy, or hostile working conditions created or maintained by Moab Salt. Although Moab Salt management and hourly employees displayed some hostility toward Tolley's protected activity in June and early July, the entire matter had been resolved well before he quit in December 2003. York continued to take Tolley's health concerns seriously. For example, he traveled with Klein through the conveyor galleries in August to look for chips from the siding and he had EAI return several times to perform additional cleaning, including hand vacuuming the metal structure inside the galleries. York's conduct, as summarized in the decision, demonstrates that Moab Salt was not hostile to Tolley's health and safety concerns.

The memo of July 8 concerning employee bonuses was unfortunate because it had the effect of subjecting Tolley and Hawks to harassment. When Tolley raised concerns about this harassment he did not provide York with the names of people who were harassing him. As a consequence, it was difficult for Moab Salt to address the harassment issue. Moab Salt cannot be expected to control the actions of its hourly employees after working hours. Tolley testified that many of the negative comments he received from fellow employees were made in Moab when they would cross paths while shopping. Moab Salt cannot force a particular employee to be Tolley's golfing partner. Moab Salt may have been able to do more to control the harassment at

⁵ Constructive discharge is typically upheld in situations where the employer's conduct is egregious. *See, e.g., Liggett Indus., Inc. v. FMSHRC*, 923 F.2d 150, 152-53 (10th Cir. 1991) (court agreed that welder with diagnosed respiratory condition was justified in quitting inadequately ventilated mine where operator demonstrated no intention of improving ventilation); *Simpson*, 842 F.2d at 463 (miner justified in quitting rather than continuing to work in mine in which operator was responsible for multiple "blatant" safety violations that had repeatedly and continually occurred); *Nantz*, 16 FMSHRC at 2210-13 (bulldozer operator's decision to quit justified in light of operator's failure to protect him from dust which caused breathing and visibility problems).

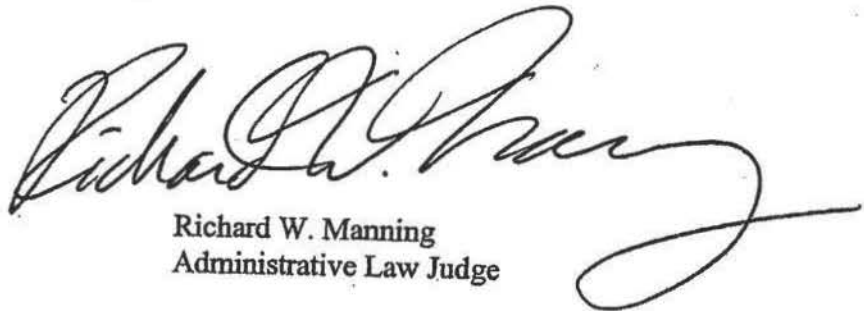
work, but by December 2003 conditions had improved considerably. All health hazards had been eliminated, the old siding had been replaced, it was obvious that the plant was not going to shut down, and employees received bonus pay.

The doctrine of constructive discharge extends liability to mine operators who indirectly effect a discharge that would have been illegal if done directly. Although the operator's motivation is only one factor to evaluate, I find that Moab Salt management was not attempting to force Tolley to quit. Indeed, it is highly likely that if Tolley had not quit he would still be employed by Moab Salt. Although Hawks was not as vocal about the asbestos issue as Tolley, he was subject to harassment, as demonstrated by his photograph placed on Tolley's vehicle. Hawks is still employed by Moab Salt and he was offered a management position in 2004, which he apparently turned down.

I appreciate Tolley's fears in the summer of 2003. His fellow employees were blaming him for their not getting bonuses. Nevertheless, Moab Salt's management properly addressed the asbestos issue and took steps to quell his concerns about asbestos exposure. It was also reasonable for Tolley to be concerned about the bonus memo of July 8. Although the company's response to Tolley's health concerns and to the harassment was not perfect, when considering the cumulative effect of all of the incidents, I find that Moab Salt did not create or maintain conditions so intolerable that a reasonable person would have felt compelled to resign. In addition, some of the hostility between Tolley and management was created or exacerbated by Tolley's own conduct in refusing to describe his safety and health concerns, as described above.

III. ORDER

For the reasons set forth above, that part of the discrimination complaint filed by Robert R. Tolley concerning the written warning, dated June 25, 2003, which was placed in his file is **AFFIRMED**. Moab Salt is **ORDERED** to remove that written warning from his file. That part of Mr. Tolley's discrimination complaint which seeks reimbursement for overtime that he alleges was denied him is **DENIED**. Finally, that part of Mr. Tolley's discrimination complaint that alleges constructive discharge is **DENIED**. For the reasons set forth above, upon removal of the written warning, this case is **DISMISSED**.⁶



Richard W. Manning
Administrative Law Judge

Distribution:

Mr. Robert R. Tolley, 3838 South 4220 West, West Valley City, UT 84120-4043 (Certified Mail)

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RWM

⁶ The Commission's procedural rule at 29 C.F.R. § 2700.44(b) provides that, if a judge sustains a discrimination complaint brought under section 105(c)(3) of the Mine Act, he should notify the Secretary of that fact so that the Secretary can file a petition for assessment of civil penalty. In this case, I denied most of the relief that Tolley was seeking and sustained a very small portion of the discrimination complaint. As a consequence, I find that a civil penalty is not appropriate in this case.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

January 10, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2004-36
Petitioner	:	A.C. No. 46-08593-11714
	:	
v.	:	
	:	
BAYLOR MINING, INC.,	:	Jim's Branch No. 3a
Respondent	:	

ORDER DENYING MOTION **FOR** **CERTIFICATION OF RULING FOR INTERLOCUTORY REVIEW**

This case is before me on a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). On August 18, 2004, I granted, in part, and denied, in part, a motion of the Respondent to compel the Secretary to furnish certain documents. *Baylor Mining, Inc.*, 26 FMSHRC 739 (Aug. 2004). On November 8, 2004, the Secretary's motion for partial reconsideration of that order was denied. *Baylor Mining, Inc.*, 26 FMSHRC 905 (Nov. 2004). The Secretary has now filed a Motion for Certification of Interlocutory Ruling for Review. The Respondent has filed a response in opposition to the motion. For the reasons set forth below, the Secretary's motion is denied.

At issue is an order "that the Secretary furnish the names of her miner witnesses to the Respondent two days before the hearing and that at the same time, the Secretary provide to the Respondent the statements, including memoranda of interview, of any miners who will be witnesses." *Id.* at 907 (footnote omitted). This order does not meet either of the criteria in the Commission's rules for interlocutory review.

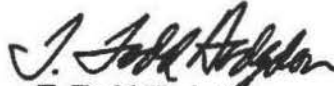
Commission Rule 76, 29 C.F.R. § 2700.76, controls requests for interlocutory review. Rule 76(a)(1)(i), 29 C.F.R. § 2700.76(a)(1)(i), provides that review cannot be granted unless the "Judge has certified, upon his own motion or the motion of a party, that his interlocutory ruling involves a controlling question of law and that in his opinion immediate review will materially advance the final disposition of the proceeding." This order does not involve a controlling question of law, nor will its immediate review materially advance final disposition of the proceeding.

The order does not involve a controlling question of law because the Commission has already ruled that the names of miner witnesses, along with any statements they may have made,

must be furnished to the Respondent. In *Asarco, Inc.*, 14 FMSHRC 1323, 1331 (Aug. 1992), the Commission observed "that Asarco will be able to obtain the names of the Secretary's witnesses two days before the trial and that any statement of a miner who is called may be obtained for the purpose of refreshing his recollection or impeaching his credibility at the trial." In a subsequent case, the Commission specifically stated that "the judge may at trial order disclosure of informants' statements" even if the statements, as here, had previously been determined not to be discoverable, *Sec'y of Labor on behalf of Gregory v. Thunder Basin Coal Co.*, 15 FMSHRC 2228, 2237 (Nov. 1993). Therefore, I conclude that the Secretary's motion does not meet the first requirement for interlocutory review.

The Secretary claims that immediate review of the order will materially advance final disposition of the proceeding, but does not state how. It is difficult to discern how it would. If the statements are furnished as ordered, the case will proceed to trial. If the order is reversed and the statements are not furnished, the case will still proceed to trial. Granting interlocutory review will only delay the case, not materially advance its final disposition. Consequently, I conclude that the Secretary has not met the second requirement for interlocutory review.

Certification of a ruling for interlocutory review can only be granted if the ruling involves both a controlling question of law and immediate review of the ruling will materially advance the final disposition of the proceeding. The ruling in this case involves neither. Accordingly, the motion for certification is **DENIED**.



