

February 2012

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Newmont USA Limited v. Secretary of Labor, MSHA, Docket Nos. WEST 2010-652-RM, (Judge Lewis, January 5, 2012)

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Secretary of Labor, MSHA v. Excel Mining, LLC., Docket Nos. KENT 2008-1481-R, KENT 2009-33. (Judge Gill, January 5, 2012)

Secretary of Labor, MSHA v. Mach Mining, LLC., Docket No. LAKE 2009-495, et al. (Judge Manning, January 18, 2012)



## **COMMISSION DECISIONS AND ORDERS**





Upon consideration of the judge's certification, we hereby grant review of the judge's order of November 28, 2011, with regard to the issue of whether a violation not deemed attributable to reckless conduct may be deemed flagrant under 30 U.S.C. § 820(b)(2) based on the operator's history of prior similar violations. Conshor Mining, LLC and the Secretary of Labor are hereby ordered to file initial briefs on or before 30 days from the date of this order. Response briefs by both parties will be due 30 days following service of the last initial brief. Initial briefs shall not exceed 35 pages; response briefs shall not exceed 25 pages. Reply briefs will not be filed.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy  
Michael F. Duffy, Commissioner

/s/ Michael G. Young  
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.  
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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WASHINGTON, DC 20001

February 15, 2012

SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	Docket Nos. LAKE 2008-2-R
v.	:	LAKE 2008-98
	:	
NORTH AMERICAN DRILLERS, LLC	:	

Before: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

**DECISION**

BY: Jordan, Chairman; Duffy and Young, Commissioners

These consolidated contest and civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”). The Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a citation to North American Drillers, LLC (“North American”) alleging a violation of the company’s shaft sinking plan when the operator used a non-permissible pump to remove water from a shaft.<sup>1</sup> The Secretary of Labor subsequently vacated the citation and filed a motion to dismiss the penalty and contest proceedings. North American filed an opposition to the Secretary’s motion and requested declaratory relief regarding whether dewatering an otherwise completed mine shaft constitutes “excavation” under 30 C.F.R. § 77.1914(a) in violation of the plan’s terms. Administrative Law Judge Gary Melick granted the Secretary’s motion and did not address North American’s request for declaratory relief.

North American filed a petition for discretionary review challenging the judge’s dismissal and his failure to grant or consider its request for declaratory relief. It requested that the Commission grant declaratory relief in its favor. We granted North American’s petition for review. For the reasons stated herein, we affirm the judge’s decision.

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<sup>1</sup> “Permissible mine equipment” is defined as equipment that has been formally approved by MSHA after having passed inspections, the explosions test, and other requirements specified by it. *See* Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 399 (2d ed. 1997).

**I.**  
**Factual and Procedural Background**

North American is a contractor specializing in large diameter shaft drilling and construction for various commercial industries, including coal mining. On January 8, 2007, North American submitted a shaft sinking plan to MSHA to construct the Flannigan Portal Ventilation Shaft at American Coal Company's Galatia Mine in Harrisonburg, Illinois. PDR at 2; S. Br. at 2. After receiving MSHA approval, North American began construction of the shaft in March 2007. *Id.*

North American employs the "blind drilling" method of excavation, which differs significantly from the conventional "shaft construction" method. PDR at 2; N. Am. Opp'n to Mot. to Dismiss at 4. The latter requires drilling, shooting with explosives, and removing material through a mucking process. PDR at 2; N. Am. Opp'n at 4, Ex. E, at 38. The conventional method also requires that individuals work in the shaft during excavation. PDR at 2; N. Am. Opp'n at 4, Ex. E, at 38-39. In contrast, blind drilling consists of drilling, lining, and grouting while the shaft is filled with water, and is accomplished without the use of blasting and drilling. PDR at 2; N. Am. Opp'n at 4-6, Ex. E, at 30-35. Because all of the work is performed from the surface, blind drilling eliminates the need for individuals to work in the shaft. N. Am. Opp'n at 4, Ex. E, at 31. The final step of the process entails pumping water out of the shaft using a submersible pump. N. Am. Opp'n at 6. The motor and all electrical components of the pump remain below the water level in the shaft at all times during the dewatering process, thereby making "unlikely" the possibility of an electrical spark from the pump. N. Am. Opp'n at 6, Ex. E at 76. The water remains above the electrical components at all times, and if it drops below a certain level, the pump will not function. N. Am. Opp'n Ex. E at 78, 81-82.

On August 30, 2007, North American had completed drilling, lining, and grouting the Flannigan Shaft and was in the final process of pumping the water out of the shaft. N. Am. Opp'n at 6, Ex. E at 67-72, E-2. MSHA Inspector Dean Cripps arrived at the Flannigan construction site and observed North American utilizing a non-permissible pump below the shaft's collar. PDR at 5; N. Am. Opp'n at 7. As a result of his observations, Inspector Cripps issued Citation No. 6666927 to North American, alleging a violation of 30 C.F.R. § 77.1900-1, which requires that operators comply with their MSHA-approved shaft plans.<sup>2</sup> PDR at 5; N. Am. Opp'n Ex. E-1; S. Br. at 2. The "Condition or Practice" section of the citation reads as follows:

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<sup>2</sup> 30 C.F.R. § 77.1900-1 provides:

**Compliance with approved slope and shaft sinking plans.**

Upon approval by the Coal Mine Health and Safety District Manager of a slope or shaft sinking plan, the operator shall adopt and comply with such plan.

A non-permissible submersible pump is being used below the collar of the Flannigan air shaft construction. The approved shaft and slope sinking plan requires all electric equipment used below the collar be permissible.

N. Am. Opp'n Ex. E-1. The approved January 8, 2007, shaft plan reads in pertinent part:

Paragraph 3(d)(vii):

The finished shaft will be dewatered using a submersible pump, which will be removed prior to underground personnel mining within 100' of the shaft bottom.

Paragraph 10(b):

As per 30 C.F.R. § 77.1914, no non permissible electrical equipment shall be utilized below the shaft collar during excavation.<sup>3</sup>

N. Am. Opp'n Ex. B at 14-15. The alleged violation was abated on September 5, 2007, after North American removed the non-permissible pump from the shaft. Pet. for Assess. Ex. A.

North American contested both the citation and the associated civil penalty. The contests were consolidated, the parties conducted discovery, and the matter was set for hearing before Judge Melick.

On April 3, 2009, the Secretary filed a Motion to Dismiss, stating that "MSHA is vacating the citation at issue in this matter based upon further review of the evidence." S. Mot. to Dismiss at 1. North American opposed the motion and requested that the matter proceed to hearing, that an order be entered dismissing this matter with prejudice, or that declaratory relief be granted in the form of a ruling on the use of the term "excavation," as applied to the requirements of section 77.1914(a). N. Am. Opp'n at 2, 11. In a letter dated April 2, 2009, counsel for North American memorialized a March 30, 2009, conversation in which he alleges that counsel for the Secretary announced that MSHA would cite North American in the future under the same regulation and the same facts despite the decision to vacate the citation at issue. N. Am. Opp'n at 7, Ex. C. Upon receipt of the letter, the Secretary's counsel called counsel for

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<sup>3</sup> 30 C.F.R § 77.1914(a) provides:

**Electrical Equipment.**

(a) Electric equipment employed below the collar of a slope or shaft during excavation shall be permissible and shall be maintained in a permissible condition.

North American and disputed the letter's characterization of the March 30 conversation. S. Br. at 19 n.6.

The judge issued two orders of dismissal in the proceedings. The first order dismissed North American's penalty proceeding with prejudice based on MSHA's vacatur of the underlying citation. Unpublished Order dated April 9, 2009. The second order dismissed North American's proceeding contesting the citation. Unpublished Order dated April 9, 2009. In dismissing the contest proceeding, the judge reasoned that MSHA's vacatur of Citation No. 6666927 had rendered that proceeding moot. As support, the judge relied on *RBK Construction, Inc.*, 15 FMSHRC 2099, 2101 (Oct. 1993), in which the Commission held that the Secretary has unreviewable discretion to vacate citations. The judge did not address North American's request for declaratory relief.

## **II.** **Disposition**

### **A. Jurisdiction**

The threshold issue before us is whether the Commission maintains the requisite jurisdiction to consider North American's challenge. The Secretary argues that section 105 of the Act, 30 U.S.C. § 815, only grants the Commission jurisdiction over "extant" enforcement actions brought by the Secretary and, because she has unreviewable discretion to vacate a citation, the Commission is without jurisdiction to consider North American's request for declaratory relief. S. Br. at 8-11, *citing RBK*, 15 FMSHRC at 2101; *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7-8 (1985); *Kaiser Coal Corp.*, 10 FMSHRC 1165, 1169-70 (Sept. 1988); and *Reich v. Contractors Welding of Western New York, Inc.*, 996 F.2d 1409, 1412-13 (2nd Cir. 1993). The Secretary further contends that the Commission must defer to her reasonable interpretation of sections 105(a) and 105(d) in determining whether the Commission has jurisdiction over these proceedings. S. Br. at 6-7. North American responds that because section 105(d) of the Act grants operators the right to contest the issuance of a citation or order, and sections 105(a) and 105(d) confer jurisdiction upon the Commission to hear an operator's contest, no unilateral action by the Secretary can divest the Commission of jurisdiction. N. Am. Reply Br. at 3-4.

The Secretary misframes the issue. The question presented is not whether the Secretary's exercise of discretion to vacate a citation is reviewable, but rather whether the Secretary's exercise of that discretion automatically terminates or revokes this Commission's jurisdiction in its entirety after it has been properly invoked. We hold that it does not.

The Commission has acknowledged that it lacks authority to overturn a decision by the Secretary to withdraw or vacate a citation under the Mine Act. *RBK*, 15 FMSHRC at 2101, *citing Cuyahoga*, 474 U.S. at 7-8; *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879 (June 1996). The Commission and the courts have also recognized that under the Mine Act, Congress intended to delegate such enforcement authority to the Secretary, not the Commission.

*Mechanicsville*, 18 FMSHRC at 879; *Sec’y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006); *Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 319 (4th Cir. 2008). Consequently, our decision in *RBK* directly overruled our holding in *Youghiogheny & Ohio* requiring that “adequate reasons” must exist to justify the Secretary’s vacation of a citation and subsequent motion to dismiss. *Youghiogheny & Ohio Coal Co.*, 7 FMSHRC 200, 203 (Feb. 1985) (“*Y&O*”).

Although the Commission lacks authority to review the Secretary’s decision to vacate a citation, our jurisdiction over the proceeding does not automatically terminate upon vacatur. After an operator has contested a citation, section 105(d) authorizes the Commission to “issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary’s citation, order, or proposed penalty, or *directing other appropriate relief.*” 30 U.S.C. § 815(d) (emphasis added). Thus, section 105(d) unambiguously sets forth a broad grant of Commission authority to direct “other appropriate relief.” This statutory grant authorizes the Commission to retain jurisdiction to properly address any remaining legal and procedural requirements after the vacatur of a citation or order, such as questions of mootness or the appropriateness of declaratory relief. As the Commission has concluded, if it were to be deprived of jurisdiction when the Secretary vacates a citation, there would be no room for the Commission to ensure that cases over which its jurisdiction had been properly invoked could be dispensed with on terms that are in accordance with the Act.<sup>4</sup> *Climax Molybdenum Co.*, 2 FMSHRC 2748, 2750 (Oct. 1980), *aff’d sub nom.* 703 F.2d 447 (10th Cir. 1983); *see also Mid-Continent Res., Inc.*, 12 FMSHRC 949, 957 (May 1990). Because we conclude that the relevant language of the Mine Act is unambiguous, we need not reach the Secretary’s argument that her interpretation is entitled to deference under *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).<sup>5</sup>

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<sup>4</sup> We reject the Secretary’s assertion that because the rationale in *Climax* and its successors is based largely on precedent overruled by *RBK*, the *Climax* line of cases is “no longer good law.” S. Br. at 14 n.5. We read *RBK* to narrowly hold that the Secretary has unreviewable discretion to vacate a citation and that the Commission is, therefore, without authority to overturn that decision. We further note that, following the Supreme Court’s decision in *Cuyahoga*, the Occupational Safety and Health Review Commission (“OSHR”) similarly concluded that the Secretary cannot unilaterally deprive it of jurisdiction simply by withdrawing a citation. *See, e.g., General Electric Co.*, 12 O.S.H. Cas. 1597 (BNA) (1985); *Asbestos Abatement Consultation & Eng’g*, 15 O.S.H. Cas. (BNA) 1252 (1991).

<sup>5</sup> Even if we were to reach the argument, we would conclude that the Secretary is mistaken in arguing that her interpretations of the Commission’s authority to administer sections 105(a) and (d) are entitled to deference. Such deference is warranted only where Congress has delegated the authority to administer a statutory provision to the agency seeking deference. We have held that Congress charged the Commission with administering sections 105(a) and 105(d). *See Marfork Coal Co.*, 29 FMSHRC 626, 632 (Aug. 2007) (“The Commission is clearly charged with administering the provisions of section 105(a) and 105(d), (continued...)”)

*See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that deference to an agency’s interpretation of a statute may not be applied “to alter the clearly expressed intent of Congress”) (citations omitted).

We further conclude that the Secretary’s reliance on *Kaiser Coal* is misplaced. *See* S. Br. at 9. In *Kaiser Coal*, we determined that, absent an extant enforcement action, we lacked jurisdiction over an application for declaratory relief. 10 FMSHRC at 1166. However, the present case is readily distinguishable from *Kaiser Coal*, in that the latter involved an operator that withdrew its section 105(d) contest as a condition of settlement and later filed a request for declaratory relief *after* the order terminating the proceeding had become final. Conversely, in the instant case, there has been no settlement or withdrawal of the contest, nor has there been an interruption of the Commission’s jurisdiction, which procedurally is terminated only by its final order. North American’s request for declaratory relief was filed well before the judge dismissed the proceedings, and was renewed by its timely filed petition for discretionary review.

We find the Secretary’s reliance on *Contractors Welding*, 996 F.2d at 1409, similarly unavailing. *Contractors Welding* involved a settlement agreement reached while the parties’ case was pending on appeal. *Id.* at 1411. The settlement was conditioned on the Secretary vacating the related citation and OSHRC vacating its previous decision. *Id.* OSHRC, however, vacated the portion of the decision that affirmed the citation, but sought to preserve its analysis as valid precedent. *Id.* at 1412. The Second Circuit held that OSHRC’s action constituted an advisory opinion for which it had no authority, thus violating its appellate mandate. *Id.* at 1412-14. Factually, *Contractors Welding* bears little similarity to the instant case.

In summary, based on the plain language of section 105(d), we conclude that once an operator has properly contested a citation pursuant to section 105 of the Act, the Secretary cannot, by vacating the citation, automatically divest the Commission of jurisdiction. *Climax*, 2 FMSHRC at 2750; *Mid-Continent*, 12 FMSHRC at 957. Accordingly, we hold that the Commission retains jurisdiction to properly address the operator’s questions of mootness and the appropriateness of declaratory relief.

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<sup>5</sup>(...continued)

which set forth the procedures for contesting, before the Commission, the enforcement actions of the Secretary and the manner in which hearings shall be conducted before the Commission.”). The Secretary essentially confuses issues involving the breadth of her enforcement discretion – a prosecutorial function – with issues involving a Commission judge’s authority to manage a case and determine whether any relief is appropriate – a purely judicial function. *See* S. Br. at 7-8, n.3.

## B. Mootness

North American argues that because the Secretary has indicated that she will cite North American in the future under the same regulation and facts, it was plain error and an abuse of discretion for the judge to dismiss the proceedings as moot. N. Am. Br. at 13-15. It further contends that it will suffer collateral consequences in the form of continuing legal costs when it challenges MSHA's future unsupportable citations issued under section 77.1914(a). *Id.* at 15-16. The Secretary counters that North American was cited for violating its plan for the Flannigan Shaft and, because construction of the Flannigan Shaft is complete, North American cannot be cited for violating that plan again. S. Br. at 20-21, Attach. 3 at 2.

The Commission has recognized that concepts of mootness must be applied with care in the administrative setting. *Mid-Continent*, 12 FMSHRC at 955. However, while the article III constitutional requirement of "case or controversy" does not literally apply to federal administrative agencies like the Commission, "an agency receives guidance from the policies that underlie the 'case or controversy' requirement of article III . . . . An agency acts within its discretion in refusing to hear a case that would be considered moot if tested under the article III 'case or controversy' requirement." *Id.* (quoting *Climax*, 703 F.2d at 451).

A case is moot when the issues presented no longer exist or the parties no longer have a legally cognizable interest in the outcome. *Climax*, 703 F.2d at 451-52 (finding issues moot and denying declaratory relief after the Secretary vacated the citations); *Brent Roberts*, 20 FMSHRC 1245, 1248 (Nov. 1998) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)) (finding issues moot after Secretary withdrew his proposed revocations of certifications and filed an unopposed motion for dismissal); *Mid-Continent*, 12 FMSHRC at 956 (holding enforcement action concluded and denying declaratory relief after Secretary vacated underlying citation and withdrawal order and sought dismissal of penalty proceeding). However, when there is a substantial likelihood that an allegedly moot question will recur, the issue remains justiciable. *Mid-Continent*, 12 FMSHRC at 955. Administrative orders also remain justiciable if they are short term orders capable of repetition, yet evading review. *See, e.g., Climax*, 2 FMSHRC at 2752. Additionally, voluntary cessation of a challenged practice does not render a case moot unless there is no reasonable expectation that the wrong will be repeated. *Greater Yellowstone Coalition v. Tidwell*, 572 F.3d 1115, 1121(10th Cir. 2009); *see Reich v. OSHRC*, 102 F.3d 1200, 1201 (11th Cir. 1997).

The Secretary's vacatur of the citation, along with the judge's dismissal of the civil penalty with prejudice, eliminated the possibility that North American would be held liable for the alleged violation of its shaft plan for the Flannigan Shaft. Therefore, we conclude that these proceedings lack a live "case or controversy" as to Citation No. 6666927.

Nonetheless, North American contends that there is a substantial likelihood that it faces recurrent harm because the Secretary has allegedly declared that she will continue to enforce section 77.1914(a) (the permissibility regulation) against North American in the future under identical circumstances. N. Am. Br. at 14, 16, 18. Here, the Secretary sought to enforce section

77.1900-1 (the plan compliance regulation), and although she freely admits that she will cite North American in the future under section 77.1900-1 if it is found to be in violation of its shaft plan, the Secretary is within the bounds of her authority to do so. Shaft plans are mine-specific and are thus designed to address the unique conditions of a particular mine. See *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). Therefore, whether North American is cited in the future for use of a non-permissible pump below the shaft collar will have to be considered in the context of the specific language of the plan in question. *Jim Walter Res., Inc.*, 28 FMSHRC 579, 589 (Aug. 2006). Thus there is not a substantial likelihood that the question before us will reoccur, causing North American additional harm. Hence, resolution of whether North American violated the shaft plan for the Flannigan Shaft, which requires that “no non-permissible electrical equipment shall be used below the shaft collar *during excavation*,” is not determinative of whether North American will violate some other plan for failure to use permissible equipment. See N. Am. Opp’n Ex. B, at 15 (emphasis added).

North American further submits that the vacated citation is a “short-term order, capable of repetition, yet evading review.” N. Am. Br. at 14-15. We are not persuaded by this argument since there is no indication in the record that the Secretary makes a practice of citing operators, only to subsequently vacate the citations. See *Climax*, 703 F.2d at 452. Here, the Secretary chose to vacate the citation based on her review of the specific circumstances surrounding the alleged violation. The possibility of future citations being vacated under similar circumstances is purely speculative. We likewise find unavailing North American’s argument that it will suffer collateral consequences in the form of continuing legal costs. The Commission has found that the inconvenience of having to commence more than one suit is not “a hardship sufficient to justify review when the issues are not otherwise fit for judicial resolution.” *ASARCO, Inc.*, 20 FMSHRC 1001, 1008 (Sept. 1998) (citations omitted).

Additionally, North American argues that the Secretary’s vacatur of the citation does not render its contest proceeding moot because the Secretary’s “prosecutorial discretion” is wholly unrelated to an operator’s statutory right to “initiate and maintain a contest to the validity of the citation’s initial *issuance* under 105(d) of the Mine Act.” N. Am. Br. at 8-10; see PDR at 8 (emphasis added). This assertion cannot be reconciled with the Tenth Circuit’s holding in *Climax*, in which the court held that the issues before a Commission ALJ were rendered moot by the government’s vacation of a citation. 703 F.2d at 452.

Here, North American has presented no extraordinary condition that warrants the conclusion that this case is not moot. The Secretary has chosen to forego prosecution by vacating the underlying citation, and the judge has dismissed the citation with prejudice. It would be counter-productive and procedurally burdensome for the Commission to allow the operator to pursue a contest proceeding that is devoid of live controversy. It also serves no purpose to force the Secretary to continue litigating the merits of a citation that she has determined to be legally or otherwise unworthy of prosecution. The Secretary’s power to vacate would be nullified if an operator were allowed to continue litigating the merits of a citation simply because it filed a section 105(d) contest. Accordingly, we conclude that the issue involved is moot.

### C. Declaratory Relief

We now turn to the question of whether North American would be entitled to declaratory relief, assuming *arguendo* that the case was not moot. North American submits that the judge erred by not granting its request for declaratory relief because the Commission's authority to grant such relief is well established. N. Am. Br. 17-18. It seeks a declaration that its shaft sinking plan only barred the use of non-permissible electrical equipment below the shaft collar "during excavation," and that it was not engaged in "excavation" when it was dewatering the shaft. *Id.* at 5, 16.

In rejecting an operator's contention that the Commission was required to grant declaratory relief, the Tenth Circuit explained that the "Commission's power to grant declaratory relief is clearly discretionary, *see* . . . 5 U.S.C. § 554(e). . . . [T]he Commission is not required to grant declaratory relief unless a failure to do so would be an abuse of discretion." *Climax*, 703 F.2d at 452 n.4; *see Mid-Continent*, 12 FMSHRC at 953-54.

The primary purpose of declaratory relief is "to save parties from unnecessarily acting upon their own view of the law." *Mid-Continent*, 12 FMSHRC at 954 (quoting *Beaver Creek*, 11 FMSHRC at 2430). For a Commission judge to grant declaratory relief, the complainant must show that there is an actual, not moot, case or controversy between the parties under the Mine Act; that the threat of injury to the complainant is real, not speculative; and that the issue as to which relief is sought is ripe for adjudication. *Id.* Moreover, "when there is a substantial likelihood that an allegedly moot question will recur, the issue remains justiciable and declaratory judgment may be rendered to define the rights and obligations of the parties." *Id.* at 955 (quoting 10B Charles Alan Wright et al., *Federal Practice and Procedure Civil* § 2757 (3d. ed. 2011)).

North American has failed to make the necessary showing for declaratory relief. As stated, *supra*, there exists no live controversy between the Secretary and North American as to Citation No. 6666927, and no substantial likelihood that North American faces recurrent harm in the form of another citation predicated on the phrase "during excavation."

Even if the Commission were to declare that dewatering under the blind drilling method did not constitute "excavation," it would not follow that North American would be free to use non-permissible pumps to dewater shafts in the future. Since issuance of the citation in question, the Secretary has required North American to include language in its shaft sinking plans similar to that in this plan, modified so as to exclude the term "excavation" but, nonetheless, requiring the use of permissible equipment. N. Am. Reply Br. at 11; Sec'y Br. at 22 n.7, Attachs. 4, 5. The modified provision states that: "The finished shaft will be dewatered in such a way as to be compliant with 30 C.F.R. § 77.1914(a). *If electrical equipment is used below grade to dewater the shaft it will be permissible.*" S. Br. at 22 n.7, Attachs. 4, 5 (emphasis added).

This modified language demonstrates that the Secretary's ability to enforce her policy regarding permissible pumps is not contingent upon the act of excavating or use of the term "excavation." The language also significantly diminishes the likelihood that subsequent disputes will arise over the term "excavation" as it relates to non-permissible pumps, because the permissibility requirement is clearly uncoupled from the act of excavation. Indeed, counsel for North American acknowledged at oral argument that since issuance of the subject citation, North American has not been cited again for violation of its shaft plans. Oral Arg. Tr. at 20-21.

In short, although North American ostensibly seeks to challenge the meaning of "excavation," it appears that the actual issue for which it seeks relief is the broader question of whether MSHA may properly require the use of permissible pumps to dewater mine shafts when the blind drilling method is employed.<sup>6</sup> However, as we have noted, in other situations the Secretary has required the use of permissible pumps in a shaft plan without using the term "excavation." Thus, if North American were to prevail in establishing that dewatering does not entail "excavation," it would have no effect on the Secretary's enforcement of the Act, or on North American's ability to use equipment it prefers. Because "[o]ne of the most important considerations that may induce a court to deny declaratory relief is that the judgment sought would not settle the controversy between the parties," 10B *Federal Practice and Procedure Civil, supra*, § 2759, such relief is not appropriate here.

It is well established that "absent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval." *C.W. Mining Co.*, 18 FMSHRC 1740, 1746 (Oct. 1996); *see also Monterey Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983). The Secretary's action in disapproving such a proposed mine plan may be overturned only if it is "arbitrary and capricious." *Emerald Coal Res.*, 29 FMSHRC 956, 966 (Dec. 2007). If North American wishes to challenge MSHA's policy as arbitrary and capricious by proving that non-permissible pumps in blind drilling provide at least the same level of protection to miners as permissible pumps, there are suitable means to do so. In particular, North American could refuse to adopt the plan provision and accept a technical violation. *See id.* at 972; S. Br. at 28. This would better facilitate North American's intended challenge and afford it more appropriate relief. North American has not instituted such a challenge here, and the factual record has not been developed in this regard. *See Hollis v. Itawamba County Loans*, 657 F.2d 746, 750 (5th Cir. 1981) (stating that in exercising their discretion to grant declaratory relief, courts may take into consideration the adequacy of the record for the determination they are required to make).

As the Tenth Circuit has noted, "[t]he Commission may reasonably choose to reserve its use of declaratory relief for special cases in order to conserve its administrative resources." *Climax*, 703 F.2d at 453. We choose to do so here. Because rendering an interpretation of

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<sup>6</sup> North American argues that permissible pumps are no safer than non-permissible pumps when dewatering a finished shaft, particularly when blind shaft drilling is utilized. N. Am. Br. at 21-22, Exs. 5(D) at 17, 5(E) at 37, 75-76.

“excavation” would contribute little toward North American’s ultimate goal of abolishing or even circumventing MSHA’s prohibition, we conclude that a grant of declaratory relief in these proceedings would not be an efficient use of judicial resources. Accordingly, we deny North American’s request for declaratory relief.

**III.  
Conclusion**

For the reasons discussed above, we hold that the judge did not err in dismissing the proceedings as moot. We also find that the judge did not abuse his discretion in refusing to consider or grant North American’s request for declaratory relief in the first instance. Accordingly, we affirm the judge’s decision.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy  
Michael F. Duffy, Commissioner

/s/ Michael G. Young  
Michael G. Young, Commissioner

Commissioners Cohen and Nakamura, concurring:

We join the majority opinion and agree with our colleagues that the vacatur of the citation does not deprive the Commission of jurisdiction to consider the issues of mootness and declaratory relief. We also agree with our colleagues that the issue presented by North American – involving the phrase “during construction” in the shaft drilling plan – is moot, and that the Commission should not grant declaratory relief.

We write separately in order to address more fully North American’s central assertion that an operator has the statutory right “to initiate and maintain a contest to the validity of the citation’s initial *issuance* under 105(d) of the Mine Act.” N. Am. Br. at 8 (emphasis added); N. Am. R. Br. 3-4, 6-9; Oral Arg. Tr. 5, 11, 25, 29. North American contends that section 105(d) gives an operator the right to make a challenge “that is not just to the paper that it’s written but the facts under which that citation was first issued.” Oral Arg. Tr. 5. North American insists that the Secretary’s vacatur of the citation does not affect its right to challenge the “issuance” of the citation:

Thus, the fact that Congress provided a right to “contest the issuance of a citation” in Section 105(d), while providing a more limited right to “contest the citation” in Section 105(a) is clear evidence that Section 105(d) allows an operator to contest the issuance of the citation itself, and North American cannot be divested of this right, nor the Commission divested of jurisdiction to hear North American’s exercise of its right, by the Secretary’s unilateral decision to vacate the citation.

N. Am. R. Br. 7-8.

North American’s argument is based on a misreading of the statute. Contrary to North American’s assertion, section 105(d) does not provide a right to contest the issuance of a citation, as distinct from the citation itself. Rather, as discussed at the oral argument (Oral Arg. Tr. 12-19), section 105(d) sets forth the Commission’s jurisdiction in detail. It contains three separate types of jurisdiction involving contests filed by an operator, set out in three parallel clauses:

1. “the issuance or modification of an order under section 104;”
2. a “citation or a notification of proposed assessment of a penalty under subsection (a) or (b) of this section;” and
3. “the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104.”

*See* 30 U.S.C. § 815(d). The word “issuance” in section 105(d) is followed by the words “or modification of an order issued under section 104.” This relates to withdrawal orders based on failure to abate a violation, certain unwarrantable failure violations, S&S violations issued when

an operator has been found to have a pattern of violations, respirable dust violations, and training violations.

Thus, the statute does not state that an operator may contest “the issuance of a citation,” but rather “the issuance or modification of an order issued under section 104.” The right to contest a citation is contained in the second provision of section 105(d), which gives an operator the right to contest a “citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section.” This is the provision under consideration in this case, and it does not mention the “issuance” of a citation.

Nevertheless, North American argues that the word “issuance” in section 105(d) modifies all three provisions. Oral Arg. Tr. 13, 18. However, this reading of the statute makes no sense. The word “issuance” must refer to some specific action by the Secretary. Looking at the third provision, it makes no sense to say that the Secretary could issue “the reasonableness of the length of time set for abatement.” Plainly, the word “issuance” applies only to an order issued under section 104, as stated in the first provision of section 105(d).

/s/ Robert F. Cohen, Jr.  
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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February 27, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2009-834
v.	:	A.C. No. 34-01728-193433
	:	
FARRELL-COOPER MINING COMPANY	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On June 27, 2011, the Commission received from Farrell-Cooper Mining Company (“Farrell-Cooper”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

On December 2, 2010, Chief Judge Lesnick issued an Order to Show Cause which by its terms became an Order of Default if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Farrell-Cooper’s failure to answer the Secretary’s April 28, 2010 Petition for Assessment of Civil Penalty.

Farrell-Cooper asserts that it filed a timely response to the Show Cause Order on December 28, 2010. The Secretary does not oppose the request to reopen, and notes that the Denver Regional Solicitor’s Office received the answer on January 10, 2011. Moreover, MSHA states that its records show that the operator sent a check dated May 19, 2011, in response to a delinquency notice mailed on May 11, 2011.

Having reviewed Farrell-Cooper's request and the Secretary's response, in the interest of justice, we conclude that Farrell-Cooper was not in default under the terms of the Show Cause Order, as it timely complied with the Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy  
Michael F. Duffy, Commissioner

/s/ Michael G. Young  
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.  
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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February 27, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 2012-66
ADMINISTRATION (MSHA)	:	A.C. No. 15-19199-258836 B294
	:	
	:	Docket No. KENT 2012-67
	:	A.C. No. 15-19068-256038 B294
	:	
	:	Docket No. KENT 2012-68
v.	:	A.C. No. 15-18694-242102 B294
	:	
	:	Docket No. WEVA 2012-70
	:	A.C. No. 46-09002-252812 B294
	:	
TWIN RIDGE DEVELOPMENT, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On October 4, 2011, the Commission received from Twin Ridge Development, Inc. (“Twin Ridge”) four motions seeking to reopen four penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>1</sup> The Secretary does not oppose the requests to reopen.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2012-66, KENT 2012-67, KENT 2012-68, and KENT 2012-70, all captioned *Twin Ridge Development, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. *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”); *JWR*, 15 FMSHRC at 787. 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).

Having reviewed Twin Ridge’s requests and the Secretary’s responses, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy  
Michael F. Duffy, Commissioner

/s/Michael G. Young  
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.  
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

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Federal Mine Safety & Health Review Commission  
601 New Jersey Avenue, N. W., Suite 9500  
Washington, D.C. 20001-2021



For the foregoing reasons, the precautionary petition filed by Big Ridge is denied.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy  
Michael F. Duffy, Commissioner

/s/ Michael G. Young  
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

February 29, 2012

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

v.

E.R. JAHNA INDUSTRIES, INC.

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Docket No. SE 2010-780-M  
A.C. No. 08-01021-218131

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On August 19, 2011, the Commission received from E.R. Jahna Industries, Inc. (“Jahna”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

On March 17, 2011, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became an Order of Default if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Jahna’s failure to answer the Secretary’s August 19, 2010 Petition for Assessment of Civil Penalty.

Jahna filed a timely response to the Show Cause Order which included a typographical error in the case docket number. The Secretary does not oppose the request to reopen.

Having reviewed Jahna's request and the Secretary's response, in the interest of justice, we conclude that Jahna was not in default under the terms of the Show Cause Order, as it timely complied with the Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy  
Michael F. Duffy, Commissioner

/s/ Michael G. Young  
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.  
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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February 29, 2012

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

v.

ALVIN J. COLEMAN & SON, INC.

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Docket No. YORK 2010-77-M  
A.C. No. 27-00050-202337

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On August 22, 2011, the Commission received from Alvin J. Coleman & Son, Inc. (“Coleman”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

On March 15, 2011, Chief Administrative Law Judge Lesnick issued an Order to Show Cause and Order of Default in response to Coleman’s failure to answer the Secretary’s January 6, 2010 Petition for Assessment of Civil Penalty. The judge ordered the operator to file its answer within 30 days or it would be in default.

Coleman asserts that it submitted a timely answer to the Secretary’s Petition for Assessment and did not receive the Order to Show Cause. The Secretary does not oppose the request to reopen and notes that the Philadelphia Regional Solicitor’s Office indicated that the operator’s answer was timely received by the MSHA Warrendale, PA District Office on February 1, 2010. The answer indicates that it was also sent to the Commission.

Having reviewed Coleman's request and the Secretary's response, in the interest of justice, we conclude that the Order of Default should be vacated because Coleman timely filed an answer to the petition. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy  
Michael F. Duffy, Commissioner

/s/ Michael G. Young  
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.  
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

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Chief Administrative Law Judge Robert J. Lesnick  
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# **ADMINISTRATIVE LAW JUDGE DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

721 19<sup>TH</sup> Street, Suite 443  
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303-844-3577/FAX 303-844-5268

February 1, 2012

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of RICHMOND TEDDY JENKINS,	:	Docket No. CENT 2012-254-DM
Applicant	:	MSHA No. SC MD 12-03
	:	
v.	:	Garland Pit
	:	
CHIEFTAIN SAND AND PROPPANT, LLC,	:	Mine I.D. 03-01985
Respondent	:	

**DECISION AND ORDER GRANTING TEMPORARY REINSTATEMENT**

Appearances: Karla S. Jackson, Esq., and Michael Schoen, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, for Applicant; Thomas E. Reddin, Esq., Winstead PC, Dallas, Texas, for Respondent.

Before: Judge Manning

This case is before me on an application for temporary reinstatement brought by the Secretary of Labor on behalf of Richmond Teddy Jenkins against Chieftain Sand and Proppant, LLC (“Chieftain”) under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (the “Mine Act”). The application was filed by the Secretary on or about January 3, 2012 and Chieftain requested a hearing within 10 days of receipt of the application. The application alleges that Chieftain discriminated against Jenkins when he was made to operate defective equipment. He filed his complaint of discrimination with MSHA on November 9, 2011, and he was terminated from his employment on November 26, 2011. The application states that the Secretary has determined that the underlying discrimination complaint filed by Jenkins was not frivolously brought. A hearing in this temporary reinstatement proceeding was held in Texarkana, Texas. Chieftain produces sand that is principally used by the oil and gas industry in hydraulic fracturing. The pit and associated facilities are located near Garland, Arkansas. For the reasons set forth below, I find that the applicant established that Jenkins’ discrimination complaint was not frivolously brought.

**I. SUMMARY OF THE EVIDENCE**

Jenkins testified that he was hired by Chieftain on March 12, 2011. He performed many tasks for Chieftain including basic utility work, maintenance work, and operating mobile equipment. On October 27, 2011 he was operating a front-end loader (“loader”). Jenkins testified that both of the side windows on the loader were missing. The window on the left had been missing for a considerable length of time. (Tr. 38). The window on the right had fallen out

about two months prior to October 27. (Tr. 38, 43). He testified that he did not remove any of the windows. (Tr. 40). Jenkins testified that when he told management that the window on the right side had fallen out, he was told to place the window in the shop in a safe location. (Tr. 41-42). A cold front had come through the area on or just before October 27 and it was also raining on that day. Jenkins testified that he was cold and wet. At some point on October 27, 2011, he stopped operating the loader and parked it. (Tr. 18, 46). He told his immediate supervisor, Michael Coleman, that he could not continue to operate the loader in these conditions. (Tr. 109).

Coleman testified that he has operated the loader in the rain. (Tr. 106, 118). The seat is located in the center of the cab. (Tr. 105). Unless it is a blowing rain, the operator does not get particularly wet. He characterized the rain on October 27 as a “misting rain,” but he admitted that it was cold that day. (Tr. 109-10). Coleman testified that Jenkins removed the windows from the loader earlier that year.<sup>1</sup> (Tr. 108). Coleman also testified that one of the windows was still in the shop and Jenkins could have replaced it. (Tr. 120). Jenkins was ordered to either operate the loader or clean up spilled sand with a shovel. (Tr. 44, 91). After some discussion, Jenkins and Coleman agreed that he could shovel sand that had accumulated around the sand storage bins. Jenkins testified that he made one more “pull” with the loader and then started shoveling. (Tr. 18-19, 44). Jenkins testified that he believed that operating the loader without side windows in the cold rain was a safety issue. (Tr. 22). Coleman testified that Jenkins never raised any safety issues when they discussed his operation of the loader on October 27. (Tr. 110).

Jenkins called MSHA sometime after October 27 to complain about the loader. (Tr. 23, 62). He talked to Steve Medlin about the windows on the cab of the loader. (Tr. 70-71, 82). In the meantime, on November 3, Jenkins was issued a warning notice by Chieftain. The notice alleged that Jenkins’ job performance violated company policy in three ways. First, the notice states that he “refused to operate the equipment he normally would operate” with the result that “another employee was called in to perform his job duties.” (Ex. R-4). Second, the notice states that Jenkins “went to perform other job functions that he was not requested to do without notifying his supervisor and was uncooperative when asked what he was doing.” *Id.* Finally, the notice stated that he “disregarded and/or refused to follow company policy on transition of duties from his shift to next shift employees.” *Id.* The warning notice alleges that he left work early without notice and that he could face termination of employment if he continued to disregard company policy. Jenkins refused to sign this warning notice. (Tr. 22, 54).

Conard Riggs, the operations manager at Chieftain, testified that he was the author of the warning notice. He testified that neither he nor any member of management considered Jenkins’ complaint about the windows to be a safety complaint. (Tr. 128, 152-55, 167). Jenkins did not phrase his verbal complaint to Coleman in those terms and management considered the issue to be one of comfort rather than safety. He testified that the second element of the warning notice

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<sup>1</sup> It should be noted that the cab on the loader is not air-conditioned, but there is a small fan in the cab to provide ventilation. (Tr. 117).

was included because Jenkins did not start shoveling as he was directed, and instead performed other tasks of an unrelated nature. (Tr. 155). The third element of his discipline notice was issued because Jenkins left work early without permission. *Id.* It is a practice at Chieftain for employees to leave after the arrival of the next shift so that any problems or concerns can be communicated to the oncoming shift. Riggs testified that he would not have written up the warning notice if the only issue was Jenkins' refusal to continue operating the loader that day for reasons of safety. (Tr. 157). If he had started shoveling and worked the entire shift, no discipline notice would have been issued. Riggs testified that Jenkins refused to sign the notice solely because of the third element on the notice. (Tr. 156).

Steve Medlin came to the pit on November 9 to investigate Jenkins' hazard complaint. (Tr. 73). There were two items on the anonymous written hazard complaint that he gave to mine management, one about the windows and another raising concern about the brakes on the loader. *Id.* Medlin tested the brakes and determined that they were fully functional. (Tr. 76). He issued a citation for the missing windows. Jenkins testified that he participated in this investigation with Inspector Medlin and that the company knew that he called in the safety complaint. (Tr. 24, 63-64).

Jenkins also filed his complaint of discrimination with MSHA on November 9. In the body of the complaint, Jenkins wrote "Name calling – made to operate equipment (defective)." (Ex. R-1).<sup>2</sup> On the first page of the complaint, the form asks the following question: "Has the Discriminatory Action Resulted in your being suspended, laid off, or discharged?" Mr. Jenkins checked the box marked "No." (Tr. 28). At the hearing, Jenkins admitted that he did not have to operate the subject loader at any time after he complained about its condition on October 27. (Tr. 21, 52-53, 113). Another employee operated the loader for a few days, but then it was taken out of service to be repaired. (Tr. 111-12).

On November 26, 2011, Jenkins was terminated from his position at Chieftain. The notice of termination states, as follows: "Teddy was witnessed smoking in Conex<sup>3</sup> under shop labeled no smoking, Conex houses flammable materials, building is clearly labeled no smoking, Teddy has been hazard trained for no smoking areas, as well as safety meetings, termination." (Ex. R-6 emphasis in original). Richard Binger, the plant manager, told Jenkins that he was

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<sup>2</sup> Jenkins admitted that the allegation of "name calling" is not part of this case. (Tr. 51-52). Jenkins alleges that an independent contractor who had been performing work at the pit called him names earlier in 2011. Jenkins, who is African-American, filed a complaint with the Equal Employment Opportunity Commission ("EEOC") that included this allegation.

<sup>3</sup> The "Conex" is a large freight container with doors that open at the back. (Ex. R-5). It resembles a tractor trailer without wheels, but it is larger. Such containers are often called intermodal containers because they can ride on flatbed rail cars and be carried on ships. The Conex was sitting on the ground at Chieftain and was used as a storage shed.

terminated. (Tr. 31). Jenkins testified that Binger told him that he had a witness who saw him smoking in the Conex. Jenkins was told to leave the property after this discussion.

Jenkins admitted at the hearing that he was smoking in the vicinity of the Conex on November 26, but he denied that he smoked inside the Conex. (Tr. 66, 80). He also admitted that the area where he was smoking was posted with no smoking signs and that flammable materials were stored in the Conex. (Tr. 58). He testified, however, that many people smoked in the vicinity of the Conex and that cigarette butts were in the area. (Tr. 64-66). He told Medlin that the stated reason for his termination was the fact that he was smoking in a non-smoking area. (Tr. 58-59, 79, 92).

Inspector Medlin testified that, when he conducted his investigation, he was concerned that, if rain water entered the cab of the loader, the foot pedals could become wet and slippery, making the vehicle unsafe to operate. He was also concerned about noise and dust exposure because the loader operator would be unable to close the windows. (Tr. 74-75, 82-83). He inspected all three front end loaders at the pit and only one had windows missing. Medlin met with Riggs and reviewed the citation with him. When Jenkins called Medlin after he had been terminated from employment, he asked for reinstatement but he did not file an amended complaint of discrimination. (Tr. 35-36, 51, 81). When Medlin traveled to the pit on December 8, 2011 as part of his special investigation of the discrimination complaint, he interviewed Coleman and Binger, but he never asked them why Jenkins was terminated. (Tr. 92, 95-96, 113, 163).