T. Todd Hodgdon
Administrative Law Judge
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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, DC 20001

January 12, 2005

NATIONAL CEMENT COMPANY	:	CONTEST PROCEEDING
OF CALIFORNIA, INC.,	:	
Contestant	:	Docket No. WEST 2004-182-RM
	:	Citation No. 6361036; 02/09/2004
And	:	
	:	
TEJON RANCHCORP,	:	
Intervenor	:	
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Lebec Cement Plant
Respondent	:	Mine ID: 04-00213

ORDER LIFTING STAY

AND

**DECISION GRANTING SECRETARY'S MOTION
FOR SUMMARY DECISION**

This contest proceeding was stayed on March 18, 2004, to provide the parties with an opportunity to file joint stipulations for the purpose of filing cross motions for summary decision on the issue of jurisdiction. Specifically, the issue is whether a private paved 4.3 mile long two-lane road, beginning at State Route 138 in northern Los Angeles County and ending at the entrance to the National Cement Company of California, Inc., ("National Cement") Lebec Plant, is subject to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (Mine Act). The subject road is on land owned by Tejon Ranchcorp ("Tejon"). The jurisdictional issue arose after Citation No. 6361036 was issued on February 9, 2004, citing an alleged violation of the Secretary of Labor's ("the Secretary's") mandatory safety standard in 30 C.F.R. § 56.9300(a) that requires the construction of berms or guardrails on the banks of roadways where significant drop-offs exist.

Tejon filed an unopposed motion to intervene that was granted on June 10, 2004. National Cement, Tejon and the Secretary filed Joint Stipulations on November 17, 2004. National Cement's Motion for Summary Decision was filed on December 13, 2004. Tejon moved for summary decision and filed a memorandum in support of National Cement's motion on December 13, 2004. The Secretary's Motion for Summary Decision was filed on December 15, 2004. The parties' motions having been filed, the stay in this matter **IS LIFTED**.

National Cement, Tejon and the Secretary have stipulated to the use of joint exhibits proffered in an exhibit book. The parties' joint stipulations are set forth below.

A. JOINT STIPULATIONS

I. Issue Presented

1. The issue to be addressed in the parties' cross motions for summary decision is whether the roadway that is the subject of Citation No. 6361036 is a "mine" as defined by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802(h)(1), and thus whether the cited roadway is within the jurisdiction of the Mine Safety and Health Administration (MSHA).

II. National Cement

2. National Cement owns and operates a facility ("cement plant") near the town of Lebec in southern Kern County, California, just north of Los Angeles County. At this location, National Cement extracts minerals such as limestone, shale and silica from quarries, and processes them with other materials that were acquired from off-site sources, to produce Portland cement for sale.

3. National Cement is engaged in mining at the cement plant, and its mining operations there affect interstate commerce. The cement plant constitutes a "mine" as defined in the Mine Act and is subject to regulation by the Mine Safety and Health Administration.

4. The cement plant is designed to have a maximum cement production capacity of 1,5000,000 tons. In 2003, the cement plant produced and sold 931,882 tons of cement. National Cement expects to sell approximately the same amount in 2004.

5. The cement plant is located on the southern portion of the Tejon Ranch (the "Ranch"). Tejon owns the land on which the cement plant is situated.

III. Tejon Ranchcorp and the Tejon Ranch

6. Tejon is a publicly traded corporation and is the sole owner of the Ranch.

7. The Ranch is an operating cattle ranch and commercial property consisting of approximately 270,000 acres in Los Angeles and Kern Counties in California. The Ranch is roughly 40 miles by 26 miles, or about a third of the size of Rhode Island, and is the largest contiguous expanse of land under single ownership in California.

8. A variety of commercial activities take place on the southern portion of the Ranch, where the subject road is located. Tejon and/or its lessees, licensees, and authorized visitors, use the road for livestock ranching, filmmaking and guided and unguided hunting. Tejon allows

members of a fee-for-permit program to camp, hunt on, and explore the ranch; some of them use the road for this purpose. Tejon has granted utility easements, and utility companies use [of] the road pursuant to those easements. Tejon is also seeking to develop land surrounding part of the road, and its contractors and representatives of the public and government agencies use the road to view and study the land.

9. There are approximately 30 miles of paved roads on the Ranch. The Ranch also contains a network of dirt roads. There are significantly more miles of dirt roads than paved roads on the Ranch.

IV. The Subject Road

10. A 4.3 mile long, paved, two-lane road (the "road" or the "subject road") begins at State Route 138 in northern Los Angeles County and runs north into Kern County to the Cement Plant. Tejon owns the land on which the road sits. Dirt roads intersect the subject road and continue onto Ranch land.

11. The subject road does not have an official, publicly recorded name. Some time ago, National Cement employees erected a sign at the highway end of the road, in honor of a deceased employee, that purported to designate the road the "Wayne Hand Road." The sign was later removed.

12. The road has one lane in each direction and is the only paved road providing vehicular access to the cement plant. All of National Cement's customers, contractors, vendors, and employees use the road to travel to and from the cement plant. All purchased raw materials are brought to the plant via the road, and all cement produced at the plant is trucked out to customers by use of the road. Vehicles associated with the cement plant that use the road are typically commercial, over-the-road trucks and passenger vehicles.

V. The Subject Citation

13. On February 9, 2004, MSHA issued National Cement the citation that is the subject of this proceeding. Citation No. 6361036, issued pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977, alleges a violation of the standard at 30 C.F.R. § 56.9300(a). The citation reads as follows:

The mine operator failed to provide berms and guardrails on the banks of the primary access road to the Lebec Cement Plant. There were drop offs along the roadway ranging from 6 ft. to approximately 25 ft. and sufficient to cause a vehicle to overturn or endanger persons in equipment. The roadway was used extensively by large over-the-road trucks, delivery vehicles, and personal vehicles of mine personnel and vendors. The lack of berms or guardrails on the two lane

road presented a hazard particularly during inclement weather when vehicles could be expected to slide and potentially become involved in accidents.

14. The citation at issue in this case was properly served by a duly authorized representative of the Secretary upon an agent of National Cement on the date and place stated therein.

15. National Cement filed a timely Notice of Contest of the subject citation.

VI. Lease and Easement Granted to National Cement

16. Tejon executed Easement Deeds and entered into a Cement Manufacturing Plant Lease with Pacific Western Industries, Inc. ("Pacific Western"). The grantee and lessee's rights under the easements and lease were later assigned to General Portland Cement Company and ultimately to National Cement.

17. The rights of Tejon and National Cement in the road are founded upon these documents.

VII. Original Construction of the Road

18. Before the cement plant was constructed in the mid-1960's, Tejon relied upon a network of unimproved roads to access this part of the Ranch. Now, Tejon uses the existing dirt roads as well as the subject road

19. In 1965, Pacific Western began construction of the road. Portions of certain existing unimproved ranch roads were used as part of the route for the subject roadway. Joint Exhibit 7 shows the configuration of the unimproved roads in 1965. In 1966 the road was paved and the cement plant was constructed and became operational.

20. In 1970, Tejon executed and conveyed a Grant Deed to the State of California allowing the state to construct a state water aqueduct across this portion of the Ranch. The state did so and, later in 1970, built a bridge over the aqueduct, and realigned and re-built a portion of the road to cross the bridge.

VIII. The Road and Related Features

21. The only persons allowed on the road are Tejon's employees, vendors, contractors, lessees, licensees and visitors; National Cement's employees, vendors, contractors and visitors; and those persons so authorized by the State of California, in accordance with the aforementioned Grant Deed. Signs posted at the highway entrance to the road reflect this:

a. On State Route 138, on either side of the road, are posted signs which read "National Cement Plant." Arrows on the signs point up the road.

b. On the east side of the road is a sign that reads:

**PRIVATE ROAD
KEEP OUT**

**NO HUNTING TRESPASSING
RIGHT TO PASS BY PERMISSION
AND SUBJECT TO CONTROL OF OWNER
SECTION 1008, CIVIL CODE**

**VIOLATORS WILL BE PROSECUTED!
TEJON RANCH CO.**

c. On the west side of the road is a sign that reads:

**PRIVATE ROAD
NO TRESPASSING
VIOLATORS WILL BE PROSECUTED**

**HEAVY TRUCK TRAFFIC
NATIONAL CEMENT CO., INC.
TEJON RANCH CO.
CIVIL CODE 1008**

d. On the east side of the road, several yards north of the sign described in subparagraph b. above, is a sign that reads:

**NOTICE YOU ARE NOW ENTERING PRIVATE PROPERTY
OF NATIONAL CEMENT CO. INC.**

The possession or use of illegal or controlled substances, materials or weapons is absolutely prohibited. Removal of Company property without Company permission or defacing of such property is strictly forbidden. Vehicles and/or personal property are subject to detainment and search by the Company as required. Thank you for your cooperation. National Cement Co., Inc. California Plant [The corporate Symbol of National Cement]

e. On the east side of the road, north of the sign described in subparagraph d. above, is a sign that reads:

PROPOSITION 65 WARNING

Warning: This area contains chemicals that are known to the State of California to cause cancer and birth defects and other reproductive harm at a level which requires a warning. These chemicals include crystalline silica, trace metals contained in raw materials and process equipment, and chemicals contained in fuels, lubricants, equipment, vehicle exhaust, use of tobacco products, and other substances coincidental to the manufacture of Portland Cement or as a result of their use in the manufacture of Portland Cement. Portland Cement contains chemicals known to the State to cause cancer and birth defects and other reproductive harm. Exercise care to avoid inhalation of dust when handling cement or its products. For more information contact the plant manager. Material safety data sheets are available on request for materials used and produced at this plant.

f. On the east side of the road is a monument displaying the National Cement corporate symbol.

22. There is fencing running along both sides of the road enclosing ranch land.

23. At the southernmost entrance to the road, just off State Route 138, there is a cattle crossing guard situated on the surface of the road. There are two more cattle guard crossings located at other points along the road.

24. There are gates located at various points in the fencing that runs alongside the road. Behind various gates are dirt roads, trails and livestock corrals. Tejon maintains locks on each of these gates. Some gates also have locks maintained by utility companies. The parties agree that at least some gates are used. The parties are unable to determine how often any given gate is used and are unable to determine if there are gates that are never used.

25. None of the gates or fields on either side of the road are used by National Cement.

26. A gate and guardhouse is located at the north end of the paved portion of the road, in front of the cement plant. In recent years, the guardhouse has been manned only during periods in which substantial construction was being undertaken at the plant. Over a three to four year period, from time to time, when there were a number of contractors entering the plant, National Cement posted a guard at the guardhouse to screen traffic coming into the plant. Since that time, the guardhouse has not been manned.

27. Adjacent to the guardhouse, National Cement has posted a sign which reads:

NOTICE

ANYONE ENTERING THIS FACILITY MUST STOP AT THE
FRONT OFFICE AND CHECK IN BEFORE PROCEEDING TO
ANY OTHER LOCATION WITHIN THE PLANT.

EXCEPT NATIONAL CEMENT EMPLOYEES, DELIVERY WORKERS and OVER THE ROAD TRUCK DRIVERS. THIS INCLUDES, BUT IS NOT LIMITED TO VENDORS, SALESMEN, CONTRACTORS, SERVICEMEN, AND VISITORS.

This is a Mine Safety and Health Administration, (MSHA) regulated site and as such requires all those who enter to comply with 30 Part 46 of the Code of Federal Regulations (CFR).

NOTICE

ALL VEHICLES WITH AN OBSTRUCTED VIEW TO THE REAR MUST EITHER BE EQUIPPED WITH A BACK-UP ALARM OR HAVE AN OBSERVER PRESENT WHILE BACKING UP. NO EXCEPTIONS

IX. California Department of Water Resources Aqueduct

28. A water aqueduct owned and maintained by the California Department of Water Resources ("DWR") crosses under the road. A bridge owned and maintained by DWR carries the road traffic over the aqueduct.

29. In early 1970, Tejon and DWR executed a Grant Deed that provided for the construction of the California Aqueduct and related facilities on Tejon lands.

30. Later that year, DWR realigned a portion of the existing road to traverse the bridge it built which crosses the aqueduct. This realignment is the present configuration of the road.

31. DWR maintains the bridge and its approaches, approximately 600 feet in all. National Cement does not perform any construction or maintenance on this part of the road.

32. The aqueduct is enclosed by fencing. At each edge of the bridge within DWR's right of way are locked gates in that fencing. DWR controls the locks on these gates. Two roads run alongside the aqueduct, one on each side. Only one of the aqueduct roads is paved. The aqueduct roads run between State Route 138 and a pumping station. The State has posted signs notifying persons that access to the aqueduct is prohibited, that entering the aqueduct is dangerous, and that trespassing is forbidden by the California penal code.

33. DWR uses that part of the road south of the bridge to access the bridge and its approaches, but does not use the road north of that area.

34. The state has installed speed bumps and related warning signs on the road in both directions at the approaches to the bridge.

X. Maintenance of the Road

35. The cement plant lease provides that "Lessee [National Cement] and the other grantees, if any, of joint-use easements and rights of way, pro rata in accordance with their respective use thereof, shall maintain all such easements and rights of way in such condition as necessary for use thereof by Lessee in the usual conduct of its business." National Cement (and the predecessor cement plant companies on the property) have always maintained and kept in usable condition the road (except the bridge and its approaches, which DWR maintains). This maintenance includes, from time to time, resurfacing, sealing and restriping of the pavement and seasonal patching of sections of pavement needing repair.

36. In November of 2003, National Cement resurfaced, sealed and restriped the road, and also installed speed bumps and speed limit signs on the road.

37. National Cement has not sought Tejon's pre-approval of maintenance to be done on the road.

XI. Cement Plant-Related Use of the Road

38. The majority of traffic on the road is for cement-plant-related purposes.

39. The cement produced at the plant is transported to customers in tanker trucks. The trucks weigh approximately 25,000 pounds empty as they arrive at the plant via the road, and weigh approximately 80,000 pounds loaded as they leave the same way.

40. National Cement purchases raw materials such as silica and gypsum, which arrive at the plant via the road in similar trucks weighing approximately 80,000 pounds full. They usually leave the plant empty, weighing approximately 25,000 pounds. They exit the plant by use of the road.

41. National Cement operates 24 hours per day, 7 days per week. Trucks run 6 days per week, throughout the day and night, although the trucks leaving with cement are concentrated between midnight and the early morning hours.

42. An average 148 round-trips are made daily (6 days per week, excluding holidays) by the tanker trucks.

43. There are also an average 84 employee round-trips and 5 deliveries to the cement plant daily via car and truck.

44. Part of the written materials in National Cement's Site-Specific Hazard Training program indicate that National Cement's contractors, vendors and employees are to follow all traffic signs and speed limits and are not to pass other vehicles on the road.

**XII. Use of the Road by Tejon
and its Lessees for Livestock Operations**

45. Tejon's ranch management staff use the road an estimated two to three times each month. The road provides access to parts of the ranch where the staff must repair fences, livestock watering facilities and corrals.

46. Tejon leases 50,000 acres on the northern part of the ranch to Echeverria Cattle Company, and 200,000 acres on the southern two-thirds of the ranch to the Centennial Livestock Company. Centennial has 7000-9000 head of cattle spread across the southern two-thirds of the ranch in various fenced fields including the fields that lie on both sides along the length of the subject road. The cattle are rotated between the various ranch fields about every six months, in order to always have access to a fresh supply of grass. The cattle operator's employees use many of the roads on the Ranch, including the subject road. They make an estimated 300 vehicle round-trips per year on the subject road to provide care for livestock in fields on the Ranch. Most of these trips entail use of a pick-up truck, which sometimes pulls a horse trailer. This use of the road by pickup truck accounts for approximately 99% of the cattle operator's total annual trips on the subject road. A few times a year, the cattle operator also uses the road to transport livestock to and from the Ranch or between fields using semi trucks pulling livestock trailers that can carry 60-70 head of cattle each. Sometimes dual trailers are used for this purpose.

**XIII. Use of the Road by Tejon and its Licensees
for Commercial Filmmaking and Photography**

47. Through its Film Department, Tejon contracts with entertainment production companies, commercial photographers and others to provide locations on the Ranch for the filming of motion picture scenes, commercials, music videos and for commercial still photography.

48. Since the subject road is paved, it is sometimes accessed for filming purposes by large production company trucks and other vehicles. Tejon's Film Department and the film crews use the gates on the sides of the road that are controlled by Tejon to access dirt roads leading to the areas in this part of the Ranch that are used for filming.

49. The road is used an estimated 25 to 30 days per year to scout filming locations. On those trips, a Tejon representative and production company location scout travel to potential filming sites on the Ranch in a passenger vehicle.

50. Approximately 3% of the total number of filming licenses granted by Tejon from 2001 to mid-2004 has required use of the road to access the filming locations. In this period, 6 productions were filmed in locations requiring use of the road. (The road was not used at all for filming from July 28, 2002 to June 15, 2004). Four of those occasions required use of the road on a single day; one required use on two days, and one necessitated use of the road on five

days. Filming can involve up to 20 or 30 vehicles; it can involve substantially less. Typically, one or two persons associated with the production company may make as many as 10 to 15 trips on the road in passenger vehicles during the filming period. Larger trucks used for filming typically will make one round-trip per day on the road. Typically one or two Tejon representatives will be present at the filming location.

XIV. Use of the Road by Tejon and its Lessees and Licensees for Hunting and Explorer Programs

51. Tejon's Wildlife Management Department operates a hunting program on the Ranch in which, for a fee, hunters are permitted to hunt game. Tejon's employees and some of Tejon's hunting lessees and licensees use the road to access hunting areas on the ranch, as discussed below.