Paul Thetford, a plant operator, testified for Chieftain. He stated that the Conex contained gasoline, hydraulic fluid, grease and other flammable materials. (Tr. 133). He testified that he saw Jenkins open the door to the Conex, walk into the Conex with a lit cigarette in his mouth, grab a blue bag and a pie pan, and walk back out with a lit cigarette. (Tr. 133-34, 138). Thetford testified he was about ten feet away from the door of the Conex talking to Robert Glass, a contract welder, when he observed Jenkins. He reported these events to Mr. Binger, but he did not talk to Jenkins about it. (Tr. 141-42). Thetford told Medlin during his investigation that he observed Jenkins enter the Conex with a lit cigarette. (Tr. 136). Riggs testified that Robert Glass told him that he saw Jenkins smoking in the Conex. (Tr. 161). The employee break area is immediately adjacent to the Conex. He estimated the break area to be about 30 feet away. (Tr. 142-43). Employees are allowed to smoke in this area as long as the doors to the Conex are closed, but no smoking is ever allowed inside the Conex. (Tr. 135). There are two "No Smoking" signs on the Conex, one on the outside of the door on the left and one inside the door on the right. (Ex. R-5).

Riggs testified that some violations of company policies are so severe that an employee who violates such a policy is immediately terminated. (Tr. 158-59). Smoking in the Conex is one of the offences that will automatically lead to termination. Riggs testified that two other employees were immediately terminated for violations of safety policies in the months prior to the termination of Jenkins. Jacob Johnson was terminated on August 7, 2011 because he bypassed safety features on 480-volt electrical starters. (Tr. 162-63; Ex. R-7). Virgil

Humphries was terminated on November 11, 2011 because he removed a handrail on a dredge to repair a pump and he failed to replace the handrail after he completed the repairs. (Tr. 163; Ex. R-8). Humphries was terminated after MSHA issued a citation for the missing handrail. Riggs admitted that Chieftain did not have a written document that memorialized its company policies, but he testified that the policies were discussed with employees including Jenkins. All employees had attended safety meetings in which it was stated that smoking was prohibited in the Conex at any time and that smoking was prohibited in the vicinity of the Conex if the door was in the open position. (Tr. 171). On the other hand, Thetford testified that he could not recall receiving any training or instructions concerning smoking policies. (Tr. 147).

## **II. ARGUMENTS OF THE PARTIES**

The Secretary contends that the evidence clearly establishes that the discrimination complaint was not frivolously brought and that all one has to do is connect the dots. On October 27, the company disciplined Jenkins for complaining about the safety of operating the loader in the rain without functioning side windows. Jenkins filed a hazard complaint with MSHA as a result. Second, Jenkins discussed this issue with Inspector Medlin on November 8. Third, Medlin inspected the pit on November 9 as a result of Jenkins' hazard complaint, Jenkins participated in the inspection, and Medlin issued a citation for the condition of the windows. The Secretary maintains that Chieftain had no objective, written policy prohibiting smoking in and around the Conex. Finally, when Jenkins was called to the office to discuss the smoking incident, the termination notice had already been drafted; no discussion was permitted.

Chieftain argues that Jenkins never filed a complaint of discrimination alleging that he was terminated from his employment because of his protected activity. His discrimination complaint, filed before he was terminated, simply alleges that he was required to operate a defective loader. The facts show, however, that after Jenkins complained about the loader he was not required to operate it again. Chieftain also contends that MSHA did not investigate the termination aspect of the discrimination complaint. When Medlin conducted his investigation he questioned employees about the events of October 27, 2011, but he never asked employees about the events of November 26, 2011. The evidence shows that Jenkins committed an obvious and serious safety violation that justified his termination. Other employees had likewise been terminated for committing safety violations. When confronted about the safety violation, Jenkins did not deny the infraction. Finally, Chieftain argues that Jenkins filed an amended complaint with the EEOC that alleges that he was "disciplined and discharged in retaliation for filing an EEOC charge." (Ex. R-3). Chieftain maintains that his MSHA discrimination complaint is entirely inconsistent with the allegations in his EEOC complaint. Chieftain maintains that the evidence establishes that there is no causal connection between his actions on October 27 and his termination on November 26.

### III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c)(2) 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, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978) (“*Legis. Hist.*”).

Section 105(c)(2) provides, in pertinent part, that the Secretary shall investigate each complaint of discrimination “and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.” The Commission established a procedure for making this determination at 29 C.F.R. § 2700.45. Subsection (d) provides that the “scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner’s complaint was frivolously brought.”

“The scope of a temporary reinstatement proceeding is narrow, being limited to a determination by the judge as to whether a miner’s discrimination complaint is frivolously brought.” *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d sub nom. Jim Walter Resources Inc. v. FMSHRC*, 920 F.2d 738 (11<sup>th</sup> Cir. 1990). Courts and the Commission have equated the “not frivolously brought” standard contained in section 105(c)(2) of the Mine Act with the “reasonable cause to believe standard” at issue in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). It has also been equated with “not insubstantial.” *Jim Walter Resources*, 920 F.2d at 747. Congress indicated that a complaint is not frivolously brought if it “appears to have merit.” (*Legis. Hist.* at 624-25).

The first issue that must be addressed is whether I have the authority to order temporary reinstatement in this instance because Jenkins did not file a complaint alleging that he had been discharged for his alleged protected activity. Section 105(c)(2) provides, in pertinent part, that any “miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may . . . file a complaint with the Secretary alleging such discrimination.” Mr. Jenkins filed such a complaint on November 9, 2011, alleging that he was “made to operate” defective equipment. He implicitly alleged that his refusal to operate the loader was protected activity. Although he did not directly communicate his safety concern to management, for purposes of this temporary reinstatement proceeding it can be assumed that his refusal was based at least in part on his concerns over his safety. He did not specifically state what adverse action was taken against him in his discrimination complaint. Once he shut down the loader, he was not required to operate that loader again. One can easily imply, however, that the adverse action was the written warning notice issued to him on

November 3, 2011. Under a section entitled “Consequences of Further Infractions,” Riggs had written “You can face termination of employment if you continue to disregard company policy and standards.” (Ex. R-4). As a consequence, it is clear that the company considered the three infractions included in the warning notice to be serious. At the time Jenkins filed his complaint, he had not been terminated from his employment.

Section 105(c)(2) requires that the Secretary start her investigation of the discrimination complaint within 15 days of receipt and then it provides that “if the Secretary finds that *such complaint* was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.” (Emphasis added). First, it must be noted that this provision is only relevant if the miner had been discharged from his employment. In this instance, at the time Jenkins filed his discrimination complaint, he had not been discharged and he indicated that fact on MSHA’s discrimination complaint form. The second point to note is that the issue is whether the complaint filed by the miner was frivolously brought and not whether the Secretary’s application for temporary reinstatement was frivolously brought. For reasons that I cannot understand, Jenkins did not amend his discrimination complaint to include his termination after he was discharged and, indeed, it appears that Medlin advised him that he was not required to do so. It is not uncommon for a miner to file amended discrimination complaints if the alleged adverse action becomes more severe.<sup>4</sup> Jenkins testified, however, that he asked Medlin if he could be temporarily reinstated.

In *Sec’y on behalf of Dixon et al v. Pontiki Coal Corp.*, 19 FMSHRC 1009 (June 1997), the Commission addressed a similar issue. In that case, a single miner filed a discrimination complaint with the Secretary. Based upon her investigation, the Secretary determined that she should file a discrimination proceeding on behalf of this miner and a number of other miners for the same discriminatory conduct by the mine operator. The operator maintained that, under section 105(c)(2), the Secretary is limited to filing discrimination proceedings before the Commission only on behalf of those who filed an initiating complaint. *Id.* at 1016. The Secretary argued that “section 105(c)(2) permits her to file a complaint alleging all discrimination her investigation may have uncovered. . . .” *Id.* After reviewing the language of the Mine Act, the Commission concluded that the Secretary’s interpretation was reasonable. *Id.* at 1017. The Commission also noted that the Secretary’s interpretation was consistent with Commission precedent that has recognized that “it is the scope of the Secretary’s *investigation*, rather than the initiating complaint, that governs the permissible ambit of the complaint filed with the Commission.” *Id.* at 1017-18 (emphasis in original).

On the basis of this Commission decision, I hold that, for the purposes of this temporary reinstatement proceeding, the failure of the applicant to amend his complaint of discrimination to

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<sup>4</sup> See, for example, *Sec’y on behalf of Pollock v. Kennecott Barney’s Canyon Mining*, 22 FMSHRC 419 (March 2009) (ALJ), in which four discrimination complaints were filed as events unfolded.

include an allegation that he was terminated from his employment because of his protected activity is not fatal to his request for temporary reinstatement so long as the scope of the Secretary's investigation included such an allegation. I find that, although the Secretary's investigation has been rather cursory at this point, Inspector Medlin did include this issue in his investigation. In his declaration dated January 3, 2012, Inspector Medlin stated that:

Mr. Jenkins has asserted to me that he was discriminatorily terminated from his employment by respondent on, or about, November 26, 2011 because he engaged in such protected activity. Mr. Jenkins has asserted that this constitutes an act of discrimination under the Mine Act. This assertion does not appear to me to be frivolous.

(Ex. A ¶4e to Application for Temporary Reinstatement). Medlin interviewed Jenkins on this issue and took Jenkins at his word. As stated above, Medlin did talk to Thetford about the smoking issue and he also received a written statement from Chieftain. (Tr. 101). Consequently, I concluded that have I have jurisdiction to order that Jenkins be temporarily reinstated, if the Secretary has met her burden of proof.

I find that the Secretary presented sufficient evidence to establish that the complaint of discrimination was not frivolously brought. I find that Jenkins engaged in protected activity when he refused to drive the loader in the cold rain without side windows being present. The fact that Chieftain did not recognize his complaint as safety related is a factor to be considered but it is not determinative. Jenkins also suffered an adverse action about four weeks later when he was terminated from his employment. The key issue is whether there was any kind of causal nexus between these two events. The Commission has frequently acknowledged that it is often difficult to establish a "motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999).

Smoking in the Conex with the door closed presented a very real and serious hazard to anyone working in the vicinity. Immediately terminating the employment of someone who smokes in the Conex is a reasonable and creditable action by an employer. Chieftain presented credible evidence that Jenkins was smoking in the Conex on the day that he was terminated and that Jenkins did not specifically deny doing so when confronted by management. Jenkins testified that he was not smoking in the Conex but only in the vicinity of the Conex, as other employees have been permitted to do. As a consequence, there is a conflict in the testimony. The Commission has held that the judge should not undertake to resolve disputes of fact or credibility that arise in a temporary reinstatement hearing. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717,719 (July 1999); *Sec'y of Labor on behalf of Stahl v. A & K Earth Movers, Inc.*, 22 FMSHRC 323, 325-26 (2000). A temporary reinstatement hearing is held for the purpose of determining "whether the evidence mustered by the miners to date established that their complaints are nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources*, 920 F.2d at 744.

If I assume that Jenkins was not actually smoking in the Conex but was only smoking in an area where other employees frequently smoke, then the reason given for his termination could well be mere pretext and one could conclude he was actually terminated, at least in part, for complaining about operating the “defective” loader. I find that his testimony was not inherently unworthy of giving any credit. Based on the evidence presented, I cannot hold “that things could not have happened the way the [applicant] alleges that they did. . . .” *A & K Earth Movers Inc.*, 22 FMSHRC 233, 237 (Feb. 2000) (ALJ); *aff’d* 22 FMSHRC 323 (March 2000). Chieftain’s evidence indicates that it may well have a valid defense to Jenkins complaint but, as set out above, the purpose of a temporary reinstatement proceeding is to determine whether the evidence presented by the Applicant establishes that his complaint is not frivolous.

Chieftain maintains that, because it did not require Jenkins to operate loader after he complained about its condition and that it took the loader out of service to be repaired, there can be no question that Jenkins’ alleged protected activity was unrelated to his subsequent termination. Chieftain argues that it did not exhibit any hostility toward the protected activity. The Commission has held that a showing of hostility toward the protected activity is not required to support an order for temporary reinstatement. *A & K Earth Movers*, 22 FMSHRC at 325 n. 2. In addition, Jenkins also participated in the MSHA investigation conducted by Medlin as a result of his hazard complaint during which Chieftain received a citation for the missing windows. Chieftain knew of this participation. It is not unforeseeable that his participation precipitated a desire on the part of mine management to look for a reason to terminate Jenkins’ employment. It is somewhat curious that, if Thetford saw Jenkins walk into the Conex with a lit cigarette, why he did not immediately tell Jenkins to get out in order to protect his own safety. Thetford was only a few feet away from the Conex. Instead, Thetford did not say a word to Jenkins or try to get him out of the Conex, but immediately went to Binger to tell him what happened, seemingly knowing that it would get Jenkins in trouble.

Chieftain argues that, because Jenkins never stated in his complaint filed with MSHA that he believes his termination was because of his safety activities and then set forth, under oath, an entirely different reason for his termination in a complaint before the EEOC, there can be no merit to his MSHA complaint.<sup>5</sup> (Tr. 14). I find that this is a compelling argument which raises serious questions about Jenkins’ credibility. The two complaints appear to be inconsistent. Nevertheless, Jenkins may be unsure exactly why he was terminated and may have filed the EEOC complaint to protect his rights and to avoid any potential laches argument. This issue will need to be considered if a formal complaint of discrimination is filed by the Secretary. I am

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<sup>5</sup> Because this proceeding does not involve the EEOC complaint, little evidence was admitted at the hearing on this issue. In his EEOC complaint, Jenkins alleges that, starting in July 2011, an independent contractor employee performing work at the pit hurled racial epithets at Jenkins and also threatened him. (Ex. R-3). He admitted that this contractor no longer worked on the property starting around September 2011. (Tr. 52-53). In his complaint, Jenkins states that he was “disciplined and discharged in retaliation for filing an EEOC charge, in violation of Title VII of the Civil Rights Act of 1964, as amended.” (Ex. R-3).

bound by the Commission's decision in *Pontiki Coal Corp.* in which the Commission held that it is the scope of MSHA's investigation that "governs the permissible ambit of the complaint." 19 FMSHRC at 1016.

#### IV. ORDER

For the reasons set forth above, Chieftain Sand and Proppant, LLC is hereby **ORDERED** to immediately reinstate Richmond Teddy Jenkins to the position he held immediately prior to his termination on November 26, 2011, at the same rate of pay and benefits for that position, or to a similar position with the same or equivalent duties, at the same rate of pay and benefits. The Secretary **SHALL COMPLETE** as quickly as possible her investigation of the underlying discrimination complaint. I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R § 2700.45(e)(4). On or before **February 27, 2012**, counsel for the Secretary shall advise me and the parties, in writing, whether the Secretary has determined that Chieftain violated section 105(c) of the Mine Act.<sup>6</sup>

/s/ Richard W. Manning  
Richard W. Manning  
Administrative Law Judge

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RWM

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<sup>6</sup> Under section 105(c)(3), the Secretary is required to complete her investigation within 90 days of receipt of the complaint of discrimination. Because Jenkins was not terminated until November 26, 2011, for purposes of this order only, I have calculated the 90 day period to begin on that date and expire on February 27, 2012.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES

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February 6, 2012

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of CHUCK E. MOSBY,	:	Docket No. LAKE 2012-261-DM
Complainant	:	MSHA Case No.: NC-MD-12-01
	:	
v.	:	
	:	
MULZER CRUSHED STONE, INC.,	:	Mine: Rockport Plant
Respondent	:	Mine ID 12-01389

**AMENDED DECISION AND ORDER**  
**REINSTATING CHUCK E. MOSBY**

Appearances: Edward V. Hartman, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, representing the Secretary of Labor (MSHA) on behalf of Chuck E. Mosby

Donna Vetrano Pryor, Esq., Patton Boggs LLP, Denver, Colorado, representing Mulzer Crushed Stone, Inc.

Before: Judge Andrews

Pursuant to section 105 (c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor (“Secretary”) on January 6, 2012, filed an Application for Temporary Reinstatement of miner Chuck E. Mosby (“Mosby”) to his former position with Mulzer Crushed Stone, Inc., (“Mulzer” or “Respondent”) at the Rockport Plant pending final hearing and disposition of the case.

On December 8, 2011, Mosby filed a Discrimination Complaint alleging, in effect, that his termination was motivated by his protected activity.<sup>1</sup> In the Secretary’s application, she

<sup>1</sup> Under the Act, protected activity includes filing or making a complaint of an alleged danger, or safety or health violation, instituting any proceeding under the Act, testifying in any such proceeding, or exercising any statutory right afforded by the Act. *See Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981).

represents that the complaint was not frivolously brought, and requests an Order directing Respondent to reinstate Mosby to his former position as a machinist.

Respondent filed a request for hearing on January 17, 2012. An expedited hearing was held in Jeffersonville, Indiana on January 26, 2012. The Secretary presented the testimony of the complainant Mosby, and the Respondent did have the opportunity to cross-examine the Secretary's witness, and present testimony and documentary evidence in support of its position. 29 C.F.R. §2700.45(d). At the hearing, the parties agreed that any temporary reinstatement should be economic only.

For the reasons set forth below, I grant the application and order the temporary economic reinstatement of Mosby.

### **Discussion of relevant 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., 1<sup>st</sup> Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990).

Temporary Reinstatement is a preliminary proceeding, and narrow in scope. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The substantial evidence standard applies.<sup>2</sup> *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). A temporary reinstatement hearing is held for the purpose of determining "whether the evidence mustered by the miners to date established that

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<sup>2</sup> "Substantive evidence" means "such relevant evidence as a reliable 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)).

their complaints are nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.” *Jim Walter Resources*, 920 F.2d at 744.

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

However, in the instant matter, Mosby need not prove a *prima facie* case of discrimination with all of the elements required at the higher evidentiary standard needed for a decision on the merits. Rather, the same analytical framework is followed within the “reasonable cause to believe” standard. Thus, there must be “substantial evidence” of both the applicant’s protected activity and a nexus between the protected activity and the alleged discrimination. To establish the nexus, the Commission has identified these indications of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec’y of Labor on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has acknowledged that it is often difficult to establish a “motivational nexus between protected activity and the adverse action that is the subject of the complaint.” *Sec’y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). The Commission has further considered the disparate treatment of the miner in analyzing the nexus requirement. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

### **The evidence**

On December 3, 2011, Mr. Mosby executed a Summary of Discriminatory Action, filed with his Discrimination Complaint of December 8, 2011. In this statement he wrote that on November 28, 2011, he was terminated from his job after eleven years of employment. He stated he was accused of lying to the company by Kevin Fulkerson, a maintenance Supervisor, who had gone through his toolbox and confiscated a personal notebook. Mosby wrote that he kept these notes regarding anything he spoke to the company about, from suggestions of improvement or efficiency, to violations, including times he had talked to management about safety violations or even EPA violations. He reported that a week or so before he was terminated he told his foreman, Joe Beckhort [*sic*], about an oxygen cylinder that had the cap missing and was not tied down; it had been removed from a welding cart. He stated that Joe Beckhort [*sic*] listened, noted it, and said he would take care of it, but the next day the problem had not been fixed. Mosby also recalled an incident about nine months before his termination when, following a three-day lay-off, he was asked in a very intimidating manner by Safety Director Brian Peter if he had anything to report him. Mosby wrote that, at the time, he was scared of losing his job, and said no. He ended the summary statement by concluding that because of finding his notebook, they were accusing him of lying. (Exh. S-2).

Submitted with the application was the January 5, 2012 Declaration of Thomas J. Pavlat, a Special Investigator employed by the Mine Safety and Health Administration. Mr. Pavlat stated that he had investigated the discrimination claim of Chuck E. Mosby against Mulzer Crushed Stone, Inc. He had determined the following:

c. On or about November 8, 2011, the affected miner, Chuck E. Mosby, engaged in protected activity by reporting to his immediate supervisor, Joe Beckort, that an oxygen cylinder at Respondent's worksite was missing a cap and was not properly secured.

d. On November 28, 2011, after returning to work from the Thanksgiving holiday, Mr. Mosby was terminated by respondent.

(Exh. S-3). The Special Investigator concluded that evidence exists that Mulzer Crushed Stone, Inc., "decided to discharge Mr. Mosby based, in part, on his making an internal safety complaint," and determined that the discrimination complaint was not frivolously brought. (*Id.*)

The Respondent disputes that there is any nexus between Mosby's safety complaint regarding the oxygen cylinder and any adverse action, namely his subsequent termination. Instead, Mulzer contends that Mosby was terminated in accordance with its progressive disciplinary policy. Mosby had already received verbal discussions regarding his behavior and a three-day layoff. Moreover, Respondent argues that Mosby did not engage in protected activity by keeping a log of safety issues that he neither reported nor corrected.

#### Stipulation of Facts

During the hearing, the parties entered the following six stipulations on the record:

- I. Mulzer Crushed Stone, Inc., did business and operated a mine known as the "Rockport Plant" and was an operator as defined in Section 3(d) of the Mine Act, 30 U.S.C. Section 802(d).
- II. Mulzer's operation is located at or near Rockport, Indiana, and is a mine, the products of which enters commerce or the operations of products which effect commerce, all within the meaning of Section 3(b) and 4 of the Mine Act, 30 U.S.C. Section 802(d) and 803.
- III. The affected miner, Mr. Chuck Mosby, worked for Respondent in its Rockport Plant as a maintenance employee, and is a miner within the meaning of Section 3(g) of the Mine Act, 30 U.S.C. Section 802(g).
- IV. On or about 7 or 8 November, 2011, Mr. Mosby reported to his immediate supervisor, Joe Beckort, that a compressed gas cylinder was missing a cap and was not properly secured.
- V. On November 28th, 2011, upon returning to work from the Thanksgiving holiday, Mr. Mosby was terminated by Mulzer Crushed Stone, Inc.

- VI. This temporary reinstatement proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and its designated Administrative Law Judge pursuant to Sections 105 and 116 of the Mine Act.

Testimony of Chuck E. Mosby

Chuck Mosby, the Complainant, testified that he began working in a machine shop after graduating high school in 1982. (TR 16).<sup>3</sup> He began working as a machinist in the maintenance department for Mulzer Crushed Stone's Rockport, Indiana facility in November, 2000. (TR 14-15). In that capacity, he stated that he worked in a machine shop, operating lathes, milling machines, drill presses, and any other necessary machine to complete maintenance tasks. (TR 15). Mosby stated that on November 7, 2011, he observed an unsecured oxygen cylinder without a permanent cap. (TR 21). He described the cylinder as four to five feet tall, and approximately eight inches in diameter, with a valve on top. (TR 20). The cylinder is used for cutting metals or welding, and contains a high amount of pressurized gas. (*Id.*) He opined that the situation presented a safety hazard affecting those working in the area because if the cylinder would fall over and knock the valve off, the tank would become a projectile. (TR 21). According to Mosby, gas cylinders are supposed to be secured with a tie, strap or chain, whether they are stored or moved, to prevent tipping or falling. (TR 22). Upon observing the gas cylinder, Mosby stated that he reported to his supervisor, Joe Beckort, that the cylinder was standing unsecured and needed to be strapped. (TR 22-23). Mosby said he saw the cylinder again towards the end of his shift on the following day in the same location, but did not make any further report to anybody. (TR 23-24).

Mosby then stated that he clocked in on Monday, November 28, 2011, his first day of work after the Thanksgiving holiday, and was called to the office by Kevin Fulkerson, the maintenance superintendent. (TR 24-25). The meeting included Fulkerson, Mike Hughes, superintendent of the Rockport yard, and Joe Beckort, Mosby's shop supervisor. (TR 25). Mosby testified that he was fired during that meeting, and believed his termination was due to his complaint about the gas cylinder. (TR 25-26).

On cross-examination, Mosby admitted that he did not resolve the situation regarding the gas cylinder, but reported it to his supervisor, which he believed fulfilled his obligations under the employee manual. (TR 29-30, 32-33). He added that it would have taken him approximately ten to fifteen minutes to resolve the situation himself, but he was never told to do so. (TR 33, 54). In further describing his work, Mosby stated that his duties varied, and he did whatever the foreman asked him to do, and he was to complete his tasks expeditiously to move on to the next assignment, rather than look for violations and correct them on his own. (TR 50-51).

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<sup>3</sup> The abbreviation "TR" is used to reference the hearing transcript.

Mosby also testified about notes he kept in a calendar book regarding safety issues, or other issues that bothered him. (Exh. R-C; TR 34-45). He made observations of safety hazards, some of which he reported, and others he did not. (TR 37-44). Mosby acknowledged that he had been disciplined for his actions, including kicking an empty plastic trash can, and being accused of not properly maintaining a piece of equipment. (TR 46-47).

#### Testimony of Jeff Mulzer, Vice President

Jeff Mulzer, Vice President for Administration with Mulzer Crushed Stone, testified on behalf of the Respondent. Mulzer stated that he made the determination to terminate Mosby's employment after consulting with Gloria Allen, Director of Human Resources, and Brian Peters, Director of Safety. (TR 58). He likewise spoke with Mr. Fulkerson, but neither Fulkerson or Joe Beckort were part of the final determination regarding Mosby's termination. (TR 59). He was unable to recall any discussion regarding unsecured gas cylinders prior to the issue being raised at the hearing. (*Id.*) Mulzer stated that the decision to terminate Mosby was in accordance with the company's progressive disciplinary system, in which an escalating pattern is used to correct employee behavior. (TR 60-61).

Mulzer recalled notes regarding verbal warnings, and he likewise had recollection that Mosby was given a three-day layoff recently, which factored into the decision to terminate Mosby's employment. (TR 61). Noting that he did not have a calendar in front of him, he was unable to recall when the decision to terminate Mosby occurred, but stated that it was after they reviewed his notebook. (TR 62-67, 73). He initially testified on cross-examination that he did not touch Mosby's notebook, but spoke with "the people who did the investigation." (TR 67). Mulzer later testified that he was involved in finding the notebook, after determining, in consultation with Ms. Allen, that it was reviewable since it was stored in a company toolbox on company property. (TR 69-70). According to Mulzer, they reviewed the information written in the notebook, looked at the items recorded and determined which had been reported and which had not, and considered Mosby's work history. (*Id.*) Mulzer noted that he was aware of Mosby's "reputation for being bombastic", and that he "understood that he was somebody...to complain whenever he wanted to." (TR 68).

#### Testimony of Thomas J. Pavlat

Thomas Pavlat, a special investigator for the Mine Safety and Health Administration ("MSHA") in the North Central District's Peru, Illinois office, testified for the Respondent. Pavlat stated that he made an initial determination of the case, based on information he had received by late December, 2011. (TR 89-90). Based on that information, he determined that Mosby's claim was not frivolously brought, and issued a declaration to that effect on January 5, 2012. (TR 90, Exh. S-3). In making that determination, Pavlat stated that his investigation was limited to conversation with Mosby. (TR 90-91). After making the initial determination, Pavlat testified that he continued his investigation, interviewed several witnesses, collected documents, and completed an analysis of this information, which contributed to the letter of January 20, 2012, notifying Mosby of the MSHA decision on his discrimination claim. He further testified

that based on the evidence gathered during this subsequent investigation on the merits of the case, he then felt the claim was frivolously brought. (TR 92-93, 102-103, Exh. R-D).

### Exhibits

The Secretary submitted three exhibits into the record at the hearing and they were duly admitted into evidence. (TR 18). Exhibit S-1 is the Application for Temporary Reinstatement, filed by the Secretary on January 6, 2012. The Secretary concluded, after an initial investigation, that the discrimination complaint was not frivolously brought.

Exhibit S-2 includes Mosby's complaint to MSHA regarding his dismissal. Mosby completed MSHA Form 2000-124, entitled "Discrimination Report", on December 3, 2011, and Discrimination Complaint, MSHA Form 2000-123, which was filed by Mosby on December 8, 2011. In the handwritten December 3, 2011 Report, Mosby wrote that he was terminated from employment after Kevin Fulkerson accused him of lying to the company. Mosby further noted that Fulkerson went through his toolbox and confiscated his personal notebook, which he had used to make personal notes, suggestions, or notes regarding safety or EPA violations to "people and management". In addition, Mosby noted that he informed Beckort about the oxygen cylinder being unsecured and missing a cap. He noted that the problem had not been fixed as of the next day, and that he kept the notebook, in part, because he had experienced "problems for several years getting the company to take my problems seriously." He concluded the report by noting that he had not reported anything to Brian Peter when asked nine months prior because he felt intimidated and was scared of losing his job.

The December 8, 2011 Complaint was filed by Mosby with the Indianapolis Field Office in MSHA's North Central District. It identifies Mulzer Crushed Stone as the Respondent Organization, and Kevin Fulkerson, Maintenance Superintendent, as the person responsible for the discriminatory action.

Exhibit S-3 is the Declaration of Thomas J. Pavlat, signed January 5, 2012. In the declaration, Pavlat stated that he had investigated Mosby's discrimination claim, and at that point in his investigation, Pavlat determined that on or about November 8, 2011, Mosby engaged in protected activity by reporting the oxygen cylinder's condition to his immediate supervisor, Beckort. He likewise noted that Mosby was terminated upon reporting for work on November 28, 2011. Based on the information he had, Pavlat concluded that evidence existed that Mulzer decided to discharge Mosby "based, in part, on his making an internal safety complaint." He concluded, "[t]hus, it is my determination that the discrimination complaint filed by Chuck E. Mosby was not frivolously brought."

Respondent likewise entered four exhibits into the record at the hearing and they were duly admitted into evidence. (TR 31-32, 35). Exhibit R-A is an "Acknowledgement of Receipt", purportedly a page from Mulzer's published employee manual. It is signed by Chuck Mosby and a company representative. Exhibit R-B includes the cover page, pages 9-10, and 33-34 of the 2007 Edition "Employee Manual" for Mulzer Crushed Stone, Inc., Materials Transport, Inc., and Shamblin Stone, Inc.

Exhibit R-C includes seventeen side-by-side pages of the calendar books used by Mosby to record his notes, suggestions and observations of safety complaints. The exhibit consists of selected pages from 2007 and 2010 date books. The book contains numerous entries, including observations of safety violations. Mosby noted that the book itself is not always indicative of the dates of the incidents; rather, it was a spare notebook which he utilized for the previously stated purpose, and if the entry had a date handwritten with it, that was the date of the occurrence. (TR 49).

Exhibit R-D is the letter dated January 20, 2012, from MSHA's North Central District Manager to Mosby. The letter advises Mosby that MSHA's review has determined that "facts disclosed during the investigation do not constitute a violation of Section 105(c). Therefore, discrimination, within the confines of the Mine Act, did not occur."

The record includes significant discussion about the relevance of Pavlat's investigation and determinations subsequent to his January 5, 2012 declaration, which may have been relied upon in the January 20, 2012 letter. (TR 78-88, 93-101). Pavlat's testimony reflects a change in his position after a further in depth evaluation of the circumstances. However, the January 20, 2012 letter is neither signed by him, nor does it state that the claim was frivolously brought. Rather, the letter reflects that the Secretary will not proceed with a discrimination case on Mosby's behalf, under Section 105(c)(2) of the Mine Act. The letter further advises Mosby of his right to proceed with an action on his own behalf, under Section 105(c)(3) of the Mine Act.

The Commission has noted that the Secretary's decision "not to proceed with the discrimination complaint does not transform that complaint into a frivolous action." *Secretary of Labor on behalf of Mark Gray v. North Fork Coal Corp.*, 33 FMSHRC 27, 41 (Jan. 2011). The Commission further explained that, "[t]o the contrary, not only does the Secretary's negative determination not reduce the complaint into a frivolous claim, the Commission has explicitly acknowledged that it 'may find discrimination where the Secretary has not' and the 'the Secretary's determination not to prosecute [a] discrimination case...is not probative'" of whether discrimination occurred. *Id.*, quoting *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1117 (July 1995).

Accordingly, Exhibit R-D, and the information contained therein, may be relevant to the consideration of Mosby's underlying complaint. It is not relevant, however, to the matter presently at issue, namely whether the claim was frivolously brought. As such, it is not considered in this decision.

### **Findings and conclusions**

#### *Protected activity*

On about November 7 or 8, 2011, Mosby advised his supervisor, Joe Beckort, of the presence of an oxygen cylinder which was standing unsecured, and uncapped. Section 105(c)(1) states, in relevant part:

No person shall discharge or in any manner discriminate against...or otherwise interfere with the exercise of the statutory rights of any miner...in any coal or other mine subject to this chapter because such miner...has filed or made a complaint under or related to this chapter, **including a complaint notifying the operator or the operator's agent...of an alleged danger or safety or health violation in a coal or other mine.**

30 USC § 815(c)(1)(**Emphasis added**). By notifying his supervisor of the unsecured, uncapped gas cylinder, I find that Mosby engaged in protected activity.

Moreover, Mosby stated that he believed his suggestions or safety complaints were neither acted upon nor respected. His aggravation led him to a discussion with a counselor, who suggested Mosby record his thoughts in a diary-like log book. Mosby followed this suggestion and began making what he described as observations of safety issues or violations, or suggestions to improve efficiency. Mosby asserted that this log was never intended to be used to attack the company, but rather, was his personal book designed to prevent him from becoming upset.

The Respondent argues that keeping a log book is not protected activity, citing *Collins v. Federal Mine Safety and Health Review Com'n*, 42 F.3d 1388 (6<sup>th</sup> Cir.), 1994 WL 683938 (C.A.6) (*unpublished*). The only similarity between Collins' and Mosby's circumstances is that each of them kept their respective safety logs private; however, their reasons for doing so diverged greatly. In *Collins*, for example, the Claimant knowingly violated the law, and kept a record of his activities solely to protect himself and his job, if ever confronted with his violations. (1994 WL 683938 at 4). The Court considered Collins' motivation in determining that "granting relief would frustrate the congressional purpose of encouraging miner participation." (*Id.*)

Mosby did not use the log as a means to cover any violative actions. Instead, Mosby used his log to identify violations or suggestions, and compile them in written form to avoid **the** aggravation of being ignored by the company. Although he stated that he never showed the log to anyone, or even told anyone about its existence, he acknowledged that some of the items found in the log were raised with supervisors, while others were not.

After considering the circumstances of this case, I find Mosby further engaged in protected activity by keeping the safety log, and reporting some of the safety conditions contained therein to company personnel.

#### *Nexus between the protected activity and the alleged discrimination*

Having concluded that Mosby engaged in protected activity, the examination now turns to whether that activity has a connection, or nexus to the subsequent adverse action, namely Mosby's November 28, 2011 termination.

Respondent has cited *Secretary of Labor on behalf of Ronald A. Markovich v. Minnesota Ore Operations*, in which the Administrative Law Judge noted that timing of a discharge may be evidence of a nexus with protected activity, but “that is not always the case.” 18 FMSHRC 1250, 1256-1257 (July 1996)(ALJ). As the ALJ further observed, the Commission has recognized that a nexus between protected activity and a subsequent adverse action is rarely supplied exclusively by direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. More often, the determination of a nexus is made by the trier of fact drawing an inference from circumstantial evidence. *Id.* The Commission has identified several circumstantial indicia of discriminatory intent, including: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See, e.g., CAM Mining, LLC*, 31 FMSHRC at 1089; *see also, Phelps Dodge Corp.*, 3 FMSHRC at 2510.

*Hostility or animus towards the protected activity*

Mosby did not recall being treated differently by Beckort after raising the issue with the gas cylinder. Moreover, in deciding to terminate Mosby, Jeff Mulzer stated that he and Beckort did not directly speak about this incident; however, it is unclear from the record whether Beckort spoke to any of the other individuals who contributed to the decision. Moreover, Mulzer was uncertain about who alerted him to the presence of Mosby's log book of safety issues, including that it “could've been Beckort.” (TR 70). The safety log listed a number of observations by Mosby regarding safety concerns and suggestions. Mosby did not always report his safety concerns, believing that his observations were not respected or acted upon. In addition, Mulzer acknowledged that he was aware of Mosby's reputation to be “bombastic” and “somebody...to complain whenever he wanted to.” Considering the record as a whole, I find that Respondent had hostility or animus towards Mosby's protected activity.

*Knowledge of the protected activity*

Mosby informed his supervisor, Beckort, about a safety violation. As the shop supervisor, and Mosby's direct supervisor, he was a representative of the operator. Thus, the Respondent was aware of the safety complaint. Moreover, Jeff Mulzer testified that he received information regarding the existence of Mosby's safety log. He acknowledged that he was involved in finding the notebook. At first he said that he did not touch the notebook, but only spoke to those who investigated the situation. Later, however, he stated that “we” determined that they could rightfully access Mosby's toolbox, take the notebook, and review the information. The record is clear that whether Mr. Mulzer was personally involved, or relied on information provided by Respondent's employees after their investigation, Respondent was aware of the presence of the notebook and the information contained therein.

Accordingly, I find sufficient evidence that the Respondent had knowledge of Mosby's protected activity.

### *Coincidence in time between the protected activity and the adverse action*

In the present matter, the time between Mosby's protected activity, namely his November 7-8, 2011 safety complaint regarding the unsecured and uncapped oxygen cylinder, and his actual termination, on November 28, 2011, was approximately twenty days. According to Mulzer, the decision to terminate Mosby was made on either November 25, 26 or 27. Moreover, the record is entirely unclear as to when Mosby's notebook was obtained and reviewed by the Respondent's employees.

As the Commission has noted, "[a] three week span can be sufficiently close in time", especially when there is evidence of intervening hostility, animus or disparate treatment. *CAM Mining, LLC*, 31 FMSHRC at 1090. Likewise, in *All American Asphalt*, a 16-month gap existed between the miners' contact with MSHA and the operator's failure to recall miners from a layoff; however, only one month separated MSHA's issuance of a penalty resulting from the miners' notification of a violation and that recall failure. *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999). The Commission stated "We 'appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.'" *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34, 47 (Jan. 1999)(quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991).

The time between Mosby's most recent safety complaint until the termination was approximately twenty days. The record is unclear about when Mosby's safety log was discovered, but it may have been in that intervening twenty-day period. Moreover, although Mosby was terminated on November 28, 2011, the decision to terminate him was made one to three days prior. Thus, I find that the time span between the protected activities and the adverse action is sufficient to establish a nexus.

### *Disparate Treatment of Mosby*

Mosby acknowledged two previous instances of discipline for his behavior or actions at the worksite, including a verbal discussion and a three-day layoff. In describing the Respondent's progressive disciplinary process, Mr. Mulzer indicated that the typical pattern included, "a verbal warning, maybe multiple verbal warnings, written warning, possibly one of those three-day layoff[s], and then maybe a final warning or not, and then termination." (TR 60). On cross-examination, Mulzer added that following the progressive policy depends on the circumstances and the "seriousness of the incident and the situation." (TR 62).

Both Mosby and Mulzer identified at least one verbal warning, and Mulzer believed the file may have included notes of multiple verbal conversations. Neither identified a written warning having been issued to Mosby. Likewise, Mosby was not afforded the tentative final warning. Although Mulzer noted that the Respondent's progressive disciplinary policy can be altered for serious situations, he offers no insight as to why Mosby was not afforded each step of the identified policy.

Accordingly, I find Respondent disparately treated Mosby, because he was treated differently than provided for by the Respondent's disciplinary policy.

Having considered the four factors above, I find that the Secretary has established a nexus between Mosby's protected activity and the Respondent's subsequent adverse action.

### **Conclusion**

In concluding that Mosby's complaint herein was not frivolously brought, I give significant weight to the evidence of record that he had a history of and engaged in a number of protected activities including the most recent complaint regarding the unsecured and uncapped oxygen cylinder. I also conclude that Respondent showed animus toward Mosby's alleged protected activities and that there was a close connection in time, approximately three weeks, between his first alleged protected activity and his November 28, 2011 discharge. That time may be less, depending upon the time the safety log was discovered and reviewed.

Respondent asserts that its discharge of Mosby was based on his unprotected activities, such as violating the company's policy on reporting or resolving safety violations. In addition, it asserts that their decision was made in accordance with its established escalating disciplinary plan. Although Mulzer may, in any subsequent proceedings, prevail on the merits, I find that Respondent's evidence on this record is not sufficient to demonstrate that Mosby's complaint of discrimination was frivolously brought. To the contrary, since the allegations of discrimination have not been shown to be lacking in merit, I find they are not frivolous.

### **ORDER**

Based on the above findings, the Secretary's Application for Temporary Reinstatement is granted. Accordingly, Mulzer Crushed Stone, Inc., based upon agreement of the parties, is **ORDERED** to provide immediate<sup>4</sup> economic reinstatement to Chuck E. Mosby, at the same rate of pay for the same number of hours worked, and with the same benefits, as at the time of his discharge.

/s/ Kenneth R. Andrews

Kenneth R. Andrews  
Administrative Law Judge

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<sup>4</sup> This amendment reflects the statutory language of 105(c)(2), however the effective date for temporary reinstatement remains February 2, 2012, the date of the original Decision and Order.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

721 19<sup>th</sup> Street, Suite 443  
Denver, CO 80202-2500  
303-844-3577/FAX 303-844-5268

February 7, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2010-53-M
Petitioner	:	A.C. No. 26-02567-196388-01
	:	
v.	:	Docket No. WEST 2010-54-M
	:	A.C. No. 23-02567-196388-02
TITAN CONSTRUCTORS, INC.,	:	
Respondent	:	Titan Constructors Products

**DECISION**

Appearances: Tyler P. McLeod, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;  
Mark Wray, Esq., Law Offices of Mark Wray, Reno, Nevada, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Titan Constructors (“Titan”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (the “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Henderson, Nevada. In lieu of filing post-hearing briefs, the parties presented oral argument at the hearing.

Prior to the hearing, the Secretary submitted a Motion for Partial Summary Decision and Memorandum of Points and Authorities on October 25, 2011. Titan submitted its Response to Secretary’s Motion for Summary Decision and Supporting Points and Authorities on November 9, 2011. By Order dated November 10, 2011, I denied the Secretary’s Motion for Partial Summary Decision because there were genuine issues of fact in dispute. 29 C.F.R. § 2700.67(b)(1). The hearing was held on December 11, 2011.

Titan owned and operated a portable crusher that had been moved to several locations in eastern Nevada. In addition, Titan owned and operated a concrete batch plant. In 2007, Titan moved the portable crusher to the property where the concrete batch plant is located.<sup>1</sup> These cases involve nineteen section 104(a) citations, one section 104(d)(1) citation, and four 104(d)(2)

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<sup>1</sup> At the hearing, Titan often referred to this property as the “Ready Mix Property” and the adjacent area where the pit and crusher were located as the “Steptoe Valley Pit.”

orders of withdrawal. The parties have settled two orders and eleven citations. (GX-10)<sup>2</sup>. The remaining nine citations and two orders allege violations that occurred in or in relation to the shop that is in the same building as the batch plant. Titan stipulated that, in the event the court should find that the shop was subject to jurisdiction of the Mine Act, it would withdraw its contest as to the charging documents. (JX-1, ¶ 3). As a consequence, the sole issue before me is whether this shop area inspected by the U.S. Department of Labor’s Mine Safety and Health Administration (“MSHA”) was subject to the jurisdiction of the Mine Act.