52. Tejon, for a fee, annually grants a license to a hunter permitting him and up to 8 others to hunt, from September 1 through January 30, in an area of the Ranch west of the subject road. The license also permits them to camp on a tract of land located several miles west of the road. The hunters maintain a campsite at that location, keeping trailers there year-round for overnight accommodations. The hunters access the campsite initially by traveling over the subject road to a dirt road that leads to the campsite. The license also permits the hunter to invite up to 8 other non-hunters to stay at the campsite at any given time, but not to accompany the hunters in the field. The hunters drive passenger vehicles, including SUVs or old jeeps, and may use the subject road or other dirt roads to access the camp and hunting area. They are allowed to hunt for coyote, bobcat, rabbit, gray squirrel and ground squirrel, chukker, dove, quail, bandtail pigeon, and up to 8 buck deer total between them per season. Tejon records show that they were present for at least part of an estimated 28 days during the 2002-2003 season and 32 days during the 2003-2004 season. It is impossible to know for certain how many times they may have used the road during this timeframe; however, Tejon's records reflect that the hunters signed in and out at a gated entrance to the hunting area that is along the subject road at least 38 times during the 2002-2003 season and at least 33 times in the 2003-2004 season.

53. From September through December, Tejon employees occasionally use the road to take hunters on guided pronghorn antelope hunts on the Ranch. They may use the road only once during the hunt, or may use it every day for a three or four day period. Less occasionally, National Cement requests that Tejon employees come to the cement plant to eliminate one of the many wild pigs that are on the Ranch, when one becomes a nuisance. Tejon employees respond by guiding hunters into the area, which may involve use of the road on one occasion or may require both morning and afternoon trips on the road over a three to five day period.

54. From January 1 through July 15 of each year, Tejon provides guided pig hunts. These hunts do not occur every week. On the weeks when the pig hunts occur, it is at the rate of approximately twenty hunts per week. Ten to twenty percent of these hunts will use the road to access a hunting area.

55. From early February through August 31 of each year, the road provides one of ten access points to the Ranch for participants in an off-season, family-oriented "Explorer Program." Members pay an \$850 annual fee to explore the Ranch. Some of them camp in one of the 20 designated campsites located throughout the Ranch. Many of the members hunt ground squirrels; some also hunt coyote. In early January there is a very short bobcat season. For an additional \$350 fee, they may take one pig per year. There are currently 200 members and their families in the program, most of whom drive on the Ranch in passenger vehicles. Occasionally a member will drive a large motor home on the Ranch. There is no limit to the number of times members of this program may access the Ranch or use the road during the February 1 to August 31 program period. Tejon's records show that, during the 7 months of the program in 2004, member vehicles used the road at least 138 times, the majority of which were round-trips.

XV. Tejon's Security Program

56. Tejon has one full-time and four part-time security persons. The full-time security person regularly uses the road to access areas of the Ranch to address security problems such as poaching, trespassing and vandalism. The part-time security persons use the road sporadically for security purposes. Tejon estimates it uses the road for security activities on average once per day (some days there may be multiple trips and some days there may be no travel on the road by Tejon's security personnel).

XVI. Planned Community

57. Tejon is in the planning stages of a commercial and residential development of approximately 12,000 acres of the Ranch, including land surrounding a portion of the road. Tejon's name for the proposed new development is "Centennial" (it is unrelated to the Centennial Livestock Company). The development plans are for a 23,000 unit master plan community which would include housing, retail, schools, and office facilities.

58. As proposed, the subject road would run roughly through the center of the Centennial development. Current plans are for the subject road to be one of the main traffic arteries of Centennial. It also would continue to provide access to the cement plant. Tejon is analyzing the projected traffic patterns of Centennial to determine what the future configuration of the road would be (i.e., whether it will have additional lanes and/or turn pockets added).

59. The Centennial project has been in the planning stage for five years. Tejon has submitted a plan to Los Angeles County, which has circulated it to 60-70 agencies for comments. Environmental impact studies are being conducted, which also must be submitted to 60-80 agencies for comment and approval. Tejon's goal is to conduct public hearings in 2005 and obtain initial approval from the county board of supervisors in 2006. If approval is granted, there would then be another round of public hearings and further approvals to be obtained. Tejon plans to begin construction five years from now, and complete the final phase of the development in twenty years. Tejon expects the project to proceed on schedule. Given the need for

government approvals, probable litigation in opposition to the development, concerns expressed by the military regarding fly-over rights and other factors, there is the possibility, as with any such project, that the project may be delayed, altered, or may never be built.

XVII. Current Use of the Road for Centennial-Related Purposes

60. A variety of consultants have been using the road to access areas of the Ranch to conduct field studies and for other purposes related to planning for the Centennial development.

61. Tejon's records reflect that for the period from January 1, 2004 to mid-May, 2004, the road was used to access lands lying within the Centennial project area by eighteen different groups, consultants, and individuals. The lands were accessed to perform various studies of hydrogeology, geology, biology, and archaeology, and conduct site investigations with government representatives.

62. It is expected that this activity will continue through the end of 2004. Those studies and uses of the road will then cease. Tejon expects that visits via the road to the site for marketing and public relations purposes will then begin. These visits are expected to be of shorter duration but of higher frequency than the consultant visits have been.

XVIII. Use of the Road by the FAA and Utility Companies

63. On at least one occasion, persons affiliated with the Federal Aviation Administration used the subject road to access a communications tower located on Tejon land adjacent to the cement plant quarry. It is not known how often the FAA has used the road.

64. Southern California Edison Company, SBC (Pacific Bell), and WorldCom Communications have transmission lines and related facilities (including an electrical substation) on the Ranch in the vicinity of the road, pursuant to easements granted them by Tejon. These utilities use the road from time to time to access their facilities on the Ranch but it is not known for certain how often this occurs.

65. At least one of these utilities has locks and no trespassing and other warning signs on certain gates that are located adjacent to the road. For example, a sign near one of the gates on the road reads:

Southern California Edison SCE This transmission line is patrolled. Unlawfully damaging transmission facilities is a felony punishable by fine and imprisonment in the state prison. A reward of \$1000 is offered for information leading to the arrest and conviction of such offenders.

Another sign on another gate reads:

PRIVATE PROPERTY
KEEP OFF
So. Calif. Edison Co.

66. The parties presume that these transmission lines do not serve the cement plant exclusively, but also serve other areas.

IXX. 1992 Citation

67. On March 4, 1992, an MSHA inspector issued Citation No. 392810 alleging a section 104(a) violation of 30 C.F.R. § 56.9300(a) for failure to erect berms or guardrails. This citation reads as follows:

The main road to mine site from Hwy 138 was not equipped with berms or guardrails along the elevated portions. Several areas on both sides of road along length of road had steep banks that could cause vehicle to overturn should overtravel occur. Some of the area's elevated 20 to 30 foot and angled some areas about 60 to 80 degrees. The road access to mine site, included in leased area of mine, maintained by operator, and built for exclusive use of mine related persons, for operator. Road 4 ½ to 5 miles in length and termination due date reflects size of job to install overtravel precautions.

68. On April 9, 1992, the local MSHA field office vacated Citation No. 392810. MSHA's subsequent action notice states that:

This action is to "vacate" this citation since it was issued in error. The main entrance roadway runs from a public highway to the mine site office. Traveled by the company and public to reach the mine property. At the mine site near the main office where mine site activities begin was a posted guard shack indicating the restrictions and the actual activities of the mining operation. The main entrance from the main public highway was leased by the mine operator but used/traveled by various other personnel and the public – once arriving at mine property signs were posted that the mine office must be contacted prior to entering the work sites. The mine operator had no control over personnel using the entrance roadway until they arrived at the mine site office – (no security – locked gate at entrance off public highway).

69. Between April 1992 and February 3, 2003, the Secretary did not issue any citations concerning the subject road.

XX. February, 2003 Citations

70. On February 4, 2003, MSHA issued Citation No. 6351224 to National Cement, alleging a violation of 30 C.F.R. § 56.9300(d)(3) with respect to the road. The citation reads as follows:

The primary access road had faded and missing delineators for the entire distance of the haulway. The large over the road haul trucks are crossing over where the yellow center lines were. This could result in a catastrophic crash with the miners. Also, during rain, fog and at night the delineators are practically impossible to see. The primary access road to the plant is used extensively by the company, contractors, and large over the road haul trucks.

71. On February 5, 2003, the Secretary modified Citation No. 6351224 stating that, "This action is to add to the conditions and practices the statement that the access road include the fact that the road is also used by the 'Tejon Ranch' for egress and regress."

72. In the normal course of reviewing citations issued by the field offices, MSHA's western district office determined that 30 C.F.R. § 56.9300(d)(3) was incorrectly cited by the inspector, since that provision only applies to "elevated roadways [that] are infrequently traveled and used only by service or maintenance vehicles" Consequently, on February 13, 2003, the MSHA field office vacated Citation No. 6351224 and issued in its place Citation No. 6351230 (discussed below).

73. On February 13, 2003 the MSHA inspector issued Citation No. 6351230 to National Cement, alleging a violation of 30 C.F.R. § 56.9300(a) with respect to the subject road. The citation reads as follows:

The primary access road to the plant had no guard rails or berms to protect vehicles and persons from going over the edge of the road. There are drop offs all along the highway ranging up to approximately 25 feet where a vehicle could easily roll over. The road is used extensively by large over the highway trucks, miner's vehicles, and various other vehicles. The two lane road without berms or guard rails presents a hazard, especially during inclement weather where the possibility of sliding and crashing may be prevalent.