## I. BASIC LEGAL PRINCIPLES

Section 4 of the Mine Act provides, in part, that “each coal or other mine . . . shall be subject to the provisions of this Act.” 30 U.S.C. § 803. Section 3(h)(1) of the Act, in pertinent part, defines “coal or other mine” as:

(A) an area of land from which minerals are extracted . . . (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property . . . on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or . . . used in or to be used in, the milling of such minerals, or the work of preparing coal or other minerals . . . . In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

30 U.S.C. § 802(h)(1).

In order to effectuate the “convenience of administration,” MSHA and OSHA entered into an interagency agreement, which attempts to delineate the areas of authority and to provide a procedure for resolving general jurisdictional questions between the two agencies (“Interagency Agreement”). 44 Fed. Reg. 22,827 (April 17, 1979).

The legislative history of the Act indicates that the Act’s definition of a mine is to be broadly interpreted. The Senate Committee responsible for drafting the Mine Act remarked:

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<sup>2</sup> The following abbreviations are used in this decision: GX= government exhibit; JX = the parties’ joint stipulation of fact; Tr.=transcript of the hearing; Sec’y MSD = Secretary’s Motion for Partial Summary Decision; Titan RMSD = Titan’s Response to Secretary’s Motion for Partial Summary Decision.

“What is considered to be a mine and to be regulated under this Act [shall] be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within coverage of the Act.” S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* (“*Legis. Hist.*”) at 602.

## II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

On August 5 and 6, 2009, MSHA Inspector James Fitch inspected Titan’s facilities and issued eleven citations and orders related to the area on the property that he referred to in the citations as the shop. Titan contends that the shop area is not subject to Mine Act jurisdiction. By contrast, the Secretary maintains that the Mine Act, Commission precedent, and the Interagency Agreement establish that MSHA had jurisdiction over the shop at the time of the contested inspection.

### A. Background Summary of Testimony

Inspector Fitch has worked for MSHA since January 2001 and is currently a supervisory inspector. (Tr. 11). Fitch testified that he began working in the mining industry in 1980 and worked in the industry until the present inspection, stopping a few times to serve in the Army and to work as a car salesman. (Tr. 12-14). Fitch had never inspected the Titan facilities before; however, he testified that MSHA inspected Titan in 2008 and that he reviewed the prior inspection report and field notes before performing his inspection. (Tr. 17, 20-22).

On August 5, 2009, Inspector Fitch arrived at the site and pulled up in front of the shop area. (Tr. 22). He described the structure as large, with bay doors and a man door, and assumed that the structure contained an office. *Id.* When he arrived, he noticed a conveyor belt lying beside the main road, old equipment including a trailer, and in front of the shop, he saw one or two vehicles. (Tr. 24). Facing the shop area, to the left, was a small friction crane, several stockpiles, and a road leading from the shop area back around the stockpiles. (Tr. 25). He did not see any other structures or buildings. *Id.* At this point, Shane Cooper, Titan’s president, arrived and they went into the office and talked a bit. (Tr. 26; Tr. 151). Fitch stated that he thought he was in the office because it was a small, enclosed space inside the same building but separated by walls, doors, and a window. (Tr. 27). He noted that the room contained a table, computer, shelves, and chairs and explained that there were no other areas in the structure that looked like an office. *Id.* Fitch testified that mines are required to have an office. *Id.*

Upon exiting the office into the shop area, Fitch stated that there was a first-aid kit, eye-wash bottles and a fire extinguisher and off to the left was a batch plant. (Tr. 28). To the right, at a back wall of the shop, were bolt pins, shelves with equipment, parts, V-belts, and some tires located in the front right of the shop. (Tr. 28). Fitch observed that the tires belonged to haul trucks. *Id.* He also saw a fabrication table, a cabinet containing hand tools, drills, grinders, cords, parts, scrap metal, trash, and a “curious” square wooden structure that was the shop

restroom. (Tr. 28-29). Fitch testified that mines are required to have a bathroom. (Tr. 29). He explained that the front left corner of the building was the office and behind that and to the left was the batch plant, which appeared to be portable. (Tr. 29). Fitch stated that the batch plant was not subject to MSHA jurisdiction pursuant to the Interagency Agreement. (Tr. 30).

After leaving the shop area, Fitch inspected the working portion of the mine site and returned to the shop the next day. (Tr. 32). He estimated that the shop and the plant area are less than 500 yards apart. (Tr. 34). Fitch issued his first citation for two unsecured acetylene bottles standing in front of the bay doors and explained that he believed he had jurisdiction to do so due to the proximity of the shop to the plant and the large haul truck down for maintenance in front of the shop. (Tr. 38-39). He testified that he believed three people worked on the mining operations: Kenny, Shane, and Zach Cooper. (Tr. 44-45).

Fitch testified that the equipment he observed at the site included a generator, an electrical control trailer, two screens, a feed hopper, at least five conveyors, a log washer, an electrical distribution panel, a Caterpillar loader, a broken-down Caterpillar loader, possibly a backhoe, and a friction crane. (Tr. 45). The record contains photos of the site, as described by Fitch, which appear in the record at GX-2. (Tr. 46-49). Fitch also described many of the items needed to maintain this equipment and testified that these items were stored in the shop area. (Tr. 49-50). Fitch testified that except for the tires and the batch plant, which he did not consider to be part of the mining operations, the rest of the materials inside the shop could have easily been used on the mine site and anywhere else. (Tr. 51-52).

Referencing the photos taken in support of each of the eleven citations from the shop, Fitch stated that the 55 gallon barrels of oil, some parts on the shelves, V-belts, nuts and bolts, oil and lubricants, acetylene tanks, parts to the haul truck, a man-basket which was missing from the shop, and the restroom are all items that could be used in a mining operation and/or are required by the safety standards. (Tr. 52-62).

Inspector Fitch related the citations to the photos as follows: messy workplace (Citation No. 6357687), spilled oil on the shop floor (Citation No. 6357689), acetylene cylinders in front of shop bay doors (Citation No. 6357679), an unapproved, flammable storage can (citation 6357685), a missing, required man-basket (Citation No. 6357686), "no smoking signs" not posted (Citation No. 6357688), two unlabeled jerry cans (Citation No. 6357690), an extension cord with a missing ground prong (Citation No. 357691) and a head grinder with missing guard (Citation No. 6355701)<sup>3</sup>. (Tr. 53-61; GX-3).

Inspector Fitch also discussed citations that were issued outside of the shop area for guarding violations; specifically, Citation Nos. 6357681, 6357695, 6357697, 6357698, and 6357700. (Tr. 63-69). He explained that in order to abate these citations, guards for the

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<sup>3</sup> Citation Nos. 6357692 (continuity/resistance testing) and 6357693 (Haz/com program/chemicals in shop) were not enumerated in this portion of Inspector Fitch's testimony.

referenced parts needed to be fabricated. He assumed that the fabrication work necessary to abate these citations would have been performed in the shop, although Citation No. 6357698 might be repaired in the field. (Tr. 66-68). Fitch testified that the workers he observed had access to all of the referenced shop areas and explained that there was no lock on the door. (Tr. 70). He also stated that no one told him that the shop area was not used in connection with the mining operation and that during a previous inspection, MSHA issued a citation for an uninspected fire extinguisher. (Tr. 70-72). This citation is now closed and became a final order on February 6, 2010. (Tr. 74, GX-6).

On cross-examination, Fitch testified that he knew that the portable crusher had only operated five days since the last MSHA inspection in 2008, and that, when he looked at the area of the shop where the tires and batch plant were located, he knew that those were not within his jurisdiction. (Tr. 85). He considered the rest of the area to be within his jurisdiction because it could have been used for mining and was likely to be so used. *Id.*

Fitch testified that he did not know when the portable crusher was moved to the Ready Mix Property. The storage areas and the tools in the shop made him believe that the area was to function as a shop. (Tr. 85-86; 94). He admitted that the proximity of the shop to the portable crusher could have been a contributing factor in why he issued the shop citations. (Tr. 88-89). Fitch remarked that, if an item was used strictly for the batch plant, then it would be part of the batch plant only. (Tr. 97-100). Fitch stated that, if the portable crusher did not exist on the property, then MSHA would not have jurisdiction. (Tr. 103).

Fitch explained that he wrote the citations for the shop instead of leaving it to OSHA because he saw conditions that violated MSHA's safety standards.<sup>4</sup> He determined that miners could easily and probably did go into the building to use the restroom, to get parts, and to repair mining equipment. (Tr. 107). Fitch testified that the three main things that he thought made the shop part of a mine were the existence of the office in the building, the existence of the restroom, and the existence of tools, lubricants, and parts that could easily be used for a mine site. (Tr. 112). Fitch admitted that he did not know objectively whether a particular tool or a part was used on the portable crusher but that he suspected they had been. (Tr. 114).

Inspector Fitch testified that the location of the shop in relation to the crushing plant made it more likely that a person would go to the shop for a part or to work on equipment, than drive to Ely, Nevada, to do so. (Tr. 115). He noted that the company did not offer any proof during his inspection that the shop was used solely for the construction business. (Tr. 117). Fitch stated, that if the portable crusher were ever moved to a different location and no mining equipment were used or repaired at the Ready Mix Property, MSHA would no longer inspect that shop. (Tr. 124). He stated that he believed the haul truck outside of the building was

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<sup>4</sup> The Occupational Safety and Health Administration has approved Nevada as a "state plan" state. As a consequence, safety inspections of the batch plant would be conducted by the State of Nevada, hereinafter designated as "NVOSHA."

purchased for use in the mine, although he admitted that no one told him this directly. (Tr. 125-126). Fitch testified that the mine was not operating that day and stated that the things he saw in the shop could also be used for purposes other than mining. (Tr. 127, 133-134).

Fitch stated that nothing in the shop indicated what items in the shop area were for the mining operation and what items were for the batch plant. (Tr. 141-43). Fitch noted that MSHA's policy would be that once a piece of equipment enters the mine property itself, it is subject to MSHA's jurisdiction if it had been used at the mine. *Id.* Fitch testified that what he termed "daily job briefings" were kept in the office. (Tr. 146).

Shane Cooper, President of Titan, testified that he and his brother Kenny are the principals of Titan and explained that the Ready Mix Property is a parcel of 40 acres with a 60-by-110 foot steel, prefabricated metal building with a batch plant. (Tr. 152). Cooper testified that the property is seven miles north of Ely, that the batch plant and shop were on the property when his family bought it but the portable crusher was not at that location. (Tr. 154-155). Cooper testified that the office and the computer inside it were specifically constructed for the batch plant. (Tr. 156). He stated that the records for the portable crusher are kept at his home rather than in the batch plant office. (Tr. 157).

Cooper testified that during the inspection, he had to leave and go home to get the records requested by Inspector Fitch. (Tr. 159). Cooper stated that Titan Constructors purchased the Ready Mix Property out of bankruptcy in October 2007. (Tr. 160-162). The portable crusher was moved in 2006 from an unrelated location near Ruth, Nevada, first to his home and then to the Ready Mix Property in 2007. (Tr. 165-166). Cooper testified that he would use the restroom facilities in the building on a day when Titan was using the portable crusher. (Tr. 168). He admitted that employees could easily use a bolt or oil from the shop for the portable crusher. He could not state that there has never been anything in the shop that has been used on the portable crusher. (Tr. 167-168).

Cooper stated that the shop building is subject to the jurisdiction of NVOSHA. (Tr. 168). He admitted that Titan can build guards for the portable crusher in the shop and use the shop to fabricate other parts for the crusher. In addition, the oxygen acetylene carts and the welder can be moved over to the crusher for use in repair work. (Tr. 169). He testified that the building was custom fabricated for the batch plant itself. (Tr. 171). Cooper stated that everything in the shop is related to the construction industry, that the trucks are used to haul aggregates, equipment, and for installing underground water and sewer mains, and that the dump truck has never operated in any capacity because it had and still has a damaged engine. (Tr. 174-176).

Cooper testified that Titan has a 40-foot van that typically accompanies the portable crusher when it is moved around. (Tr. 181). He explained that the van is essentially a shop van and that it contains steel benches, a table, shelving, nuts, bolts and hand tools. (Tr. 184-185). He parked this van at his home when the crusher was moved to the Ready Mix Property. On cross-examination, Cooper admitted that the Steptoe Valley Pit is the same parcel of land as the Ready Mix Property and that the portable crusher has been located at the property since about

2007. (Tr. 186-187). He testified that Titan does use the shop tools and the stored materials, nuts and bolts for the portable crusher, which is why Titan did not need the van on the property. (Tr. 188).

Cooper testified that Titan kept the daily job briefings, as required by MSHA regulations, in the batch plant office and that they were produced for Inspector Fitch. (Tr. 190). He also noted that the top of the daily job briefing form indicates that the job location is the Steptoe Valley pit. (Tr. 190, GX-11). Cooper reviewed the daily job briefings and testified that one listed work procedure was “built guards for stacker.” (Tr. 191-192, GX-11). He testified that this work was performed at the Ready Mix shop and also that the welder and torches have been moved to the stacker. (Tr. 192). Cooper noted that on the form under “recognized hazards” it says, “hot steel, cutting, welding.” (Tr. 193). He admitted that the welding tools are kept at the Ready Mix Shop or in the van that goes with the portable crusher. *Id.*

Cooper testified that he was not aware that MSHA regulations require a mine office and stated that Titan did not have one. (Tr. 194-194). He testified that the computer is used for the batch plant, not for any mining purposes, and that it is specific to the batch plant. (Tr. 194). He testified that Titan sells aggregates used in road building to the Nevada Department of Transportation. (Tr. 195). In terms of the equipment associated with the crushing operations, Cooper testified that Titan has a couple of screens, conveyor belts, stackers, a loader, and a rubber tire backhoe. (Tr. 196).

Cooper testified that customers come onto the property with their own trucks to be loaded with aggregate and that the loads were generally sold by volume. (Tr. 197). He stated that there is no separate scale house. (Tr. 198).

## **B. Summary of the Parties’ Arguments**

The Secretary argues that Titan used the shop in its mining operation and that miners accessed the shop. Consequently, the Secretary submits that the shop constituted a “structure” or a “facility” used in the mining process, as contemplated by Section 3(h)(1), which subjected it to MSHA’s jurisdiction. (Sec’y MSD 6).

The Secretary points out that the shop was only 350 feet away from the pit and within walking distance to it. (Sec’y MSD 8). The Secretary also notes that the shop served several functions, including storage, repair, and fabrication of mining equipment, maintenance and the keeping of records, and also included toilet facilities for the miners. (Sec’y MSD 9). The Secretary argues that simply by location, Titan’s miners had access to the shop, even if only to use the restroom facilities. *Id.* The Secretary further contends that the shop was used to some degree by miners to support the mine process, including storing tools and equipment, repairing and fabricating items for the mine, and keeping and maintaining mine records. *Id.*

The Secretary argues that the Interagency Agreement establishes MSHA jurisdiction over the shop and cites the provision of the Agreement which provides “[t]he consideration of these

factors will reflect Congress' intention that doubts be resolved in favor of inclusion of a facility within the coverage of the Mine Act." (Sec'y MSD 10). Thus, the Secretary reasons, both work locations and work functions are important factors in determining jurisdiction. *Id.* The Secretary points out that Inspector Fitch observed a haul truck from the pit, that functioned to haul material from the mine at the Titan shop, undergoing maintenance. (Sec'y MSD 11). In addition, Inspector Fitch found supplies and equipment stored throughout the shop, all of which functioned to keep equipment at the mine in working condition. *Id.* Consequently, because the shop was used for mining, any doubts about jurisdiction should be in favor of inclusion of the facility under the Mine Act. *Id.*

During closing arguments, the Secretary argued that, although the shop building was not originally built to support a sand and gravel operation, the fact of the matter is that there is a sand and gravel operation located there. (Tr. 200). The Secretary argued that the miners are Titan employees who work at the crusher operation and who, by necessity, access the shop. The use of the shop by these miners essentially opens the door for MSHA to inspect the facility and to issue citations for violations. *Id.*

In response, Titan argued that the shop area is used for the batch plant located inside of it and that Titan is a construction company which, in addition, operates a portable crusher. (Titan RMSD 2). Titan contended that there is no mine office in the shop and that mining-related records are kept in the owner's home, not in the shop. *Id.* Titan submitted that the haul truck parked outside the bay doors has never been used by Titan in any capacity and was never used in a pit operation. *Id.* Titan further argued that no materials are used in interstate commerce, the parts and tools in the shop could be used for anything on the Ready Mix Property but are used for Titan's vehicles and construction equipment. It further argues that there is no proof that miners use the toilet located in the shop. *Id.*

Titan contended that the Ready Mix Property contains a shop building that was constructed for the batch plant within it and that the shop tools and equipment were used for the batch plant years before the portable crusher was moved to the Ready Mix Property. *Id.* Titan also argued that the bay doors are configured for ready mix trucks and semi-trucks, not for portable crushers and that the shop was never considered part of a "mine" before the 2009 inspection by Inspector Fitch.

Titan argued that the standards for determining whether a shop can be part of a mine cannot be so expansive that they amount to no standards at all and cites "*National Cement Co. of California/Tejon Ranchcorp*,"<sup>5</sup> in which the Commission observed that although the definition of a mine was to be given a "very broad meaning," that "does not mean that section 3(h)(1)(B)

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<sup>5</sup> *Sec'y of Labor v. Nat'l Cement Co. of Cal.*, 30 FMSHRC 668 (2008).

should be read contrary to common sense.”<sup>6</sup> (Titan RMSD at 3). Titan argued that where the Secretary is urging a “standard” that is so broad that it amounts to no standards at all, the Secretary is exceeding the bounds of her jurisdiction. *Id.*

Titan contended that none of the factors cited by the Secretary from the Interagency Agreement support MSHA jurisdiction in this case. *Id.* Specifically, Titan stated that the processes employed at Titan’s shop is a concrete batch plant, unrelated to the portable crusher, that two people operate the portable crusher, and that no people operate the shop. *Id.* at 4. Finally, Titan argued that there is no evidence as to NVOSHA’s inability to enforce safety precautions at the shop. *Id.*

During closing arguments, Titan stated that the net drawn by MSHA is cast far and wide and that this case is an example of that. (Tr. 202). Titan argued that the shop is not part of the mine, that NVOSHA has jurisdiction, and that the Interagency Agreement specifically says that batch plants are under OSHA’s jurisdiction. (Tr. 203). Titan contended that if the Secretary’s arguments are adopted and the Mine Act is construed to mean that inspectors can inspect anything if it “might” be used in a mine, such a construction is inconsistent with Congressional intent. (Tr. 203-304).

Titan argued that its witnesses were credible but MSHA displayed its bias when its inspector testified falsely concerning the location of the company documents related to the crushing operations and the usage of the cited truck in the pit. (Tr. 204). Titan emphasized that in the *Bokus* case, cited below, the Commission did not reach the issue of whether the garage in that case constituted a mine but limited its holding to items that the Secretary proved were actually used in mining operation. (Tr. 205).

Titan argued that the entire property on which a portable crusher is used should not become a mine as that term is defined in the Mine Act. (Tr. 207). Titan further argued that the shop building is, and always has been, a batch plant, that everything inside it is there for the batch plant, and that the Commission’s decisions are consistent with Titan’s arguments. (Tr. 208).

### **C. Discussion and Analysis**

Titan contends that the shop area of its facility is not subject to Mine Act jurisdiction because it is used for the batch plant located inside the same building. More specifically, Titan argues that, because the shop was originally constructed for the batch plant and that the shop tools and equipment were used for the batch plant years before the portable crusher was moved to the Ready Mix Property, NVOSHA, not MSHA, has jurisdiction. I disagree.

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<sup>6</sup> *Id.* at 678.

As stated above, section 3(h)(1) of the Mine Act defines a “mine,” in pertinent part, to include “structures, facilities, equipment, machines, tools, or other property . . . used in or to be used in, . . . the work of extracting . . . minerals . . . or . . . the milling of such minerals, or the work of preparing . . . minerals . . . .” 30 U.S.C. § 802(h)(1). The Secretary promulgated the Interagency Agreement as a guide to be used when determining whether certain operations and facilities fall under the purview of MSHA or OSHA. Appendix A of the Interagency Agreement specifically provides that concrete ready mix or batch plants, whether or not located on mine property, are subject to OSHA jurisdiction. 44 Fed. Reg. 22,827 (April 17, 1979).

The Secretary did not argue in this case that MSHA has jurisdiction over Titan’s batch plant or any supplies, equipment, machines, tools or other property that are used exclusively for the batch plant. The Mine Act does not directly address the situation raised in which “structures, facilities, equipment, machines, tools or other property” that are used for a facility that is not subject to the jurisdiction of the Mine Act, are also used or available for use in a mine. Commission precedent establishes that when equipment or facilities are available for use by miners, such equipment and facilities must comply with MSHA safety standards. *See, e.g., W.J. Bokus Indus.*, 16 FMSHRC 704 (Apr. 1994); *Beylund Constr.*, 31 FMSHRC 1410 (Nov. 2009) (ALJ) (*citing Ideal Basic Indus., Cement Div.*, 3 FMSHRC 843 (1981)). Thus, the Secretary need only establish that the items were available for use in mining.

Titan’s president, Shane Cooper, testified that Titan used tools and materials from the shop, such as nuts and bolts, for its portable crusher. (Tr. 188). There is no question that the portable crusher falls under MSHA’s jurisdiction and it has a mine ID number. In addition, the record further establishes that miners working on the crusher used the shop tools, including a welder, torches, and an oxygen acetylene cart to fabricate guards for the crusher, and utilized the restroom that is located in the shop. (Tr. 169, 191-192; GX-11). That the shop was originally designed for a batch plant and is predominantly used for the batch plant, does not mitigate the fact that some mining-related activity occurs at the shop. As described above, the evidence shows that items related to the portable crusher are located in the shop and that miners have access to these shop items and use them for the portable crusher.

In resolving close jurisdictional questions, the legislative history of the Act provides additional guidance. The Senate Committee that drafted the Mine Act noted that what is considered to be a mine and to be regulated under the Act should be given the broadest possible interpretation. *Legis. Hist.* at 602. Moreover, the Committee further commented that jurisdictional doubts should be resolved in favor of inclusion of a facility within the coverage of the Act. *Id.* This expansive, encompassing definition of what constitutes a mine reflects the Act’s purpose of protecting the health and safety of those who work in the coal mining industry. 30 U.S.C. § 801.

When the portable crusher was located on property near Ruth, Nevada, without a readily available shop, the company’s shop van was located on that property for use by miners. When Titan moved the portable crusher to the Ready Mix Property, it elected to allow miners to use the existing batch plant shop rather than bring the van to the Ready Mix Property. (Tr. 185). In

doing so, Titan subjected at least part of its shop to Mine Act jurisdiction. The van was parked at Shane Cooper's home. (Tr. 185). Moreover, Cooper admitted that Titan used tools in the shop when repairing the crusher, fabricated parts for the crusher in the shop, and used miscellaneous supplies, such as nuts and bolts stored in this shop, for the crusher. (Tr. 184-189). That is why the shop van was not brought to the Ready Mix Property.

By allowing miners working on the crusher to access the shop to get supplies, to fabricate and repair parts, and to use the restroom facilities, Titan opened the shop to MSHA jurisdiction. The shop ceased to be used exclusively for the batch plant and instead became a facility used for both mining-related and non-mining-related operations.

Titan next states that "[t]wo people operate the portable crusher and no people operate the shop." (Titan RMSD at 4). This is irrelevant. Commission precedent establishes that both work locations and work functions are important in determining jurisdiction. *Calmat Co. of Ariz.*, 27 FMSHRC 617, 621; *W.J. Bokus Indus.*, 16 FMSHRC 704 (Apr. 1994). As the shop tools and facilities were used in, could be used in, and were available for use in Titan's mining operation, they are covered by the Mine Act.

Finally, Titan submits that "there is literally no evidence as to OSHA's alleged inability to enforce safety precautions in the shop." (Titan RMSD at 4). The Secretary has admitted that it has no jurisdiction over the concrete batch plant and anything in the shop that relates strictly to the batch plant. Nevertheless, MSHA, not OSHA, is charged with regulating the safety and health of the nation's mining operations. MSHA has the expertise to oversee the safety and health hazards associated with the mining processes at Titan's facility. Because miners had access to the shop, used shop tools and equipment to fabricate and repair mine equipment, and had access to and utilized the shop restroom facilities, I find that the Secretary established Mine Act jurisdiction over those areas of the shop that are used for the mining operation.

Titan also raised a commerce clause issue, arguing that the products from the crusher do not enter into interstate commerce. The Secretary maintains that the evidence demonstrates that the products produced in Titan's mining operation substantially affect interstate commerce. The Mine Act defines "commerce" as: "trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof . . . or between points in the same State but through a point outside thereof." 30 C.F.R. § 802(b). I find that the record establishes that the materials produced by Titan's crushing operation were supplied to the Nevada Department of Transportation under highway maintenance contracts. (Tr. 180). As all manner of vehicles, private and commercial, from all over the United States, traverse the roads in Nevada, Titan's products are effectively used by these interstate vehicles. To argue that materials sold to a state for its roads do not affect interstate commerce defies common sense. Thus, I find that Titan's mining operation substantially affects interstate commerce within the meaning of the Act.

As set forth above, I find that the Secretary established Mine Act jurisdiction over those parts of the shop that were used or reasonably could be expected to be used by Titan's employees

for the mining operations. Moreover, as previously noted, Titan stipulated that if I were to find its shop was subject to the jurisdiction of the Mine Act, it would withdraw its contest as to the charging documents. (Ex. JX-1). On the basis of this stipulation, I affirm the citations and orders.

### III. SETTLED CITATIONS

The parties presented a settlement offer at the hearing for those citations that issued at the crusher. The proposed settlement is as follows:

Citation/Order No.	Modification to Citation	Proposed Penalty	Amended Penalty
WEST 2010-53-M			
6357684	Modify to 104(a) High Negligence	\$2,000	\$1,000
6357699	Modify to 104(a) High Negligence	\$2,000	\$807
6357702	Modify to 104(a) Moderate Negligence	\$2,000	\$500
WEST 2010-54-M			
6357680	No Change	\$100	\$100
6357681	Modify to Moderate Negligence	\$100	\$100
6357682	Modify to Moderate Negligence	\$100	\$100
6357683	Modify to Moderate Negligence	\$161	\$100
6357694	No Change	\$100	\$100
6357695	Modify to Law Negligence	\$100	\$100
6357696	Modify to Low Negligence	\$100	\$100
6357697	No Change	\$100	\$100
6357698	Modify to Low Negligence	\$100	\$100
6357700	Modify to Unlikely Non S&S	\$362	\$300
		TOTAL	\$3,507

#### IV. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Titan is a very small operation that, based on information at MSHA's website, worked 164 hours in 2009 and 385 hours in 2010. The operation is currently idle. It had a history of about 12 citations in the 15 months prior to August 5, 2009. Titan did not assert that the penalties proposed by the Secretary would have an adverse effect on its ability to continue in business. The gravity and negligence findings are set forth above or in the citations.

#### V. ORDER

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

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty Amount</u>
<u>WEST 2010-53-M</u>		
6357687	56.20003(a)	\$2,000.00
6357689	56.4102	2,000.00
<u>WEST 2010-54-M</u>		
6357679	56.16005	243.00
6357685	56.4402	100.00
6357686	56.15001	108.00
6357688	56.4101	243.00
6357690	47.41(a)	100.00
6357691	56.12025	100.00
6357692	56.12028	243.00
6357693	47.31(a)	100.00
6357701	56.14107(a)	100.00
Total penalty citations/orders issued in shop:		\$5,337.00
GRANT TOTAL DUE:		\$8,844.00

For the reasons set forth above, the citations and orders are **AFFIRMED** or **MODIFIED** as set forth in this decision. Titan Constructors, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$8,844.00 within 40 days of the date of this decision.<sup>7</sup>

/s/ Richard W. Manning

Richard W. Manning  
Administrative Law Judge

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RWM

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<sup>7</sup> Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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February 8, 2012

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2010-1400-DM
Petitioner	:	MSHA Case No. WE-MD-10-05
on behalf of LANCE CARTER,	:	
Complainant	:	
v.	:	Mine: Dantoni Mine
	:	Mine ID: 04-05545
KINO AGGREGATES, INC., and	:	
NOBLE PLANT,	:	
Respondents	:	

**DECISION**

Appearances: Isabella M. Finneman, Esq., Katherine M. Kasameyer, Esq., U.S. Department of Labor, Office of the Solicitor, 90 7th Street, Suite 3-700, San Francisco, California 94103

Kurt D. Hendrickson, Esq., Knox Lemmon Anapolsky & Schrimp LLP, 300 Capitol Mall, Suite 1125, Sacramento, California 95814

Before: Judge John K. Lewis

This case is before me upon a complaint of discrimination brought by the Secretary of Labor (“Secretary”) on behalf of Lance Carter (“Carter”), a miner, against Kino Aggregates, Inc., a corporation (“Kino Aggregates”) and Noble Plant, an individual, pursuant to § 105(c) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c).

Complainant Carter alleges that he had been unlawfully discharged by Respondents, Kino Aggregates and Noble Plant, in December 2009, during a Mine Safety and Health Administration (“MSHA”) inspection, due to Mr. Carter having engaged in protected activities, including raising various safety complaints regarding Respondents’ facility. Respondents allege that Mr. Carter was not, in fact, fired in December 2009, but voluntarily relinquished his employment by walking off the job. Additionally, Respondents allege that Mr. Carter was not recalled after a pre-planned lay-off due to his past poor work performance.

For reasons set forth below I find in favor of Complainant.

## **I. Procedural History**

On February 8, 2010, Carter filed a complaint with MSHA alleging discrimination under Section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2).<sup>1</sup> After investigating the allegations, the Secretary decided there was sufficient evidence of discrimination to file a complaint on Mr. Carter's behalf on May 21, 2010, pursuant to section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1).<sup>2</sup> A hearing was held in Sacramento, California on November 2 and 3, 2011, at which both the Secretary and Respondents presented evidence and testimony. Subsequent to the hearing both parties submitted briefs which have been received and considered in rendering this decision.

## **II. Summary of the Testimony**

### **A. Lance Carter**

Kino Aggregates is owned by Respondent, Noble Plant, and the facility is essentially a river bed rock quarry. Kino Aggregates' main customer, DeSilva Gates, is a highway construction business whose hot plant that manufactures asphalt lies adjacent to the Kino

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<sup>1</sup> Section 105(c)(2) of the Mine Act states, in relevant part:

Any miner...who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection 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 forward a copy of the complaint to the respondent and shall cause such investigation to be made as [s]he deems appropriate...if upon such investigation, the Secretary determines that the provisions of this subsection have been violated, [s]he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner,...alleging such discrimination or interference and propose an order granting appropriate relief.

<sup>2</sup> Section 105(c)(1) of the Act, in pertinent part, provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine...

Aggregates facility. (*See inter alia* Tr. 20, 25-27, Vol. I; GX 1).<sup>3</sup> construction business whose hot plant that manufactures asphalt lies adjacent to the Kino Aggregates facility.

Before his employment at Kino Aggregates, Mr. Carter had worked for Matthew Ready Mix for about twelve years at its Orville Plant. He was initially in charge of computers. In his final three years he was head of maintenance, being responsible for Occupational Safety and Health Administration (“OSHA”) compliance and highway truck safety compliance. He was also involved in the design and set-up of computer-controlled machinery, as well as the training of operators. He reportedly doubled production for Matthew Ready Mix during this period. (Tr. 15, Vol. I).

After working for Matthew Ready Mix, Mr. Carter worked for Baldwin Contracting (“Baldwin”), providing “modern technology to their rock plants.” (Tr. 16, Vol. I). Mr. Carter was also a plant foreman for Baldwin, being responsible for MSHA compliance. *Id.* He later worked as a mechanic for Lone Star Company and a quarry manager for Eagle Aggregates. *Id.* At Eagle Aggregates Mr. Carter “built the plant from flat ground” and “started the MSHA process from zero.” Mr. Carter testified he received eighty hours of training from MSHA. (Tr. 16-17, Vol. I).

In approximately July 2007, Mr. Plant hired Mr. Carter to work at Kino Aggregates. (Tr. 17, Vol. I). At the time of Mr. Carter’s hiring, Kino Aggregates only had a small plant in operation and Mr. Carter was initially hired as a union mechanic. Much of its machinery and “MSHA infrastructure” was being removed due to the dissolution of a partnership between Mr. Plant and Candy Vargas. (Tr. 18-19, Vol. I). Mr. Plant asked Mr. Carter to design a new plant; Mr. Carter designed the facility’s electrical and water systems, decided upon necessary machinery, and negotiated for and arranged the purchase of such equipment. (Tr. 20-21, Vol. I).

By June 1, 2008, Kino Aggregates was in full production. (Tr. 21, Vol. I). During “the busy season” the plant usually ran five to six days per week at ten hours a day. (Tr. 22, Vol. I). Due to the muddy conditions during the winter time, it was difficult to separate quarried materials into their various sizes. Kino Aggregates shut down for “winter maintenance and upgrades” because it was not cost effective to process materials during the winter months. (Tr. 22, Vol. I).

At Kino Aggregates Mr. Carter “carried the MSHA program.” (Tr. 28, Vol. I). He conducted all MSHA training, documented all safety meetings and was responsible for all aspects of the MSHA safety program. (Tr. 28-31, Vol. I). However, while Mr. Carter had complete “administrative responsibility” for MSHA related matters, all decisional authority rested with Mr. Plant. (Tr. 28, 30, 34-35, Vol. I).

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<sup>3</sup> The abbreviation “Tr.” refers to trial transcript. The abbreviation “GX” refers to government exhibits.

During this time period, Mr. Carter expressed safety complaints about the lack of regular plant clean-up schedules and procedures. The build up of dirt and rock created, *inter alia*, the hazard of miners stumbling on walkways. (Tr. 37-38, 50-54, Vol. I). Mr. Carter also voiced concerns regarding inadequate dust control at the plant. Despite the obvious danger of respirable disease posed by crushed rock dust containing silica, Mr. Carter was unable to persuade Respondent to install an effective dust control system. Besides the danger of silicosis, excess dust also created the danger of mechanical and electrical breakdown. (Tr. 46-52, Vol. I; GX P1).

Additionally, Mr. Carter raised safety concerns regarding the inadequate foundations upon which various plant machines were positioned. The affected machinery could fall over, posing another hazard to miners. (Tr. 58-62, Vol. I). Mr. Carter also complained of the safety dangers associated with an untrained worker – Allen Reiss. Although designated a “night watchman” Mr. Reiss was involved in all aspects of the plant’s operations including the operation of machinery. (Tr. 60-71, Vol. I). Mr. Carter was prohibited by Mr. Plant from giving safety training to Mr. Reiss, based, in part, upon Mr. Plant’s fears that the union would learn of Mr. Reiss’ existence. (Tr. 61-61, Vol. I). The issue of inadequately trained miners was a constant source of friction between Mr. Carter and Respondent. (Tr. 67-69, Vol. I; GX P-1).

By approximately April 2008, Mr. Carter had concluded that he would not be able “to do what was necessary to stay in (safety) compliance.” (Tr. 34, Vol. I). “So as to avoid personal liability” Mr. Carter informed Mr. Plant that he would no longer be able to be responsible for any aspect of compliance with safety rules and wrote a letter to MSHA indicating such. (Tr. 34, Vol. I).

Mr. Carter believed that he would not be able to perform necessary safety functions because Mr. Plant had ignored his various safety concerns in the past. For example, in order to clear debris, miners were required to climb to the top of the plant “scalper.” However, there were no access ways, no ladders, and no walkways. A miner would be required “to climb steel” with no place to tie a safety apparatus. (Tr. 36, Vol. I). The scalper had a series of straight metal pieces that shook at high frequency and looked like a cattle guard at a 90° angle. As it was sometimes muddy and very slippery, a miner could easily lose his balance and slip or fall while swinging a sledge hammer to loosen debris. Mr. Carter once slipped, tumbling about ten feet into the “primary crusher,” suffering bruises. (Tr. 43-45, Vol. I; GX P-1).

On December 16, 2009, Mr. Carter went to work but was experiencing increasing lung pain which he attributed to the dusty conditions at the facility. Mr. Carter radioed James Potts that he would be leaving work early due to pulmonary problems. Mr. Potts said “Okay.” (Tr. 90-91, Vol. I). Mr. Carter also called off the next day, Friday, December 17, 2009. (Tr. 93, Vol. I). Either James or Melissa Potts took his call and again said “Okay.” (Tr. 93, Vol. I). On Monday, December 21, 2009, Mr. Carter telephoned Ms. Potts, again calling off due to illness and requesting permission to see a physician. (Tr. 94-97; GX P-2). The physician reportedly diagnosed Mr. Carter as suffering from “irritant bronchitis from excessive dust.” (Tr. 98).

On December 22, 2009, Mr. Carter returned to work, filled out a time card and handed his physician's note to Mr. Potts. *Id.* That day Mr. Carter noticed that an MSHA inspector – Bill Berglof – was on the premises and Mr. Carter began accompanying Inspector Berglof around the facility.

After approximately four hours, Mr. Carter over heard Noble Plant – who had been following the inspection – speaking on his cell phone. Mr. Plant reportedly said: “We’ve got an MSHA inspection going on here, and Lance is pointing out every little thing.” (Tr. 101, Vol. I). In response to a remark that Mr. Carter had reportedly turned Kino Aggregates into MSHA, Mr. Plant stated: “I know. He cut his own throat real bad.” (Tr. 101, Vol. I).

As the MSHA inspector walked to the next site, Mr. Carter approached Mr. Plant who again upbraided Mr. Carter for having called MSHA and the union, and for “pointing out problems.” (Tr. 101, Vol. I). At the end of the conversation, Mr. Plant told Mr. Carter: “Well, as far as I’m concerned, you don’t work here anymore.” Mr. Carter asked: “Are you laying me off...right now or at the end of the day?” Mr. Plant responded: “Right now. Just go.” (Tr. 102, Vol. I). Mr. Carter testified that Mr. Plant never called him back to work after this episode, resolving any uncertainty that this was an actual final work termination as opposed to a temporary lay-off. (Tr. 106, Vol. I).

After this conversation, Mr. Carter applied for unemployment compensation, (Tr. 105, Vol. I), and signed up on the union out-of-work list (Tr. 108, Vol. I; GX P-4). He worked in various temporary jobs after Kino. (Tr. 108-114). At the hearing, Mr. Carter testified that he had been working as a crane operator for approximately one month, beginning this job in September 2011, and expecting such to last until March 2012. (Tr. 14, 114-115, Vol. I). Among his forms of income, Mr. Carter received an inheritance after his father’s death of \$30,000 in cash, and a rental home with a fair market value of \$120,000. (Tr. 119, Vol. I).

Mr. Carter testified that, due to various financial commitments and his marital breakup, he would never have voluntarily left his employment at Kino Aggregates. (Tr. 118, Vol. I).

## **B. William Berglof**

At the hearing William Berglof testified that he had been working as an MSHA inspector in December 2009. (Tr. 134, Vol. I). On December 22, 2009, he had gone to Kino Aggregates to perform both an EO1 and health inspection. (Tr. 136-137, Vol. I). He met James Potts who later introduced him to Lance Carter. Mr. Potts indicated that Mr. Carter would accompany Inspector Berglof on his inspection. (Tr. 138). At a certain point Adam Plant also arrived on the scene and instructed Mr. Carter that he should go talk to Noble (Bud) Plant. (Tr. 139, Vol. I). When Inspector Berglof passed near Noble Plant’s truck, Inspector Berglof over heard Mr. Plant tell Mr. Carter “you didn’t have to call MSHA.” (Tr. 141, Vol. I). Later, Inspector Berglof asked Adam Plant where Mr. Carter had gone and was told by Adam Plant: “I think grandfather fired him, but I don’t know for sure.” (Tr. 142, Vol. I).

Inspector Berglof indicated that he had written several citations during his inspection, some in the presence of Mr. Carter and some in the presence of Adam Plant. (Tr. 143, Vol. I).

### **C. Adam Plant**

At the hearing, Adam Plant testified that he was employed at Kino Aggregates since June 2003. (Tr. 145-146, Vol. I). The grandson of Noble Plant, Adam Plant was the current plant operator. (Tr. 147, Vol. I). Mr. Plant acknowledged that Lance Carter had “designed and built” the facility. (Tr. 152, Vol. I). Mr. Carter was also responsible for “all the MSHA training and everything” and “was the one responsible for safety on site.” (Tr. 157, Vol. I). Mr. Plant also indicated that Mr. Carter had unsuccessfully attempted to repair a secondary crusher in 2009. (Tr. 160-164, Vol. I).

Adam Plant had not spoken with Mr. Carter from December 16, 2009, to December 21, 2009, but, due to Mr. Carter’s return of various work items, including a truck, truck keys, and cell phone, Mr. Plant believed that Carter had quit his employment on December 21, 2009. (Tr. 169-171, Vol. I).

However, on December 22, 2009, Adam Plant observed Mr. Carter and Inspector Berglof performing an inspection. (Tr. 172-173, Vol. I). At some point, Mr. Carter left the inspection and walked by Noble Plant’s truck. Adam Plant did not see Carter stop at the truck nor did he hear any words exchanged between Noble Plant and Mr. Carter. (Tr. 172-173, Vol. I).

### **D. Melissa Potts**

At the hearing Melissa Potts, granddaughter of Noble Plant, testified that she had worked at Kino Aggregates since April 2004, and had been employed in various positions. Her present job was that of office manager, which included payroll and book-keeping duties. (Tr. 182-185, Vol. I). As office manager, she also reviewed time cards which were located in the scale house next to the time clock. (Tr. 185, Vol. I). The position of office manager also covered other administrative duties. If somebody wanted to go home sick, and could not find Noble Plant, the employee would advise Ms. Potts. (Tr. 186, Vol. I). Further, Ms. Potts was the individual who would approve doctor visits if Mr. Plant was not available. (Tr. 193, Vol. I).

Ms. Potts further testified that, due to adverse weather conditions impeding plant operations, Kino employees were usually laid off in December. (Tr. 187, Vol. I).

She did not directly speak to Mr. Carter on December 16, 17, 18 or 19. However, James Potts, her husband, who was hunting on plant property, did telephone her on December 19, 2009, informing her that Mr. Carter had dropped off his pick-up truck, keys, and cell phone next to the scale house. (Tr. 191, Vol. I). On December 21, 2009, Mr. Carter called Ms. Potts, requesting permission to make a physician visit. (Tr. 192, Vol. I).

On the morning of December 22, 2009, Ms. Potts observed Mr. Carter in the scale house. However, she had no discussions with him. (Tr. 153, Vol. I). At approximately 11:30 a.m. Mr. Carter returned to the office, informing Ms. Potts that “he couldn’t stand” her grandfather. Ms. Potts was unsure of Mr. Carter’s exact words but he informed her that he was no longer going to work at Kino Aggregates, he was quitting, and thought he had a job at DeSilva Gates. (Tr. 194, Vol. I).

Ms. Potts indicated that all of her and her husband’s income derived from working for her grandfather. (Tr. 197, Vol. I).

### **E. James Potts**

At the hearing James Potts, husband of Noble Plant’s granddaughter, Melissa, testified that he had been employed at Kino Aggregates since 2004, and was now working as a loader operator. (Tr. 208).