74. At a subsequent conference requested by National Cement, the company pointed out that the similar citation issued eleven years earlier for this condition was vacated. On April 14, 2003, the inspector lowered the negligence level, stating that "Information provided at the Health and Safety Conference, indicated that a previously issued citation for this condition was vacated, therefore the company's negligence was less than originally evaluated."

75. When reviewing this citation, the district office learned of the 1992 citation which had been vacated. The district then began a review of the issue with MSHA's national office, and requested review by the Office of the Solicitor. The District Manager then concluded that MSHA had jurisdiction over the road, but felt that he should vacate the citation to avoid any objections by National Cement that the company did not have adequate notice. On November 17, 2003, the inspector vacated Citation No. 6351230 stating that the citation "is vacated without prejudice due to inadequate notice that the road in question was subject to the Agency's jurisdiction."

76. In a letter dated December 16, 2003, from the MSHA District Manager to National Cement, MSHA informed the company that MSHA considered the road to be subject to the agency's jurisdiction:

This letter is to inform you that MSHA has carefully reviewed the facts regarding the Wayne Hand Road which is located between National Cement Company's Lebec Plant, and Highway 138. The Mine Safety and Health Act Section 3(h)(1)(B) specifically includes 'private ways and roads appurtenant to' mines, as 'mines' subject to MSHA jurisdiction. MSHA, therefore, examines all pertinent facts to determine whether such roads are to be considered as part of a mine. Here, MSHA has determined that it has jurisdiction over the Wayne Hand Road leading from Highway 138 to the Lebec Plant. This jurisdiction is based on our finding that National Cement Company maintains this road, that it holds an easement on this road and that this road is the sole means of egress to and from the mine. It also appears that traffic to and from the Lebec Plant constitutes the vast majority of traffic along this road.

National Cement Company is hereby put on notice that conditions which violate applicable MSHA regulations with respect to the road shall be subject to MSHA's enforcement authority, effective immediately.

77. On February 9, 2004, MSHA issued National Cement the citation that is the subject of this proceeding, as discussed in paragraph 13 above.

B. CONCLUSIONS OF LAW

I. Statutory Framework

National Cement extracts minerals such as limestone, shale and silica at its Lebec Plant. (Stip. 2). Consequently, National Cement concedes its cement plant is a "mine" as defined by the Mine Act. (Stip. 3). The issue to be resolved is whether the private road used to enter National Cement's mine facility is a "mine" as defined by section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1). Section 3(h)(1) defines a "coal or other mine" in pertinent part, as "an area of land from which minerals are extracted . . . [and] *private ways and roads*

appurtenant to such area” (Emphasis added).

The first inquiry in statutory construction is “whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. See *Chevron*, 467 at 842-43; accord *Local Union 1261, UMW v. FMSHRC*, 917 F. 2d 42, 44 (D.C. Cir. 1990).

The parties’ stipulations establish that the subject road is a “private way.” (See, e.g., Stip. 10-12, 16-17, 21, 35-37, 44). Turning to whether the subject private way is appurtenant to the mine as contemplated by section 3(h)(1), the term “appurtenant” is commonly defined as: “a: annexed or belonging legally to some more important thing (a right-of-way – to land or buildings); b: incident to and passing in possession with real estate – used of certain profits or easements.” *Webster’s Third New International Dictionary* 107 (1993). An “easement appurtenant” is defined as: “an easement created to benefit another tract of land, the use of easement being incident to the ownership [or leasehold] of that other tract.” *Black’s Law Dictionary* 549 (8th ed. 2004).

It is undisputed that Tejon has granted National Cement an easement to traverse a private road on Tejon property that serves as the exclusive means of vehicular traffic in and out of the Lebec cement plant. (Stip. 12, 16, 17). The private road is a roadway appurtenant to the Lebec mine site. Consequently, the subject road is squarely within the purview of the section 3(h)(1) definition of a mine that includes “private ways and roads appurtenant to” a mine site.

Although the operative terms “private ways and roads appurtenant to” a mine are not ambiguous; in cases of ambiguity, the Commission and the courts have recognized that the legislative history encourages a broad, inclusive application of the definition of “a mine” embodied in section 3(h)(1). *Drillex, Inc.*, 16 FMSHRC 2391, 2394 (December 1994) (Citations omitted). Assuming, for the sake of argument, that the circumstances of this case create ambiguity, National Cement argues, in essence, that the roadway should not be included under the broad reach of section 3(h)(1) because the road is a multi-purpose road that is owned by the Tejon Ranch; because National Cement does not have exclusive use of the road; and because of the Secretary’s prior reticence to assert Mine Act jurisdiction.

II. Road Ownership

With respect to Tejon’s ownership of the road, the Commission has recognized that, in appropriate circumstances, there is a jurisdictional basis even if a mine operator lacks ownership when the cited conditions would affect miners. *TXI Operations, LP*, 23 FMSHRC 54, 60 (Jan. 2001) (ALJ) citing *Justice Supply & Machine Shop*, 22 FMSHRC 1292, 1297 (Nov. 2000). As an initial matter, the road conditions affect the welfare of miners as evidenced by National Cement’s Site-Specific Hazard Training program that seeks to ensure that cement plant contractors and employees traveling the road obey traffic signs and speed limits. (Stip. 44).

While lacking an ownership interest, National Cement has an easement granted by Tejon to use the road at will, and there are several road signs posted that evidence National Cement's use and control of the road. (Stip. 16, 17, 21). For example, a posted sign on the east side of the road warns travelers that they are "ENTERING PRIVATE PROPERTY OF NATIONAL CEMENT CO. INC." (Stip 21(d)). The majority of the traffic on the road is for cement plant related purposes as evidenced by a posted road sign reflecting "HEAVY TRUCK TRAFFIC." (Stip. 21(c), 38). Moreover, National Cement has a history of maintaining the road, and it recently resurfaced, sealed and restriped the road, and it installed speed bumps and speed limit signs. (Stip. 35, 36). Significantly, National Cement has not sought Tejon's pre-approval for its road maintenance projects. (Stip. 37).

Despite the above indicia of control, National Cement asserts a finding of jurisdiction is inappropriate because it lacks the requisite control of the roadway in the event it was called upon to obey a 104(b) withdrawal order. This argument is unpersuasive. Compliance with a 104(b) order simply would require National Cement to turn away its traffic at the private road's entrance at the intersection of State Route 138. National Cement's additional claim that it is precluded from constructing berms and guardrails where appropriate because it lacks the authority to make major changes to the road is belied by its construction of speed bumps and its posting of speed limits. Obviously, it is in the interests of both Tejon and National Cement to make road improvements that ensure safety. Consequently, it is apparent that National Cement retains the requisite degree of control over the road to warrant Mine Act jurisdiction.

I can discern no rational reason why National Cement truck drivers should be exempt from Mine Act protection because it has a right of easement rather than an ownership interest of the land on which the road is built. I note that National Cement also does not own the land on which its Lebec Plant is built. (Stip. 5). Accordingly, National Cement's lack of an ownership interest is not a bar to Mine Act jurisdiction.

III. Non-Exclusive Use

The road is the only paved road providing vehicular access to the cement plant. All of National Cement's customers, contractors, vendors, and employees traverse the road to travel to and from the cement plant. Vehicles associated with the cement plant that use the road are typically commercial, over-the-road trucks and passenger vehicles. All purchased raw materials are brought to the plant via the road, and all cement produced is transported by truck to customers by use of the road. (Stip. 12). While National Cement does not have exclusive use of the road, as noted, the vast majority of the traffic is for plant related purposes. (Stip. 38).

Cement trucks weigh approximately 25,000 pounds empty as they arrive at the plant via the subject road. The loaded trucks exit the plant via the road weighing approximately 80,000 pounds. (Stip. 39). Raw materials, such as silica and gypsum, arrive at the plant over the road in similar trucks weighing approximately 80,000 full and these trucks depart the plant weighing approximately 25,000 pounds empty. (Stip. 40).

Non-National Cement use of the road is dwarfed by National Cement traffic. National Cement operates 24 hours per day, 7 days per week. (Stip. 41). Trucks operate 6 days per week, day and night, although trucks leaving the cement plant are concentrated between midnight and early morning hours. (Stip. 41). An average of 148 round-trips (6 days per week excluding holidays) are made by tanker trucks. (Stip. 42). In addition, 84 employee round-trips and 5 deliveries to the cement plant via car and truck occur each day. (Stip. 43).

In contrast, Tejon's ranch management staff uses the road only approximately 3 times each month. (Stip. 45). Tejon's cattle raiser lessees traverse the road approximately 300 round-trips per year to care for livestock. (Stip. 46). Parenthetically, National Cement users travel more than 300 round-trips in 2 days. Other non-cement plant users include filmmakers scouting film locations approximately 20 to 30 times per year, and hunter licensees who use the road approximately 40 round-trips during each annual hunting season. (Stip. 49, 52). Consequently, National Cement's frequent and disproportionate use of the road justifies Mine Act oversight.

IV. Enforcement History

Prior to issuing the subject Citation No. 6361036 on February 9, 2004, for an alleged violation of 30 C.F.R. § 56.9300(a) because of a lack of berms or guardrails, MSHA issued several citations that were subsequently withdrawn. In March 1992 MSHA issued a similar citation citing a lack of berms or guardrails that was vacated the following month after MSHA determined "[t]he mine operator had no control over personnel using the entrance roadway until they arrived at the mine site office" (Stip. 67, 68). MSHA did not issue any citations concerning the subject road from April 1992 until February 2003. (Stip. 69).

On February 4, 2003, MSHA issued a citation for an inadequate roadway centerline delineation that was vacated because the cited mandatory standard only applied to elevated roadways infrequently traveled by service or maintenance vehicles. (Stip. 72). The citation was superceded on February 13, 2003, by a citation citing a lack of berms or guardrails. (Stip. 73). The citation was vacated without prejudice for lack of notice on November 17, 2003, following a Health and Safety Conference wherein National Cement pointed out that a similar citation had been withdrawn for lack of jurisdiction in 1992. (Stip. 74, 75).

In a letter dated December 16, 2003, MSHA's District Manager informed National Cement that MSHA was asserting jurisdiction over the roadway. (Stip. 76). On February 9, 2004, Citation No. 6361036 was issued resulting in this contest proceeding.

MSHA's on-again, off-again, approach to its oversight responsibility with respect to the subject roadway is disconcerting for it undermines industry confidence in consistent Mine Act administration. However, MSHA's lack of consistent enforcement cannot preclude the exercise of MSHA jurisdiction. It is well recognized that jurisdiction attaches to all mine facilities despite MSHA's discretionary lapses. In this regard, the court has stated:

Congress was sufficiently concerned about the health and safety conditions at mines that, as was stated in [the Commission's decision in] *Air Products*, "[u]nder the Mine Act, enforcement is not left to MSHA's discretion. Section 103(a) [codified at 30 U.S.C. § 813(a)] requires the agency to inspect all surface mines in their entirety at least twice a year." 15 FMSHRC at 2436 n.2 (Commissioner Doyle, concurring).

RNS Services, Inc., 115 F.3d 182, 187 (3rd Cir. 1997). Accordingly, an inconsistent enforcement history cannot bar MSHA's current assertion of jurisdiction.

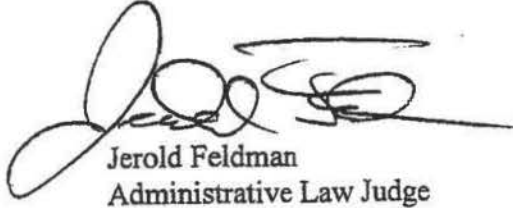
V. Part 46 Training

Finally, both National Cement and Tejon argue that a finding of jurisdiction would give rise to the absurdity of requiring all roadway users, including Tejon employees, hunters, cattle ranchers, filmmakers, campers and a myriad of consultants involved with the future residential and commercial development of ranch property, to have the Part 46 hazard training that is required of miners. 30 C.F.R. Part 46. This argument is unpersuasive. Although the courts are split on whether all contractors performing services at a mine, or only contractors performing significant services at a mine, are mine operators as defined by section 3(d) of the Mine Act, 30 U.S.C. § 802(d), the fact remains that, as a general proposition, non-mine operator Part 46 candidates must be connected with the performance of services at a mine, such as truck drivers. *Williams Natural Gas Company*, 19 FMSHRC 1863 (Dec. 1997). While it is true that 30 C.F.R. § 46.11(b) of the Secretary's regulations also requires site specific training, *as appropriate*, for visitors of a mine site, such as delivery workers, I am confident that MSHA would not seek to impose hazard training on the likes of cattle ranchers.

Consequently, the subject private roadway that is the sole means of vehicular access to the cement plant is a mine within the plain meaning of section 3(h)(1) of the Mine Act. In addition, the hazards posed to truck drivers as a consequence of a lack of appropriate berms and guardrails, as well as the degree of National Cement's utilization and control of the roadway, provide additional justification for Mine Act coverage.

ORDER

In view of the above, the roadway that is the subject of Citation No. 6361036 is a "mine" as defined by 30 U.S.C. § 802(h)(1) of the Mine Act. Accordingly, the Secretary's Motion for Summary Decision on the jurisdictional question **IS GRANTED. IT IS ORDERED** that the parties advise, within 30 days of the docketing and assignment of the pertinent civil penalty case, whether they have reached a settlement agreement with respect to the proposed civil penalty for Citation No. 6361036, or whether they desire a hearing on the merits of the citation.


Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
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January 14, 2005

DAVID R. COLEMAN, employed by	:	EQUAL ACCESS TO JUSTICE
LODESTAR ENERGY, INC.,	:	PROCEEDING
Applicant	:	
	:	Docket No. EAJ 2004-02
v.	:	Formerly KENT 2003-275
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Mine ID 15-18015
Respondent	:	Bent Mountain

INTERIM DECISION

Before: Judge Feldman

This matter concerns an application for the recovery of attorney's fees and incidental litigation expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1996), filed on July 2, 2004, by David R. Coleman who was employed by Lodestar Energy, Inc.(Lodestar). Coleman prevailed in the underlying 110(c) case brought by the Secretary that involved a fatal truck accident that occurred on October 3, 2001. 26 FMSHRC 485 (June 2004). Section 110(c) provides, in pertinent part:

Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation *who knowingly authorized, ordered, or carried out such violation* . . . shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

30 U.S.C. § 820(c) (emphasis added).

The Secretary opposes Coleman's EAJA application on substantive grounds. The Secretary does not assert that Coleman's net worth exceeds the two million dollar limit for individual eligibility under EAJA. 29 C.F.R. § 2704.104(b)(4)(I). Coleman's financial information has been submitted and will be withheld from public disclosure. 29 C.F.R. § 2704.204. The parties have not requested a hearing in this matter. 29 C.F.R. § 2704.306(b).

Briefly stated, the Secretary charged Coleman with "knowingly" violating the mandatory safety standard in section 77.1605(b) that requires mobile equipment to be equipped with adequate brakes. A knowing violation requires a showing that Coleman's conduct constituted

aggravated conduct rather than ordinary negligence. *Bethenergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992).

Under EAJA, as the prevailing party, Coleman is entitled to reasonable attorney's fees and expenses in connection with any proceeding, or any significant and discrete substantive portion thereof, in which the Secretary's case was not substantially justified. *Cooper v. United States R.R. Retirement Board*, 24 F.3d 1414, 1416 (D.C. Cir. 1994); 29 C.F.R. § 2704.105(a). The Secretary has the burden of demonstrating that her position was substantially justified. *Lundin v. Mecham*, 980 F.2d 1450, 1459 (D.C. Cir. 1992). Substantially justified means that the Secretary was "justified to a degree that could satisfy a reasonable person" and that the Secretary had "a reasonable basis both in fact and in law" to continue to proceed with her litigation. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Determining whether the Secretary's actions were substantially justified "necessarily requires the court to examine . . . the Government's litigation position and the conduct that led to litigation. After doing so, the court must then reach a judgment independent from that of the merits phase." *FEC v. Rose*, 806F.2d 1081, 1090 (D.C. Cir. 1986).

On September 20, 2004, the Secretary was ordered to specify, with particularity and supporting transcripts, all statements she relied on during the accident investigation, discovery and hearing stages to justify her position that Coleman committed a "knowing" violation of section 77.1605(b). The Secretary filed her brief in opposition to Coleman's EAJA on November 12, 2004.

In support of her belief that the litigation against Coleman was substantially justified, the Secretary referred to transcripts of MSHA investigation interviews with Elchaney Cline conducted on October 4 and October 18, 2001. (Sec'y opp. br. at 3). She also relied on statements made to MSHA during its investigation in October 2001 by Craig Anderson and Roy Collins. (Sec'y opp. br. at 3-4). With respect to the discovery phase, the Secretary acknowledged that Cline's sworn testimony at both his February 10, 2004, deposition and at the hearing that began on February 11, 2004, differed from what MSHA investigator Robert Bates understood Cline's testimony to be during his interviews with Cline shortly after the accident on October 4 and October 18, 2001. (Sec'y opp. br. at 5). Coleman replied to the Secretary's opposition to his EAJA application on December 14, 2004.

A. Factual Background

The facts in the underlying decision in this case are set forth at 26 FMSHRC 485.¹ Briefly stated, on October 3, 2001, Gary Blackburn was driving a red Mack DM600 fuel truck (FT154) down an inclined haulage road (known as the "hell hole") in order to refuel mining equipment located in a coal producing pit. At approximately 10:45 a.m., at some point along the

¹ Transcript references for the February 11 and February 12, 2004, hearing are cited as "Tr. I" and "Tr. II", respectively. Exhibit references pertain to exhibits proffered during the hearing.

road, Blackburn lost control and jumped from the vehicle sustaining injuries that resulted in his death the following day. Drivers normally relied on downshifting in low gear to control their trucks while descending steep grades. After the accident, examination of the service brakes revealed significant defects. 26 FMSHRC at 486. However, as noted in the initial decision, no one had knowledge of the specific brake defects until the wreckage was examined by MSHA during the course of its accident investigation. *Id.* at 501.