On December 16, 2009, Mr. Carter had called Mr. Potts over the CB radio, informing him that he “was going home sick.” (Tr. 210, Vol. I). On December 19, 2009, while duck hunting on the plant premises, Mr. Potts noticed that Noble Plant’s 2002 Powerstroke – which Mr. Carter usually drove – was parked with the keys and Mr. Carter’s cell phone inside. Mr. Carter’s welder and various tools were missing. (Tr. 213, Vol. I). Mr. Potts opined that Carter, by December 21, 2009, was no longer employed by Kino Aggregates. (Tr. 217, Vol. I).

### **F. Noble Plant**

At the hearing Noble (Bud) Plant testified that he was the owner/president of Kino Aggregates. (Tr. 225, Vol. II). Kino Aggregates centered upon crushing aggregates to the specifications of ready-mix plants, principally DeSilva Gates. (Tr. 228, Vol. II).

When Mr. Plant initially hired Mr. Carter, Mr. Carter advised Mr. Plant that he could handle MSHA compliance issues. Mr. Plant entrusted Mr. Carter with the responsibility that Kino was in MSHA compliance. (Tr. 239-240, Vol. II). Mr. Carter had been given authority to resolve safety issues that the plant. (Tr. 241, Vol. II).

In the summer of 2009, the HP 300 (the secondary plant crusher) seized up and Mr. Carter unsuccessfully attempted to repair it. (Tr. 248-249, Vol. II). Eventually, the machine had to be shipped out for repair at over \$40,000 in costs. (Tr. 250, Vol. II). Despite being unsatisfied with Mr. Carter’s machine repair attempts, Mr. Plant felt that Mr. Carter “could run the plant fairly” and planned to “bring (him) back during the off-season.” (Tr. 252, Vol. II).

There was an off-season at Kino Aggregates because, usually, the plant shut down in December. Inclement weather made materials too wet to crush properly and presented various safety hazards. (Tr. 243, Vol. II). On December 16, 2009, Carter had telephoned Plant asking

what part he was going “to play in the winter shut down and maintenance and repairing the crushing plant.” (Tr. 253, Vol. II). Plant asked that Carter discuss the question after the shift was over. (Tr. 254, Vol. II). However, Carter left the plant premises on December 16 before again talking to Plant. During the next few days Plant did not communicate with Carter. By December 18, 2009, Plant was uncertain regarding Carter’s employment status and “just figured he quit.” (Tr. 258, Vol. II).

On December 22, 2009, the day of the MSHA inspection, Carter “punched in” for work. Plant was telephoned by his wife who informed him that Carter was participating in the MSHA inspection. (Tr. 264). Although he observed Carter and inspector Berglof from his pick-up truck, Plant did not drive over to the pair; but, after speaking with his wife, sent his grandson Adam “to follow those guys around and see what was going on.” (Tr. 265-266, Vol. II). Mr. Plant indicated that a bad back required him to use a pick-up truck to conduct his plant management duties. (Tr. 226, Vol. II). At some point Carter walked away from the inspector and passed Plant’s truck. However, Plant did not speak to Carter. (Tr. 266-267, Vol. II).

It was company policy to pay anybody who punched in on the pay clock and so Carter was paid for his hours on December 22, 2009, despite that Plant no longer considered Carter an employee.

Plant denied that he had terminated Carter for participating in the MSHA inspection on December 22, 2009, explaining: “He had already quit. How could I terminate him or fire him? I never talked to him.” (Tr. 269, Vol. II). Stating that Kino Aggregates was a union shop, governed by a union contract, and that Carter was a union member, Plant indicated that he had never terminated Carter according to union guidelines or otherwise. (Tr. 233-237, Vol. II).

Plant had “no idea” whether Carter had complained to MSHA or the union about safety conditions at Kino. (Tr. 270, Vol. II). Nevertheless, it had been Mr. Plant’s “policy for fifty years” to pay individuals if they filed unemployment compensation claims and never to contest such. (Tr. 229, Vol. II).

On cross examination Mr. Plant conceded that he did not know whether Mr. Carter had called in sick on December 17, 18, or 19. (Tr. 275, Vol. II). He also confirmed telling Mr. Carter to bring his truck to the facility to repair an oil leak for which the company would pay. (Tr. 275-276, Vol. II). Mr. Plant further conceded that Mr. Carter had communicated to him complaints about inadequate clean-up at the facility. (Tr. 277, Vol. II).

Mr. Plant “definitely thought he (Mr. Carter) was a good employee.” (Tr. 287, Vol. II). Although he was curious as to why Mr. Carter decided to quit, Mr. Plant did not call Mr. Carter to find out the reason for such. (Tr. 287, Vol. II).

## **G. Diane Watson**

At the hearing Diane Watson testified that she was a supervisory special investigator for the Western District of MSHA. (Tr. 289, Vol. II). She had previously conducted a 110(c) investigation for Kino Aggregates in 2006. In February 2010, she revisited Kino to investigate the training of an individual who was being exposed to mine hazards – Allen Reiss. (Tr. 290-291, Vol. II). She questioned Noble Plant who indicated that Mr. Reiss was a night watchman who sometimes operated a forklift and other equipment. Mr. Plant was unaware of any training that Mr. Reiss had undergone. Mr. Plant's granddaughter, Melissa Potts, was unable to find any training records. (Tr. 291-292, Vol. II).

Ms. Watson had never seen training records of Mr. Reiss previously admitted by Respondent. (See *inter alia* Tr. 292-293, Vol. II; GX P-10).

### **III. Findings of Fact and Conclusions of Law**

Under established Commission law, a complainant establishes a *prima facie* case of a violation of section 105(c) if a preponderance of the evidence proves (1) that the complainant engaged in a protected activity and (2) that the adverse action complained of was motivated in any part by the protected activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 329 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 63 F.2d 1211 (3rd Cir. 1981).

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. *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n. 20 (Apr. 1981). If the mine operator cannot rebut the *prima facie* case, it may defend affirmatively by proving that it would have taken the adverse action based upon the miner's unprotected activities alone. *Driessen*, 20 FMSHRC at 328-29; *Pasula*, 2 FMSHRC at 2800. In analyzing a business justification as an affirmative defense for an adverse action, the Commission has held that:

The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities...[T]he narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. (Citations omitted).

*Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

In evaluating whether a complainant has proven a casual connection between protected activities and adverse action, the following factors are to be considered: (1) knowledge of the protected activity; (2) hostility or animus towards protected activity; (3) coincidence in time between protected activity and adverse action; and (4) disparate treatment. *Chacon*, 3 FMSHRC at 2516-17. The nexus in time between the protected activity and the adverse action can, standing alone, establish a sufficient basis upon which to find improper motive to terminate. *Sec’y of Labor on behalf of Clay Baier v. Durango Gravel*, 21 FMSHRC 953 (Sept. 1999). The ultimate burden of persuasion is with the Complainant. *Pasula*, 2 FMSHRC at 2800.

I find that, for reasons discussed *infra*, the Complainant has carried his burden of proving that Respondent discharged him in violation of the anti-discrimination provisions of section 105(c) of the Act.

### **A. Protected Activities**

The clear preponderance of the evidence establishes the first element of a *prima facie* case of a violation of section 105(c). At hearing Respondent’s witnesses, including Noble Plant, conceded that Mr. Carter’s duties included all aspects of health, safety, and MSHA compliance issues. (See *inter alia* Tr. 239-241, Vol. II). I accept as true Mr. Carter’s contentions that throughout his tenure at Kino he continually voiced complaints of possible danger, safety, or health violations, ranging from inadequate clean-up to hazardous machine conditions to untrained personnel.

As outlined in the summary of Complainant’s pleadings, as documented in Mr. Carter’s written notes (GX P-1), testimony *supra*, and as persuasively argued in the Secretary’s post hearing brief – the total evidences establishes a *prima facie* showing that Mr. Carter had engaged in protected activity and/or had been perceived by Respondents to have engaged in protected activity.

### **B. Adverse Action Motivated by Protected Activity**

The record further establishes a *prima facie* case as to the second prong of *Driessen*: that the adverse action complained of was motivated in any part by the protected activity. *Driessen* 20 FMSHRC 324 (Apr. 1998).

I find Mr. Carter’s description of his confrontation with Noble Plant on December 22, 2009 to be credible. I credit Mr. Carter’s testimony that he had over heard Noble Plant stating that Mr. Carter had “cut his own throat” for “pointing out every little thing” during the MSHA inspection. (See *also* Tr. 101, Vol. I).

Given the Complainant’s credible testimony that he had been verbally dismissed by Noble Plant on December 22, 2009, and given the testimony of Inspector Berglof that he had overheard Noble Plant reprimanding Mr. Carter on December 22, 2009 – “you didn’t have to call

MSHA” (Tr. 141, Vol. I)<sup>4</sup> – there is believable direct evidence that Complainant’s December 2009 discharge was motivated by his protected activity.

### C. Circumstantial Evidence

Even assuming *arguendo* the direct evidence above cited is deemed insufficient to establish discriminatory motivation, there is abundant circumstantial evidence establishing such. I essentially concur with the arguments and supporting case law advanced by the Secretary in her post-hearing brief that there is sufficient circumstantial evidence to establish that Mr. Carter’s termination was motivated by Mr. Carter’s protected activity and/or Noble Plant’s suspicion or belief that Mr. Carter had engaged in protected activity.

Circumstantial evidence must be relied upon in cases involving 105(c) complaints because “[d]irect evidence of discriminatory motivation is not often encountered; more typically, the only available evidence is indirect.” *Chacon*, 3 FMSHRC at 2510. The Commission has enumerated some of the circumstantial *indicia* of discriminatory motivation: 1) knowledge of the protected activity; 2) hostility or animus toward protected activity; and 3) coincidence in time between the protected activity and the adverse action. *Sec. of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999); *Chacon*, 3 FMSHRC at 2511.

The Commission has held that “an operator’s knowledge of the miner’s protected activity is probably the single most important aspect of a circumstantial case.” *Baier*, 21 FMSHRC at 957 (quoting *Chacon*, 3 FMSHRC at 2510). The Commission has also held that “discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1).” *Elias Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1480 (Aug. 1992).

Noble Plant suspected or believed that Mr. Carter had filed a complaint with MSHA, and further believed that such complaint was the cause of the December 22, 2009 inspection. Mr. Plant’s rebuke of Mr. Carter, “you didn’t have to call MSHA,” demonstrates that Mr. Plant suspected or believed that Mr. Carter engaged in a protected activity and clearly expressed a hostility or animus toward that protected activity. (Tr. 141, Vol. I).

Further, the proximity in time between Mr. Carter’s protected activity and termination establishes a causal connection. Courts have held that a short proximity of time between the protected activity and the adverse action can be evidence of discriminatory motivation. *See Donovan v. Stafford Construction Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984) (termination two weeks after protected activity was “itself evidence of an illicit motive”). The Commission has stated that there are not any “hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive.” *Secretary of*

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<sup>4</sup> At trial Noble Plant, an older gentleman, who had hearing difficulties, spoke in a loud tone, supporting both Complainant’s and Berglof’s testimony that they were able to over hear Noble Plant.

*Labor on behalf of James Hyles v. All American Asphalt*, 21 FMSHRC 34, 47 (Jan. 1999) (citation and internal quotation marks omitted). Nevertheless, the Commission found temporal propinquity where about a month passed between MSHA's issuance of a penalty and the operator's denial to recall from temporary layoff the four complaints who had alerted MSHA of the violations which induced the penalty. *Id.* at 47. The Commission focused on the proximity between the issuance of the penalty and the adverse action, even though the four complaints' actual protected activity of alerting MSHA occurred approximately sixteen months before the adverse action, because the Commission found that the issuance of the penalty was the "straw that broke the camel's back." *Id.*; *See also Pamela Bridge Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361 (2000) (four months between safety complaints and termination was sufficient to establish proximity).

In the instant case, Noble Plant's termination of Mr. Carter on December 22, 2009, was in extreme temporal proximity to Mr. Carter's perceived protected activity. Mr. Plant believed that Mr. Carter had complained to MSHA about Kino Aggregate's safety practices; Mr. Carter suffered the adverse action only a few hours after the beginning of the MSHA inspection. This creates a strong inference of discrimination. The MSHA inspection on December 22, 2009, which produced numerous citations and orders issued to Kino Aggregates, was the "straw that broke the camel's back," Mr. Carter having lodged multiple complaints to Mr. Plant over a variety of safety issues over his two-and-one-half-year employment by Kino Aggregates. The December 22, 2009 inspection forced Mr. Plant to resolve the safety and health issues that Mr. Carter had been complaining about for months. The close temporal proximity establishes that it was not simply by chance that Mr. Carter was fired mid-inspection. Rather, Respondents' belief or suspicion that Mr. Carter's engaged in protected activity directly caused his termination. Therefore, I find a *prima facie* case of discrimination under § 105(c) has been established.

Respondents' defenses are unsupported by the record and are contradictory, inconsistent, and pretextual in nature.

Respondents *inter alia* contend that no discrimination claim may be made because no adverse action had actually ever occurred. The Complainant voluntarily withdrew from employment in December 2009, and was never, in fact, fired by Respondent. Respondent's contention necessarily rests upon the credibility of witnesses who appeared at hearing and the weight this Court chooses to give to such. It is black letter law that the Administrative Law Judge, as trier-of-fact, must assess the credibility of all witnesses and determine the weight their testimony deserves.<sup>5</sup>

At hearing, Mr. Carter credibly testified that given, *inter alia*, his strained finances, he would never have voluntarily quit his employment at Kino Aggregates. (Tr. 118, Vol. I). Evidence presented regarding Mr. Carter's spotty and less remunerative employment after December 2009, is further supportive of Mr. Carter's contentions. (Tr. 115-116, Vol. I). All of

<sup>5</sup> A Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992).

Respondent's witnesses, including Noble Plant, acknowledged the vitally significant role Mr. Carter had played in the design, fabrication, and over all operation of Kino Aggregates.

Respondents argue that Complainant "abandoned his job out of frustration" on December 16, 2009 (or thereafter), and that therefore he was not a "miner" as defined under 30 U.S.C. § 802(g) so as to be entitled to discrimination protections afforded by the Miner Act. (See Respondent's post-hearing brief at pp. 16-17).

I found the Complainant's explanations regarding having taken sick leave due to respiratory problems on December 16, 2009, to be much more credible than the assertions of Respondents. (*See also* Doctor's First Report of Occupational Injury or Illness at GX P-6 which further supports Complainant's testimony).

I further reject any conclusion that Mr. Carter had voluntarily quit on December 22, 2009.

I find it incredible that such a valued employee as Mr. Carter could simply walk off the job one day without explanation – and Noble Plant, the mine operator, would not speak to or later contact Mr. Carter to ascertain why. (*See also* Tr. 287, Vol. II). The only credible explanation for Noble Plant's failure to question Mr. Carter regarding his sudden departure was that Mr. Plant had, in fact, fired Mr. Carter on December 22, 2009, and thus, had no reason for further inquiry.

I specifically find that Noble Plant verbally fired Mr. Carter on December 22, 2009, due to Complainant's actual or perceived protected activities and further find that Mr. Carter had not voluntarily relinquished his employment on December 22, 2009.

In addition to alleging that Mr. Carter had voluntarily quit his employment, Respondents also contend that Mr. Carter had not been asked to return to work after the winter lay-off due to his poor work performance.

Although the Respondents deny that Complainant was actually discharged in December 2009, I find that the Respondents' failure to recall Mr. Carter after winter lay-off due to his alleged past poor work performance, to have constituted a *de facto* discharge for protected work activity and was, therefore, a discriminatory adverse action.

A mine operator may affirmatively defend against a *prima facie* case establishing that any adverse action was also motivated by unprotected activity, and that it would have taken the adverse action for the unprotected activity alone. *Robinette*, 3 FMSHRC at 8118, n. 20; *See also Jim Walter Resources*, 920 F.2d at 750, citing *Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

I find the late raised claim of Mr. Carter's discharge based upon poor work performance is both inconsistent with Respondents' own witness testimony and blatantly pretextual in nature.

As noted *supra*, Noble Plant himself, the only individual who had the power to discharge employees, denied that he had fired Mr. Carter in December 2009. (See *inter alia* Tr. 289-287, Vol. II). Noble Plant "definitely thought he (Carter) was a good employee" (Tr. 287, Vol. II), "could run the plant fairly" and had planned to bring (Carter) back during the off-season. (Tr. 252, Vol. II). Thus, Respondents' affirmative defense is vitiated by Noble Plant's own testimony.

Over the Secretary's strenuous objection, Respondents were permitted for the first time to raise business justification as an affirmative defense in this matter. (See TR. 160-163, Vol. I; see also Respondents' earlier pleadings, including past answer(s) containing no specific allegation of poor work performance/discharge and Respondents' bench memoranda contending that Complainant voluntarily quit his employment in December 2009).

Though permitting the Respondents to raise the within poor work performance defense at hearing, after a careful review of the record, including Noble Plant's denials of discharge and favorable descriptions of work performance, I am constrained to agree with the Secretary that such defense is pretextual.<sup>6</sup>

The Commission's inquiry into an operator's business justification is limited to whether the reasons are plausible, whether they actually motivated the operator's actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity. Likewise, the Commission may not impose its own business judgment as to an operator's action. *Pendley v. FMSHRC*, 601 F.3d 417 (6th Cir. 2010).

Whether Complainant was discharged in December 2009 for poor work performance or whether Complainant was not recalled after the winter lay-off, the record simply does not support a business justification defense for Respondents' actions.

Noble Plant's equivocal testimony on point has already been cited. Respondents' argument that Mr. Carter would have been laid off in 2009 due to the usual pre-planned winter lay-off (Tr. 253, Vol. II), is undermined by Noble Plant's testimony that he had planned to bring Mr. Carter back during the off-season. (Tr. 252, Vol. II).

I specifically find that Mr. Carter's unsuccessful attempts to repair a crushing machine in the summer of 2009 do not constitute a plausible business reason for Mr. Carter's discharge in December 2009, or Respondents' decision to not recall Mr. Carter over half-a-year later. In fact, such repair attempts lead me to conclude that Mr. Carter was a multi-skilled employee who reasonably attempted complex repairs in-house to avoid unnecessary expenses for Respondents.

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<sup>6</sup> See also the Secretary's arguments and supporting case law in post-hearing brief as to the pretextual nature of Respondents defenses, said rationale which I fully adopt.

Further, none of Respondents' other witnesses, Adam Plant, Melissa Potts, or James Potts, offered any compelling testimony regarding alleged poor work performance.<sup>7</sup>

Respondents argue that Adam Plant's testimony should be given the "most weight." (See Respondents' post hearing brief at p. 23). In assessing witness credibility and the weight to be accorded testimony, the Administrative Law Judge must consider any possible bias or underlying interest in the outcome which might motivate a witness not to tell the whole truth. Like all the witnesses presented by Respondents, Adam Plant had a family relationship to Noble Plant and worked for the family business. Adam, in fact, replaced Mr. Carter as Kino Aggregates' new Plant Manager. As grandson of Respondent and employee/replacement manager of Respondents' Dantoni Mine, Adam Plant had an underlying familial bias and economic interest in the outcome of the case. Thus, Adam Plant is less than a wholly disinterested witness and I find he is less than fully credible.

Ultimately, the undersigned is required to resolve directly opposing testimony as to a critical fact question: did Mr. Carter have a confrontation with Noble Plant on December 22, 2009 at Mr. Plant's pick-up truck during which Mr. Plant fired Mr. Carter?

Noble Plant denied that any conversation had taken place and Adam Plant denied ever witnessing such. Yet Inspector Berglof – who I found to be the most disinterested witness – testified, under oath, that he had in fact seen and heard Noble Plant castigating Mr. Carter for having called MSHA. (See Tr. 104-141, Vol. I). Inspector Berglof's testimony is credible and has essentially corroborated Mr. Carter's testimony.

The Respondent's business justification defense(s) do appear "flimsy" and "unsupported," suggesting that Respondents "seized upon a pretext to mask" their discriminatory motivation. *NLRB v. Interstate Builders, Inc.*, 351 F.3d 1020, 1034 (10th Cir. 2003) (quoting *NLRB v. Dillon Stores, Division of Dillon Cos., Inc.*, 643 F.2d 687, 693 (10th Cir. 1981)). See *Johnson v. Paradise Valley Unified School District*, 251 F.3d 1222, 1228 (9th Cir. 2001) ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.") (quoting *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 134 (2000), *cert. denied*, 534 U.S. 1055 (2001)). The Commission has similarly rejected pretextual explanations which the operator "seized upon" as an excuse to carry out a discriminatory design. *Secretary of Labor on behalf of Robert Ribel v. Eastern Associated Coal Corp.*, 7 FMSHRC 2015, 2021 (Dec. 1985).

The record is replete with explanations and/or non-explanations of Respondents' witnesses that undermine their ultimate credibility, contradicting common sense, logic, and life experience. A critical employee suddenly walks off the work premises, never to return, but Noble Plant never enquires why. Respondents allege Complainant's voluntary withdrawal and/or discharge due to poor work performance but do not report such, as required, to the state of

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<sup>7</sup> All of said witnesses had a familial relationship to Noble Plant, were employed by Noble Plant, and all, including Noble Plant, would have an underlying interest in the outcome of the case.

California employment department. (*See also* GX P-7). Moreover, if Allen Reiss had in fact been provided MSHA training by Noble Plant prior to Mr. Carter's discharge in December 2009, why were Respondents unable to produce supporting documents during Supervisory Investigator Diane Watson's visit to Dantoni Mine in February 2010? (*See also* Watson testimony at Tr. 290-294, Vol. II; Secretary's post-hearing arguments regarding Respondents' possible fabrication of documents).

#### **IV. Conclusion**

I find that Respondents have failed to establish any affirmative defense to Petitioner/Complainant's discrimination claims. I further conclude that Petitioner's and Complainant's claims of discrimination under § 105(c) have met the requisite proof to be granted.<sup>8</sup>

##### **A. Damages**

Pursuant to the statutory relief provided at 30 C.F.R. § 815(c), Complainant is entitled to "rehiring or reinstatement" in his former position of plant operator at Respondents' Dantoni Plant.

##### **B. Duty to Mitigate**

The Mine Act provides that a miner who has been discharged is required to mitigate his damages by making reasonable efforts to find employment. *Sec. of Labor v. Gabel Stone Co.*, 23 FMSHRC 1222 (2001), *aff'd Gabel Stone Co. v. FMSHRC*, 307 F.3d 691 (8th Cir. 2002). A discharged worker's efforts at reemployment however, are not to be judged by the "highest standard of diligence." *NLRB v. Arduini Mfg. Corp.*, 394 F.2d 420 (1st Cir. 1968). Moreover, a discriminatee's alleged failure to mitigate damages is an affirmative defense. *James Keys v. Reintjes of the South, Inc.*, 21 FMSHRC 1127 (Oct. 1999). *See NLRB v. Mooney Aircraft, Inc.*, 366 F.2d 809 (5th Cir. 1966) (Failure to mitigate damages by refusal to search for alternative work or by refusal to accept substantially equivalent employment is an affirmative defense.)

At hearing, the Complainant credibly described his good faith efforts to find new employment. (Tr. 108-115, Vol. I). In its cross-examination, Respondents failed to affirmatively prove that Complainant was somehow derelict in fulfilling his duty to mitigate damages.

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<sup>8</sup> Given the within holding of actual unlawful termination, I decline to address, in full, the issue of whether there was a constructive discharge of Complainant. However, there exists compelling evidence, whether utilizing a subjective or objective standard, that Complainant faced intolerable work conditions. *Dolan v. F&E Erection Co.*, 22 FMSHRC 171, 174-81 (Feb. 2000).

### **C. Pain, Suffering, and Emotional Distress**

In prior pleadings Petitioner has requested damages for pain, suffering, and emotional distress associated with Respondents' unlawful termination. I find no documentary or testimonial evidence to support said damage claims and deny such.

### **D. Other Damages**

Section 105(c)(3) provides that when a discrimination complainant's claim is granted the Administrative Law Judge may grant "such relief as it deems appropriate."

Given the within findings that Complainant did not voluntarily quit employment and was in fact, discharged for unlawful discriminatory reasons, Respondents are ordered to expunge and/or purge any negative personnel file references regarding Complainant's alleged resignation and/or discrimination complaint. Respondents are further ordered to post a notice at Dantoni Mine that they will not violate § 105(c)(1) of the Act.

### **E. Back Pay, Interest, and the Secretary's Proposed Civil Penalties**

Pursuant to § 105(c), this Court finds that as further relief the Complainant is entitled to "back pay and interest" since December 22, 2009. I further find that Respondents are entitled to deduct Complainant's interim net wages received from other employment since December 22, 2009 from the gross pay that Complainant would have otherwise received from Respondents. The Respondents, however, are not entitled to a deduction for any unemployment compensation benefits received by Complainant.

The parties have not agreed as to the actual gross amount that Complainant would have received from Respondents since December 22, 2009. (*See* different amounts suggested by the Secretary and Respondents in their post-hearing briefs). While an Administrative Law Judge has broad discretion in fashioning an appropriate remedy so as to make the discriminatee "whole," I find an insufficient record as to the issue of Complainant's outstanding gross pay since December 22, 2009. I therefore retain jurisdiction of this matter for purposes of establishing the amount of monetary damages, including back-pay and interest, owed to Complainant.

If the parties cannot reach an agreement as to such, I shall hold further proceedings, including evidentiary hearing, if necessary, to determine an appropriate remedial amount. Pending its disposition of the within monetary damages claim(s), I shall also withhold ruling on the Secretary's proposed civil penalty of \$15,000.

## ORDER

It is hereby ordered that Petitioner's and Complainant's discrimination claims under Sections 105(c)(1) and 105(c)(2) are granted.

It is further ordered that Complainant be reinstated to his former position of plant operator at Respondents' Dantoni Mine.

It is ordered that Respondents expunge from their personnel records any negative references to Complainant's alleged resignation in December 2009, and further purge their personnel records of any negative references to Complainant's within discrimination action.

It is ordered that Respondents post a notice at Dantoni Mine that they will not violate § 105(c)(1) of the Mine Act.

It is further ordered that Complainant's claims for pain, suffering, and emotional distress damages be denied.

I find that Complainant has met his duty to mitigate damages.

I further find that the record is insufficient as to the gross pay that Complainant would have earned from Respondents since his discriminatory discharge on December 22, 2009. I therefore maintain jurisdiction of this matter for purposes of establishing the actual amount of monetary damages, including back pay and interest, for which Respondents are now liable.

With reference to such, Respondents are entitled to deduct the actual net interim earnings received by Complainant from other employers since December 22, 2009. Respondents, however, are not found to be entitled to any deductions for unemployment compensation benefits received by Complainant since December 22, 2009.

The parties are ordered within thirty days of the date of this order to advise the undersigned whether they have agreed as to specific monetary damages owed to Complainant. If the parties cannot agree, an evidentiary hearing regarding such shall be scheduled.

I shall further withhold ruling on the Secretary's proposed civil penalty of \$15,000 pending disposition of the within monetary relief claim.

/s/ John Lewis \_\_\_\_\_  
John Lewis  
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

February 10, 2012

BLACK BEAUTY COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. LAKE 2008-378-R
	:	Order No. 6672656; 04/05/2008
v.	:	
	:	Docket No. LAKE 2008-379-R
	:	Citation No. 6672658; 04/08/2008
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 2008-380-R
ADMINISTRATION (MSHA),	:	Citation No. 6672659; 04/08/2008
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-643
Petitioner	:	A.C. No. 12-02010-160151
	:	
v.	:	Docket No. LAKE 2009-72
	:	A.C. No. 12-02010-165822
	:	
BLACK BEAUTY COAL COMPANY,	:	Air Quality No. 1
Respondent	:	

**DECISION**

Appearances: Matthew M. Linton, Esq., Office of the Solicitor, U.S. Department of Labor, MSHA, Denver, Colorado, for the Petitioner;  
Arthur M. Wolfson, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Feldman

These consolidated contest and civil penalty proceedings concern Petitions for the Assessment of Civil Penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, as amended (“the Mine Act”), 30 U.S.C. § 820(a), by the Secretary of Labor (“the Secretary”) against the respondent, Black Beauty Coal Company (“Black Beauty”). The petitions sought to impose a total civil penalty of \$377,931.00 against Black Beauty for 34 alleged violations of Part 75 of the Secretary’s mandatory safety regulations governing underground coal mines. 30 C.F.R. Part 75. These matters were heard on July 12 through July 14, 2011, in Evansville, Indiana. The parties’ post-hearing briefs are of record. Prior to the

hearing the parties settled 29 of the 34 citations and orders in issue. The parties settled three additional citations as a consequence of settlement conferences after the presentation of evidence related to these citations at the hearing.

This Decision formalizes a bench decision that granted the Secretary's motion for summary decision with respect to Citation No. 6672658 in Docket No. LAKE 2008-643 that concerns an alleged non-significant and substantial (non-S&S) violation 30 C.F.R. § 50.12.<sup>1</sup> Citation No. 6672658 was issued as a consequence of Black Beauty's failure to obtain the permission of the Mine Safety and Health Administration (MSHA) District Manager before resuming normal mining operations after a mine accident was reported. This Decision also disposes of remaining Order No. 6681047 in Docket No. LAKE 2009-72 issued for an alleged inadequate on-shift examination conducted during a midnight maintenance shift that the Secretary attributes to an unwarrantable failure.

## **I. Settlement Agreements**

### **a. Docket No. LAKE 2008-643**

Docket No. LAKE 2008-643 contains 20 citations/orders for a total proposed civil penalty of \$207,516.00. Prior to the hearing, the parties agreed to settle 18 of the citations/orders for a total civil penalty of \$143,493.00. The settlement terms are of record and were approved at the hearing. (Joint Ex. 1). At the hearing the Secretary agreed to vacate Citation No. 6672659. As discussed below, the bench decision imposed a civil penalty of \$500.00 for remaining Citation No. 6672658. Consequently, the total civil penalty assessed in Docket No. LAKE 2008-643 is \$143,993.00.

### **b. Docket No. LAKE 2009-72**

Docket No. LAKE 2009-72 contains 14 citations/orders for a total proposed civil penalty of \$170,415.00. Prior to the hearing, the parties agreed to settle 11 of the citations/orders for a total civil penalty of \$59,862.00. The settlement terms are of record and were approved at the hearing. (Joint Ex. 1). At the hearing, the parties agreed to modify Order No. 6672674 to a 104(a) citation to reflect that the cited violation was not attributable to an unwarrantable failure. Black Beauty agreed to pay a civil penalty of \$7,000.00 for Citation No. 6672674. At trial, the parties also agreed to settle Order No. 6676919 by deleting the S&S designation. Black Beauty agreed to pay a reduced civil penalty of \$14,000.00 for Order No. 6676919. Remaining Order No. 6681047, adjudicated in this Decision, shall be vacated. Thus, the total civil penalty assessed in Docket No. LAKE 2009-72 is \$80,862.00.

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<sup>1</sup> Generally speaking, a violation is S&S if it is reasonably likely that a hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981).

**II. Bench Decision – Citation No. 6672658**  
**In Docket No. LAKE 2008-643**

At approximately 8:05 p.m. on Sunday, April 5, 2008, roof bolter Harold (“Jesse”) Driskill was struck by a fallen slab of rock measuring seven feet long by 47 inches wide. The fallen rock was approximately nine inches thick. The rock pinned Driskill against the mine floor and the roof bolter. The fallen material hit Driskill in the head and slid down his body. Driskill stood up with assistance, walked to a mantrip, and was taken to the surface where he was transported to a hospital by ambulance. (Gov. Exs. 15, 18, 19).

Section 50.10(b) of the Secretary’s regulations requires a mine operator to immediately notify MSHA, within 15 minutes, once the mine operator knows of an accident that involved an injury that had a reasonable potential to cause death. 30 C.F.R. § 50.10. Black Beauty timely reported the accident on the MSHA telephone hotline at 8:23 p.m., shortly after the occurrence of the accident. The accident was reported before the nature and extent of Driskill’s injuries were known.

Ron Stalhut, the MSHA Field Office Supervisor in Vincennes, Indiana, learned of the accident at approximately 9:41 p.m. at which time MSHA official Michael Rennie issued a verbal 103(k) order that prohibited Black Beauty from resuming normal mining operations at the accident site.<sup>2</sup> At that time, Stalhut dispatched MSHA inspector Sylvester DiLorenzo for the purposes of securing the accident site and initiating an accident investigation. DiLorenzo arrived at the accident site at approximately 10:50 p.m. at which time he determined that normal mining operations had resumed that had resulted in the alteration of the accident scene.

As a result of DiLorenzo’s observations, Citation No. 6672658 was issued citing a violation of section 50.12 that requires preservation of evidence at an accident site. Specifically section 50.12 provides:

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

30 C.F.R. § 50.12. (Emphasis added).

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<sup>2</sup> Verbal 103(k) order was reduced to writing in Order No. 6672656 which is the subject of the contest in Docket No. LAKE 2008-378-R. Section 103(k) of the Mine Act authorizes MSHA to issue such orders, as deemed appropriate, requiring prior approval before the resumption of normal mining activities at an accident site. 30 U.S.C. § 813(k).

Under section 50.2 of the Secretary's regulations the definition, in pertinent part, of "accident" is "[a]n injury to an individual at a mine which has a reasonable potential to cause death." After presentation of the evidence, the Secretary moved for summary decision on the issue of the fact of the violation of section 50.12. (Tr. 278). This decision formalizes the bench decision issued at trial:

The circumstances in this case were set in motion by Steve Elliott, the responsible person designated in Black Beauty's emergency response plan. Elliott was required to determine, within 15 minutes of the 8:05 p.m. accident, whether Driskill's injuries were life threatening. Erring on the side of caution, without knowing the extent of Driskill's injuries, Elliott notified MSHA at 8:23 p.m. DiLorenzo arrived at the accident site at approximately 10:50 p.m., at which time normal mining operations had resumed. Terry Courtney, the second shift manager in charge at the time of the accident, and Rick Carie, acting superintendent, advised DiLorenzo that information from the hospital reflected that Driskill had escaped serious injury. Consequently, normal mining operations had resumed. Since Black Beauty resumed mining without the permission of the MSHA District Manager, DiLorenzo issued Citation No. 6672658, alleging a non-S&S violation of section 50.12.

Medical records in an Indiana Worker's Compensation Report reflect that Driskill suffered abrasions to the arm and rib cage. Based on medical advice, Driskill was cleared to return to work on April 7, 2008, two days following the accident, without significant physical restrictions. Although Driskill apparently experienced pain and discomfort, the evidence reflects that his injuries were not life threatening.

Turning to the fact of the violation, the plain language of section 50.12 prohibits a mine operator from *altering an accident site* by resuming operations, unless such permission is granted by the MSHA District Manager. The report of an accident, rightly or wrongly, is the condition precedent to the application of the provisions of section 50.12. Having reported an accident, Black Beauty's unilateral decision to resume operations constituted a violation of section 50.12.

However, it is a mitigating factor that Black Beauty had correctly determined that the scene was not an "accident site" in that serious injury was not sustained. Consequently, the negligence attributable to Black Beauty should be reduced from the high degree asserted in Citation No. 6672658 to a low degree of negligence. The Secretary initially proposed a civil penalty of \$2,678.00. In view of the reduction in the negligence, a civil penalty of \$500.00 shall be assessed.  
(Tr. 308-25).

At the hearing, I requested the parties to address in their briefs whether section 50.12 is a reporting violation, and if so, whether it could properly be designated as S&S. However, as the citation did not allege that the citation was S&S, I decline to address this question, which I now view as moot.

**III. Order No. 6681047**  
**In Docket No. LAKE 2009-72**

There are two production shifts at Black Beauty's mine. The day production shift begins at 7:00 a.m. and ends at 3:00 p.m., and the afternoon production shift is from 3:00 p.m. until 11:00 p.m. The remaining shift is the midnight maintenance shift from 11:00 p.m. until 7:00 a.m. (Tr. 85).

During the course of an inspection conducted on the morning of September 11, 2008, MSHA inspector Glenn Fishback observed what he deemed to be obvious and extensive accumulations of combustible materials in the form of loose coal, coal fines, and float coal dust, which were allowed to accumulate along the energized 2 Main East conveyer belt header inby to the number 48 crosscut. It required approximately 20 employees shoveling each shift and the application of six 3,500 pound tanks of rock dust for a period of 18 hours to correct the affected area. As a result of his observations, Fishback issued 104(d)(2) Order No. 6681046 citing a violation of section 75.400 that prohibits the accumulation of combustible materials. (Gov. Ex. 33; Appx. I).

The violation was attributed to an unwarrantable failure.<sup>3</sup> The cited condition in Order No. 6681046 was designated as unwarrantable based on the extensive nature of the accumulations,<sup>4</sup> Black Beauty's history of section 75.400 violations, and prior meetings with mine management advising that greater cleanup efforts were required. (Gov. Ex. 33; Appx. I). The disposition of Order No. 6681046 is not in issue in this proceeding.<sup>5</sup>

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<sup>3</sup> As a general matter, an unwarrantable failure occurs when a violation is caused by aggravated conduct rather than ordinary negligence. *Emery Mining*, 9 FMSHRC 1997, 2001 (Dec. 1987).

<sup>4</sup> While the accumulations were apparently extensive, 104(d)(2) Order No. 6681046 uncharacteristically delineates the cited accumulations, in great detail, into their component parts. (*See* Appx. I).

<sup>5</sup> Order No. 6681046 was issued at the same time as Order No. 6681047, a subject in these proceedings. A decision on the merits in Order No. 6681046 is currently pending before Judge Manning as a result of a hearing conducted in LAKE 2009-304.

As a result of the conditions noted in 104(d)(2) Order No. 6681046, Fishback issued 104(d)(2) Order No. 6681047 citing an S&S violation of the on-shift provisions in 30 C.F.R. § 75.362(b) that was attributed to an unwarrantable failure. The Secretary proposes a civil penalty of \$53,858.00. Order No. 6681047 states:

An inadequate onshift examination was conducted for the 2 main East belt conveyor for the 4:30 AM to 7:30 AM examination on 9/11/2008. Obvious and extensive accumulations of combustible materials in the form of loose coal, coal fines, and float coal dust were observed by MSHA on this date. The accumulations of combustible materials were cited today in 104(d)(2) Order No. 6681046. The examination record for the 4:30 AM to 7:30 AM examination of the 2 Main East belt showed no hazards listed.

(Gov. Ex. 32).

Section 75.362(b) provides:

During each shift *that coal is produced*, a certified person shall examine for hazardous conditions along each belt conveyor haulageway where a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours before the oncoming shift.

(Emphasis added).

Addressing the propriety of Order No. 6681047 requires a discussion of the Secretary's preshift and on-shift examination requirements. An on-shift examination for hazardous conditions in each section where persons work must be conducted at least once during each shift. 30 C.F.R. § 75.362(a)(1). During production shifts, on-shift examinations must also be performed for hazardous conditions along each belt conveyor haulageway where a belt is operated. 30 C.F.R. § 75.362(b).

A preshift examination for hazardous conditions must be performed within three hours of the beginning of the subsequent eight hour shift. 30 C.F.R. § 75.360(a)(1). The preshift examination requires examination of roadways, travelways and track haulageways where persons will be working or traveling during the oncoming shift. 30 C.F.R. § 75.360(b)(1). On-shift and preshift examinations may be conducted at the same time if the examination occurs within three hours before the oncoming shift. Thus, an on-shift examination of belt haulageways during a production shift may be conducted at the same time as a preshift examination for the upcoming maintenance shift provided that examinations are conducted within three hours of the beginning of the maintenance shift. 30 C.F.R. § 75.362(b).

Order No. 6681047 alleges that: “[a]n inadequate onshift examination was conducted for the 2 main East belt conveyor for the 4:30 AM to 7:30 AM [midnight maintenance shift] examination on 9/11/2008.” Although the on-shift provisions of section 75.362 require that, at least once during each shift, examinations for hazardous conditions must be conducted in each section where anyone is assigned to work during that shift, an on-shift examination of belt entries is not required during non-production shifts. 30 C.F.R. § 75.362(b). Thus, Black Beauty asserts that an on-shift examination of the 2 main East belt conveyor during the September 11, 2008, midnight maintenance shift was not conducted because it was not required.

Rather, the most relevant examination of the belt haulageway was during the on-shift/preshift examination during the afternoon production shift on September 10, 2008. However, the Secretary’s case, as articulated in Order No. 6681047, is based on an inadequate on-shift examination from 4:30 a.m. to 7:30 a.m. during the September 11, 2008, midnight shift rather than an alleged inadequate belt examination between 3:00 p.m. and 11:00 p.m. during the preceding production shift on the afternoon and night of September 10. Thus, as noted, Black Beauty argues that Order No. 6681047 must be vacated because the cited on-shift examination that is the basis for the alleged violation of section 75.362(b) was not required.

The Secretary attempts to rebut the claim that an on-shift examination of the belt entry was not required by relying on the testimony of Black Beauty’s superintendent Gary Campbell. Campbell testified, based on his review of the examination records, that certain sections of the conveyor belts were operated during the midnight shift on September 11, 2008, for splicing or other maintenance. (Tr. 573-74). While these repaired belt sections had to be preshifted for hazardous conditions in preparation for the day shift, the Secretary has failed to demonstrate that an on-shift examination of the belt haulage system under section 75.362(b) was required given the non-production status of the mine.

Significantly, the Secretary does not explicitly contend, nor does any documentary evidence reflect, that coal was produced on the midnight shift on September 11, 2008. While Fishback testified that Black Beauty “ran [coal] all three shifts” when Fishback was formerly employed by Black Beauty, Fishback stated he could not recall whether the midnight shift was producing coal on September 11, 2008, “because its been so long ago.” (Tr. 458-60). Fishback conceded on-shift examination of belt haulageways is not required during maintenance shifts. (Tr. 460).

While it may be reasonable to assume that the extensive accumulations noted in Order No. 6681046 existed when the on-shift examination was conducted on the afternoon of September 10, 2008, the Secretary has not sought to amend Order No. 6681047. Nor was any significant evidence presented by the Secretary at trial regarding the nature and extent of the conditions in the 2 main East belt haulageway on September 10, 2008, or, concerning the circumstances underlying the September 10 afternoon on-shift examination. Thus, the central

question is whether, at this late post-trial and post-briefing date, the Commission, on its own, should consider Order No. 6681047 as amended to conform to the Secretary's regulatory requirements. Namely, whether Order No. 6681047 should be considered amended to cite an inadequate on-shift exam violation of section 75.362(b) during the September 10, 2008, afternoon production shift.

The Commission, on several occasions, has addressed the issue of the propriety of allowing post-hearing amendment of a citation to include a new theory of a violation. As a general proposition, the Commission and its Judges are guided by the Federal Rules of Civil Procedure. 29 C.F.R. § 2700.1. Although the Commission's Rules do not address amendment of pleadings, the Commission has noted that it relies on Fed. R. Civ. P. 15 when resolving such issues. *Cumberland Coal Resources, LP*, 32 FMSHRC 442, 447 (May 2010) (split decision), citing *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990).

Fed. R. Civ. P. 15(b)(2) provides:

When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move – at any time, even after judgment – to amend pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

The Commission has distinguished permitting the Secretary's post-trial amendment when the mine operator knew, or should have known, that a new theory was being advanced from instances when amendments are denied due to prejudice. For example, in *Cumberland* the Commission stated:

Accordingly, in our jurisprudence we have considered Rule 15(b) in several contexts. *Compare Consolidation Coal Co.*, 20 FMSHRC 227, 235-37 (Mar. 1998) (concluding that the Secretary could not amend a citation post-hearing to include a new theory of violation regarding the cited standard because the trial record did not reflect that the operator understood, or should have understood, that the new theory was being litigated) *with Faith Coal Co.*, 19 FMSHRC 1357, 1362 (Aug. 1997) (permitting a citation to be amended after hearing to correct a numbering error by the Secretary because the operator fully understood the gravamen of the correct standard, knowingly litigated the citation on that basis, and suffered no prejudice).

*Cumberland*, 32 FMSHRC at 447.

Thus, the dispositive question is whether the issue of the adequacy of the on-shift examination of the 2 main East belt haulageway during the afternoon production shift on September 10, 2008, “was tried with the express or implied consent of the parties.” (*Id.* at 32 FMSHRC at 447). An examination of the record evidence reflects that the Secretary’s focus was on the adequacy of the September 11, 2008, maintenance shift examination, rather than the September 10, 2008, afternoon production shift examination.

For example, Fishback testified that the most recent examination, which covered 4:30 a.m. to 7:30 a.m. on September 11, 2008, just hours before Fishback inspected the beltline, did not identify any hazardous accumulations anywhere along the 2 Main East beltline. (*Sec’y Br.* at 3 *citing* Tr. 409-10, Gov. Ex. 42 p. 213). In this regard, the Secretary asserts: “Fishback testified that it was ‘not possible’ for even one fifth of the accumulations he observed to develop in the time between the 4:30 a.m. to 7:30 a.m. examination [on September 11, 2008] and his [11:00 a.m.] inspection [later that morning].” (*Sec’y Br.* at 4 *citing* Tr. 442). In addition, the Secretary argues: “Indeed, Black Beauty offered [the] testimony of mine examiner Andrew Herndon that it only performed a ‘pre-shift’ examination from 4:30 a.m. to 7:30 a.m. on September 11, 2008 because this was a ‘non-production’ shift.” (*Id. citing* Tr. 687). Finally, the Secretary notes: “[a]s a result, Herndon testified that he never looked beyond the dump points, drives, and transfer points during the midnight shift on September 11, 2008, because he was only required to do a more limited ‘pre-shift exam.’” (*Id.*)

In the final analysis, it has been neither contended, nor shown, that the Secretary’s theory of the case was based on an inadequate on-shift examination during the afternoon production shift on September 10, 2008. Thus, Order No. 6681047 must be vacated because Black Beauty was not required under section 75.362(b), the cited mandatory standard, to conduct an on-shift examination of the belt haulageway during the September 11, 2008, midnight maintenance shift.

## ORDER

In view of the above, **IT IS ORDERED** that:

- (1) Black Beauty Coal Company shall pay a civil penalty of \$500.00 in satisfaction of Citation No. 6672658 in Docket No. LAKE 2008-643.
- (2) Consistent with the parties' approved settlement terms, Black Beauty Coal Company shall pay a total civil penalty of \$143,993.00 in satisfaction of the 20 citations/orders that are the subject of LAKE 2008-643.
- (3) 104(d)(2) Order No. 6681047 in Docket No. LAKE 2009-72 **IS VACATED.**
- (4) Consistent with the parties' approved settlement terms, Black Beauty Coal Company shall pay a total civil penalty of \$80,862.00 in satisfaction of the 14 citations/orders that are the subject of LAKE 2009-72.
- (5) Consequently, Black Beauty **IS ORDERED** to pay within 45 days of the date of this decision, a total civil penalty of \$224,855.00 in satisfaction of the citations/orders in issue in Docket Nos. LAKE 2008-643 and LAKE 2009-72.
- (6) Upon timely receipt of the total \$224,855.00 civil penalty, the captioned contest and civil penalty matters **ARE DISMISSED.**<sup>6</sup>

/s/ Jerold Feldman  
\_\_\_\_\_  
Jerold Feldman  
Administrative Law Judge

---

<sup>6</sup> Verbal 103(k) Order No. 667256 issued on April 5, 2008, in response to the Black Beauty's accident report concerning Driskill's injuries, is the subject of the contest in Docket No. LAKE 208-378-R. Order No. 667256 was not included in the parties' settlement agreement because a civil penalty was not proposed. Nevertheless, the contest in Docket No. LAKE 208-378-R is dismissed as moot in view of the disposition of Citation No. 6672658 that normal mining operations could not be resumed without prior MSHA approval.

Distribution: (Certified and Electronic Mail)

Matthew Linton, Esq., U.S. Department of Labor, Office of the Solicitor, 1999 Broadway,  
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Ave., Pittsburgh, PA 15222

/jel

Appendix I

Mine Citation/Order		U.S. Department of Labor Mine Safety and Health Administration	
<b>Section I - Violation Data</b>			
1. Date Mo Da Yr 09/11/2008	2. Time (24 Hr. Clock) 1100	3. Citation/ Order Number 6681046	
4. Served To Gary Campbell, Mine Supt.		5. Operator BLACK BEAUTY COAL COMPANY	
6. Mine AIR QUALITY #1 MINE		7. Mine ID 12-02010	
8. Condition or Provision Obvious and extensive accumulations of combustible materials in the form of loose coal, coal fines, and float coal dust were allowed to accumulate along the energized 2 Main East conveyor belt entry. The accumulations of combustible materials were allowed to accumulate from the 2 Main East header inby to the #48 x-cut. The areas are identified as follows: At the header - loose coal accumulations underneath the header measured 5 ft. in width by 20 feet in length and were 5-8 inches in depth. Float coal dust was accumulated on the header structure, belt roller brackets, and the belt structure in depths up to 1 inches. The float coal dust was dry. X-cut #6 to #7 - A coal rib roll was on the mine floor extending out into the entry for 4 feet. The accumulation of dry coal measured 8 ft. in length by 7 ft. in width by 1 foot in thickness.			
See Continuation Form (MSHA Form 7000-06) <input checked="" type="checkbox"/>			
9. Violation	A. Health Safety <input checked="" type="checkbox"/> Other <input type="checkbox"/>	B. Section of Act	C. Part/Section of Title 30 CFR 75.400
<b>Section II - Inspector's Evaluation</b>			
10. Gravity:			
A. Injury or Illness (has) (is): No Likelihood <input type="checkbox"/> Unlikely <input checked="" type="checkbox"/> Reasonably Likely <input type="checkbox"/> Highly Likely <input type="checkbox"/> Occurred <input type="checkbox"/>			
B. Injury or Illness could reasonably be expected to be: No Lost Workdays <input type="checkbox"/> Lost Workdays Or Restricted Duty <input type="checkbox"/> Permanently disabling <input type="checkbox"/> Fatal <input checked="" type="checkbox"/>			
C. Significant and Substantial: Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>			D. Number of Persons Affected: 010
11. Negligence (check one) A. None <input type="checkbox"/> B. Low <input type="checkbox"/> C. Moderate <input type="checkbox"/> D. High <input checked="" type="checkbox"/> E. Reckless Disregard <input type="checkbox"/>			
12. Type of Action 104(d)(2)		13. Type of Insurance (check one) Citation <input type="checkbox"/> Order <input checked="" type="checkbox"/> Safeguard <input type="checkbox"/> Written Notice <input type="checkbox"/>	
14. Initial Action			
A. Citation <input type="checkbox"/> B. Order <input checked="" type="checkbox"/> C. Safeguard <input type="checkbox"/> D. Written Notice <input type="checkbox"/>		E. Citation/ Order Number 6670632	
15. Area or Equipment 2 Main East Belt.		F. Dated Mo Da Yr 09/15/2007	
16. Termination Date			
A. Date Mo Da Yr		B. Time (24 Hr. Clock)	
<b>Section III - Termination Action</b>			
17. Action to Terminate			
18. Termination			
A. Date Mo Da Yr		B. Time (24 Hr. Clock)	
<b>Section IV - Automated System Data</b>			
19. Type of Inspection (activity code) 588		20. Event Number 4247603	21. Primary or MII
22. Signature <i>William E. Feltch</i>			23. AR Number 24553

MSHA Form 7000-6, Apr 03 (revised) In accordance with the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996, the Small Business Administration has established a National Small Business and Agriculture Regulatory Ombudsman and 10 Regional Fairness Boards to receive complaints from small businesses about federal agency enforcement actions. The Ombudsman annually evaluates enforcement activities and rates each agency's responsiveness to small business. If you wish to comment on the enforcement actions of MSHA, you may call 1-800-FED-FAIR (1-800-764-3647), or write the Ombudsman at Small Business Administration, Office of the National Ombudsman, 430 1st Street, SW MS 2120, Washington, DC 20416. Please note, however, that your right to file a comment with the Ombudsman is in addition to any other rights you may have, including the right to contest citations and proposed penalties and obtain a hearing before the Federal Mine Safety and Health Review Commission.

GX 33

SECTRIAL000140

Mine Citation/Order  
Continuation

U.S. Department of Labor  
Mine Safety and Health Administration

Section I - Subsequent Action/Continuation Date

1. Subsequent Action (a. Continuation)  (b. Continuation)  2. Dated (Original Issue) Mo Da Yr 09/11/2008 3. Citation/Order Number 6681046

4. Sent To Gary Campbell, Mine Supt. 5. Operator BLACK BEAUTY COAL COMPANY

6. Mine AIR QUALITY #1 MINE 7. Mine ID 12-02010 (Contractor)

Section II - Description of Action  
Continuation of 8. Condition or Practice

X-cut #7 to #8 - A coal rib roll was on the mine floor extending out into the entry for a distance of 4 feet. The accumulation of coal measured 20 ft. in length by 4 feet in width by 1 1/2 inches in thickness.  
 X-cut #13 to #14 - Loose coal was accumulated underneath the belt. The accumulations ranged from 2 to 4 inches in depth from x-cut to x-cut.  
 X-cut #14 to #15 - Loose coal and coal fines were accumulated underneath the belt. The accumulations ranged in depth from 2 to 8 inches for the width of the belt.  
 X-cut #15 to #16 - Loose coal and coal fines were accumulated underneath the belt. The accumulations ranged in depth from 2 to 6 inches for the width of the belt.  
 X-cut #17 to #18 - Loose coal and coal fines were accumulated underneath the belt. The accumulations ranged in depth from 2 inches to 1 foot for the width of the belt.  
 X-cut #18 to #19 - Loose coal and coal fines were accumulated underneath the belt. The accumulations ranged in depth from 2 inches to 1 foot for the width of the belt.  
 X-cut #19 to #20 - Loose coal and coal fines were accumulated underneath the belt. The accumulations ranged in depth from 2 to 6 inches.  
 X-cut #20 to #21 - Loose coal and coal fines were accumulated underneath the belt. The accumulations measured 3 inches in depth for the width of the belt. The loose coal and fines had also accumulated around a crib tie that was underneath the belt at this location. The accumulations measured up to 6 inches in depth.  
 X-cut #21 to #23 - Loose coal and coal fines were accumulated underneath the belt. The accumulations measured 3 inches in depth.  
 X-cut #24 to #25 - Loose coal, coal fines, and float coal dust were accumulated underneath the belt and on the belt structure. The accumulations of loose coal and coal fines ranged in depth from 2 to 3 inches. The float coal dust measured 1/2 inches on the belt structure in this area. Additionally, loose coal fines were accumulated on parts of the belt structure evidence of a spill.  
 X-cut #25 to #26 - Float coal dust was accumulated on the belt structure. The accumulation was dry and measured up to 1/4 inches in depth. Additionally, loose coal and coal fines were accumulated underneath the

Section III - Subsequent Action Taken See Continuation Form 57

9. Extended To A. Date Mo Da Yr B. Time (24 Hr. Clock)  C. Vacated  D. Terminated  E. Modified

Section IV - Inspection Data

8. Type of Inspection 3300 10. Event Number 4247603

11. Signature [Signature] AIR Number 24553 12. Date Mo Da Yr 09/11/2008 13. Time (24 Hr. Clock) 1100

Mine Citation/Order  
Continuation

U.S. Department of Labor  
Mine Safety and Health Administration

Section I - Subsequent Action/Continuation Data

1. Subsequent Action 1a. Continuation <input type="checkbox"/> <input checked="" type="checkbox"/>	2. Dated (Original issue) Mo Da Yr 09/11/2008	3. Citation/ Order Number 6681046
4. Served To Gary Campbell, Mine Supt.	5. Operator BLACK BEAUTY COAL COMPANY	
6. Mine AIR QUALITY #1 MINE	7. Mine ID 12-02010	(Contractor)

Section II - Justification for Action

belt. The accumulations measured up to 6 inches on the walkway side and 1 foot in depth on the off way side of the belt.  
 X-cut #27 to #28 - Loose coal and coal fines were accumulated underneath the belt. The accumulations ranged from 2 to 6 inches in depth for the width of the belt.  
 X-cut #29 - A rib had rolled out into the entry. The coal measured 12 feet in length by 6 feet in width and 4 inches thick.  
 X-cut #31 - Loose coal and coal fines were accumulated underneath the belt. The accumulations measured 8 feet in length by 4 feet in width by 6 inches in depth. Additionally, trash was observed in the form of cardboard boxes, plastic buckets, and wooden boards in the adjoining x-cut adjacent to the belt entry.  
 X-cut #32 - Loose coal and coal fines were accumulated underneath the belt. The accumulations measured 3 feet in length by 4 feet in width by 6 inches in depth.  
 X-cut #34 - Loose coal and coal fines were accumulated underneath the belt. The accumulations ranged in depth from 2 to 5 inches for a distance of 5 feet by 2 feet. Additionally, a rib had rolled out into the entry. The rib coal measured 8 feet in length by 6 feet in width by 8 inches in depth.  
 X-cut #36 to #37 - Loose coal and coal fines were accumulated underneath the belt. The accumulations measured 2 to 3 inches in depth by 5 feet in length by the width of the belt (5 feet).  
 X-cut #37 to #38 - Packed coal was accumulated underneath the belt. The accumulation measured up to 3 inches in depth and extended for a distance of 15 feet for the width of the belt.  
 X-cut #39 to #40 - Loose coal and coal fines were accumulated underneath the belt. The accumulations ranged in depth from 3 to 5 inches for a distance of 10 feet by the width of the belt.  
 X-cut # 43 to #48 - Loose coal and coal fines were accumulated underneath the belt. The accumulations ranged in depth from 3 to 5 inches for the width of the belt.

This mine has a history of 75.400 violations. Meetings with mine management have put the operator on notice that greater efforts towards compliance are needed.

Section III - Subsequent Action Taken		See Continuation Form <input checked="" type="checkbox"/>	
8. Extended To	A. Date Mo Da Yr	B. Time (24 Hr. Clock)	<input type="checkbox"/> C. Vacated <input type="checkbox"/> D. Terminated <input type="checkbox"/> E. Modified
Section IV - Inspection Data			
9. Type of Inspection	ESG	10. Event Number	4247603
11. Signature	AR Number	12. Date Mo Da Yr	13. Time (24 Hr. Clock)
<i>[Signature]</i>	24553	09/11/2008	1100

MSHA Form 7000-02, Mar 85 (revised)

SECTRIAL000142

Mine Citation/Order  
Continuation

U.S. Department of Labor  
Mine Safety and Health Administration

Section I - Subsequent Action/Certification Date				
1. Subsequent Action 1a. Continuation <input checked="" type="checkbox"/> <input type="checkbox"/>	2. Dated (Original Issue)	Mo Da Yr	3. Citation/ Order Number	6681046 - 01
4. Served To Gary Campbell, Mine Supt.		5. Operator BLACK BEAUTY COAL COMPANY		
6. Mine AIR QUALITY #1 MINE		7. Mine ID 12-02010		(Contractor)

The accumulations of combustible materials were removed from the 2 Main East conveyor belt header inby to crosscut #48. Management required approximately 20 employees shoveling each shift and six 3,500 lb tanks of rock dust for a period of 18 hours to correct the effected area.

Section II - Subsequent Action Taken				See Continuation Form <input type="checkbox"/>	
8. Extended To		A. Date Mo Da Yr		B. Time (24 Hr. Clock)	
				<input type="checkbox"/> C. Vacated <input checked="" type="checkbox"/> D. Terminated <input type="checkbox"/> E. Modified	
Section IV - Inspection Data					
9. Type of Inspection		10. Event Number			
B02		4247603			
11. Signature <i>Tom E. Fisher</i>		12. Date	Mo Da Yr	13. Time (24 Hr. Clock)	
		24553	09/12/2008		1130

MSHA Form 7000-9a, Mar 85 (revised)

SECTRIAL000144

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE  
601 NEW JERSEY AVENUE, N.W., SUITE 9500  
WASHINGTON, DC 20001-2021  
TELEPHONE: 202-434-9917 / FAX 202-434-9949

February 13, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	DOCKET NO. KENT 2010-544
Petitioner,	:	A.C. No. 15-19039-207936
	:	
v.	:	
	:	
WILLIAMS BROS. COAL CO., INC.,	:	Mine: Coal Hollow Mine
Respondent.	:	

**DECISION**

Appearances: C. Renita Hollins, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;  
Ken Fletcher, CLR, MSHA District 12, Beaver, West Virginia, for Petitioner;  
Mr. Huford Williams, Williams Bros. Coal Co., Inc., Mouthcard, Kentucky, *pro se* for Respondent.

Before: Judge L. Zane Gill

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Williams Bros. Coal Company at its Coal Hollow Mine, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act” or “Act”). This case involves a single 104(a) C violation of the standard found at 30 CFR § 75.1506(a) with a total proposed penalty of \$1,657.00. The parties presented testimony and documentary evidence at the hearing held in Pikeville, KY, on October 18, 2011. At the conclusion of the presentation of evidence, the Court issued a bench decision<sup>1</sup> finding a violation of the standard with “low” negligence and with gravity assessed as reasonably likely to result in a fatality that could affect up to ten miners. The Court imposed a fine of \$100.00 to be paid within 30 days of the issuance of this written decision. This written decision adopts and adapts the bench decision in compliance with Commission Rule 2700.69(a). The bench decision is incorporated into this written decision to the extent it is consistent with it.

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<sup>1</sup> 29 CFR §2700.69(a).

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Williams Bros. Coal Company, (“the company”) operates an underground bituminous coal mine, the Coal Hollow Mine (the “mine”) near Meta, Kentucky. The mine is subject to regular inspections by the Secretary’s Mine Safety and Health Administration (“MSHA”) pursuant to section 103(a) of the Act and spot inspections. 30 U.S.C. § 813(a). The parties stipulated that the company is the operator of the mine, that the mine’s operations affect interstate commerce, and that the mine is subject to the jurisdiction of the Mine Act. (Joint Response to Prehearing Order, ¶ 2).

In 2007, in the aftermath of the Sago mine disaster, the company was required to purchase and install a safe haven refuge shelter by December 31, 2009. The company was required to specify which type of refuge unit it would install and include that information in its emergency response plan (“ERP”) for MSHA approval. (Tr. 36:19-38:19) It was also required, as a minimum, to provide MSHA with a purchase order (“PO”) from a vendor showing a delivery date prior to December 31, 2009. (Tr. 100:12-101:20; 118:1-5) On August 31, 2007, the company obtained a purchase order (“PO”) from the A.L. Lee, Co. indicating a projected delivery date of April 21, 2009. (Tr. 29:15-2; Exhibit R-1c) Before the delivery date arrived, the company fell on hard times and shut down operations at the mine. The mine was closed from April 2009 until September 2009; it reopened after Labor Day 2009. (Tr. 100:12-101:20)<sup>2</sup>

The April 21, 2009 delivery date came and went while the mine was shut down. Shortly after the company resumed mining operations, it presented MSHA with an amended proposed ERP on September 9, 2009, which specified a second delivery date of November 5, 2009, but did not change the type of refuge unit. MSHA approved the amendment on October 30, 2009. (Tr. 60:2-13; Exhibit S-4) The refuge unit was not delivered by the November 5, 2009 deadline. (Tr. 122:3-125:4)

Inspector Keith Preece (“Preece”) traveled to the mine on November 16, 2009, to conduct a regular E01 inspection. (Tr. 23:17-25:4) He discovered that the mine lacked a safe haven shelter required by the mine’s Emergency Response Plan (“ERP”). He was aware from prior dealings and discussions with the company that they had committed to MSHA that a shelter would be delivered to the mine on the two dates mentioned above. Preece wrote the citation in question here because, despite committing twice to have a refuge unit in place, the company had not complied. (Tr. 28:23-29:21)

Shortly before the November 5, 2009 deadline, Huford Williams decided to substitute a Carbonoks refuge unit for the A.L. Lee unit specified in the ERP. (Tr. 101:24-102:17) He was

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<sup>2</sup> The company obtained another PO for a Chem-Bio refuge unit and submitted it to MSHA for approval and substitution in the ERP in place of the unit from A.L. Lee, Co. The company abandoned having the Chem-Bio PO substituted for the A.L. Lee, Co. PO before it was approved by MSHA. As a result, the substitution was never finalized. (Tr. 30:5-22; 110:7-111:21; 120:15-121:4)

convinced that the Carbonoks unit was safer. (Tr. 104:11-107:7) He executed a contract to purchase the Carbonoks unit on November 16, 2009. (Exhibit R-2b; Tr. 108:8-23) Given the last minute nature of his change of mind, Mr. Williams was not able to take delivery of the Carbonoks unit before Preece's inspection, nor was he able to get the ERP amended to include the Carbonoks unit prior to its delivery. (Tr. 103:18-104:2) It was delivered on or about November 20, 2009. (Tr. 73:4-13) Training was required (Tr. 62:18-23), which was completed on about November 23, 2009. (Tr. 73:14-20) Mr. Williams submitted the paperwork to amend the ERP to include the Carbonoks unit on November 25, 2009. (Exhibit S-5) The MSHA office approved the amendment to the ERP to substitute the Carbonoks unit on December 3, 2009. (Exhibit S-5) Inspector Preece terminated the citation on December 9, 2009. (Tr. 73:14-74:4; Exhibit S-1)

## **DISCUSSION**

### **The Citation**

On November 16, 2009, MSHA Inspector Preece issued Citation No. 8236579 to the company for a violation of Section 75.1506(a) of the Secretary's regulations. The citation alleges that:

The operator has not provided the refuge alternative and components the MSHA has accepted in the currently approved Emergency Response Plan (ERP). The ERP Plan approved on September 14, 2007, shows that an A.L. Lee shelter would be used at this mine. The distance from the portal to the face is approximately 2,400 feet. Delivery dates of 4-21-2009 and 11-05-2009 have passed and operator has not provided the refuge alternative.

The inspector found that a fatal injury was unlikely to occur, that ten persons could be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary proposed a civil penalty in the amount of \$1,657.00. (Exhibit S-1 and S-6)

### **The Violation**

The company does not dispute that no safe haven shelter was in place on the date of the inspection, or that the two delivery dates had come and gone prior to the inspection. It argued that: (1) It changed its mind about which unit to use for valid reasons which it felt resulted in a better and safer unit ultimately being used; (2) It was unable to take delivery of the Carbonoks unit by the second delivery date due to factors beyond its control; and (3) It was unfair, under these circumstances, for Preece to issue a citation. The company argued that the delivery deadlines expected by MSHA were unnecessarily rigid, particularly considering the fact that the Carbonoks unit the company ultimately installed (within four days of the citation) (Tr. 53:3-15) cost considerably more than the A.L. Lee unit (Tr. 107:23-108:7) and, at least in its estimation, was a qualitatively better product. (Tr. 111:23-112:14)

It is clear that there was a violation of the standard. It avails the company nothing that it could not install the unit prior to the second delivery date because those delays are directly attributable to its general delay and its decisions to substitute safe haven units. MSHA did not care which of the three units the company considered was ultimately installed. (Tr. 55:16-21) The comparative strengths and weaknesses of the three units the company considered is not important to the legal analysis here. The change of mind did not occur until after the first promised delivery date had come and gone and within days of the second deadline. The company emphasized the substitution issue only at the last minute and in such a way that it appeared to MSHA (and the Court) to be a less-than-convincing excuse for missing the deadline. There is no evidence that MSHA exceeded its authority or acted arbitrarily in ultimately forcing the issue by citing the company for a violation of 30 CFR § 75.1506(a). I find that the company did not have a safe haven unit in place on the date of the inspection, nor did it have any legal excuse relieving it of its obligation to do so.

### **Negligence**

Section 110(i) of the Mine Act requires that in assessing penalties the Commission must consider, among other criteria, “whether the operator was negligent.” 30 U.S.C. § 820(I). Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard. An operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.

Negligence “is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). “A mine operator is required [...] to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* “MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.” *Id.* Reckless negligence is when “[t]he operator displayed conduct which exhibits the absence of the slightest degree of care.” *Id.* High negligence is when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* Low negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* No negligence is when “[t]he operator exercised diligence and could not have known of the violative condition or practice.” *Id.*

Inspector Preece alleged high negligence. I disagree. Although the guidelines provided at 30 CFR § 100.3 are not binding on the Court, they do provide an analytical framework to assess the degree of negligence evident in these facts. High negligence is appropriate in circumstances where the operator knew or should have known of the violative condition, and there are no mitigating circumstances. I find that there were mitigating circumstances in this case that should have been factored into the negligence assessment. The company was convinced that the comparative quality of the Carbonoks unit justified the delay. It is appropriate to consider the company’s point of view as a mitigating factor. It is also relevant and appropriate to consider as

evidence of mitigation the fact that mine operations were suspended for economic reasons shortly before the issuance of this citation. The combination of underlying economic distress and the additional cost of installing a refuge unit (Tr. 100:12-101:20) can be considered as evidence of the company's good faith, which even when balanced against the procrastination underlying the missed deadlines, justifies a lower assessment of negligence. I conclude that the company exhibited low negligence.

### **Gravity ("Seriousness")<sup>3</sup>**

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), is often viewed in terms of the seriousness of the violation. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Gravity is "often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. See *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ). The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986).

The citation categorizes the gravity of an event arising from this violation as potentially "fatal" for up to ten miners, but that such an event would be unlikely to occur. The evidence supports this taxonomy, and the company did not argue against it, other than to claim that there should have been no citation written at all.

The company runs a single shift employing 11 miners. (Tr. 83:5-16) Preece testified that he based his gravity assessment in part on the fact that by regulation a refuge unit is only required where the distance from the mine portal to the working face is more than 2,000 feet, and that distance in this case was approximately 2,400 feet. (Tr. 42:4-21) He felt that the difference between the 2,000 foot minimum distance and the 2,400 foot actual distance was minimal and supported the "unlikely" designation. He also considered the fact that this mine liberates very little methane, which is presumably a major contributor to mine fires and explosions, which such a refuge unit is intended to address. (Tr. 43:4-22) I see no reason to second guess his thinking. I concur and conclude that this violation is properly classified as "unlikely" to cause a fatal injury to at least ten miners, as alleged.

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<sup>3</sup> The citation in this case does not allege that the violation was significant and substantial ("S&S") or that it constituted an unwarrantable failure to comply with the standard in question.

## Penalty

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the authority to assess all civil penalties provided in [the] Act. 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that in assessing civil monetary penalties, the Commission [ALJ] shall consider the six statutory penalty criteria:

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

30 U.S.C. § 820(i).

The allegations in the Secretary's petition regarding the 30 CFR § 100.3 penalty factors were not factually contested by the company at the hearing. (Exhibit S-6) I accept the Secretary's allegations regarding the operator's size and that the violation was abated in good faith. I have considered the history or past violations at this mine summarized in Exhibit S-6, including citation for the standard discussed above. I have discussed the negligence and gravity associated with this citation above. In addition, I am moved by the evidence of last minute diligence to abate this violation. After considering all of the penalty criteria, I assess a penalty of \$100.00 for this citation.

## ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. §820(i), I assess a total penalty of \$100.00. Williams Bros. Coal, Company is hereby ORDERED to pay the Secretary of Labor the sum of \$100.00 within 30 days of the date of this decision.

/s/ L. Zane Gill  
L. Zane Gill  
Administrative Law Judge

Distribution: (Certified and Electronic Mail)

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, NW, SUITE 9500  
WASHINGTON, DC 20001-2021

February 14, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. SE 2008-793-M
Petitioner,	:	A.C. No. 09-00114-153085-01
	:	
v.	:	Docket No. SE 2008-898-M
	:	A.C. No. 09-00114-156246-02
OIL-DRI CORPORATION OF GEORGIA,	:	
Respondent.	:	Docket No. SE 2008-1012-M
	:	A.C. No. 09-00114-159341
	:	
	:	Mine: Simpson

**DECISION**

Appearances: Brooke Werner McEckron, Esq., Office of the Solicitor, U.S. Department of Labor, 61 Forsyth St., S.W., Room 7T10, Atlanta, GA 30303, for Petitioner; Larry R. Evans, Health and Safety Manager, Oil-Dri Corp. of America, P.O. Box 380, 28990 Georgia Hwy 3 N, Ochlocknee, GA 31773, for Respondent

Before: Judge Rae

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Oil-Dri Corporation of Georgia, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act” or “Act”). Docket SE 2008-898-M was initially assigned to Judge Paez while docket SE 2008-1012-M was assigned to Judge Barbour. On September 27, 2010, Judge Paez granted a motion to consolidate those two dockets. On June 24, 2010 docket SE 2008-793-M was assigned to me by the chief judge. Thereafter, on November 18, 2010, the chief judge assigned SE 2008-898-M and SE 2008-1012-M to me. Prior to the hearing, the Secretary vacated citation number 6084950 in docket SE 2008-898-M. Pursuant to my Notice of Hearing, the remaining six citations were heard in Valdosta, Georgia. The parties presented evidence and filed post-hearing briefs.<sup>1</sup>

On August 19, 2011, I granted a motion made by the Secretary to amend citation numbers 6084953 and 6084954 contained in docket SE 2008-898-M to plead alternative theories of the violations as discussed below.

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<sup>1</sup> The Secretary’s exhibits are not in order as certain pre-marked documents were not offered at hearing.

The parties entered into written stipulations that were accepted by the Court and entered as Ct. Ex. A.

## I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Oil-Dri Corporation of Georgia (“Oil-Dri”) operates the Simpson clay mine. The facility was inspected in early December 2007 by MSHA Inspector David Rosenau and again in June and December 2008 by Inspector James Ellison. They issued the six citations addressed herein.

### A. Significant and Substantial

A violation is significant and substantial (“S&S”) if the violation is “of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. §814(d)(1). There must be “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). Under the *National Gypsum* definition, “the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard –that is, a measure of danger to safety – contributed to by the violations; (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, 103-104 (5th Cir. 1988), aff’g *Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (De. 1987) (approving *Mathies* criteria).

In order to meet the requirements of the third, and most difficult to establish, element of the Mathias formula, the Commission has provided the following guidance:

We have explained further that the third element of the Mathias 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 (July 1984).

This evaluation is made in consideration of the length of time that the condition in violation existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S depends upon the surrounding circumstances of the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghioghen & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

**B. Docket SE 2008-793-M**

**1. Citation No. 6107482 dated 12-3-07**

This citation was issued by MSHA Inspector David Rosenau for a violation of 30 C.F.R. §56.11002. He assessed the alleged violation as reasonably likely to result in a permanently disabling injury, significant and substantial, and the result of high negligence. The proposed penalty is \$1,026.00. The narrative portion of the citation states:

The warehouse east side loading dock adjacent to the rail line has no safety chain, curbing, or handrails for a length of 23 feet. The unguarded condition could allow persons or vehicles to travel off the edge. Persons and forklift equipment travel in the area 24 hours/day and a fall off the 4 foot high concrete deck could be expected to cause serious debilitating injury. It was stated the area was formerly used as a railcar loading position but has been unprotected for an extended period. The condition is obvious to any observer and supervisory personnel are in the area throughout the week.

Ex. S-1.

The standard cited requires that elevated walkways, ramps and stairways be of substantial construction, provided with handrails and be maintained in good condition.

Respondent alleges that the loading dock was not a walkway as docks are designed for use primarily by forklifts to load over-the-road trucks, not for persons to travel to and from appointed work areas. They go on to state that the Secretary conceded the invalidity of the citation and changed her theory to a violation of 30 C.F.R. §56.11012 pertaining to travelways. From there, they cite the decision in *Secretary of Labor v. Magma Copper Company*,<sup>1</sup> FMSHRC 837 (July 1979)(ALJ) in which Judge Koutras found the intent of the standard (§56.11012) was to protect miners who use a travelway on a regular and frequent basis to move to and from their regular duty stations or in and about the mine. (Post Hearing Brief For Oil-Dri.) The Respondent is incorrect in their statement that the Secretary changed her position with respect to this alleged violation. The Secretary did not seek to amend this citation and has continued to maintain that the facts support a finding that the area was an elevated walkway in violation of 30 C.F.R. §56.11002. (Sec'y of Labor's Post Hearing Brief at pg. 15).

In support of her position, the Secretary cites *Secretary of Labor v. Alan Lee Good*, 23 FMSHRC 995 (Sept. 2001) which defined a walkway or passageway as "a way that allows passage to or from a place or between two points." Id. at 999.

Addressing the facts of this case, Inspector Rosenau, an MSHA inspector since 1999, testified that on December 3, 2007, he observed a concrete loading dock on the east side of the operator's warehouse that was unprotected by a chain or other safety device to prevent persons

or forklifts from traveling over the edge of the deck. The deck was measured by him to be 23 feet in length and four feet above the railroad tracks at ground level. (Tr. 94.) He was told by a company representative, Tony Brannen, who accompanied him on the inspection, that the loading area was used daily by persons on foot as well as by forklift drivers. The area is a warehouse and there is movement of materials and pallets within the area. (Tr. 95.)

Rosenau determined that the area was an elevated walkway because he was told that persons and forklifts travel through this area of the warehouse daily. (Tr. 102.) He said he also cited the condition as an unprotected elevated ramp because there is a ramp out of view in the photograph on which forklifts traveled to access the bridge that connects the two buildings depicted in the photograph. (Tr. 103, Ex. S-3.) There is a water fountain and telephone call box to the south end of the open edge of the loading dock which Rosenau felt supported a finding that it is an area designated for people to travel on foot. (Tr. 95-96, Ex. S-3.)

Bobby Lee Battle, Safety Coordinator for Oil-Dri, initially testified that the loading dock was rarely accessed by people. He then went on to say, however, that the loading docks are for the purpose of loading tractor trailers. There is commonly forklift traffic on them. It is uncommon for people to walk in this area and those who would be there would be the supervisor or lead person of that warehouse or the forklift driver. (Tr. 146-47.) He further acknowledged that the company has a policy that individuals on foot have to give way to the forklifts. (Tr. 146-47.) Additionally, the Respondent stipulated prior to hearing that miners travel a portion of the loading dock on foot. (Ct. Ex. A.)

The loading dock was used as a means for miners to go to or from one area of the mine to another. Brannen's comments to Rosenau on the day of the inspection are more credible than Battle's attempt to minimize the frequency with which the cited area was accessed. All of these factors lead me to the conclusion that the area was accessed by persons on foot in the regular performance of their duties in the mine. I therefore find that the area was a travelway within the meaning of the standard and the violation has been established.

### S&S and Negligence

Inspector Rosenau found the gravity of the violation to be S&S; that is it was reasonably likely, given the conditions, that a person could fall off the edge of the deck and suffer reasonably serious injuries such as bruises and broken bones. Should a forklift travel off the edge, there is a reasonable likelihood of more serious injuries of a permanently disabling nature from a forklift pinning the operator beneath it. (Tr. 104-06.)

He found the negligence to be high because the company has been cited for the same standard in the past and because Oil-Dri demonstrated a low standard of care. Furthermore, there was no physical evidence to suggest that this area has ever been protected by any warning signs, flags, handrails or chains. (Tr. 106-07.)

I concur with Rosenau's S&S determination. Under normal continued mining operations, it was reasonably likely that the unguarded edge posed a hazard of a person falling off the edge of the dock and suffering reasonably serious injuries. I find that the nature of the injuries likely to occur would be broken bones and contusions or possibly a head injury. Because this mandatory standard pertains to a walkway used by pedestrians rather than mobile equipment, I have not taken into consideration the likely injuries involving a forklift accident.

With regard to negligence, I find mitigation in the fact that the docks had been inspected numerous times in the past by MSHA inspectors, none of whom had indicated the need for the chain or handrails across the raised deck. (Tr. 146-47.) I assess the negligence as moderate.

**1. Citation No. 6107485 dated 12-4-07**

This citation was written by Rosenau for an alleged violation of 30 C.F.R. §56.11012. He assessed this condition as reasonably likely to cause a permanently disabling injury to one person, S&S and the result of high negligence. The proposed penalty is \$1,026.00. The narrative portion of the citation reads as follows:

The access ladder to the top of the corrugated bin located in the LVM drier area does not have a safety chain or gate across the top of the handrails that surround the top of the bin deck. This condition could allow a person to fall back through the opening while working on the top of the bin. The height of the ladder is at least 15 feet. A fall from this height could result in serious injury or death. It was stated persons access the top deck of the bin every 3-4 weeks for service.

Ex. S-4.

The mandatory standard requires that openings above, below or near a travelway through which persons or materials may fall shall be protected by rails, barriers or covers. (Tr. 109-10.) Inspector Rosenau testified that the corrugated material is an outer covering around a bin designed to provide additional strength to the bin wall. (Tr. 110.) The bin deck is the roof of the bin which was accessed by ladder surrounded by a cage. The top of the cage has a vertical rail that ascends from the top rung of ladder to the horizontal handrail that runs around the bin deck. ( See Photo. Ex. S-6.) Rosenau stated that the standard would require a chain between the two vertical rails to prevent a fall through the opening of the cage. (Tr. 110-11.) This area was approximately 15 feet above the ground. (Tr. 111.) Rosenau's field notes taken contemporaneously with the inspection indicate that Battle and McCabe told him at the time he observed the condition, that the bin deck was accessed every three to four weeks. (Tr. 111, Ex. S-7 at pg 39.)

Rosenau determined that the ladder was a travelway because it was used to access the bin deck at least occasionally which is sufficient to find it fit within the definition of a travelway. There did not appear to be any other means of access to the top of the bin than the cited ladder.

(Tr. 115.) The top rung of the ladder was approximately one foot above the level of the bin deck. A person exiting the ladder onto the bin deck could potentially trip over the rung and fall onto the bin deck, or if backing onto the ladder, could trip backwards and fall down the ladder. The ladder was exposed to the elements thus increasing the potential for a slip and fall. (Tr. 116.) A chain across the opening of the ladder would prevent such a fall. (Tr. 117.) There did not appear to be any type of welded fasteners to suggest that there had ever been a chain installed. (Tr. 117.)

Respondent refutes the interpretation that the top of the ladder is a travelway or that an opening above, below or near a travelway existed. They contend “the transition point from a ladder or stairs to an upper or lower surface is merely a continuance of a way for a person to go from one place to another, and thus ...not an ‘opening.’” To require the installation of a chain would impose an additional obstacle making travel unsafe. They cite to Rosenau’s testimony that neither a staircase to the top of the bin nor a ladder into a haul truck requires a safety chain nor therefore this standard is inconsistent with other MSHA standards and OSHA standards. (Post Hearing Brief for Oil-Dri.)

Addressing this last point first, Rosenau explained that a stairway leading to the top of the bin would not have to be equipped with a handrail; the difference being that a stairway allows for gradual ascent which does not require the use of both hands to climb. A ladder, on the other hand, requires vertical ascent where a person hangs onto the upper rung and pulls himself up requiring three –point contact. (Tr. 126-27.) Rosenau acknowledged that ladders leading to the cab of a large haul truck do not require rails nor does a ladder less than 20 feet tall require a back guard. (Tr. 129.) Although this ladder does have a back cage, Rosenau was of the opinion that a person standing on the bin deck could lose their balance and fall face first down the ladder without any protection from the back cage absent a chain across the top. (Tr. 130.) Regardless of the reasons why mandatory standards may vary or seem inconsistent with one another or why OSHA may have different standards than MSHA, the issue here is not whether a handrail is needed alongside a stairway or ladder but whether the ladder was a travelway with an opening at the top as Rosenau described that required a chain across it to prevent a fall. I note, however, that as stated below, Battle testified that another ladder he did believe was a travelway did have a chain across it in compliance with this mandatory standard.

Turning to the issue of whether the ladder was a travelway, Battle testified that, contrary to his statement to Roseau at the time of the inspection that the top of the bin was accessed every three to four weeks, no work was performed on top of the bin. Since the installation of bin indicators, there was no reason to use the ladder to access the area. (Tr. 150.) There is a work area above the corrugated bin where the head pulley and conveyor are located. It is accessed by a second higher ladder at the top of the bins which is a travelway and has a ladder with a chain across it. (Tr. 150-51.) However, there is no barricade to prevent anyone from climbing the cited ladder to access the top of the bin and then the secondary ladder to the conveyor. Battle admitted that employees do go to the top of the bin, but he didn’t know why. (Tr. 157.)

Brannen testified conversely that the top of the bin is a “travelway,” not a work area; however, he admitted that if work had to be performed on the tank, it would be a work area. (Tr. 180.) He further explained that the cited ladder was used as a travelway to the top of the bin from which the secondary ladder to the conveyor was in turn accessed. (Tr. 178.) He stated that the secondary ladder has a chain because it leads to a work area where people are moving around. On a travelway, such as the cited ladder, there is no need for a chain, he claimed. (Tr. 178-79.)

Despite Brannen’s characterization of the ladder as a **travelway**, Respondent refutes the interpretation that the top of the ladder is a travelway. They again cite *Magma Copper Mine, Supra*, in support of their theory that this is not a travelway. (Post Hearing Brief For Oil-Dri.) It is difficult to discern how a ladder which is a “way for a person to go from one place to another” as described by the Respondent, is substantially different than Judge Koutras’ definition of a travelway being a placed used “for movement to and from [one’s] regular duty stations.” The ladder in question is a travelway to the bin deck which is a work place in and of itself at times, and which is also a travelway to another ladder which in turn leads to an area that Battle and Brannen confirmed is a work area. Their argument, then, is that because this ladder is one segment of the travelway leading from the ground to the conveyor head pulley two levels up, it is no longer a travelway – just a “continuance of a way for a person to go from one place to another.” They offer no authority on point in support of this odd contention.

The term “travelway” as it relates to section 56.11012 is defined in section 56.2. That section states “[t]ravelway means a passage, walk or way regularly used and designated for persons to go from one place to another.” 30 C.F.R. §56.2. Judge Manning in his *Essroc Cement* decision cites to *Alan Lee Good d/b/a Good Construction*, 23 FMSHRC 995, 1000 (Sept. 2001) in stating that for an area to qualify as a travelway, “[t]he weight of the evidence must establish the area is regularly used and designated for persons to go from one place to another.” 33 FMSHRC 459, 463 (Feb. 2011)(ALJ). In *Watkins Engineers and Constructors*, the Commission determined that a breezeway was a walkway because it was the “designated way for accessing the bag house area” and it was the “only available route.” 24 FMSHRC 669, 678 (July 2002).

The evidence in this case leads me to the following conclusions: 1) the cited ladder was the way to go from the ground level to the corrugated bin top and also to the secondary ladder to the upper level where the conveyor head pulley was located. It was so defined by the Respondent’s own witness, Brannen, 2) it was designated as the means by which to access the upper work area as there was no other access to the upper ladder according to the uncontradicted testimony of Rosenau, 3) it was used regularly, and 4) there was an opening at the top of the travelway through which persons could fall. This is corroborated by the statements made by Battle and McCabe to Rosenau during the inspection that the ladder was used every three to four weeks which I find sufficiently frequent to be considered regular use. The mandatory standard has been violated.