The accident investigation team initially believed that defective brakes were the primary cause of the accident based on the erroneous belief that an employee, Elchaney Cline, had complained to Coleman about the truck's brakes the night before the accident. *Id.* at 486. In fact, Cline testified he communicated brake complaints to Coleman approximately one month before the accident. (Tr. II, 227-30); *Id.* at n.2. There is very little evidence of brake complaints in the intervening weeks leading up to the accident. *Id.* Although poor brakes undoubtedly were a significant contributing factor, the evidence reflects the proximate cause of the accident was a defective clutch that was adjusted only two hours before the fatal accident. The clutch failure caused the truck to "freewheel" out of control. In this regard, at trial, MSHA conceded that it was implausible that Blackburn jumped while the truck was in low gear and limited to a speed of ten miles per hour. (Tr. I, 250-61); *Id.* at 486-87.

The initial decision summarized the Secretary's failure to satisfy the substantive parameters in a 110(c) case:

to prevail in a 110(c) personal liability case, the Secretary must show that Coleman, as a foreman in a position to protect employee safety, failed to act *on the basis of information that gave him knowledge or reason to know of the existence of a hazardous violation*. *Sec'y of Labor v. Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd*, 689 F.2d 632 (6th Cir. 1982). In addition, the Secretary must demonstrate that Coleman's failure to act in response to the information known to him constitutes aggravated conduct. *Bethenergy*, 14 FMSHRC at 1245.

In evaluating the evidence, *the focus is on the nature and extent of Coleman's knowledge of the brake conditions in the weeks preceding the October 3, 2001, accident. In this regard, Coleman cannot be charged with knowledge of the significant brake defects that were revealed by a detailed examination of the wreckage after the accident.* As discussed herein, the Secretary has failed to demonstrate that Coleman's failure to recognize the defective brake conditions constituted aggravated conduct. Consequently, the personal liability case brought by the Secretary against Coleman must be dismissed.

Id. at 487² (emphasis added) (footnote omitted).

² The initial decision noted Coleman was not been charged with failing to remove the truck from service because it was defective in violation of section 77.404(a). Rather,

B. Discussion and Evaluation

The Secretary's regulations implementing EAJA provides, in pertinent part:

(a) A prevailing applicant may receive an award of fees and expenses incurred in connection with a proceeding, or in *a significant and discrete substantive portion of the proceeding*, unless the position of the Secretary was substantially justified. *The position of the Secretary includes*, in addition to the position taken by the Secretary in the adversary adjudication, the action or *failure to act by the Secretary upon which the adversary adjudication is based*. The burden of proof that an award should not be made to a prevailing applicant because the Secretary's position was substantially justified is on the Secretary, who may avoid an award by showing that [her] position was reasonable in law and fact.

Section 2704.105, 29 C.F.R. § 2704.105 (emphasis added).

Thus, Coleman's EAJA application requires analysis of whether the Secretary was substantially justified in bringing her case in the investigative, discovery and trial stages of this litigation. Resolution of this issue requires a qualitative analysis of whether the evidence relied upon by the Secretary in each portion of this proceeding substantially justified her continuing assertion that, based on the facts known to him, Coleman committed a "knowing" violation of section 77.1605(b). Particular focus must be on whether the Secretary's failure to act on Cline's contradictory deposition testimony by vacating the citation against Coleman was reasonable in law and fact.

(1) Investigative Stage

As previously noted, The Secretary's principal witness in this proceeding is Elchaney Cline. Cline, a utility man who reported to Coleman, operated the defective red FT154 fuel truck for 7 hours during the shift immediately preceding the fatal accident on the morning of October 3, 2001. Coleman reported clutch problems to the maintenance department after he overheard Cline complain on the CB radio at the end of his shift that the clutch was slipping. Although Cline complained about a clutch malfunction on October 3, 2001, Cline did not complain about the service brakes at any time immediately prior to the accident. 26 FMSHRC at 498, 502. The clutch was adjusted approximately 3 hours before the fatal accident. *Id.* at 488-89.

Cline provided equivocal information shortly after the accident about the timing of relevant brake complaints he communicated to Coleman prior to the accident. Specifically, on

Coleman was charged with violating section 77.1605(b) that requires that mobile equipment must have adequate brakes. Thus, the decision identified the issue as whether Coleman's failure to recognize the inadequacy of the truck's brakes constituted a knowing violation of section 77.1605(b).

October 4, 2001, the day following the accident, Cline told MSHA investigators that he complained to Coleman about the brakes “just about every time I [got] in the truck” during the month preceding the accident. *Id.* at 490. Cline was subsequently interviewed by MSHA investigators on October 18, 2001. This time, explaining that the red truck was used infrequently, Cline stated that he last complained about the brakes to maintenance supervisor Johnny Huffman and Coleman “a month or two before the accident.” (Joint Ex. 1, p. 102; Tr. I, 67-68); *Id.* The Secretary concedes Cline’s investigation statements and testimony “often appeared inconsistent and, sometimes, contradictory.” (Sec’y post-hrg. br. at 35); *Id.* at 490 n.5.

MSHA also interviewed grease truck operator Craig Anderson during the course of its investigation. Anderson stated that on or about September 15, 2001, he complained to Coleman about the brakes failing to prevent the red fuel truck from rolling back on a hill. Like Cline, he also brought his brake complaints to the attention of the truck mechanics. Anderson drove the truck the following day without incident. Anderson did not know if the brakes had been adjusted. Anderson did not communicate any subsequent brake complaints after September 15, 2001. *Id.* at 496.

MSHA also questioned dozer operator Roy Collins during its investigation. Although Collins opined that the brakes on the red fuel truck were weak, Collins did not report any brake complaints to Coleman. Significantly, the Secretary’s investigation did not reveal any relevant written pre-shift brake complaints on the time sheets of Cline, Anderson, Collins, or any other red fuel truck operator. *Id.* at 502.

While the information provided by Cline on October 4 and October 18, 2001, with respect to the timing and frequency of his complaints was inconsistent, Cline’s brake concerns were corroborated by Anderson and Collins. Thus, it was reasonable for the Secretary to conclude after her investigation that Coleman had knowledge of brake complaints prior to the accident. When viewed in the context of MSHA’s investigation of a fatality, there was a reasonable basis in fact and in law, to support the Secretary’s belief, based on information obtained during her investigation, that Coleman had reason to know of serious brake defects on a fuel truck descending steep grades and that Coleman ignored the need for maintenance. Such conduct would constitute aggravated conduct as a matter of law.

(2) Discovery Stage

Cline was deposed on February 10, 2004, one day before the hearing. During the deposition, Cline unequivocally stated that he told Coleman approximately one month prior to the fatal accident that the brakes on the red fuel truck were inadequate. (Sec’y opp. br. at 5). Although consistent with the information provided by Cline during the investigation on October 18, 2001, Cline’s deposition testimony contradicted the information he provided to MSHA on October 4, 2001, that he frequently complained to Coleman “just about every time I [he got] in the truck.” 26 FMSHRC at 490.

Thus, after depositions, the Secretary was left with a relevant Cline complaint “a month or two before the accident” and a vague Anderson complaint approximately two weeks before the accident. Both Cline and Anderson had stated that they communicated their brake complaints to the truck mechanics as well as to Coleman. *Id.* at 490, 496. Significantly, the Secretary was left with no relevant complaints, written or verbal, during the intervening weeks prior to the accident demonstrating that Cline and Anderson’s concerns had not been alleviated. Moreover, there was no evidence of other relevant complaints by other truck operators during this period.

Despite the fact that Cline had recanted his October 4, 2001, statement in his deposition taken before the hearing that he frequently complained to Coleman “every time” he drove the truck, the Secretary elected to proceed to trial. As further discussed below, Cline’s deposition testimony undermined the continuing reasonableness of the Secretary’s position in fact and in law when viewed in the context of the paucity of the other evidence against Coleman introduced at trial.

(3) Trial Stage

In the weeks preceding the accident, Cline testified that he drove the red fuel truck on September 13, September 14, September 15 and September 21, 2001, and on the evening of October 2 until the morning of October 3, 2001. *Id.* Lodestar’s policy required equipment operators to note equipment defects on their daily time sheets. *Id.* Cline’s daily time sheets reflect he operated FT154 for 8½ hours on September 13, 2001; 4½ hours on September 14, 2001; 2 hours on September 15, 2001; 3 hours on September 21, 2001; and 7½ hours on October 2, 2001. Cline operated FT154 for a total of 25½ hours on these days. *Id.* However, he did not enter any brake defects on his time sheets. (Gov. Exs. 45, 46, 47, 53, 56); *Id.*

Cline’s deposition, in view of the absence of relevant written brake complaints on written pre-shift reports, should have raised red flags for the Secretary. The Secretary was aware of an absence of relevant written pre-shift brake complaints in Lodestar’s time sheet records for the weeks preceding the accident. Significantly, at trial, the Secretary proffered Anderson and Cline’s daily time sheets for the period September 13 through October 2, 2001, that are devoid of relevant brake complaints. (Gov. Exs. 45-48, 53, 56); *Id.* at 493, 496.