## S&S/Negligence

In Rosenau's opinion, it was reasonably likely that this condition posed the discrete hazard, under continued normal mining conditions, of a miner tripping, slipping or losing his balance and falling from the top of the ladder. Such a fall which would be reasonably likely to result in permanently disabling injuries or death due to the height involved. (Tr. 118-19.) He based his finding of high negligence on the fact that the company had two similar violations in the past, although not at this location. (Tr. 119.)

I concur with Rosenau's opinion given the height of the ladder and the fact that it is exposed to the elements increasing the risk of slipping from the roof of the bin, that the violation is S&S. I further concur with his opinion that it was the result of high negligence. The condition was openly and obviously a dangerous one. Management described this ladder as a travelway to the secondary ladder which had a chain across it. Brannen testified that because this ladder was a travelway, it did not require a chain across the opening. This evidences cognizance of the need for the chain and the callous disregard for protecting the miners from danger.

### **C. Docket SE 2008-898-M**

#### **1. Citation No. 6084953 dated 6-6-08**

This alleged violation of 30 C.F.R. §56.11001 was issued by Inspector James Ellison. Ellison accessed this non-significant and substantial violation as low in gravity which would be unlikely to result in an injury. An injury would be in the nature of lost workdays or restricted duty affecting one person. This alleged violation involved a moderate degree of negligence. The proposed penalty is \$100.00. The citation reads as follows:

Safe access was mot (sic) maintained in the walkway adjacent to the CV26 conveyor belt. A material spill had occurred which covered the width of the walkway for about 6' long (sic) to a depth of about 8 inches deep (sic). The walkway is inclined and the spill covered below (sic) an overhead conveyor with restricted headroom. Material spills expose persons to the hazard of trip and fall injuries.

Ex. S-9.

This mandatory standard states that a safe means of access shall be provided and maintained to all working places.

The Secretary amended her pleadings with respect to this citation including mandatory standard section 56.20003 as an alternate theory of the violation. 30 C.F.R. §56.20003 provides workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly.

Ellison has a master's degree in occupational safety and has been a safety manager for a cement mine where he worked for 32 years. He was an MSHA inspector from 2002 until his

retirement in 2011. On June 6, 2008, during a regular inspection, Ellison observed clay material covering the width of a walkway below an overhead conveyor belt.<sup>2</sup> The material was estimated by him to be approximately six feet in length and three feet in width and as much as eight inches deep in some areas. He gauged the depth of the spill by using his 9x12 inch notebook as a reference and observed that the material covered over one-half the 12" notebook. (Tr. 20-21, Photo. Ex. S-11.) He determined that the cited area was a working place as well as a walkway because another conveyor belt runs alongside the entire length of this walkway. That conveyor has throughing idlers, or rollers, that support the upper strand of the belt. It also has return idlers which support the belt as it returns on the lower side. The belt requires maintenance when the roller bearings wear out and require replacement or when the carrier rollers need to be cleaned, lubricated, or replaced. The belt also needs to be inspected. The walkway provides the platform from which to perform this work. ( Tr. 25.)

The spill of material on the walkway would pose a danger of tripping resulting in a foot injury and lost workdays or restricted duty, Ellison testified. (Tr. 26-27.) Because there were access points at either end of the walkway enabling a miner to reach the portions of the belt not directly adjacent to the spilled material, Ellison felt it would be unlikely to cause an injury. (Tr. 27.) Further, it would be unlikely that more than one person would be injured at the same moment. (Tr. 28.)

Oil-Dri contests the violation of §56.11001. Citing Judge Barbour's decision in *Millington Gravel Company*, 21 FMSHRC 1065(Sept. 1999)(ALJ), they assert that it is necessary to prove the area involved was a means of access to a working place and that the means of access was not safe. The fact that there were points of access on either end of the walkway both of which were safe and allowed for passage up to the point where the spill was located leads to the conclusion that the standard has not been violated. Additionally, they argue that the evidence must prove that the area is a place where work is being performed at the time of the inspection to meet the regulatory definition contained in the mandatory standard. They cite to *Standard Slag Company*, 2 FMSHRC 3312 (Nov. 1980)(ALJ) in support of this proposition. (Post Hearing Brief For Oil-Dri.)

I find *Millington Gravel* supports the Secretary's position with respect to this violation. Judge Barbour determined that a hole in an upper walkway was a violation of the same mandatory standard as cited here. Although the adjacent walkway led to an area that was used as a working place once every two years or so when sifting screens required replacement, that did not detract from the characterization as "a place where there was a reasonable possibility of a miner using the area involved as a way to reach or leave a working place." *Millington Gravel* at 1068. Ellison credibly testified that this walkway was used to service and inspect the adjacent conveyor belt. There was no other point from which the conveyor could be serviced. A miner would be required to walk the entire length of the walkway including the area where the spill was located, to inspect the belt or service the rollers and bearings located adjacent to the spill. I do not find Battles' or Brennan's testimony that the conveyor belt never needed maintenance

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<sup>2</sup> The Respondent stipulated that the cited area was an inclined walkway. (Ct. Ex. A pg. 3)

credible.(Tr. 135, 158, 171, 187.) Instead, I find Ellison’s testimony that the belt rollers do need lubrication, cleaning and replacement as well as regular inspections credible.

*Standard Slag Company* involved a situation where the alleged work platform was used with far less frequency than here. The inspector in that case could not say how frequently the area was used. The uncontroverted testimony from the operator’s witness was that the cited area was not used for years at a time. Judge Koutras found the area was not being used as a work place at the time of the inspection or at any other relevant time. Here, Ellison credibly testified that when the conveyor needed to be serviced in the area of the spill or when the belt needed to be inspected, access to the cited area would be required as there was no other means of access thus making use of the walkway more frequent.

I find the Secretary has met her burden of proving a violation of both 30 C.F.R. §56.11001 and §56. 20003.

### Negligence

Ellison opined that the condition was the result of moderate negligence because although it was visible, there was no evidence that it had been reported to management. (Tr. 28.) It was not possible to determine the exact length of time the condition was present. (Tr. 72.) I concur with his findings. I also find the gravity is low.

#### **1. Citation No. 6084954 dated 6-9-08**

Ellison issued this citation under 30 C.F.R. §56.14112(a)(1) the narrative of which states:

The guard for the drive belts, driven pulley, and fan shaft on the small Griffin dust collector located at the top of the dust silo was not maintained in a manner that would prevent persons from contacting the moving drive belts, the driven pulley, and the rotation fan drive shaft. Sections of the expanded metal guarding material were missing which exposed the moving shaft, drive belts and driven pulley. Persons working in this area were exposed to injury from contact with the moving machine parts.

Ex. S-12.

The gravity of this alleged violation was determined to be unlikely to result in a lost workday or restricted duty type of injury and not significant and substantial and affecting one person. The negligence was assessed as moderate and the proposed penalty is \$100.00.

The relevant section of the mandatory standard provides: “guards shall be constructed and maintained to withstand the vibration, shock, and wear to which they will be subjected during normal operation and not create a hazard by their use.”

I granted the Secretary's motion to plead 30 C.F.R. §56.14107(a) in the alternative. This mandatory standard requires "[M]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

The evidence presented by Ellison is that on the day of the inspection he observed that a section of the metal guard on this dust collector located at the top of the dust silo had been cut away where a lubricating device had been inserted. The resulting 5"x 8" opening was sufficiently large for one hand or two hands held together to fit through and come into contact with moving parts on the dust collector. (Tr. 32-36.) Pinch points were present where the drive belts contacted the drive pulley, which the inspector opined, could result in the amputation of a finger or a crush injury. (Tr. 38, Photo. Ex. S-14.) Based upon the condition of the remainder of the guard, it appeared that the guard was of sufficient construction and had not been damaged due to an accident. It also appeared to have been missing for a lengthy period of time as the surrounding metal had rusted. (Tr. 39.) Ellison stated that miners walk within two feet of the dust collector which is in a working area of mine due to the fact that maintenance had to be performed on a periodic basis. (Tr 42.)

Brannen confirmed that the guard was not damaged in an accident and Battle acknowledged that the opening was large enough for a hand to fit through and come into contact with moving parts. (Tr. 162, 139.) Respondent, however, maintains that the guard had always been in the condition as Ellison observed it. Therefore, the allegation that the guard was missing must fail. They further aver that the narrative portion of the citation alleges that the absence of the guard failed to protect persons from contacting the moving parts. Purposeful maintenance is not encompassed in this mandatory standard; rather, the standard seeks to prevent only inadvertent or accidental contact resulting from stumbling, falling, inattention or carelessness. Therefore, because the only contact with this fan is intentionally made by maintenance personnel and it was in an area on top of a silo with no tripping hazards were present, the citation must be dismissed.(Post Hearing Brief For Oil-Dri.)

I find both of these arguments to be without merit. With regard to the proposition that there had never been a guard so there could not be a failure to maintain it, this argument ignores the fact that mandatory standard 56.14112(a) requires that a guard *shall be constructed* in addition to being maintained. Mandatory standard 56.14107(a) imposes a requirement that moving machine parts be guarded. Under either standard, the operator has the burden of constructing a guard if one is not present where exposure to moving parts is present. It was obvious to Ellison that a guard was needed as cited. Ellison testified that it was also obvious that a guard had been cut away in order to install the automatic lubricating device on top. The metal appeared to have been cut with a torch which resulted in paint being worn away. There is also what appears to be a mounting bolt hole which would have held the missing guard in place. (Tr. 36.) The Respondent offered no evidence other than Battle's self-serving statement that there had never been a guard in support of their position.(Tr. 140.) I do not find his testimony to be credible in light of Ellison's observations. I do find Ellison's testimony credible that there had been a guard and Oil-Dri failed to maintain it.

There was no evidence presented by the Secretary to establish that the guard did not withstand the vibration, shock or wear of the dust collector as required by Section 56.14112(a). In fact, Ellison testified that from the remaining portion of the guard, it appeared to have been very well constructed, but removed. This theory of the violation fails.

The Secretary has met her burden of proving a violation of 30 C.F.R. §56.14107. This standard seeks to prevent injuries that can occur from any type of inattentiveness, carelessness, accident or negligence by requiring that all moving parts be guarded. It is a strict liability standard and does not provide exceptions such as argued by Oil-Dri that it was not required because only intentional contact with this equipment was made. Ellison's testimony established that a guard was needed, that the moving parts were exposed and that such exposure could cause a serious injury to a miner.

### Negligence

Moderate negligence was assessed by the inspector because Ellison found no evidence that the condition had been reported to management. I do not agree with this assessment as it was apparent to Ellison that the condition had been present for a sufficiently long period of time for the metal to have rusted. Additionally, the oiler had been added to the machine which would have been directed by management. It appeared that the portion of the guard that was removed was done for the purpose of installing the oiler. The evidence established, however, that the area was infrequently accessed and it was located in a remote area on top of the dust silo. Only miners servicing the equipment would be in contact with it and that would be infrequent. These facts provide sufficient mitigation to reduce the negligence to moderate.

#### **2. Citation No. 6084958 dated 6-11-08**

Ellison issued this citation which reads:

A drop off (sic) of about 4" existed at the West (sic) end of the concrete slab for the outside storage area at building #6. Forklifts use this area of the slab as a travelway to access the storage racks. Fork lift (sic) tire tracks were observed within 5 feet of the drop off (sic). Unprotected drop offs (sic) which could cause the mobile equipment being used to overturn exposes the operators to the hazards of injuries associated with powered haulage accidents.

Ex. S-15.

The citation was written as unlikely to produce permanently disabling injuries and not S&S, affecting one person and the result of a moderate degree of negligence. The proposed penalty is \$100.00.

The section of the cited mandatory standard, 30 C.F.R. §56.9300(a), requires berms or guardrails be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

The photograph taken by Ellison of the cited condition depicts a cement slab running north-south alongside of which is an area of overgrown weeds. The ground was estimated by Ellison to be about four feet below the cement slab creating a drop-off of the same elevation. (Ex. S-17.) Ellison testified that this area is outside of Building 6 and it is used by forklifts as a travelway to the storage racks located to the right of the slab.(Tr. 45, Ex. S-17 pg. 2.) While he was conducting his inspection, Ellison observed a forklift travel from the area just north of building #6, up a ramp and onto the slab and then over to the storage racks. The ramp used by the forklift to access the slab was more gradual than the drop-off from the edge but was of the same elevation change – four feet. (Tr. 45-6.) Ellison also observed forklift tire tracks within five feet of the edge of the drop-off as recorded in his inspection notes. (Tr. 44, Ex. S-16.)

Ellison determined that this slab area was a roadway or travelway (the terms being interchangeable in this particular instance) because he observed it being used as such while he was there. Also, it was paved and prepared for mobile equipment to travel upon it. (Tr. 49.) He estimated the weight of a forklift as ranging from one ton up to eight or ten tons which could cause a permanently disabling or fatal injury should it travel off the edge of the slab and overturn. (Tr. 47-48, 51-52.) Forklifts are normally equipped for only one occupant which formed the basis of his determination that one person would be affected if an accident occurred. (Tr. 52.) Because there was an alternate route to access the rack area, and because in the lengthy time in which the condition had existed there had never been an accident, he determined that such an injury was unlikely to occur. (Tr. 50-51.) The violation was abated by construction of a berm. (Ex. S-17.)

Oil-Dri contests the violation on the basis that the concrete slab was a storage area rather than an elevated roadway. They argue that such an overly broad interpretation would be tantamount to a finding that every area in which a vehicle could be operated would be defined as a roadway. (Post Hearing Brief For Oil-Dri.) They cite cases in which they concede that scales and bridges have been found to be roadways, but cite no authority concluding that a concrete area that provides access for mobile equipment to travel to and from a storage facility is not a roadway.

Oil-Dri's contention that the standard must be read narrowly is incorrect. In *Secretary of Labor v. Pappy's Sand & Gravel*, 20 FMSHRC 647 (June 1998)(ALJ) the judge found that a levee over which heavy equipment was dumping soil to raise its height it was an elevated roadway necessitating a berm despite the evidence that once the levee was completed, it was intended that grass would be planted on it. It would no longer be used for vehicular travel. The ALJ relied on the dictionary definition of the term "roadway" which included a "thoroughfare" which is defined as a place through which there is passing. Consequently, as soon as the area was traveled by the trucks, the levee became a roadway at least during the period of time in which it was being constructed. A similar result was reached by the Commission in *Secretary of Labor v. El Paso Rock Quarries, Inc.*, 3 FMSHRC 35 (Jan. 1981) where the ALJ was instructed to consider a bench an elevated roadway because it was used to carry explosives to the top of the quarry. In *Secretary of Labor v. Capitol Aggregates, Inc.*, 4 FMSHRC 846 (May 1982), the Commission interpreted an elevated ramp used by a front-end loader to access the coke hopper

as an elevated roadway. Judge Miller found that the fact that a rubber-tired truck was seen traveling on a bench was sufficient evidence that the bench was a roadway. *See Secretary of Labor v. Black Beauty Coal Company*, 32 FMSHRC 356 (March 2010)(ALJ).

I find these cases provide a myriad of examples of how broadly the definition of an elevated roadway is meant to be applied to effectuate the purpose of the standard and the Act as a whole. Ellison saw a forklift use the area cited as a means by which to travel from one part of the mine to another while he was conducting his inspection. Other tire tracks were visible in the area indicating that the area had been used in the same manner before. It stands to reason that with the slab being adjacent to storage racks, and having a ramp connecting the slab with the rest of the mine; vehicles would use the slab as the thoroughfare by which to travel between these areas. The thoroughfare or means by which the forklifts traveled is a roadway within the meaning of the mandatory standard. The citation was properly issued.

### Negligence

Ellison assigned moderate negligence to this condition because it had never been reported to the company despite the fact that it had existed for some time. Additionally, there had never been an accident due to the condition. The forklift operators were aware of it and “had learned how to handle it.” (Tr. 52.)

I find the violation to be serious but agree with the inspector that there were sufficiently mitigating circumstances to support a finding of moderate negligence.

#### **D. Docket SE 2008-1012-M**

##### **1. Citation No. 6084951 dated 6-23-08**

This alleged violation of 30 C.F.R. §56. 14100(b) was issued for the following condition:

The Show Box 3000 lbs (sic) cable hoist located on the 4<sup>th</sup> floor of the mill building was not maintained is (sic) a safe condition to prevent exposure to hazards by persons using the hoist. Two legs of the four part 3/8” wire rope hoist line were kinked near the hoist drum on the fourth floor of the mill building. This 4 part hoist is used to lift equipment, tools and machine parts to work floors during maintenance operations in the mill building. The continued use of damaged wire rope hoisting cable exposes persons to the hazard of hoisting accidents and injuries from falling objects.

Ex. S-19.

This non-S&S citation records the gravity of the condition as unlikely to result in injury but such injury would be of a permanently disabling nature. One person was affected and it resulted from moderate negligence. The proposed penalty is \$100.00.

The cited standard requires defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.

Ellison testified that two legs of the wire rope hoisting cable in question were kinked near the drum. (Tr. 54.) The condition is pictured in Ex. S-21. Upon closer inspection of the cables, he could see that the left leg was damaged horizontally across the wire rope where the metal stands had been damaged and appear to have rusted. The rust on inner wires of the rope indicated to him that the condition had been present for at least a couple of weeks although it was difficult to be sure because environmental factors would affect how quickly the metal rusts. (Tr. 66.)

It was possible to tell with the aid of a magnifying glass that there was a void area inside the bent portion of the rope indicating that the wires had separated. (Tr. 59-62.) The significance of a kink in a wire rope is that the individual wires that make up the rope cease to function independently of one another and cannot take the load put upon them. The wires often break, reducing the overall strength of the cable. Should a sufficient number of wires break, a catastrophic failure of the cable can result. For this reason, once a wire rope is kinked, it should be removed from service. (Tr. 56-57.)

Ellison stated that during his tenure as a maintenance foreman or manager for 14 years with Holcim, he was responsible for inspecting wire ropes for such damage and removing them from service. (Tr. 54-55.) He completed a training class with wire rope manufacturer Denver Wire Rope Company in 1992. He was instructed in this course that if a kink is present the rope must be removed from service. He is also familiar with the American National Standards Institute (“ANSI”) which has the same requirements. (Tr. 62-63.) He determined, based upon the visible kinks in two of the legs of this rope, that it posed a danger of failure when lifting a heavy load. Such failure could result in the load being hoisted falling and striking a miner working around or near the hoist. Permanently disabling or fatal injuries would result. (Tr. 57, 65-66, 84.) He determined that the likelihood of such an event was unlikely because the hoist was used once or twice a year. (Tr. 66.)

Oil-Dri contests this alleged violation contending that the definition of a kink is a “pulled out twisted loop” under ANSI standards which is not the condition cited here. Further, they contend that safety would not be affected during continued use as 30 C.F.R. §56.16009 requires persons to stay clear of suspended loads, and finally, that management was not under an obligation to correct the defect because they were not aware of it and had no reason to be. (Post Hearing Brief For Oil-Dri.)

Addressing their last argument first, the Respondent is correct in stating that there was no evidence presented that would establish the operator had any knowledge of the cited condition or that their lack of knowledge was unreasonable. They cite Judge Hodgdon’s decision in *Secretary of Labor v. Lopke Quarries, Inc.*, 22 FMSHRC 899 (July 2000)(ALJ). That decision was reviewed and affirmed by the Commission in *Secretary of Labor v. Lopke Quarries, Inc.*, 23 FMSHRC 705 (July 2001), stating that because the Secretary failed to establish when the defect

occurred, it could not be determined whether the operator's failure to be aware of it and correct it was unreasonable. In this case, Ellison testified that the condition could have existed for a couple of weeks but he could not be sure as humidity and other environmental conditions would affect the rate at which the metal rusted. Furthermore, he testified that he reduced the level of negligence because he could find no evidence that management was aware of the defect. No evidence was presented to determine whether the operator should have known of the defect at the time of the inspection. For instance, there was no indication as to how often the hoist was required to be inspected. Brannen testified that the hoist is used once or twice a year and Ellison said in order to see the separated wires inside the rope, he used a magnifying glass. In light of these factors, I do not find a basis upon which to find that the operator should have known of the defect triggering the requirement to correct it in a timely manner.

The citation is **VACATED**.

## II. PENALTIES

The Mine Act delegates the duty of proposing penalties under the Mine Act to the Secretary. 30 U.S.C. §§815(a) and 820(a). When an operator challenges the Secretary's proposed penalties, the Secretary petitions the Commission to assess them. 29 C.F.R. §2700.28. Once petitioned to assess the penalties, the Commission delegates to the administrative law judges the authority to assess civil penalties de novo for violations under the Act. Section 110(i), 30 U.S.C. §820(i). The administrative law judge is required by the Act to consider the following six statutory criteria in her assessment of the appropriate penalty:

(1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. §820(I).

The penalty assessment for a particular violation is within the sound discretion of the administrative law judge so long as the six statutory criteria and the deterrent purpose of the Act are given due consideration. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

I have discussed the gravity and negligence involved in each citation within the body of the discussion of each above. I have given the additional statutory criteria consideration as well as the deterrent purpose of the Act in assessing the penalties below. The parties entered into stipulations of fact with regard to the proposed penalty for each citation. They are that the proposed penalties are appropriate to the size of the Respondent's business, will not affect the operator's ability to remain in business and that the Respondent promptly abated each of the cited violations in good faith. (Ct. Ex. A.) I accept those stipulations.

Having considered the six statutory criteria and the stipulated facts, I assess the following penalties:

Docket No. SE 2008-793-M

1. Citation No. 6107482 - \$ 500.00
2. Citation No. 6107485 - \$1,026.00

Docket No. SE 2008-898-M

1. Citation No. 6084953 - \$100.00<sup>3</sup>
2. Citation No. 6084954- \$100.00
3. Citation No. 6084958- \$100.00

Docket No. SE 2008-1012-M

1. Citation No. 6084951- Vacated

A total of \$1,826.00 is assessed for the violations that were heard and decided herein.

## II. ORDER

Docket No. SE 2008-898-M, Citation No. 6084950 is **VACATED** upon request of the Secretary. I VACATE Docket No. SE 2008-1012-M, Citation No. 6084951. Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. §820(i), I assess a penalty of \$1,826.00 for the remaining two violations under Docket No. SE 2008-793-M, and the three remaining violations under Docket SE 2008-898-M. Oil-Dri Corporation of Georgia is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,826.00 within 30 days of the date of this decision.<sup>4</sup>

/s/ Priscilla M. Rae  
Priscilla M. Rae  
Administrative Law Judge

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<sup>3</sup> Although I found the Secretary proved a violation of both mandatory standards pled, I impose this penalty for only one violation, not both.

<sup>4</sup> Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

**721 19<sup>th</sup> St., Suite 443**

**Denver, CO 80202-2500**

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February 21, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2010-73-M
Petitioner,	:	A.C. No. 02-02683-195065
	:	
v.	:	
	:	
EUREKA ROCK, LLC,	:	
Respondent.	:	Eureka Portable Screening Plant

**DECISION**

Appearances: Sarah T. White, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, on behalf of the Petitioner;  
Thomas Mattics, President, Eureka Rock, LLC, Ashfork, Arizona, on behalf of the Respondent.

Before: Judge Miller

This case is before me upon a petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the “Act”), charging Eureka Rock, LLC, (“Eureka”) with multiple violations of 30 C.F.R. § 50.30(a). The Secretary proposes a total civil penalty of \$448.00 for the alleged violations. A hearing was held in Phoenix, Arizona on January 24, 2012.

**I. BACKGROUND**

Eureka operates a quarry, which includes a crushing and screening operation in Prescott Valley, Arizona. The mine produces sized volcanic rock that is sold in the local region as landscaping stone, road base, and pipe bedding. Thomas Mattics, owner of Eureka Rock, operates the mine on his own, according to his testimony, and does not employ any additional workers. Mattics relies on his sole operator/owner status as justification for not complying with the requirements of 30 C.F.R. § 50.30(a). Mattics however, does not deny that he owns and operates the quarry and that trucks arrive at the mine to be loaded by Mattics. I find that Eureka is a mine as defined by the Act and is subject to the jurisdiction of the Commission.

## II. VIOLATIONS

At the outset, I note that, within the last five years, the Secretary issued multiple citations to Eureka Rock for failure to comply with 30 C.F.R. § 50.30(a). Some of the early citations were paid, others were contested and some of those contested by Eureka, were upheld and affirmed by ALJ Melick and a civil penalty was assessed against Eureka. *Eureka Rock, LLC*, 32 FMSHRC 922 (July 2010) (ALJ). The general issue before me is whether Eureka Rock violated the cited standards as charged in this instance and, if so, the appropriate civil penalty for those violations.

a. *Fact of Violation - Citation Nos. 6453252, 6453253, 6453254, and 6453255*

Oscar Montano, MSHA Inspector, has been a mine inspector for more than six years and worked in the mining industry for sixteen years prior to joining MSHA. On June 29, 2009, Inspector Montano visited the Eureka Rock mine to conduct a routine inspection. While on site, Inspector Montano issued Citation Nos. 6453252, 6453253, 6453254, and 6453255 for alleged violations of 30 C.F.R. § 50.30(a). Citation No. 6453252 states, in pertinent part, that “[t]he operator failed to report on MSHA Form 7000-2 the correct total hours worked for the second quarter of 2008. The operator believes that he is not by definition an employee since he receives no salary/wages from this one person operation therefore, reports zero hours worked.” Citation Nos. 6453253, 6453254, and 6453255 are identical in all respects to Citation No. 6453252, but address the third quarter of 2008, fourth quarter of 2008, and first quarter of 2009, respectively.

In each of the citations the Secretary alleges that there was no likelihood of an injury or illness, that no lost workdays would be suffered, that the violations were non significant and substantial, and that the violations were the result of the operator’s high level of negligence. Section 50.30(a) of the Secretary’s regulations reads as follows:

Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 in accordance with the instructions and criteria in §50.30-1 and submit the original to the MSHA Office of Injury and Employment Information, P.O. Box 25367, Denver Federal Center, Denver, Colo. 80225, within 15 days after the end of each calendar quarter. These forms may be obtained from the MSHA District Office. Each operator shall retain an operator's copy at the mine office nearest the mine for 5 years after the submission date.

30 C.F.R. § 50.30(a).

The facts of this case are not in dispute. The Respondent does not contest that he failed to record the hours worked at the mine on MSHA form 7000-2 (the “form”). Instead, Mattics, the owner and operator of the mine, contends that he is the only person who works at the mine and he is not required to record the hours he works on the form since he is not an employee. He

argues that the back of the form refers only to “employees” and, since he is not an employee, but rather is the owner and sole operator of the mine, he is not required to record any hours worked.

At hearing, Mattics agreed that the issue before me is identical to that which was addressed by ALJ Melick in his June, 2010 decision. Nevertheless, he asserts that he has not paid, and will not pay, any penalty assessed for these violations.<sup>1</sup> Mattics has a history of refusing to properly fill out MSHA Form 7000-2, and, as a result, has received a number of “failure to abate” orders. He continues to assert that MSHA has no jurisdiction at his mine and that he is not required to fill out the section of the form which asks for the number of hours worked. Conversely, the Secretary argues that Mr. Mattics is an employee and must include his hours on the form.

Mattics asserts that “you have to have some employees working before there is jurisdiction.” (Tr. 47) I find the Respondent’s arguments to be without merit. Section 50.30(a) requires mine operators to complete MSHA Form 7000-2 in accordance with the instructions set forth in Section 50.30-1. As pertinent to this analysis, Section 50.30-1 requires that mine operators fill out the relevant portion of MSHA Form 7000-2 with the “total hours worked by all employees during the quarter covered.” 30 C.F.R. § 50.30-1(g)(3). ALJ Melick, in addressing the Secretary’s identical argument in his own case, stated the following:

The Secretary notes . . . that the term “employees” is defined in another subsection of the cited standard as including “all classes of employees (supervisory, professional, technical, proprietors, owners, operators, partners, and service personnel) on your payroll full or part time.” See 30 C.F.R. § 50.30-1(g)(2). The Secretary argues therefore that under the rules of regulatory construction, that definition applies as well to the term “employees” used in 30 C.F.R. §50.30-1(g)(3)[.] The Secretary is clearly correct in this regard. Administrative regulations are generally subject to the same principles of construction as statutes. *Miller v. United States*, 294 U.S. 435, 442 (1935). In analyzing the rules of statutory construction, the Supreme Court of the United States has stated that the established canon of construction is that similar language contained within the same section of a statute must be accorded a consistent meaning”. *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 501 (1998). The Supreme Court has further held that “there is a natural

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<sup>1</sup> Mattics refused to appear at the hearing but his arguments were put on the record at the beginning of the hearing. (Tr. 3-11). No speaker phone was available so only one side of the conversation was recorded and preserved at the end of the transcript. (Tr. 44-49). Mattics knew of the hearing and had no intention of attending or presenting evidence, but instead of issuing a default decision, I called him while on the record to give him another opportunity to present his side of the case. Some of the facts in this decision are based upon that conversation.

presumption that identical words used in different parts of the same acts are intended to have the same meaning. *Atlantic Cleaners & Dryers, Inc. v United States*, 286 U.S. 427 (1932). Furthermore, in *Morton Int'l Inc.*, 18 FMSHRC 533 (Apr 1996), this Commission held that “regulations should be read as a whole giving comprehensive, harmonious meaning to all provisions”. *Id* at 536.

Therefore, as a matter of law, the definition of the term “employees” found in 30 C.F.R § 50.30- 1(g)(2) is applicable to the term “employees” found in 30C.F.R. § 50.30-1(g)(3)[.]

*Eureka Rock, LLC*, 32 FMSHRC at 924. I find ALJ Melick’s analysis of the fact of violation issue in his case to be entirely consistent with my own analysis in the instant matter. Consequently, I also find that Mr. Mattics, as owner and sole operator of the mine, falls within the definition of “employee” as contemplated by Section 50.30-1, and, therefore, in accordance with the cited standard, is required to report his own hours on MSHA Form 7000-2. Given that Mr. Mattics does not dispute that he failed to record his hours on the form, and that each of the subject quarterly forms contains a zero in the space where Mr. Mattics should have reported his hours worked, Sec’y Exs. 8, 9, 10, and 11, I find that the Secretary has proven a violation of the cited standard.

b. *Negligence*

The Secretary alleges that the violations were the result of the Respondent’s high level of negligence. The Secretary asserts that Eureka Rock’s previous and repeated citations for failure to comply with 30 C.F.R. § 50.30(a) indicates a high level of negligence. Indeed, Eureka Rock does not dispute the repeat nature of these violations. While Inspector Montano issued the subject violations in June 2009, before ALJ Melick delivered his July 2010 decision ruling that Eureka Rock’s owner operator hours must be recorded, a look at the history of the Eureka mine consistently demonstrates violations of the quarterly reporting requirements as far back as 2001. In addition, a number of those citations were not terminated and, as a consequence, Eureka was issued multiple failure to abate orders. Sec’y Ex. 2. Moreover, in this case, Eureka refused to abate the violations and was issued a failure to abate order for each citation issued. Accordingly, I agree with the Secretary and find that the subject violations were properly assigned a high level of negligence.<sup>2</sup>

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<sup>2</sup> I note that, while the subject citations were issued before ALJ Melick’s July 2010 decision, the Respondent’s Answer in the instant case was filed on April 15, 2011, after ALJ Melick’s decision and the Commissions’ subsequent denial of the Respondent’s Petition for Discretionary Review and Petition for Reconsideration. Notably, the Respondent states in his Answer in the instant case that the “Mine Safety and Health Administration has no authority from Congress to inspect a mine site whose only worker is solo. In the past, Eureka has believed this, now in the present, Eureka believes this, and in the future Eureka will always believe in this.” Sec’y. Ex. 18.

#### IV. PENALTY

The principles governing the authority of Commission administrative law judge to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the authority to assess all civil penalties provided in [the] Act. 30 U.S.C. § 820(i). The Act requires that in assessing civil monetary penalties, the Commission [ALJ] shall consider the six statutory penalty criteria:

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

30 U.S.C. 820(i).

Eureka has a long history of Section 50.30(a) violations and has received multiple failure to abate orders related to such. I have addressed the negligence and agree that it was properly assessed at high. However, given Eureka Rock's small size, and the low gravity of the violations, I find that a civil penalty of \$200.00 for each of the citations is appropriate.

#### V. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of \$200.00 each for Citation Nos. 6453252, 6453253, 6453254, and 6453255. Eureka Rock is hereby **ORDERED** to pay the Secretary of Labor the sum of \$800.00 within 30 days of the date of this decision.

/s/ Margaret Miller  
Margaret A. Miller  
Administrative Law Judge

Distribution: (U.S. First Class Mail)

Sarah T. White, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, Colorado, 80202-5708

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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February 27, 2012

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. PENN 2011-79
Petitioner,	:	A.C. No. 36-05466-237004-01
	:	
v.	:	
	:	
EMERALD COAL RESOURCES, LP,	:	
Respondent.	:	Mine: Emerald No. 1

**DECISION**

Before: Administrative Law Judge John Kent Lewis

Appearances: Jennifer K. Welsh, Esq., United States Department of Labor,  
Office of the Solicitor, Suite 630E, The Curtis Center, 170 S.  
Independence Mall West, Philadelphia, PA for the Secretary

R. Henry Moore, Esq., Jackson Kelly, PLLC, Three Gateway Center,  
Suite 1340, 401 Liberty Avenue, Pittsburgh, PA for the Respondent

**STATEMENT OF THE CASE**

This civil penalty proceeding was held pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802 *et seq.* (2000), (the “Act”). This matter concerns an alleged violation of the mandatory safety standard 30 C.F.R. § 75.360(b)(3). Order No. 8007970 was served on Respondent on July 27, 2010. This alleged violation was found to be significant and substantial in nature, as well as an unwarrantable failure to comply with a mandatory safety standard. Respondent was assessed a penalty of \$60,000.00. A hearing was held in Pittsburgh, Pennsylvania on November 9, 2011, and the parties participated fully therein. They later submitted post-hearing briefs.

Order No. 8007967 was also contained in this docket. It was disposed of in a Decision Approving Partial Settlement issued by the undersigned on October 18, 2011.

## **STIPULATIONS AT HEARING**

The parties stipulated to the following facts at hearing:

1. Emerald is an “operator” as defined by § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter “the Mine Act”), 30 U.S.C. § 803(d), at the coal mine at which the Order at issue in this proceeding was issued.
2. Operations of Emerald at the coal mine at which the Order was issued in this proceeding are subject to the jurisdiction of the Mine Act.
3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge pursuant to Sections 105 and 113 of the Mine Act.
4. The individual whose signature appears in Block 22 of the Order at issue in this proceeding was acting in the official capacity and as an authorized representative of the Secretary of Labor when the Order was issued.
5. A true copy of the Order at issue in this proceeding was served on Emerald as required by the Mine Act.
6. Emerald demonstrated good faith in the abatement of the Order.
7. The penalty that has been proposed will not affect Emerald’s ability to continue in business.
8. The parties stipulate to the authenticity of their exhibits, but not to the relevance or truth of the matters asserted therein.
9. Emerald utilizes in the working section at issue what is known as a “full face miner.” It mines the full width of the working face that is 16 feet wide.
10. Such full face miner is equipped with an integral bolter. As the miner advances, two roof bolts are installed. With such bolts, a steel channel or strap is installed. The strap is held in place by the roof bolts.

## **SUMMARY OF THE TESTIMONY**

Robert W. Newhouse (“Newhouse”) is a Supervisory Coal Mine Safety and Health Inspector with approximately forty-three years of experience in the mining industry. Tr. 19, 21. After several years as a miner, he became an inspector for the Mine Safety and Health Administration (“MSHA”) in 1977 and was promoted to supervisor in 1985. Tr. 20, 21. He

explained that, although he is the supervisor, he accompanies inspectors on inspections approximately forty times a year. Tr. 19, 20. Moreover, he stated that he has been in Respondent's Emerald No. 1 Mine (the "Mine") "many, many times" and is generally familiar with the requirements of Respondent's roof control plan. Tr. 21.

On the day in question, Newhouse accompanied MSHA inspector Shannon Boring ("Boring") to Respondent's Emerald No. 1 Mine to observe all of his inspections actions in order to ensure that Boring was conducting inspections correctly and enforcing the law correctly. Tr. 29, 30. Newhouse also wanted to get a general idea of the condition of the mine. Tr. 30. When they arrived on the C-3 Section, they walked down the No. 2 Entry where Newhouse observed the deteriorated roof condition on the right hand side. Tr. 32. Newhouse testified that the straps had been hit with equipment, they were bent forward and they were twisted and pushed about ten inches from their original location. Tr. 35, 36. In clarifying the importance of the straps, Newhouse explained that Respondent uses a full-face miner with integral bolter mounted on it. Tr. 22. It cuts the full face, sixteen feet wide and proper height, in a straight direction without shifting. Tr. 22, 23. The machine is large enough that it leaves just enough room for personnel to walk up to operate the bolters. Tr. 23. The straps are installed to provide some measure of protection from roof falls until the miner is pulled from the entry and the center bolts are installed.<sup>1</sup> Tr. 26-28.

The roof above the area of straps was cracked and there was loose rock that both needed to be taken down and sitting on the straps that measured approximately twenty inches by twenty inches. Tr. 36, 37. Newhouse stated that putting this type of pressure on the straps resulted in tremendous pressure on the on the bolts and anchorage. Tr. 37. Due to the fact that the area had been mined on the previous day's afternoon shift, the inspectors surmised that this was when the straps were hit. Tr. 39, 40.

Boring issued Order No. 8007970 ("Order"), which stated:

The preshift examination conducted on July 27, 2010, for the 08:01 A.M. shift in the C-3 Section (MMU 033-0) was not adequate. The hazard that is depicted in Order #8007969<sup>2</sup> was not recorded in the preshift exam record book located on the surface. This exposes miners entering the section to unknown hazards, which constitutes more than ordinary negligence. The violation is an unwarrantable failure of an operator to comply with a mandatory standard. This order will not be terminated until mine management reviews the requirements of 30 CFR 75.360 with all certified persons at this mine.

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<sup>1</sup> Bolts are typically to be installed at a maximum of a five foot center. Tr. 26.

<sup>2</sup> Order No. 8007969 was also issued to Respondent on July 27, 2010. It was written due to the damage to the straps and unsupported roof as a result of this damage. Ex. GX-3.

Boring designated the Order as highly likely to result in a fatal injury. Ex. GX-4. Newhouse agreed with this designation because the area involved was eight to eight and a half feet with rocks approximately twenty inches by twenty inches in size. Tr. 58. Whether the rock is four inches or six inches thick, it was Newhouse's opinion that it could cause serious or fatal injuries. Tr. 58. He testified that he further agreed with Boring's designation of high negligence because the examinations are critical to safety, several safety meetings and discussions had been conducted with Respondent and Respondent itself had issued various publications and safety talks to educate its employees. Tr. 59; Ex. GX-4, GX-6, GX-7. Newhouse testified that the Order was written in light of the fact that the condition was obvious and Respondent was already on the D-series<sup>3</sup> and was designated for special assessment due to its history of roof falls, rock falls hitting miners, extensive violations of the roof control plan and miners walking under unsupported roof. Tr. 59, 60. This Order was abated when the requirements of 30 C.F.R. § 75.360 were reviewed with all certified persons at this mine. Tr. 46; Ex. GX-4.

Newhouse estimated<sup>4</sup> that, depending upon when the straps were hit, six preshift and onshift examinations may have been conducted prior to the inspection. Tr. 49. He testified that 30 C.F.R. § 75.360 generally requires that examinations be made for hazardous conditions, and any hazardous condition found must be corrected or dangered-off and notified in the record book on the surface. Tr. 52. However, during onshift examinations, hazards must be noted in the record book whether they are corrected or dangered-off. Tr. 53. The purpose of the examinations is to detect and record the hazards so that anyone entering the mine will be aware that the hazard exists. Tr. 52. He further stated that the condition first cited in Order No. 8007969 was not noted until it was corrected while the inspectors were present. Tr. 56.

In response to MSHA's Rules to Live By Program, Newhouse testified that Respondent prepared a safety talk to present to its employees in which it acknowledged both minor and serious accidents had occurred and that several violations had been issued to the mine. Tr. 62, 63. Although, under cross-examination, it was shown that violations of 30 C.F.R. § 75.202(a), such as that found in Order No. 8007696, are the fourth most cited nationwide and no violations of 30 C.F.R. § 75.360(b)(3), at issue here, had been issued to the mine in the previous fifteen months. Tr. 82; Ex. GX-9. To illustrate the seriousness of deteriorated roof conditions in the Emerald No. 1 Mine, Newhouse relayed a terrible, but survived, incident that occurred in September 2009, in which the foreman on the C-3 Section had walked back to observe mining activities when a large rock fell out from between the strap and drove his face onto a steel rod, which entered his lower jaw and exited near his eye socket. Tr. 75. The foreman did survive this injury. Tr. 75. It was revealed under cross-examination, however, that prior to the July 2010 inspection, the most recent injury was a broken nose that was suffered in January 2010. Tr. 81.

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<sup>3</sup> Once Respondent is placed on the D-series, it must complete a "clean" inspection before it can be removed. Tr. 59.

<sup>4</sup> Newhouse admitted that he did not know precisely when the condition occurred. Tr. 90.

As previously discussed, Shannon Boring is a Coal Mine Safety and Health Inspector. Tr. 29, 97. Boring has about four and a half years of experience with MSHA and previously had worked for CONSOL as a roof bolter for several years. Tr. 97-99. He testified that, upon entering the area, he noticed the bent straps, but he decided to look at it later because, although he identified it as an obvious hazard, he did not feel that there was any imminent danger. Tr. 101, 126. Instead, he continued forward to get the last opening reading. Tr. 101. In describing the straps, he explained that they were “bent ahead,” and there was unconsolidated rock, slips and cracks that were “gapped open” a little bit. Tr. 102. He also stated that he remembered a linear that went across the entry. Tr. 102. His notes indicated that the unsupported area was approximately nine feet by eleven feet. Tr. 111.

In describing the damage to the straps, Boring testified that there were some nicks and one of the straps was nearly torn in half on the left-hand side. Tr. 104. It appeared to him that it had happened when the miners had started to turn the crosscut and the union representative, Justin Drew (“Drew”) agreed with this estimate. Tr. 105. Boring stated that Drew told him that he had started the turnout on the previous day shift and he had not hit any straps. Tr. 105. From this, Boring concluded that the straps had been hit during the afternoon shift. Tr. 105. However, when he reviewed the preshift examination books for July 25, 2010, and July 26, 2010, there was no record of any hazards or dangers present. Tr. 106.

Boring argues that the roof condition was a hazard because it was deteriorated, cracked and loose rocks were hanging. Tr. 106, 107. He explained that the roof bolters pried some of the loose rock down before beginning to work and, when they installed the center roof bolt, the roof raised slightly. Tr. 107, 108. This indicated to Boring that the immediate roof was fractured. Tr. 108. In light of these observations, he issued Order No. 8007970 stating that the preshift examination was inadequate and exposed the miners to the unknown dangers of the roof condition that was present. Tr. 109. He explained that the standard requires that any hazards must be written down in the books and, at the very least, the midnight shift preshift examination for the day shift was inadequate, but it is possible that the afternoon preshift examination for the midnight shift may have been as well. Tr. 109. He later admitted, however, that he could not be certain precisely when the straps were hit or whether the condition of the roof had changed between the day shifts on July 26, 2010 and July 27, 2010. Tr. 118.

On cross-examination, Boring acknowledged that pulling down unsecured rock is part of the duties as a roof bolter and the straps had, in fact, prevented the loose rock that was laying on them from falling to the ground. Tr. 113, 114. Although he stated that he considers the area to be unsupported until bolted, he further admitted that when mining with an integral bolter, the center area normally is not bolted until later. Tr. 117, 118. He stated that he believed that the center bolting was to be done during the day shift on July 27, 2010, but further questioning revealed that he was assuming this because the bolter was present. Tr. 124, 125. No one in the mine informed him whether this was the case. Tr. 125.

James Matthew Hindman (“Hindman”) is MSHA’s Roof Control Supervisor for District 2 and he has held this position for four years. Tr. 130, 131. Prior to this position, he spent five years as an MSHA inspector and has a collective thirty-nine years of experience in various positions in the mining industry. Tr. 132. The responsibilities of his current position include reviewing all of the roof control plans and roof control addendums for the underground coal mines. Tr. 131. He supervises seven specialists who perform roof control inspections, six of which focus solely on roof control issues. Tr. 131. He stated that he began learning about roof control issues from the very first day in the mine because, not only is it the number one killer in a mine, but he also ran a roof bolter for approximately three years. Tr. 133. Over time, he developed a specialty in roof control issues and has testified in several hearings. Tr. 133.

Because Hindman had a hand in approving the Mine’s roof control plan, he is generally familiar with its requirements. Tr. 133, 134. He explained that Respondent’s roof control plan requires that it, at a minimum, place a strap<sup>5</sup> and two bolts for every five feet that the miners advance. Tr. 134. If roof conditions become poor, extra measures can be taken, such as shortening the strap spacing, using supplemental supports, etc. Tr. 134. He testified that any damage to a strap creates a wider space between it and the other straps, which could allow larger pieces of rock to fall between them. Tr. 136. He further stated that damage reduces their effectiveness because they should be as tight against the roof in order to prevent movement in the roof; although, he acknowledged that the strap is almost never in contact with the roof all the way across because the roof is not perfectly flat. Tr. 136, 147. Another concern is that damage to the strap could also cause bolts to lose their torque, allowing the roof to sag. Tr. 136, 137. He opined that, while the straps need to have been replaced, it would have been easy to back the miner out and put in a few bolts to adequately support the area. Tr. 142, 143.

Hindman further opined that the mine’s roof was generally in poor condition for several reasons. Tr. 138. The first was a statement made in Respondent’s opening statement expressing the fact that it was bolting on three-foot centers, well above the minimum plan of five-foot centers. Tr. 138, 139. He testified that this is normally done when the roof is broken or cracks or breaks exist. Tr. 139. The second was mirrored statements made in the testimony of Newhouse and Boring. Tr. 139. Both testified that the temporary roof support actually raised the roof up. Tr. 139. This indicated to him that the roof was fractured and voids existed above the visible roof. Tr. 139. The final reason was testimony that the drill jumped while drilling the holes for the roof bolts. Tr. 107, 108, 139. This also suggested to Hindman that there were voids or breaks above the roof, but he also testified that it could have occurred from differences in the strata.<sup>6</sup> Tr. 139, 155. Hindman stated that the Emerald No. 1 Mine has as much of a history of

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<sup>5</sup> Although Newhouse generally described the straps as an extra preventative measure, Hindman clarified that Respondent’s plan actually requires them.

<sup>6</sup> Specifically, Hindman stated that the drill could appear to “jump” if clay or another coal seam was hit because they are not as hard of materials as sandstone. Tr. 155. He testified that the existence of either is a defect in the roof. Tr. 155, 158, 159.

roof problems as any other mine, but it does have a personnel problem. Tr. 140. Specifically, it has a problem with miners walking under unsupported roof, which has caused injuries in the past. Tr. 140. However, he acknowledged under cross-examination that mine management had held meetings to express to the miners that this behavior would not be tolerated. Tr. 154.

In response to the state of the straps at issue in Order No. 8007696, Hindman expressed his concern that the straps being pushed forward a foot or two is much more dangerous than a nick in a strap. Tr. 145. The straps are very strong, but pushing them exposes loose roof. Tr. 145, 146. If miners were working in the area, he opined that there was a reasonable likelihood that a large piece of rock could fall and break the neck of or kill a miner. Tr. 146, 147. Previous testimony described the straps as having been bent into a “V” shape, and Hindman stated that this condition should have been obvious to a preshift examiner. Tr. 36, 146. However, he did generally admit that the condition of the roof would be evaluated at the time of the exam, and there is room for potential disagreement between people as to whether a hazard exists or not. Tr. 156.

As a final matter, Hindman was questioned about the use of eight or nine roof bolts to abate the condition. Tr. 158. He testified that this would be a lot of bolts and would tend to indicate to him that the roof was broken up. Tr. 158. However, he also admitted that, when a citation is issued, operators will sometime install more bolts than necessary in order to satisfy the inspector. Tr. 159. Hindman himself had no knowledge of where the bolts were installed nor could either Newhouse or Boring describe where they had been installed to explain the necessity of them. Tr. 159, 160.

John Bonham Hayhurst II (“Hayhurst”) worked in various positions at the Mine from 2003 until August 2009, when he left for other employment opportunities. Tr. 161-163. His positions included faceman, bolter, miner operator, face boss and a coordinator. Tr. 161-162. He was certified by Pennsylvania and received his mine foreman papers while working for Respondent. Tr. 163. On July 27, 2010, Hayhurst had worked the midnight shift as a bolter. Tr. 164. He testified that, during that shift, he had center bolted the No. 2 entry and had made it “[j]ust almost to the Crosscut 2 to 1. Tr. 164, 165. The bolter was left in the No. 2 entry with the expectation that the next shift would finish center bolting and rib pin. Tr. 165.

Hayhurst testified that he had conducted the pre-shift examination in preparation for the day shift<sup>7</sup>, which consisted of checking the faces, the air in the last open crosscut return, the presence of methane, power centers, and chargers. Tr. 165; Ex. GX-5. He further stated that he checked the roof conditions and noticed that the two straps in question had been damaged and bent in the center, although not “tremendously.” Tr. 166. Generally, Hayhurst testified that if a strap is hit and cut in two, it is replaced. Tr. 166. If it is hit and not cut in to, the crew typically

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<sup>7</sup> This pre-shift examination would have taken place started around approximately five o’clock in the morning.

moves on. Tr. 166. In his opinion, he did not notice any loose rock, slips or cracks that presented a hazard, nor did he believe that the damage to the straps themselves presented a hazard. Tr. 167. He also stated that he did not see any material on the straps when he conducted his examination. Tr. 167. In determining whether a hazard exists, Hayhurst mostly relies on his experience as a miner and stated that the determination is quite often a judgment call. Tr. 168, 169. Given his knowledge and experience in the industry, he did not believe that the area in question was a hazardous area during his on-shift<sup>8</sup> and pre-shift examinations. Tr. 171.

In describing the conditions of the roof and straps, Hayhurst testified that the outside bolts were tight. Tr. 169. He stated that twisted or dislodged bolts can be determined by the existence of gaps between the bolt and the roof. Tr. 169. He recollected that the straps were spaced on approximately two and half foot centers because the top was slate rather than sandstone, and although management was not necessarily worried about the condition of the roof, it prefers to error on the side of safety due to the unpredictable nature of a slate roof.<sup>9</sup> Tr. 169, 170, 179. On cross examination, however, Hayhurst admitted the possibility that, even though the bolts appeared to be tight and solid, a bolt could lose torque even though it was not visibly dislodged. Tr. 174, 175. He further admitted that a significantly bent, but not broken, strap can prevent a hazard if the roof above it is bad. Tr. 174.

Justin Michael Drew (“Drew”) is a mine examiner at Respondent’s Mine, where he has worked for nearly six years. Tr. 180, 181. Prior to working his position as mine examiner, he also worked as a faceman, bolter, miner operator and fire boss. Tr. 181. Collectively, he has approximately ten years of experience in the mining industry and, like Hayhurst, has his assistant foreman papers certified by Pennsylvania. Tr. 181, 182. In his position as mine examiner, he conducts pre-shift examinations to ensure that the mine is safe for the oncoming shift. Tr. 181. He is also a member of the United Mine Workers. Tr. 181.

The day prior to the inspection, Drew was operating the continuous miner and recalled finishing up the 2 Straight and getting ready to make the turn from 2 to 1. Tr. 183. While making the turn and after putting two straps up, the temporary roof support that is on the miner went down and the miner had to be backed up so that it could be changed. Tr. 184. Although Drew did not know that he had hit the straps, he was later informed by miner operator at a meeting that the operator had noticed a nick in a strap when conducting the pre-operational examination of the continuous miner following Drew’s shift. Tr. 184. While Drew stated that it is common practice to replace a “completely” damaged or ripped out strap, he testified that he would not have replaced the strap that he allegedly hit. Tr. 184, 185.

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<sup>8</sup> Although the on-shift examination is not at issue in this alleged violation, it is significant that Hayhurst conducted both of these examinations and the adequacy of the pre-shift examination is now in question.

<sup>9</sup> Because sandstone is a harder mineral than slate, roof bolts can be spaced farther apart without added worry of a roof fall.

The day of Boring's inspection, Drew accompanied them as a representative of the union. Tr. 186. Contrary to Boring's testimony that he traveled down the edge of the canvas on the left-hand side of entry when examining the face, Drew testified that they walked straight down the middle of the entry and, therefore, under the two damaged straps. Tr. 119, 186, 187. He noted that Newhouse called Boring back to look at the straps which Drew described as bent in a slight "V" that was displaced approximately six to eight inches. Tr. 187, 188. He did recall the presence of some rock outby the damaged straps that was pulled down, although he could not remember exactly who had actually pulled it down, how it was done or how hard of a job it was to remove. Tr. 189, 190.

After the rock was removed, Drew testified that he examined the bolts and determined that they were undamaged. Tr. 190. He admittedly did not test the bolts though, even though he admitted to cracks in the roof in the area that the straps were damaged. Tr. 198. As Newhouse and Boring testified, Drew also observed the roof lift when the temporary roof support was placed against it while the straps were being bolted. Tr. 190. However, he stated that this is a typical occurrence. Tr. 190. Although he did not recall witnessing the jumping of the drill in this particular occurrence, he testified that it is not unusual for the steel to jump in the bolt drilling process due to cracks or gaps in the roof. Tr. 190, 191.

Howard Campbell Springer, Jr., ("Springer") is an assistant shift foreman at the Mine where he has worked for five years and is certified in Pennsylvania to be an assistant mine foreman. Tr. 200, 202. His responsibilities include checking on people in the mine, checking on equipment and generally helping run the shift. Tr. 200, 201. Prior to his current position, he had approximately thirteen and a half years of experience, including ten spent as a surveyor. Tr. 201. His entire eighteen and half years in the mining industry have included some responsibility to evaluate roof conditions, whether through his normal duties or through pre-shift or on-shift examinations. Tr. 202.

On the day of the inspection, Springer testified that he was supervising his crew as they advanced the belt and the power in the C-3 section of the mine when he encountered Inspectors Newhouse and Boring in the No. 3 entry. Tr. 203, 204. He observed the damaged straps, but stated that they were intact and, in his opinion, they did not constitute a hazard. Tr. 204-206. He testified that in the course of mining, it is common practice to replace straps that are damaged badly enough and move on from the ones that are not. Tr. 205. He recalled that the straps were not replaced; rather, bolts were simply installed beside them. Tr. 206. Contrary to the testimony of Newhouse, Boring and Drew, Springer stated that he did not see the roof lift or the steel jump during the drilling and bolting process. Tr. 206. Also contrary to other testimony, he stated that the roof was not sagging in any way and the rock that was removed took considerable effort to pull down. Tr. 208, 209.

Springer had conducted the on-shift examination in that particular area on the day of the inspection. Tr. 207. He stated that nothing was recorded in the on-shift examination book because he did not see anything that he deemed to be a hazard. Tr. 207. On cross-examination,

he admitted, however, that although he takes annual refresher training courses that also cover roof control, he has never taken any formal classes on roof control. Tr. 212, 217. He testified that Newhouse instructed him to record the bent straps in the on-shift examination book, which Springer did even though he stated that he disagreed that a hazard existed and was told to write it down by State Inspector Bill Gardner. Tr. 207, 208, 214, 215. His objections, although noted in the examination records, were not voiced during the inspection for fear that questioning Newhouse could lead to harsher penalties.<sup>10</sup> Tr. 208, 216; Ex. GX-5.

Keith A. Mills (“Mills”) has been a shift foreman at the Mine for four years. Tr. 220. He has approximately thirty years of experience between mines in Pennsylvania and Illinois and he has also held positions as section foreman, assistant shift manager and production coordinator. Tr. 220, 221. He is currently certified in Pennsylvania, but has conducted pre-shift and on-shift examinations in both states. Tr. 221, 222.

Although not present when Newhouse and Boring were conducting their initial examination, Mills testified to being present when the problem with the straps was being discussed, but before the bolting process had begun. Tr. 222. He observed the straps and acknowledged that they were, in fact bent; however, he did not believe that the condition was either abnormal or constituted a hazard that had to be recorded in the examination books. Tr. 223. Like Springer, Mills testified that he did not observe the roof in the No. 3 entry to be sagging. Tr. 224. He stated that, in his opinion, the roof in the Wabash Mine in Illinois was considerably worse than that in the Emerald No.1 Mine. Tr. 225.

On cross-examination, Mills disagreed that the straps were bent into a “V” shape, but agreed that they were bent. Tr. 226. He further stated that, although he did not believe that the straps were twisted, they were not lying flat and was flexion in the strap that was more severe at the end. Tr. 226, 227. He further agreed that cracks in the roof and rock resting on the straps would not be abnormal and that when bolters are concerned about the condition of the roof, they often place straps and bolts much closer than the five foot maximum. Tr. 227, 228.

Gary Bochna (“Bochna”) is the Safety Rep at the Mine where he has worked in the Safety Department since 1980. Tr. 229. His current position requires him to take dust samples, accompany federal inspectors and other unspecified, safety-related jobs. Tr. 229. Prior to his work in the Safety Department, Bochna was a mine examiner for a very short period of time. Tr. 230.

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<sup>10</sup> Although Springer states that he was essentially threatened by Newhouse, this testimony was neither corroborated by any other witness who accompanied the inspectors that day nor was Newhouse’s alleged abuse of position raised at any other time prior to hearing by Respondent.

Bochna testified that he observed the nicked straps as well as the material that was being held by them. Tr. 232, 233. He stated that miners used a slate bar<sup>11</sup> to bring down the loose material and it did not require substantial effort. Tr. 233. He testified that, if he had been conducting the pre-shift examination, he does not believe that he would have recorded the cited condition as a hazard.<sup>12</sup> Tr. 234. He did, however, admit that some serious injuries have occurred in this mine due to roof falls. Tr. 236, 237.

Norman David Moore (“Moore”) has worked at the Mine for almost ten years and is currently an electrician. Tr. 238. Prior to this assignment, he was a mechanic and a roof bolter. Tr. 238, 239. Further, Moore holds a position on the Safety Committee for the miner’s union in which he investigates accidents, accident reports and citations, accompanies inspectors through the mine and represents miners in safety disputes with the company. Tr. 239, 240.

Moore testified that, after seeing the Order at issue here, he spoke with several miners on the morning and afternoon shifts and looked at the bent straps himself. Tr. 240. He agreed with many of the men that the condition, as it existed on July 27, 2010, was not a hazard. Tr. 241, 244. He further stated that the men felt as if the number and spacing of the bolts suggested by the inspector were overkill for the condition.<sup>13</sup> Tr. 243. He did not, however, see the condition in its original state, only after the rock had been scaled down and the roof had been bolted. Tr. 245. Rather, he had discussed the condition with Dwayne Reckard, the miner operator who had nicked the straps during the afternoon shift and believed that they did not constitute a hazard. Tr. 240, 248. He also admitted that, when safety is concerned, there really is no overkill. Tr. 247.

William B. Shifko (“Shifko”) has worked at the Mine since 1977 and his current position is Manager of Compliance, which he has held since 1992 except for a two year span as Safety Manager. Tr. 250, 251. In his position, he maintains records, informs others of alarming trends both in the mine and elsewhere, educates miners on full compliance with the regulations, occasionally accompanies inspectors and often prepares the facts for litigation, when needed. Tr. 250, 251. Shifko has held his foreman papers since 1979 and testified that he had likely conducted thousands of pre-shift and on-shift examinations prior to his current position. Tr. 252.

Shifko prepared the safety talks based on MSHA’s “Rules to Live By” program that were given to Respondent’s employees on April 5, 2010 and April 12, 2010. Tr. 253. During these safety talks, Shifko covered all of the regulations that were addressed by the program for both

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<sup>11</sup> A slate bar is a tool used to scale down a roof. It is about six feet long and one end of it is flat while the other is pointed.

<sup>12</sup> This statement has somewhat little probative value, as Bochna acknowledges that he spent very little time as a mine examiner, specifically, as little as six months. Tr. 230.

<sup>13</sup> Moore explained that the bolters and miner operator generally decide the spacing of the bolts because they have the best knowledge of the roof conditions. Tr. 242.

the underground and surface mines. Tr. 254. He explained that a lot of new miners were hired in 2009 and that there had been problems in the Mine with someone walked under supported roof. Tr. 254. Because of this, he felt compelled to educate and train them in order to prevent injuries. Tr. 254. Although the talks addressed the fact that “far too many accidents” had occurred, Shifko stated that, in his opinion, one accident was too many and he takes any injury personally. Tr. 254, 255.

Shifko testified that the last major injury occurred in 2009. Tr. 255. He did, however, state that there had been accidents that he considered to be minor, in which a miner was injured but not severely and the injury did not result in the loss of any work time. Tr. 256. He stated that these accidents were common in any underground mine and certainly were not exclusive to Respondent’s Mine. Tr. 256. Given this testimony, Shifko maintained that he would not have considered the nicked straps a hazard. Tr. 268. He did state, however, that if the straps were severed, he would likely rethink that answer. Tr. 268.

## **LAW AND REGULATIONS**

30 C.F.R. § 75.360(b) states that “the person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen, and determine if the air is moving in its proper direction at the following locations.” Subpart (3) continues “[w]orking sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the sections or in the area during the oncoming shift. The scope of the examination shall include the working places, approaches to worked-out areas and ventilation controls on these sections and in these areas, and the examination shall include tests of the *roof*, face and rib conditions on these sections and in these areas.” 30 C.F.R. § 75.360(b)(3)(emphasis added).

1A violation is properly designated as significant and substantial “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). The Commission later clarified 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 show: (1) an underlying violation of a mandatory safety standard; (2) a discrete safety hazard contributed by the violation; (3) a reasonable likelihood that the hazard contributed to will result in injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature (the “Mathies” Test). *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).

A finding of an “unwarrantable failure to comply with a mandatory safety standard” suggests more than ordinary negligence. *Emery Mining Corporation*, 9 FMSHRC 1997, 2000 (1987). It is aggravated conduct that is “characterized by such reckless disregard, intentional misconduct, indifference or serious lack of reasonable care.” *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001). Some aggravating factors include: the length of time the violation existed,

the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, the obviousness of the violation, involvement of a supervisor in the conduct and the operator's knowledge of the violation. *Consolidation Coal Co.* 22 FMSHRC 340, 353 (Mar. 2000). All of the relevant facts and circumstances must be considered when determining whether the actor's conduct is aggravated, or whether the level of negligence should be mitigated. *Id.*

## **ISSUES AT HEARING**

The significant issues at hearing were whether Respondent's failure to record the condition noted in Order No. 8007969 resulted in an inadequate preshift examination that was both significant and substantial in nature and an unwarrantable failure to comply with a mandatory safety standard.

## **CONTENTIONS OF THE PARTIES**

The Secretary contends that the condition of the straps with rock lying on top of them constituted an obvious hazard that was highly likely to result in a fatal injury. As such, Respondent should have noticed it during its pre-shift examination and recorded it in its pre-shift examination book in order to warn miners entering the mine for the immediate shift that a hazardous condition existed. She finally argues that Respondent's knowledge of the condition and failure to record it was an unwarrantable failure to comply with a mandatory safety standard. In consideration of these arguments, the Secretary contends that Order No. 8007970 should be affirmed as written.

Respondent argues that the nicked straps were not an obvious hazardous condition that must be recorded in the pre-shift examination book; rather, although it admits that reasonable minds may differ, it argues that this condition was based on a valid judgment call made by the pre-shift examiner. Following this argument, Respondent contends that there is no violation of 30 C.F.R. § 75.360(b)(3), let alone a significant and substantial violation that is an unwarrantable failure to comply with a mandatory standard. Based on the foregoing, Respondent argues that Order No. 8007970 should be vacated.

## **ANALYSIS AND CONCLUSIONS**

The Commission has determined that pre-shift examinations are fundamental in assuring a safe work environment for the miners. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997); *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995). In *Big Ridge*, Judge Miller noted that "[t]he preshift examination is intended to prevent hazardous conditions from developing ... [t]he preshift examiner must look for all conditions that present a hazard." 2011 WL 1621389 (Mar. 2011)(FMSHRC). The determination of whether the preshift examination was adequate is based on whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the safety standard herein, would have recognized this hazard needed to be

recorded in the preshift examination book. *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (May 1990) aff'd 951 F.2d 292 (10<sup>th</sup> Cir. 1991); *Consolidation Coal Co.*, 33 FMSHRC 283, 290 (2011)(ALJ); *Big Ridge*, 2011 WL 1621389 (Mar. 2011)(FMSHRC).

The undersigned finds that the pre-shift examination was inadequate and the violation is significant and substantial in nature. In pertinent part, the requirements of 30 C.F.R. § 75.360(b)(3) state that a pre-shift examination must include tests of the roof conditions in an area where work is scheduled to be done. Here, the straps at issue were severely bent, arguably into a “V” shape. Tr. 35, 36, 102, 187, 188, 226, 227. Drew and Dwayne Reckard, through the testimony of Mills, acknowledged that these straps had been nicked at least a day prior to the Order at issue having been written. Tr. 184, 240. Although it is common place to ignore straps which have been simply nicked or lightly damaged, these straps were severely damaged, bent at least six inches and as much as ten inches forward and twisted, leaving deteriorating roof relatively unsupported. Tr. 35-37, 102, 106, 107, 187-189, 226, 227. The ALJ gives credence to the Secretary’s witnesses, above cited, as to the nature and extent of the roof damage. See also Tr. 146. The undersigned finds that, even without the fallen roof lying on the straps at the time of the pre-shift examination, the reasonably prudent person familiar with the mining industry, the nature of the roof conditions at the mine and the protective purpose of the safety standard would have recognized that this must be recorded in the examination book.

The existence of this violation contributes to the likelihood of a roof fall. Because the center roof bolts cannot be installed until the full-face miner has been removed from the cut, the straps are inserted as a temporary security measure until the center bolts can be installed. If these bolts are severely bent or severed, they are incapable of performing this function. As the bolts are typically installed on a five foot center, a strap that is bent as much as five inches in the center leaves a significant area between itself and the previous strap. This, in turn, leaves a larger area that is unsupported until the roof bolts are installed. The combination of a larger area of unsupported roof and a strap damaged to the point of those described here could significantly increase the likelihood that a roof fall would occur. However, the undersigned does not agree that this is highly likely to result in an accident. The condition had existed for at approximately twenty-four hours in which mining continued and, later, an inspection began. Although the material on the straps was loose, inspector Boring stated he did not believe that he was in any imminent danger due to the condition. In fact, he continued down to the face before being called back by Newhouse. Also, though it did not take abnormal effort, the material still had to be pulled down by other miners. Under these circumstances, it is not highly likely that someone would have been injured as a result of the condition. For the foregoing reasons, the undersigned finds that a roof fall was reasonably likely to occur.

The undersigned also finds that a roof fall is reasonably likely to cause an injury or illness and that this injury could be fatal in nature. If the roof were to fall while the miner was still in operation, it endangers, at the very least, the continuous miner operator as well as those miners who are operating the integral bolter as the machine moves through the cut. If the roof were to fall after the continuous miner has been removed, it endangers the lives of the roof

bolters as well as anyone moving through the area. The size of the fallen roof was measured at approximately twenty inches by twenty inches. Tr. 58. Regardless of the thickness of this material, a miner hit by it could at the very least suffer a painful bruise, contusion or gash and, at the very most, it could cost him his life. Respondent had a history of injuries due to roof falls at the mine to attest to this fact. Based on the foregoing, the undersigned finds that the violation at issue is significant and substantial in nature.

However, the undersigned does not find that this violation constitutes an unwarrantable failure to comply with a mandatory safety standard. By its definition, an unwarrantable failure suggests more than ordinary negligence. 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 (Mar. 2000). A judge may also determine, in his discretion, that some factors are not relevant or may determine that some factors are much less important than other factors under the circumstances. *IO Coal Company*, 31 FMSHRC 1346, 1351 (Dec. 2009). In determining whether Respondent's conduct was aggravated in the context of unwarrantable failure in this case, the undersigned finds that significant evidentiary questions remained unresolved as to when the straps at issue were bent and when the associated roof sections were damaged. In this case, the relevant aggravating factors of length of time that the violation existed and the operator's knowledge/notice of such are critical factors.

The Secretary cannot pinpoint with any accuracy how long the condition as cited existed. While there is testimony stating that the straps had been bent early the day before, there is no evidence in the record to suggest when the material fell onto the straps. This condition could have occurred simultaneously as the straps being hit or moments prior to the inspectors entering the mine. Without more evidence, there is simply not enough to imply aggravated conduct or greater than ordinary negligence on the part of Respondent. Further, given, *inter alia*, the admission of Secretary's own witness, Robert Newhouse, that he could not determine at what time the violative condition had actually occurred, I decline to speculate regarding such in reaching a finding of unwarrantable failure. Tr. 90.

Moreover, Hayhurst conducted his examination, observed the nicks straps and made a judgment call based on this observation.<sup>14</sup> While all of the Secretary's witnesses opined that this was the wrong judgment call, there was much discussion that reasonable minds could possibly differ on the issue. While the hazard seems obvious to the undersigned, he is aware that the conditions of a courtroom and an underground mine are materially different and, therefore, affords the examiner's judgment some deference in the matter.

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<sup>14</sup> It is noted here that Hayhurst testified that he did not see any cracks or loose material at this time. However, this testimony ran contrary to every other witness that testified on the issue of the roof conditions. Generally, the undersigned found Respondent's witnesses to be less than forthcoming on several issues. Not only did they contradict one another throughout the hearing, but each had his own explanation as to why his particular explanation was correct, based on what he believed would be most helpful to Respondent's case.

In summary, the undersigned finds that while Respondent did check the conditions of the roof on July 27, 2010, this examination was inadequate to ensure a safe working environment for miners. Although the facts are sufficient for a finding that the violation was reasonably likely to result in a fatal injury to a miner, there is not enough evidence in the record to show that the condition was highly likely to result in an accident. Further, while I find sufficient proof that Respondent's actions were negligent in nature, I do not find persuasive proof of conduct so aggravated in nature so as to constitute unwarrantable failure to comply with a mandatory safety standard.

### **ORDER**

In light of the foregoing, it is hereby **ORDERED** that Order No. 8007970 be **MODIFIED** from a 104(d)(2) order to a 104(a), reasonably likely, moderate negligence citation. Due to these modifications, it is further **ORDERED** that Respondent **PAY** the Secretary of Labor the sum of \$9,100.00 within thirty (30) days of the date of this decision.<sup>15</sup> Upon receipt of payment, this case is **DISMISSED**.

/s/ John Kent Lewis  
John Kent Lewis  
Administrative Law Judge

Distribution: (Certified Mail)

Jennifer K. Welsh, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 630E, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA 19106

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/kmb

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<sup>15</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, N.W., SUITE 9500  
WASHINGTON, DC 20001-2021  
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

February 29, 2012

SECRETARY OF LABOR, MINE	:	CIVIL PENALTY PROCEEDING
SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2011-34
Petitioner	:	A.C. No. 12-02394-233729
	:	
v.	:	
	:	
BLACK PANTHER MINING, LLC,	:	Mine: Oaktown Fuels Mine No. 1
Respondent	:	

**AMENDED DECISION AND ORDER** †

Appearances: Edward V. Hartman, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for Petitioner

Drew Miroff, Esq., Ice Miller, Indianapolis, Indiana for Respondent

Before: Judge McCarthy

**I. Statement of the Case**

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Black Panther Mining, LLC (“Black Panther” or “Respondent”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). In my view, as expressed in pre-hearing conference calls, this case should not have been tried, but MSHA refused to back off the unwarrantable failure designation. Accordingly, unnecessary time and resources were devoted to this litigation.

A single section 104(d)(1) Order dated August 17, 2010 remains at issue.<sup>1</sup> The condition

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† In response to Respondent’s unopposed motion to amend decision by interlineation, the decision of January 27, 2012 is hereby amended pursuant to 29 C.F.R. 2700.69(c) to correct an apparent clerical error in the parties’ Stipulated Fact No. 3.

<sup>1</sup> The parties made a joint motion on the record to settle the two other citations in Docket No. Lake 2011-34. The parties agreed that Order No. 8429032 alleging a section 104(d)(1) unwarrantable failure to comply with 30 C.F.R. 75.361(a) would be modified to a section 104(a) citation, with moderate negligence and a reduced penalty of \$460. The parties further agreed that section 104(d) Order No. 8429035 would be modified to a section 104(d)(1) citation with a  
(continued...)

or practice alleged to be a significant and substantial (S&S) and an unwarrantable failure violation of 30 C.F.R. § 75.1725(c)<sup>2</sup> is as follows:

Repairs or maintenance were being performed on the 2 Main South belt at crosscut number 2 without power removed from the drive motors and blocked against motion. The maintenance chief was observed with a chain hoist on two separate sections of belt frame ratcheting them together. Drive motors number 1 and number 2 were observed plugged into the power center at crosscut number 1 with the emergency stop switch for motor number 2 engaged. This violation is an unwarrantable failure to comply with a mandatory safety standard, and the maintenance chief has engaged in aggravated conduct constituting more than ordinary negligence.

Pet. Ex. 1. The gravity is alleged to be reasonably likely to result in an injury or illness that could be reasonably be expected to result in lost workdays or restricted duty, with one person affected. Negligence is alleged to be high. The proposed penalty is \$2,000, the statutory minimum under section 110(a)(3)(A). The Order was terminated when the work on the conveyor belt was completed before the situation could be addressed.

Respondent admits operator, mine, authorized representative, and interstate commerce status, but denies the violation and concomitant gravity, negligence, S&S, and unwarrantable failure findings and the validity of the civil penalty.

An evidentiary hearing was held in Indianapolis, Indiana on November 7, 2011, after repeated conference calls failed to settle this matter. The parties introduced testimony and documentary evidence, and witnesses were sequestered. At the conclusion of the hearing, based on the credible testimony from each of the Respondent's witnesses and the inability of MSHA Inspector, Anthony DiLorenzo, to testify from firsthand knowledge as to how the power system

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<sup>1</sup>(...continued)

statutory minimum penalty of \$2,000. I have considered the representations presented and conclude that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Accordingly, the joint motion to approve partial settlement in Docket No. Lake 2011-34 is approved. See Tr. Tr. 25-26.

<sup>2</sup> 30 CFR 75.1725(c) provides:

Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion except where machinery motion is necessary to make adjustments.

worked, I granted a “directed verdict” vacating the citation. I found that the power was turned off and the machinery was blocked against motion when Respondent’s maintenance chief, John Vennard, made the repairs at issue. Tr. 212.

On the entire record, including my observation of the demeanor of the witnesses,<sup>3</sup> and after considering the post-hearing briefs, I make the following:

## **II. Factual Background**

### **A. Stipulated Facts**

The parties stipulated to the following facts.

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.

2. At all times relevant to these proceedings, Black Panther Mining, LLC's operations affected interstate commerce.

3. At all times relevant to these proceedings, Black Panther Mining, LLC operated the Oaktown Fuels Mine No. 1, which is owned by Oaktown Fuels Mine No. 1, LLC and located in Knox County, Indiana.

4. The Oaktown Fuels Mine No. 1 is an underground mine for the extraction of bituminous coal.

5. Black Panther Mining, LLC began underground mining at the Oaktown Fuels Mine No. 1 in April of 2007.

6. If the citation and penalty proposed in this case are upheld, Black Panther Mining, LLC's ability to continue operations would not be threatened.

7. Citation No. 8426631, which is the order at issue, was issued to Black Panther Mining, LLC on August 17, 2010, pursuant to section 104(d) of the Federal Mine Safety and Health Act of 1977.

8. The subject citation was properly served upon an agent of Black Panther Mining, LLC.

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<sup>3</sup> In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, and consistency or lack thereof within the testimony of witnesses and between the testimony of witnesses.

9. Maintenance chief, John Vennard, was performing maintenance on the 2 main south belt assembly at crosscut number 2 on August 17, 2010.

10. At the time Mr. Vennard was performing maintenance on the 2 main south belt assembly, the belt's drive motors number 1 and number 2 were plugged into the power center at crosscut number 1.

11. The emergency stop switch at the power center for drive motor number 2 was engaged.

12. The emergency stop switch at the power center for drive motor number 1 was not engaged.

## **B. The Inspection**

### **1. MSHA's Witness**

On August 17, 2010, MSHA's certified mine inspector, Anthony DiLorenzo,<sup>4</sup> visited Respondent's mine with a trainee (T. Blair)<sup>5</sup> to conduct an EO2 spot ventilation inspection. Tr. 37, 41, 44; P. Ex. 2, p. 2. DiLorenzo and Blair were accompanied underground by Respondent's safety director, Matt Dowell. DiLorenzo made contemporaneous notes during the inspection, but otherwise I find that DiLorenzo's testimony and recollection was not very reliable. Tr. 43, 47, 194; P. Ex. 2.

DiLorenzo spent the majority of the inspection at the active section (MMU-003-004) of 2 Main South in an area where the roof had recently fallen near cross cut 16. Thereafter, DiLorenzo, Blair, and Respondent's safety technician trainee, Bobby Cox,<sup>6</sup> walked the 2 Main South belt from the tail piece out-by the belt drive, checking ventilation stoppings and air flow, and looking for coal dust or rock dust on surfaces. Tr. 42-43, 194; P. Ex. 2, pp. 1 and 3. DiLorenzo's notes reflect the belt was down at that time. P. Ex. 2, p. 7.

DiLorenzo initially testified that while walking the belt he saw Respondent's maintenance chief, John Vennard, shift maintenance foreman, Jason York, and unit mechanic, Greg Simmons,

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<sup>4</sup> DiLorenzo was an acting field office supervisor at the time. He started with MSHA in July 2007, became an authorized representative in August of 2008, and had slightly over 4 ½ years of previous mining experience. Tr. 37-38.

<sup>5</sup> Blair did not testify to corroborate the testimony of DiLorenzo, the Secretary's sole witness.

<sup>6</sup> Cox did not testify, but was still employed by Respondent. Tr. 199. Dowell testified that Respondent spoke to Cox before trial, but Cox purportedly could not recall anything about the citation at issue. Tr. 200.

ratcheting two pieces of the belt frame back together, with a standard chain hoist or come-along, in order to slide a cotter pin back into the structure. According to DiLorenzo, they were working both sides of the belt. Tr. 44-46, 96. DiLorenzo's notes indicate that Vennard was performing the work and York and Simmons were standing in the area watching. P. Ex. 2, p. 9; *but see id.* at 11 noting "men working on belt." Dowell was apparently still in the travel way entry when DiLorenzo made this observation. Tr. 46-47. I do not credit this testimony from DiLorenzo since he distanced himself from this testimony in subsequent testimony and the preponderance of the credible evidence indicates that Vennard and Simmons were performing the work and York was stationed at the belt master, as explained below.

DiLorenzo testified with uncertainty that he *probably* walked within a yard of where Vennard was performing the work and *probably* asked how are you doing, what's going on, but could not recall whether he had any conversation with or made eye contact with Vennard before heading towards the power center, as described below. Tr. 91-92. DiLorenzo observed that the chain hoist was attached to two separate sections of the belt stretcher (rail) and Vennard had his arm on the inside of the stretcher between the structure and the belt and was ratcheting the two sections of the rail together from outside the structure in order to insert a cotter pin that was missing. Tr. 55-56, 93-94, 95; see R. Ex. 7.

DiLorenzo never saw anyone in contact with the belt. Tr. 96. According to DiLorenzo, York and Simmons were just observing, standing there waiting. Tr. 55-56. Based on his experience performing similar maintenance, DiLorenzo testified that it would take less than 30 minutes to ratchet two frames back together. Tr. 57.

Subsequently, DiLorenzo testified that York and Simmons were just in the area and he did not see them perform any actual work. Tr. 57. On subsequent questioning from the Court during cross examination as to which side of the belt he saw York on, DiLorenzo testified that at one point in time York was on the off side of the belt (i.e., opposite the belt master), but "they were not just all standing in one location, they were moving around to different forms." Tr. 88-89. I do not credit this testimony about York's location. Rather, I find consistent with the credible testimony of each of Respondent's witnesses, as set forth below, that Vennard posted York at the belt master and York did not leave that area. Thereafter, on further cross, DiLorenzo conceded that he never saw York or Simmons perform any work on the structure. Tr. 112.

DiLorenzo testified that he observed Vennard for about one minute, more or less, and recalled that Vennard's arm was inside the belt frame (over the structure) for about 10-15 seconds. Tr. 60, 92, 103. DiLorenzo testified that if the belt started while Vennard's arm was inside the frame, the chain hoist possibly could have unlatched and whipped around striking Vennard, or Vennard could have been hit by the chain structure or the belt itself, likely causing cuts or lacerations to his arm. Tr. 59.

DiLorenzo then continued walking out-by toward the belt drive and then walked toward the power center in cross cut 1. Tr. 48. He could not recall whether anyone was at the belt master when he walked to the power center. Tr. 58. He testified that the belt master in 2 Main South belt was about 120-150 feet away from the power center, which was located in cross cut 1

on the opposite side of the secondary escapeway. Tr. 58; *see* R. Ex. 8. DiLorenzo further testified that as he walked down the 2 Main South belt, he should have seen anyone who was posted at the belt master and would have annotated that in his notes. Tr. 58-59. His notes do not reflect that anyone was stationed at the belt master. P. Ex. 2. I give little weight to this testimony from DiLorenzo because his recollection was not impressive, particularly concerning where York was located, and the Secretary adduced no testimony concerning DiLorenzo's practice, customary or otherwise, with regard to taking notes.

Dowell rejoined DiLorenzo at the power center. Tr. 49, 110. At that location, DiLorenzo observed that the power cable for drive motor no. 1 and 2 were coupled into the power center, and the emergency stop (e-stop) for drive motor no. 2 was engaged, i.e., physically depressed to open the circuit, but the e-stop for drive motor no. 1 was not engaged. The belt was not running. Tr. 48, 80-81; *see* R. Ex. 1 and 2.<sup>7</sup> Dowell confirmed that the power center circuit was open as one of the e-stops was engaged, and the manual off switch and e-stop at the belt master were also engaged. Tr. 203-05. Consistent with his training and experience, DiLorenzo testified that "power off" meant that the circuit breaker is open and the power couplings are removed from the power source. Tr. 49, 57, 65, 116.

DiLorenzo rhetorically asked Dowell, "Am I seeing this correctly" or "Is this really what it appears to be?" DiLorenzo testified that it was obvious that the power cables were still coupled into the power center that was supplying power to the drive motors and only one circuit breaker was open. Tr. 50, 65. He could not recall what Dowell said, if anything, in response, but opined that Dowell's facial expressions conveyed displeasure. Tr. 50. Dowell could not recall indicating any displeasure and does not recall arguing with DiLorenzo at this point. Tr. 206. When repeatedly asked by the Court what specific facial expressions he observed, DiLorenzo could offer nothing more than the opinion that Dowell was tight lipped. Tr. 51-53. DiLorenzo testified that he remained at the power center about 10-15 minutes. Tr. 92.

DiLorenzo and Dowell then traveled from the power center back towards the belt line, which was about 90 feet away, where Vennard, York, and Simmons were stationed along the belt. DiLorenzo testified that he intended to remove all miners from the area until the power to the belt drive motors was turned off according to DiLorenzo's understanding of MSHA policy. By the time DiLorenzo arrived, however, the work had been completed.

The whole sequence of events lasted less than 10 minutes, but DiLorenzo testified in response to a leading question that the condition need not last a long period of time for an injury

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<sup>7</sup> On cross examination, DiLorenzo conceded that if the e-stop was engaged on one drive but not on the other drive, the belt would not move. He further testified that if the belt was running and one of the e-stops was engaged, the belt would shut off. Tr. 80. DiLorenzo refused to concede, however, that if one attempted to restart the belt with only one circuit breaker open, the belt would not move. Rather, DiLorenzo opined, without verification or testing, that the belt could move because there was still one closed circuit to the second drive motor. Tr. 81-82, 105.

to occur because it would take just several seconds for someone to turn the belt back on. Tr. 55, 66. DiLorenzo testified that Vennard was not in a position to prevent anyone from starting the drive motor no. 1 at the belt master. Tr. 59.

DiLorenzo testified that he spoke with Dowell and Vennard about the alleged violative practice and the potential action that he would be taking after checking his references. P. Ex. 2, p. 12; Tr. at 67-69, 97. DiLorenzo further testified that as he was leaving to return to the surface, the operator restarted the 2 Main South belt, but DiLorenzo did not see how this was done. Tr. 73.

Once DiLorenzo returned to the surface, he reviewed the CFR and any PIBs, PILs or PPLs applicable to the standard, including P. Exs. 3 and 5. Tr. 69-70; P. Ex. 2, p. 12. P. Ex. 3 is Program Policy Letter No. PO8-V-01, effective March 18, 2008 through March 31, 2010. That PPL had expired at the time the instant Order was written on August 17, 2010. P. Ex. 4 is Program Policy Letter No. P11-V-01, effective February 8, 2011 through March 31, 2013, which post-dated the Order and clarified PPL PO8-V-01 in a manner not material here.

PPL PO8-V-01, MSHA's interpretation of the cited regulation (Tr. 76), provides in relevant part, as follows:

**Purpose**

This Program Policy Letter covers the MSHA policy concerning the requirements of Section 75.1725(c), Title 30 of the Code of Federal Regulations (CFR), in order to prevent injuries while machinery repairs or maintenance are performed. This policy letter addresses the meaning of 30 C.F.R. § 75.1725(c), and identifies a number of methods for complying with the standard.

**Policy**

Section 75.1725(c) provides that "[r]epairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments."

"Machinery" includes hydraulic jacks or cylinders, belt conveyors, longwall conveyors, and other machinery used in coal mines. "Repair" means to fix, mend, or restore to good working order. "Maintenance" means the labor of keeping machinery in good working order and includes clean-up, clearing jammed material or conducting examinations on or in close proximity to machinery.