Cline testified that the FT154 would “barely crawl” down the steep decline at no more than five miles per hour if the vehicle was downshifted in first gear. *Id.* at 496. Downshifting in second gear limited the vehicle to five to ten miles per hour. *Id.* Operators relied on downshifting rather than the service brakes when descending the haulage road. *Id.* Cline never expressed concern that the red fuel truck could not safely traverse the steep grade on “hell hole” haulage road. *Id.* Cline drove down the “hell hole” hill in second and low with a full load of fuel on October 2, 2001, and did not report any brake complaints. *Id.* The significance of this evidence on the issue of substantial justification cannot be overstated. Going into the trial, the Secretary had no evidence that any red fuel truck operator had ever complained to Coleman about

inadequate brake operation while descending the "hell hole" accident site, the steepest grade at the mine site.

As noted, at trial Cline initially testified, "I told Dave Coleman and Johnny Huffman that the brakes wasn't (sic) working right . . . three weeks to a month before the accident." (Tr. I, 67); *Id.* at 493. Cline subsequently testified he told Coleman and Huffman twice about a month before the accident. (Tr. I, 69-70); *Id.*

On cross-examination, Cline further clarified the only brake complaint he communicated to Coleman prior to the accident:

Q. Now let's go back to the month before. [What] I understood from what you told me in yesterday's deposition is the first person you told was Mr. Huffman?

A. Yes.

Q. That the brakes needed worked on, they were weak, or how did you refer to it, they needed looked at?

A. Yes.

Q. And [Huffman] was head of maintenance for this Lodestar job?

A. Yes.

Q. And that after you reported it to Mr. Huffman, I think you told me, what, about ten minutes or so [you] saw Mr. Coleman?

A. Yes, I got in the truck to go around the hill and met Dave coming and I told him.

Q. And what you told Mr. Coleman was, "The brakes need to be looked at. I've just told Mr. Huffman about it," correct?

A. I never told him I talked to Johnny. I said, "The brakes need to be fixed, they ain't right."

Q. (Examining deposition transcript) Do you remember yesterday that when you had your conversation with Mr. Coleman - -

A. Yes.

Q. - - He asked you what Johnny Huffman had told you?

A. Yes.

Q. So you did have a discussion with Mr. Coleman on the fact that you just talked to Mr. Huffman about brakes?

A. Yes.

Q. Right? You remember that now, right?

A. Yes.

Q. Okay. There was a discussion about a switch on [the] pedal and some other things, wasn't there?

A. Yes.

Q. So what happens here is you talk to Mr. Huffman first, the chief of maintenance, right?

A. Yes.

Q. Then you say around the corner or around the hill when you run into Mr. Coleman?

A. Yes.

Q. You tell him that you want the brakes looked at and you have been talking to Mr. Huffman, the guy that's in charge of maintenance?

A. Yes.

Q. Now, the procedure up at this job is that if you needed something fixed you just went right to a mechanic, didn't you?

A. Yes.

Q. You didn't wait for a foreman to authorize it or anything else, you could call a mechanic over to get anything that you wanted done, basically?

A. We'd have to get a hold of Dave, yes.

Q. But you also at times went right to the mechanic, didn't you?

A. Yes.

Q. Now, you also told me yesterday that you had your conversation with Mr. Huffman first and then with Mr. Coleman, but Mr. Coleman very well could have believed that this was being handled because you had addressed it with the head of maintenance of the mine?

A. Yes.

Q. And you told me yesterday you had no further conversations with Mr. Coleman about any brake issues other than that incident about a month before?

A. Yes.

(Tr. I, 80-83); *Id.* at 493-96.

Cline testified that the clutch on the red fuel truck was slipping during his shift that began the evening of October 2, 2001. Cline informed Coleman of the clutch problem over the CB radio at the end of his shift at approximately 5:30 a.m. on October 3, 2001. *Id.* at 498. Coleman advised Cline that he would take care of it. The clutch was adjusted that morning before Blackburn's accident. (Tr. I, 80); *Id.*

While the Secretary could not be sure of Cline's testimony at trial, she had reason to know Cline was an unreliable witness after taking his deposition. When the Secretary decided to proceed to trial with Cline as her key witness, she did so at the risk of EAJA liability. EAJA was intended to reimburse individuals, such as Coleman, who incur the expense of defending against Government litigation that should not have been brought. The Secretary's decision to go to trial, although well intentioned, was not substantially justified in fact and in law. Cline's deposition testimony, and the lack of relevant verbal or pre-shift written brake complaints in the weeks preceding the accident, fail to justify, as an issue of fact, the Secretary's position that Coleman had the requisite knowledge that a hazard continued to exist. The lack of clear and reliable evidence concerning the nature and extent of Coleman's knowledge undermined the Secretary's ability to demonstrate at trial the higher threshold for a 110(c) violation, namely, that Coleman engaged in aggravated conduct as a matter of law.

While I recognize the Secretary's prosecutorial discretion, it is noteworthy that, at all times relevant to this 110(c) proceeding, there were three other shift foreman in addition to Coleman who supervised operators of the red fuel truck who were not charged by the Secretary. *Id.* at 487. Moreover, it was not uncommon for equipment operators to bring truck defects directly to the attention of the mechanics, or the maintenance supervisor, who could make adjustments without a foreman's knowledge. *Id.* at 488, 496. Yet, for reasons best known to the

Secretary, the supervisory mechanic who allegedly was informed by Cline of the defective condition of the service brakes, was not charged with a 110(c) violation.

Even, Cline, the Secretary's key witness, does not believe that MSHA should have filed a case against Coleman because Coleman was not the supervisory mechanic responsible for repairs. *Id.* at 496. Cline characterized Coleman as a foreman who was interested in safety and one who would not hesitate to remove a defective vehicle from service. (Tr. I, 93). *Id.*

While Lodestar's failure to maintain adequate service brakes may constitute an unwarrantable failure, unwarrantability, alone, is not evidence of aggravated conduct by a particular agent of the company. *Id.* at 499. Thus, although the disrepair of the brakes evidences Lodestar's inexcusable neglect, it does not provide the reasonable justification required to be shown by the Secretary to defeat Coleman's EAJA application.

(4) Special Circumstances

Finally, the Secretary argues, alternatively, that even if she was not substantially justified throughout all phases of this proceeding, Coleman should be disqualified from EAJA recovery because there are "special circumstances [that] make an award unjust." 29 C.F.R. § 2704.100 As a bar to recovery, the Secretary relies on the initial decision that determined Coleman lacked credibility when he testified that he could not recall any relevant brake complaints communicated to him by Cline and/or Anderson. *Id.* at 501.

As the initial decision noted, it is not surprising that Coleman, who was the focus of a fatal accident investigation, asserted that he could not recall the brake complaints relied on by the Secretary. *Id.* In the absence of adequate justification for bringing Coleman to trial, the Secretary is in no position to fault Coleman for his reticence to aid in his own prosecution. Given the facts in this case, I am neither surprised nor offended by Coleman's asserted lack of recollection.

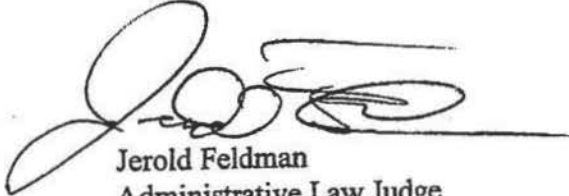
Accordingly, the Secretary has failed to demonstrate adequate special circumstances to preclude Coleman's reimbursement. Consequently, Coleman's EAJA application for attorney fees and litigation expenses shall be granted for all expenditures incurred as of the February 11, 2004, trial date including fees and expenses related to post-hearing filings.

ORDER

In view of the above, **IT IS ORDERED** that Coleman's EAJA application for attorney fees and expenses incurred on or after of February 11, 2004, **IS GRANTED**. Coleman's application for fees and expenses through the discovery and deposition stages of this proceeding **IS DENIED**.

This is an Interim Decision on EAJA liability. It does not become final until a Final Decision on EAJA REIMBURSEMENT is issued. Accordingly, **IT IS FURTHER ORDERED** that the parties should confer **before February 18, 2005**, in an attempt to reach an agreement, consistent with this Decision, on the specific reimbursement to be awarded. If the parties agree on the amount of reimbursement, they shall file a Joint Stipulation on Reimbursement **on or before March 5, 2005**. An agreement concerning the scope and amount of reimbursement to be awarded shall not preclude either party from appealing this decision.

If the parties cannot agree on reimbursement, the parties **ARE FURTHER ORDERED** to file, **on or before March 29, 2005**, Proposals for Reimbursement specifying the appropriate reimbursement to be awarded accompanied by supporting documentation, if any. I am available for a telephone conference if the parties so desire.



Jerold Feldman
Administrative Law Judge

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