Methods to comply with this standard to prevent inadvertent or unexpected motion include:

1. Opening the circuit breaker for the affected machinery, provided no energized parts or conductors are exposed, and placing the run selector switch for startup of the machinery in the "off" position. . . .
2. Opening the circuit breaker at the power center that supplies power for the affected machinery (30 C.F.R. § 75.900) and disengaging the power cable coupler that supplies power to the machinery (30 C.F.R. § 75.903).
3. Opening a manual visible disconnect switch, either within the circuit or onboard the machinery, (30 C.F.R. § 75.903) and securing the switch against re-energization. A control circuit start-stop switch does not constitute a manual disconnect.
4. In cases such as steeply inclined belt conveyors and suspended loads, when removing the power alone will not ensure against unintentional or inadvertent movement, the machinery shall be physically blocked, in addition to removing the power by one of the three methods described above. Physical blocking may be achieved by the use of such devices as bars, chocks, or clamps.<sup>8</sup>

Other methods may be appropriate in particular situations to prevent unintentional or inadvertent movement. What method(s) is appropriate depends upon the circumstances and type of machinery. The critical determination is whether the method(s) used would effectively prevent motion. . . .

In addition, it is important to emphasize that restoring power prematurely while repairs or maintenance are ongoing places a miner performing that work in harm's way. Operators must prevent inattentive restarting and assure that repairs or maintenance have ceased before power is restored to the machinery. Preventive measures operators can take include locking and tagging out, clearance checks, or visible or audible alarms with built-in time delays before restart to warn the miner(s) performing the work so power will not be restored without the miner's knowledge.

See P. Ex. 3, pp. 1-2.

DiLorenzo conceded that the standard does not require lock out and tag out and there were other methods to comply. Tr. 98, 111. On the other hand, DiLorenzo testified that the belt was

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<sup>8</sup> DiLorenzo testified on cross that both paragraphs nos. 3 and 4 were inapplicable here because the belt drive was not equipped with a manual, visible, disconnect switch (paragraph 3) and the record fails to establish that the belt being repaired was a steeply inclined belt conveyor (paragraph no. 4). Tr. 83.

electrically powered equipment because it receives power from two electric drive motors at the power center, which turns gears and pulleys to move the conveyor belt. However, he did not write a violation under 30 C.F.R. 75.511 because mechanical work was being performed on the belt, not electrical work on the belt drive motors. Tr. 120-21. In response to another leading question on direct, DiLorenzo testified that Respondent was working on a belt frame that contained a belt that actually could be moved by drive motors. Tr. 122. He further testified that if someone turned the power switch at the belt master to the “on” position, that would cause the motor on the closed circuit to run. Tr. 123.

After reviewing his references, DiLorenzo wrote the instant Order and gave it to Dowell and Respondent’s operations manager, Brad Rigsby, while explaining why he had written the Order. Tr. 7-71; P. Ex. 2, p. 12. Di Lorenzo conceded that he did not know or inquire about what Black Panther’s training was concerning the restarting of belts that had stopped. Tr. 99, 100. DiLorenzo testified that even if he knew that Black Panther miners were trained not to restart a belt until they knew why it was stopped, he still would have written the unwarrantable failure order. In his view, Vennard, York, and Simmons just happened to be close to the belt master, but there could be other situations where work was performed farther away from the belt master where somebody could walk over and turn the untagged belt master switches on, despite training not to do so in situations when they did not know why the belt was down. DiLorenzo explained that not everyone does what they are trained to do. Tr. 100-01.

DiLorenzo testified that he designated the violation as S&S because an injury was reasonably likely to occur. DiLorenzo arrived at this conclusion based on the fact that Vennard’s arm was inside the frame between the belt structure and the belt when power was not turned off, and nothing prevented the 2 Main South belt from being turned on, such as by a miner turning the switch at the belt master from “off” to “manual” or to “auto” (automatic) at the belt master. Tr. 60-61, 72.

In designating the violation as an unwarrantable failure, DiLorenzo at first described Vennard’s conduct as intentional and “extensive” because he was the maintenance chief and an agent of the operator, who had performed maintenance on equipment without the power being shut off and in front of subordinates.<sup>9</sup> DiLorenzo also considered the fact that Vennard had previously given DiLorenzo the impression that he knew or should have known the regulations, including the fact that one could not perform maintenance on equipment without the power being off. Tr. 61, 64-65, 108-09. In this regard, DiLorenzo testified that around June or July of 2010, he sat in on a safety talk that Vennard gave to third-shift personnel about turning power off and locking and tagging out machinery or equipment during maintenance or repair work. DiLorenzo described this talk as one of the best references to lock out/tag out that he had ever heard. Tr. 62-

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<sup>9</sup> On cross, however, DiLorenzo testified that he did not believe that Vennard was intentionally violating the standard. Tr. 111.

63, 104.<sup>10</sup> DiLorenzo testified that during the talk, he recalled Vennard describing “power off” as being removed from the power source and locked out, although he did not recall Vennard speaking about belts, just equipment generally. Tr. 63, 104. DiLorenzo was not aware of any prior violations of 30 C.F.R. 75.1725(c) at this mine, nor was he aware of any notification by MSHA that Respondent needed to make greater efforts to comply with the standard. Tr. 66-67, 109-10.

On cross examination, DiLorenzo testified that in his opinion, paragraph no. 2 of the expired PPL was not complied with because only one of two circuit breakers was open and it was his understanding that if one of the two drive motors was engaged, the belt could still move. Tr. 77, 102.<sup>11</sup> DiLorenzo testified that when leaving for the surface, he observed the Respondent attempt to restart the 2 Main South belt after the repairs were made without closing the circuit breaker that was already open, and the “belt did attempt to start and move, shut down.” Tr. 77-78, 102. DiLorenzo did not explain what attempt to start or move meant. I give no weight to this testimony as it was little more than assumption given DiLorenzo’s previous testimony that he did not see the belt or how the belt was restarted when he left the power center, and he did not inquire as to how the belt master or power center worked. Tr. 73, 116-17. In this regard, there is no evidence that DiLorenzo ever asked anyone from Respondent how the power center or belt master or any switches or drive motors at those locations actually operated. In fact, DiLorenzo conceded that he never investigated how the belt master worked, but agreed that if the belt master switch was off and the e-stop was engaged, the e-stop would have to be disengaged and the master switch turned on before the belt could start moving. Tr. 101-02. Thereafter, he testified that engaging the e-stop on the belt master opens the circuit and guards against movement, but does not assure that movement cannot be resumed. Tr. 105. DiLorenzo never tested his theory that unless the power cables were unplugged, the belt could start up because the cables were still energized.

With regard to paragraph no. 1 of the expired PPL, DiLorenzo testified that such method was not complied with because the affected machinery was the 2 Main South belt, which had two different motors, but only one of those motors had the circuit breaker open. DiLorenzo disputed Respondent’s position that both motors needed to be engaged for the belt to move. Tr. 84. As noted above, DiLorenzo testified that Respondent attempted to start the 2 Main South belt with only one of the circuit breakers closed while he was present and the belt did move, “attempted to

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<sup>10</sup> DiLorenzo conceded that he left the safety chat with the impression that Vennard knew his stuff about locking and tagging out, and about teaching his employees the proper way to do so in order to prevent unintentional or inadvertent movement, when necessary. Tr. 104.

<sup>11</sup> The option in paragraph 2 requires “[o]pening the circuit breaker at the power center that supplies power for the affected machinery (30 C.F.R. § 75.900) and disengaging the power cable coupler that supplies power to the machinery (30 C.F.R. § 75.903) (underscore added). DiLorenzo did not address the second part of the conjunctive guideline, but there is no dispute that the power cable couplers were not disengaged.

start,”<sup>12</sup> but did not have enough power or torque to turn the belt with only one drive motor running. I have declined to credit this testimony. I note that DiLorenzo did not see who attempted to start the belt from the belt master with only one circuit breaker open at the power source while he purportedly stood at the power center with Dowell where the catheads were engaged. Tr. 85, 112. DiLorenzo testified, without detail as to personal observation, that the second time Black Panther attempted to start the belt, they closed both circuits to drive motor 1 and 2 and the belt ran normally. Tr. 113-14. In short, I find DiLorenzo’s testimony too vague and imprecise to establish that belt actually moved when Respondent “attempted” to restart it as DiLorenzo was headed for the surface. On redirect, DiLorenzo answered affirmatively in response to the following leading question from counsel for the Secretary: “My question was basically getting to the point that while you were at the power center, one of the circuits to belt number 2, belt drive motor number 2, was still open, and the circuit for belt drive number 1 was closed when you were at the power center and you saw the belt move?” Tr. 115. In addition, DiLorenzo testified that to the best of his recollection, he *believed* that Vennard closed the circuit at the power center by resetting the circuit breaker on that drive motor (Tr. 115), but York contradicted DiLorenzo. 179-180. I credit York, who credibly testified on questioning from the Court that once he was cleared by Vennard to start the belt, he went to the power center and released the e-stop for the no. 2 drive motor and then went back to the belt master, released the e-stop, turned the power on, and started the belt. See Tr. 179-80.

I also note that DiLorenzo never went to the belt master and did not know whether the belt master was in the “on” or “off” position or whether the e-stop was engaged, which would open the circuit for the belt master and guard against belt movement. DiLorenzo insisted that someone could reset the e-stop and turn the belt back on. Tr. 86-88, 105. He conceded, however, that the belt master controls whether the belt moves or not, and if the e-stop is on and the belt master control switch is off, the belt will not move, unless someone turns on the switch. Tr. 88, 90.

## **2. Respondent’s Witnesses**

Respondent’s witnesses conveyed a slightly different version of events surrounding the inspection. John Vennard has been Respondent’s maintenance chief since June 2006 after working in several maintenance positions since 2001, including a two-year stint as maintenance foreman. Tr. 133-34. Vennard maintains all electrical and mechanical aspects of underground coal mine equipment. Three shift foreman, including York, and 35 electricians, report to Vennard. Vennard teaches an 8-hour refresher training course for all mechanics, holds an electrical card, and performs on-the-job training, whenever necessary. Tr. 135.

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<sup>12</sup> It is not clear that DiLorenzo could see or was looking at the belt when standing at the power center. See R. Ex. 8. He certainly could not see the belt master. Tr. 114. On questioning from the Court, he conceded that he assumed that somebody was attempting to start the belt at the belt master. Tr. 116-17.

Vennard testified that on August 17, 2010, he was leaving a continuous miner unit that was performing room and pillar mining when a belt examiner flagged him down because a belt was spilling coal. Tr. 137. Vennard examined the spillage area, walked to the belt master, turned the power switch from “auto” to “off”, engaged the e-stop button, and then went to the power center and hit the e-stop for one of the drive motors, but did not remember which one. Tr. 138-39, 140.<sup>13</sup> On his way back to the spillage area, Vennard encountered section foreman York and unit mechanic Simmons. Vennard instructed York to go to the belt master until Vennard flagged him to turn the belt back on. Tr. 138-39, 143.<sup>14</sup>

After taking said precautions, Vennard then went to the spillage area to put the pin back in the belt structure. Vennard could not perform the task alone because the belt was loaded with coal and Vennard could not pick the structure up himself and replace the pin. Tr. 143. So Simmons went to the man-trip to retrieve a come-along (ratchet hoist). Vennard and Simmons then put the come-along on the belt structure, pulled the structure back together, and put the pin in it. There was no electrical work involved and Vennard testified that it was not possible to come in contact with the belt during the task, which was completed about 10-15 minutes after Vennard left the power center.<sup>15</sup>

Vennard testified that York did not assist with the repair task and never left the belt master. Tr. 145. Dowell testified that he never saw York leave the belt master where they conversed. Tr. 201-02. York confirmed that Vennard explained to him that he had shut the belt down to re-pin the belt structure, that Vennard instructed York to stay at the belt until Vennard

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<sup>13</sup> On cross, based on his experience reading MSHA PPLs, Vennard was asked for his understanding of how MSHA defines power off. He opined that power off meant either the circuit breaker was open or the power to that circuit was open. He further opined that if you are required to have a visual disconnect, one can remove the catheads and put a lock and tag on them, but power off is somewhat of a gray area. Tr. 164-65.

<sup>14</sup> York corroborated Vennard’s testimony that Vennard instructed York to post at the belt master until Vennard completed his work on the belt so the belt could be restarted. Tr. 177. York could see Vennard from the belt master, but not from the power center. Tr. 184. York testified that he has been posted at the belt master on other occasions, such as setting belt drives on new installations, and from that vantage point he has been able to observe the work being performed on various occasions. Tr. 185.

<sup>15</sup> Vennard testified that if he had been performing electrical work on the cables or at the power center, he would have used a physical log out and tag out mechanism. Tr. 157; cf. 163. Vennard further testified that he trained his shop that if the miners had any question in their mind as to whether lock out tag out applied or whether a piece of machinery could be turned on and could move or experience a power surge, then they should lock out and tag out and remove the cables. Tr. 169.

completed his work so no one could try to turn the belt on, that the whole job lasted about 5-10 minutes, and that York never left the belt master until he was cleared to start the belt. Tr. 178, 181-82, 188.<sup>16</sup>

After completing the repair, Vennard proceeded down the belt line toward the belt master and told York to start the belt master, and then he turned right at crosscut one (towards the power center) and saw Inspector DiLorenzo with Dowell in the entry at the power center. Tr. 146-49, 161-62.<sup>17</sup> Vennard did not instruct DiLorenzo or Dowell to disengage the e-stop at the power center and does not recall when the belt started back up or where he was when the belt started back up, although he testified that he would not have left the area if the belt did not start back up. Tr. 162-63. Vennard could not recall who released the e-stop at the power center, which was necessary to start the belt back up. Tr. 161. On redirect, Vennard again could not recall whether he disengaged the e-stop at the power center. Tr. 170. On further questioning from the Court, he could not recall any details about the belt being started back up. Tr. 172.

York testified that once he was cleared by Vennard to start the belt, he went to the power center and released the e-stop for the no. 2 drive motor and then went back to the belt master, released the e-stop, turned the power on, and started the belt. Tr. 179-80. York did not have any conversations with inspector DiLorenzo and does not recall seeing him, although York spoke with Dowell to ask what was going at some point when DiLorenzo was not with Dowell. Tr. 180, 188.

Vennard testified that the belts shuts off if the power is turned off or the e-stop button is engaged, and with either action, the belt does not move. Tr. 140. Vennard further testified that he was familiar with 30 C.F.R. 75.1725(c) and believed that his actions complied with the standard by turning the power off and blocking the belt from motion. Moreover, there were no moving parts and Vennard did not come in contact with the belt or enter any pinch point area. Tr. 151-52.

In response to questioning from the Court, Vennard testified that it was not necessary to engage both e-stops at the power center because they feed through a series circuit and pushing one e-stop will shut down the circuit, which is monitored at the belt master and prevents the belt from moving. Tr. 142, 155.<sup>18</sup> Vennard conceded that the power system was designed to run on

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<sup>16</sup> With regard to training, Vennard testified that every belt drive has a mine phone and before starting a belt back up, a maintenance mechanic or foreman must call and find out why the belt is stopped. Tr. 149. Safety Director Dowell corroborated this testimony. Tr. 205. Typically, the miner who shuts the belt down is the miner who gives the order to start the belt back up. Tr. 151.

<sup>17</sup> Initially, on direct, Vennard did not remember where he went after telling York to restart the belt. Tr. 147.

<sup>18</sup> Vennard did not explain this to inspector DiLorenzo and DiLorenzo did not ask. In  
(continued...)

one motor, and in such case, the e-stop for that motor was controlling, but when both motors were being used, as in this case, one e-stop controls both motors. Tr. 155. When asked on cross why he stationed York at the belt master if engagement of one e-stop at the power center would ensure that the belt would not move, Vennard testified, “I think I positioned him there as much as not to turn it on as when I flagged him to turn it on. So we could get the belt back up and running.” Tr. 160. “He was positioned there as much as not to let the belt start, as to get the belt started as fast as we could.” Tr. 165-66. Thereafter on cross, Vennard testified that he did not need to position York anywhere, but it was a hectic, moment and he was in a hurry to get the belt back up and running. Tr. 166, 169-170.<sup>19</sup> On further aggressive cross examination concerning whether he was in a hurry and positioned someone there to protect him, but did not follow the standard, Vennard held tough and testified that he complied with the standard, which he acknowledged on redirect was designed to prevent motion or movement of equipment (Tr. 170), by turning the power off at the power center and removing power from the belt. Tr. 166-67.

On further questioning from the Court, Vennard testified that the belt was blocked against motion during his repairs because the power was off and the belt could not move. Tr. 172. He testified that if the power had been on, the belt still would have been running. Tr. 173. He further acknowledged a difference between “power off” and “blocking against motion” and volunteered that one could actually put a belt block or tie on a belt to keep it from rolling, but such precaution was unnecessary in the circumstances of this case based on the type of machinery since the belt was loaded and was located on a flat surface without incline, and was not going to move with power off. Tr. 171-72, 174. The Secretary offered no probative evidence or persuasive argument to the contrary.

Vennard also testified that it was not necessary to decouple the power cables for the two drive motors at the power source because there were three open circuits, the power was off, and the belt could not start. Tr. 157. Vennard testified and Dowell confirmed that in order for the belt to start moving again, one would have to release the e-stop at the power center, release the e-stop at the belt master, and then turn the switch back to the “on” position at the belt master. Tr. 152, 208. He further testified that all three of these things needed to happen for the belt to move in any fashion or start back up. In fact, Vennard testified that he had tested this before and confirmed that such was the case. Tr. 153. Dowell also testified that in the past he had tried to start the belt when the e-stop to one motor at the power center was engaged and the belt would

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<sup>18</sup>(...continued)

fact, Vennard testified, contrary to DiLorenzo’s suggestion otherwise (Tr. 91-92), that DiLorenzo never spoke to Vennard while underground, and Vennard did not see DiLorenzo until DiLorenzo was at the power center when Respondent began the process of starting the belt back up. Tr. 142. I credit this testimony of Vennard over the uncertain testimony of DiLorenzo cited above.

<sup>19</sup> York candidly conceded on cross that Respondent was in a hurry to get the belt back up and running to increase production, but testified on redirect that hurrying does not equate to sidestepping or short-cutting safety requirements. Tr. 188-89.

not move or even attempt to start up. Tr. 207. On cross, Dowell further opined that Vennard went above and beyond what 30 C.F.R. 75.1725(c) required by opening the circuits at the power center and belt master, turning the power off at the belt master, and stationing York at the belt master. Tr. 208.

On questioning from the Court, Dowell opined that Vennard complied with the first paragraph of PPL PO8-V-01 concerning methods to comply with the standard to prevent inadvertent or unexpected motion, by opening three different circuits. Tr. 209. Dowell further opined that Vennard also complied with the second paragraph of PPL PO8-V-01 because when he hit the e-stop at the power center, he essentially disengaged the power cable couplers that supplied power to the drive motors for the belt because they could not function after the e-stop was engaged. Tr. 211.

York also confirmed on cross that Respondent took three steps to ensure that power was off for the belt line, i.e. engaging the e-stop at the power center and the e-stop and power off switch at the belt master. Tr. 183. On cross, York also acknowledged that the belt master controls the starter on the motors, but if the power center circuit is open, which it was, one cannot start the motors. Tr. 182-83.

York further testified that 30 C.F.R. 1725(c) requires equipment to be powered off and blocked from motion, and Respondent's practice under Vennard's leadership was to turn the power switch off and trip the circuit at the power center. Tr. 186. On questioning from the Court, York opined that "power off" meant turning the key on the belt master to "off" (switch off at the belt master) to separate the circuit between the belt master and the starter box at the power center for the motors. York further noted that Vennard took the initiative to engage the e-stop on the belt master as well as the e-stop on one of the two motors that were tied together in a series at the power center. Tr. 189-90. York also opined that "blocked against motion" typically concerned maintenance on mobile equipment or rubber-tired vehicles that have been parked or left idle. He confirmed that the belt on which Vennard was performing repairs could not move if the power was off and the circuit was open at the power center, and that even if the belt master was turned back on, the belt would not move with the e-stops engaged. Tr. 190-91.

Respondent's final witness was Matt Dowell, Respondent's representative throughout the hearing. As noted, Dowell drove the man-trip from the active working section to the end of the belt flight line, while DiLorenzo walked the belt line. Tr. 44. Dowell testified that DiLorenzo asked Dowell to pick him up at the end of the belt flight. Tr. 194. Dowell apparently arrived first (Tr. 200) and parked in the secondary escapeway at cross cut 1 near the power center. Dowell then walked over to the 2 main south belt line, which was down, and then out-by to the belt master, where he spoke to York. York explained to Dowell that guys were working in-by the belt line, where lights were visible, and they were fixing a problem with the belt. Tr. 194-95, 197, 200.

Dowell then heard DiLorenzo holler for him from around the corner at the power center about 90 feet away. When Dowell arrived back at the power center, DiLorenzo asked Dowell

how come the belt was not locked and tagged out. Tr. 195, 200.<sup>20</sup> Dowell testified that he did not respond to DiLorenzo's inquiry, but noticed that the motor was engaged for one drive. Then DiLorenzo headed back over through cross cut 1 toward the belt area where Vennard and Simmons were completing their work. Tr. 195-97; see also R. Ex. 8.

Dowell testified that he saw York again when DiLorenzo was questioning Dowell about why the catheads were not locked and tagged out. Tr. 202. I infer this is when York was headed toward the power center to open the circuit after Vennard flagged him following completion of the repair work. Dowell testified that DiLorenzo made some notes and then they proceeded outside. Tr. 202.<sup>21</sup>

Dowell further testified that in the man trip on the way out, DiLorenzo was reading through his references and indicated that he had to check some sources once on the surface. Tr. 202. Thereafter, DiLorenzo returned to Dowell's office and indicated that he was issuing a 104(d)(1) Order based on the PPL. Tr. 202. Dowell testified that operations manager Rigsby was present, but Rigsby did not testify. Tr. 203. Dowell testified that he questioned DiLorenzo about the Order, noting that the power was off. According to Dowell, DiLorenzo said that power off meant "locked out and tagged out in this instance." I credit this testimony from Dowell. DiLorenzo's contemporaneous notes confirm that he was viewing the alleged violation as a contravention of lock out and tag out requirements (P. Ex. 2, pp. 10 and 11), although DiLorenzo abandoned this theory at trial. Tr. 98, 111.

### **3. The "Directed Verdict"**

At the close of Respondent's case, I granted Respondent's motion to dismiss (styled by Respondent as a motion for a directed verdict, see Tr. 124 and 212) and vacated the citation. I found, based on the credible testimony from each of Respondent's witnesses and the inability of inspector DiLorenzo to testify from firsthand knowledge as to how the power system worked, that the requirements of 30 CFR 75.1725(c) were complied with because the power was turned off and the belt effectively was blocked against motion under the circumstances. Tr. 212-13. I reaffirm that decision in this written opinion.

As Judge Gill noted when granting a contestant's motion to dismiss at the close of the Secretary's case in a slightly different context in *Clintwood Elkhorn Mining Co.*, 32 FMSHRC 1880, 1881 (Dec. 2010)(ALJ Gill), Fed. R. Civ. P. 52(c) allows the dismissal of a matter at the judge's discretion when a party fails to prove a key element of their case. Fed. R. Civ. P. 52(c) provides:

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<sup>20</sup> As noted above, it is undisputed that the cited standard does not require log out and tag out.

<sup>21</sup> Dowell does not recall seeing Blair or Cox at the power center. Tr. 201. Further, Dowell never saw DiLorenzo speak to Vennard, York or Simmons. Tr. 202.

If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

Thus, during a non-jury trial, Rule 52(c) authorizes the court to enter judgment at any time that it is appropriate to make a dispositive finding of fact on the evidence. In *Clifford Meek v. Essroc Corporation*, the Commission found that a ruling on a motion for involuntary dismissal under Rule 52(c) was at the judge's discretion and found "no error by the judge and affirm[ed] his procedural determinations." *Clifford Meek v. Essroc Corporation*, 15 FMSHRC 606, 614 (April 1993). In *Sec'y of Labor v. Martin County Coal Corporation and GEO /Environmental*, the Commission found that a judgment on a partial finding was appropriate because the judge had heard the Secretary's entire case. *Sec'y of Labor v. Martin County Coal Corporation and GEO/Environmental*, 28 FMSHRC 247 (May 2006). In addition, the Commission found in *Martin County Coal* that the judge does not need to address every point of evidence. *Id.* The judge must only include findings and conclusions on "material issues of fact [and] law." *Id.*, citing Fed. R. Civ. P. 52(c).

In this case, I heard all the evidence from both parties before finding at the close of the Respondent's case that the Secretary failed to establish a violation of the cited standard by a preponderance of the evidence. As discussed below, the Secretary failed to prove the key factual elements for her case by a preponderance of the evidence. Specifically, the Secretary failed to establish that a repair was made on the belt structure when the power was on or when the belt was not blocked against motion. All credible evidence is to the contrary.

I credit the testimony of Respondent's witnesses that Vennard examined the spillage area, walked to the belt master, turned the power switch from "auto" to "off", engaged the e-stop button, and then went to the power center and hit the e-stop for one of the drive motors. Although Vennard did not decouple the power cables or catheads at the power center, such method of compliance was unnecessary per the PPL since Vennard had already opened all circuit breakers for the affected machinery and turned the power switch off. In addition, Vennard instructed foreman York to go to the belt master until Vennard flagged him to turn the belt back on. Tr. 138-39, 143. I credit the testimony of Respondent's witnesses that York never left the belt master until he disengaged the e-stop at the power center after being flagged by Vennard to restart the belt once the minor repair was completed. The Secretary made no specific argument as to how the belt was not blocked against motion and her sole witness conceded that a log out and tag out procedure was not required. Further, I credit Vennard's testimony that the belt was effectively blocked against motion because the belt was loaded on a flat surface without incline and could not move with the circuits open and the power off.

In short, I find that Respondent complied with 30 C.F.R. § 75.1725(c). *Cf. Island Creek Coal Company*, 22 FMSHRC 822 (2000). Accordingly, Order No. 8426631 is vacated.

## ORDER

For the reasons set forth in note 1 above, the joint motion to approve partial settlement in Docket No. Lake 2011-34 is **APPROVED** under the criteria set forth in Section 110(i) of the Act. Accordingly, Order No. 8429032 alleging a section 104(d)(1) unwarrantable failure to comply with 30 C.F.R. 75.361(a) is modified to a section 104(a) citation, with moderate negligence and a reduced penalty of \$460, and Order No. 8429035 is modified to a section 104(d)(1) citation with a statutory minimum penalty of \$2,000.

Order No. 8426631 is **VACATED**.

If it has not already done so, within 40 days of the date of this decision, Black Panther Mining, LLC is **ORDERED** to pay a total civil penalty of \$2460 for the alleged violations that have been settled. Upon payment of that penalty, this proceeding is **DISMISSED**.

/s/ Thomas P. McCarthy \_\_\_\_\_  
Thomas P. McCarthy  
Administrative Law Judge

Distribution: (E-Mail and Certified Mail)

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# **ADMINISTRATIVE LAW JUDGE ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, NW, SUITE 9500  
WASHINGTON, DC 20001-2021  
TELEPHONE: 202-434-9953 / FAX: 202-434-9949

February 15, 2012

TODD DESCUTNER,	:	DISCRIMINATION PROCEEDING:
Complainant,	:	
	:	
	:	Docket No. WEST 2011-523-DM
	:	WE MD 2010-18
v.	:	
	:	Mine: Leeville Mine
	:	Mine ID: 26-02512
NEWMONT USA LIMITED,	:	
Respondent.	:	

**RULING ON TIMELINESS OF COMPLAINT**  
**AND**  
**ORDER TO SHOW CAUSE**

This proceeding arises under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3). In the complaint, Todd Descutner alleges that he was unlawfully terminated from his job as a haul truck driver at Newmont USA Ltd’s (Newmont’s) Leeville Mine after “exercising [his] rights under the Mine Act.” Discrimination Complaint 2. To redress the alleged discrimination, Mr. Descutner asks for several remedies: The expungement of his work record, payment of back pay, payment of a pension, and damages due to the “pain and suffering.” *Letter of Todd Descutner* (January 13, 2011).

After the matter was assigned to the court, Newmont filed an Amended Answer.<sup>1</sup> In its Amended Answer Newmont denied the court’s jurisdiction asserting that “the complaint was not timely brought.” *Newmont’s Amended Answer* (November 22, 2011) at 2. In addition, Newmont denied that it discriminated against Mr. Descutner when it terminated him on or about June 9, 2010. Rather, the company claimed it “terminated [Mr.] Descutner for insubordination and for damaging equipment” and that the basis for Mr. Descutner’s termination was “unrelated to any alleged protected activity.” *Id.*

Following the receipt of the Amended Answer, the court issued an order requesting that the parties submit additional information. The court stated:

To rule on Newmont’s claim that the Commission is  
barred from entertaining the case because

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<sup>1</sup> On September 6, 2011, prior to the matter being assigned, Newmont filed a limited answer to Mr. Descutner’s complaint in which it denied “any and all claims of discrimination” made by Mr. Descutner. *Respondent Newmont USA Limited’s Answer to Petitioner’s Discrimination Complaint* (September 6, 2011) at 1.

[Mr. Descutner's complaint] was late filed, the court requires additional information.

Mr. Descutner shall provide the court in writing with an explanation as to why his complaint with MSHA was not filed within the 60 days required by the statute. . . In other words, Mr. Descutner shall state the circumstances, if any, which justify why his complaint was late.

Newmont shall provide the court with a written explanation as to the "material legal prejudice" it will suffer – assuming there is any – if Mr. Descutner's claim goes forward.

Order (December 2, 2011) at 2.

After several delays, Mr. Descutner responded to the order by essentially claiming ignorance of the statute's timeliness requirements and by citing his reliance on advice from unnamed officials of the Mine Safety and Health Administration (MSHA). Mr. Descutner stated:

I was delayed . . . because no one ever told me how to go about protesting my termination. The union representative informed me there was no next step, so I had to do the whole case by myself until MSHA stepped in. I finally got in touch with MSHA and they let me know how to file a complaint. This was after months of trying to get my case heard by someone. I did speak with MSHA and they assured me my case was filed within the allotted times. I have done everything MSHA has asked of me.

*Letter of Todd Descutner to Administrative Law Judge David Barbour*  
(January 26, 2012).

For its part Newmont stated that, "To the extent Newmont has suffered any legal prejudice, it is limited to the potential fading of memories of witnesses." *Response to Order to Provide Additional Information* (December 19, 2011) at 2-3. The company also noted that its in-house counsel who represented the company during MSHA's special investigation of Mr. Descutner's complaint to the agency had left the company.

### TIMELINESS OF THE COMPLAINT

The court finds that neither of the circumstances cited by the company are sufficient to defeat Mr. Descutner's complaint. First, while it is true that memories of potential witnesses fade with time, Mr. Descutner's complaint was filed at most 52 days late (*see Order 2*) and this hardly constitutes a delay that can be presumed to cause prejudicially faded memories. Moreover, the departure of its in-house counsel during or following the conclusion of MSHA's investigation is not in itself prejudicial. Counsel presumably left his work product with the company, including his notes and/or recordings of his or others' interviews of those with knowledge of the facts surrounding Mr. Descutner's termination. Further, the company does not claim its former in-house counsel is unavailable for consultation if the case goes forward.

Newmont also challenges Mr. Descutner's excuse for his late filing. The company notes that it provided Mr. Descutner with training in miners rights and responsibilities, including the right to file a discrimination complaint with MSHA within 60 days of an alleged adverse action and that this training was most recently given to Mr. Descutner approximately six months prior to his discharge. *Response to Order 3*. It further notes that at that time Mr. Descutner was given a copy of MSHA's pamphlet on miners' rights, a publication that contains the Act's timeliness requirements. *Id.*

Although the court accepts all of Newmont's assertions as true, it none the less finds that Mr. Descutner has established "justifiable circumstances" for the late filing of his complaint. In reaching this conclusion the court is especially mindful that Mr. Descutner is representing himself. Therefore, in the court's view, the showing that Mr. Descutner needs to make to go forward is modest. *Pro se* litigants in Mine Act discrimination cases are frequently not learned in the Act and the rights it affords even in the face of required training, and the Commission has been loath to bar such persons from litigating when they have misapprehended applicable procedures or misunderstood the Act's requirements. This is especially so since Mr. Descutner's delay in filing was not lengthy. As Commission Administrative Law Judge Michael Lasher observed, "The 60-day statutory limitation is not a particularly long filing period in view of the lack of sophistication of the average Complainant and the complexity of some of the legal bases for bringing a discrimination action." *John C. Gross v. Leeco, Inc.*, 7 FMSHRC 219, 229 (February 1985) Further, while Judge Lasher also noted that, "[T]he placement of limitations on the time-periods during which a plaintiff may institute legal proceedings is primarily designed to assure fairness to the opposing party by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared," the court concludes that Newmont has not established that such factors are at issue here. For these reasons the court finds that Mr. Descutner's complaint is not barred for untimeliness.

### SUFFICIENCY OF THE COMPLAINT

The court's finding that the complaint is not barred for untimeliness does not end the matter. There is still the issue of the complaint's adequacy.

In its Order the court observed that the complaint was lacking in necessary specifics. In the complaint he filed with MSHA, Mr. Descutner claimed that he "was terminated after exercising [his] rights under the Mine Act. *Complaint to MSHA 4*. In the complaint he filed with the Commission,

Mr. Descutner stated that “beyond the shadow of doubt” he was certain “that [his] rights under [section] 105 © were violated.” *Complaint*. Finding that Newmont and the court were “left to guess as to what [Mr. Descutner was] referring,” the court ordered Mr. Descutner to state how and when his rights were exercised and why he believed his termination was related to the exercise of those rights. *Oder* 2-3. The court summed up its order by stating, “In other words, [Mr. Descutner] must provide the court with a reasonably complete account of what . . . [he] believes happened and why.” *Id.* 3.

The court’s order was issued on December 2, 2011, and Mr. Descutner was required to comply within 15 days of the order. He did not, and he still has not. He has submitted nothing to the court to amplify and make meaningful his contention that he “was terminated for exercising [his] rights under the Mine Act.” *Complaint to MSHA* at 4.

The court recognizes that leeway in pleading that is traditionally given to *pro se* complainants. *See e.g. Clyde Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1920 (November, 1996). However, the requirement of Commission Rule 42 that a complaint contain “a short and plain statement of the facts setting forth the alleged . . . discrimination” is there for a reason. 29 C.F.R. § 2700.42. The Respondent can hardly make meaningful trial preparations if it is left to guess at the facts the Complainant is alleging. In addition, the court can not judge the legal sufficiency of the complaint in a vacuum.

Because Mr. Descutner has failed to comply with the court’s order with regard to supplementing his complaint, he is **ORDERED TO SHOW CAUSE** within 15 days of the date of this order why his complaint should not be dismissed.

/s/ David Barbour  
David Barbour  
Administrative Law Judge

Distribution: (Certified Mail)

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Todd Descutner, 399 Parkchester Drive, Apartment B, Spring Creek, NV 89815

/sa

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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WASHINGTON, DC 20001-2021  
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February 28, 2012

SECRETARY OF LABOR, MINE	:	CIVIL PENALTY PROCEEDING
SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2009-35
Petitioner	:	A.C. No. 11-02752-164722
	:	
v.	:	
	:	
THE AMERICAN COAL COMPANY,	:	Mine: Galatia Mine
Respondent	:	
	:	

Appearances: Travis W. Gosselin, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner

Jason W. Hardin, Esq., and Mark E. Kittrell, Esq., Salt Lake City, Utah, for Respondent

Before: Judge McCarthy

**STAY ORDER**

This case is before me on a petition for assessment of civil penalties filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against American Coal Company, Inc. (“American Coal” or “Respondent”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”).

This case involves two section 104(d)(2) orders issued to Respondent, American Coal Company ("American Coal"), for alleged violations of 30 C.F.R. 75.400 concerning float coal dust and loose coal accumulations. Both orders were assessed as “repeated” “flagrant” penalties. A hearing was held on August 23-24, 2011 in Evansville, Indiana. The parties introduced testimony and documentary evidence, and witnesses were sequestered. On October 19, 2011, the parties filed a Joint Motion for Extension of Time to File Post-Trial Briefs. I granted an extension of the briefing period until November 18, 2011. Thereafter, Reply Briefs were filed by the parties on December 2, 2011.

Recently, during the drafting of my decision, the Commission granted interlocutory review on the issue of whether a violation not deemed attributable to reckless conduct may be deemed flagrant under 30 U.S.C. § 820(b)(2) based on the operator's history of prior similar violations. See *Secretary of Labor v. Conshur Mining, LLC*, Docket Nos. KENT 2008-562 and KENT 2008-762, Order dated February 15, 2012 (Attachment A). The instant matter presents the same issue of first impression, i.e., what is meant by a "repeated" "flagrant" violation. Accordingly, I conclude that it is not an efficient use of judicial resources to decide this matter at this time. Rather, I deem it prudent to stay this matter for six months or until the Commission decides *Conshur Mining*, whichever occurs sooner. At that time, I will revisit the stay or ask the parties to address whether a supplemental hearing or additional briefing is warranted in light of any Commission decision in *Conshur Mining*.

/s/ Thomas P. McCarthy  
Thomas P. McCarthy  
Administrative Law Judge

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Upon consideration of the judge's certification, we hereby grant review of the judge's order of November 28, 2011, with regard to the issue of whether a violation not deemed attributable to reckless conduct may be deemed flagrant under 30 U.S.C. § 820(b)(2) based on the operator's history of prior similar violations. Conshor Mining, LLC and the Secretary of Labor are hereby ordered to file initial briefs on or before 30 days from the date of this order. Response briefs by both parties will be due 30 days following service of the last initial brief. Initial briefs shall not exceed 35 pages; response briefs shall not exceed 25 pages. Reply briefs will not be filed.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy  
Michael F. Duffy, Commissioner

/s/ Michael G. Young  
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.  
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/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

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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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February 29, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2011-1193
Petitioner,	:	A.C. No. 34-02105-262625
	:	
v.	:	
	:	
SPIRO MINING, LLC,	:	
Respondent.	:	Mine: Calder Mine

**ORDER DENYING RECONSIDERATION**

**ORDER DENYING RESPONDENT’S MOTION FOR CERTIFICATION OF 12/21/2011  
INTERLOCUTORY RULING**

This case is before me upon the Secretary’s Petition for the Assessment of Civil Penalty (“Petition”) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815 (2010), whereby Spiro contests the proposed civil penalty and underlying violation issued to it at its Calder Mine. On December 22, 2011, I issued my Order Denying Respondent’s Motions to Dismiss (“Denial Order”), and I subsequently issued my Prehearing Order on December 23, 2011.

After the issuance of these orders, Spiro filed its Motion for Consideration with attached Letter-Motion Seeking Reassurance or Recusal in *MSHA v. Spiro Mining, LLC*, CENT 2011-1193 (collectively, “Motion for Consideration”).<sup>1</sup> Spiro seeks my recusal from this matter, or alternatively, reconsideration of the Denial Order and reassurance of my impartiality. (Mot. Cons. 3.) The Secretary responded to Spiro’s Motion for Consideration, and Spiro filed a reply to the Secretary’s response.

Additionally, Spiro filed a Motion for Certification of 12/22/2011 Interlocutory Ruling (“Motion for Certification”) seeking my certification for interlocutory review by the Commission of several issues related to the Denial Order. The Secretary responded to Spiro’s Motion for Certification, and Spiro filed a reply to the Secretary’s response.

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<sup>1</sup> This Order uses the following abbreviations in citations: Spiro’s Motions to Dismiss Action for Failure to State a Claim and for Lack of MSHA Jurisdiction is abbreviated as “Mots. Dismiss”; Spiro’s Letter-Motion Seeking Reassurance or Recusal in *MSHA v. Spiro Mining, LLC*, CENT 2011-1193, is abbreviated as “Mot. Cons.”; and Spiro’s Motion for Certification of 12/22/2011 Interlocutory Ruling is abbreviated as “Mot. for Certification.”

As set forth below, both of Spiro's motions are hereby DENIED.

## **I. Respondent's Motion for Consideration**

Spiro seeks reconsideration of my Denial Order, contending that I improperly dismissed its arguments (1) that the Secretary lacks subject matter jurisdiction in this case and (2) that the Secretary has failed to state a claim. (Mot. Cons. 2–3.) My Denial Order construed Spiro's requests as a motion for summary decision under Commission Rule 67, as the Commission's Rules do not provide a procedure analogous to Federal Rule of Civil Procedure 12. *Spiro Mining, LLC*, 34 FMSHRC \_\_\_, slip op. at 1–3, No. CENT 2011-1193 (Dec. 22, 2011) (ALJ).

The Commission “has long recognized that [] ‘summary decision is an extraordinary procedure,’” and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which ‘the Supreme Court has indicated that summary judgment is authorized only ‘upon proper showings of the lack of a genuine, triable issue of material fact.’” *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (quoting *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994)). In reviewing the record on summary judgment, the Court must evaluate the evidence in “‘the light most favorable to . . . the party opposing the motion.’” *Hanson Aggregates*, 29 FMSHRC at 9 (quoting *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962)). Any inferences “‘drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.’” *Hanson Aggregates*, 29 FMSHRC at 9 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

### **A. Jurisdiction**

My Denial Order interpreted Spiro's argument that “FMSHRC/MSHA and Mine Act jurisdiction lacks in cases, such as this, where at the citation's issuance Calder Mine's initial ‘operations’ had not ever yet ‘produced products’ or ‘affected MSHA/interstate commerce’” (Mots. Dismiss 1) as contesting whether the Calder Mine is a “mine” under the Mine Act, *Spiro*, 34 FMSHRC \_\_\_, slip op. at 2–3. In its Motion for Consideration, Spiro now clarifies that it “never argued its business should not be considered . . . a ‘coal or other mine’ per Section 3 of the Mine Act.” (Mot. Cons. 2.) Rather, Spiro argues that the Secretary lacks jurisdiction because its Calder Mine has not affected interstate commerce. (*Id.*)

Section 4 of the Mine Act states: “Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this chapter.” 30 U.S.C. § 803. It is well-established that the language of Section 4 demonstrates Congress's intent to exercise its full authority under the Commerce Clause to regulate the mining industry. *D.A.S. Sand & Gravel, Inc. v. Chao*, 386 F.3d 460, 462–63 (2d Cir. 2004), *cert. denied*, 544 U.S. 1048 (2005); *United States v. Lake*, 985 F.2d 265, 267–68 (6th Cir. 1993); *Marshall v. Kraynak*, 604 F.2d 231, 232 (3d Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980). Accordingly, the Mine Act has been held to apply to operations that sell their products even on a purely intrastate basis. *D.A.S. Sand & Gravel*, 386 F.3d at 463–64. Such operations may engage in activity affecting interstate commerce through purchasing mining supplies from a local dealer or consuming commercially produced electricity. *Lake*, 985 F.2d at 269.

Spiro's Motion for Consideration contends that "a good faith argument may still exist to be made and heard in these regards for an extension, modification, or reversal of existing law." (Mot. Cons. 2.) Spiro has yet to reveal the details of its good faith argument. Other than referencing the Mine Act, Spiro does not offer any legal citations or concrete factual support for its position, such as affidavits or other documentation. Consequently, Spiro has failed to demonstrate the absence of a genuine issue of material fact on the question of jurisdiction. Nonetheless, Spiro is welcome to introduce any legal arguments or evidence supporting its position at a hearing on this matter.

B. Secretary's Statement of a Claim

Spiro also contends that my Denial Order improperly concludes that the Secretary has stated a proper claim. (Mot. Cons. 2–3.) As noted above, Spiro's motion to dismiss for failure to state a claim was treated as a motion for summary decision. The Secretary's citation narrative states verbatim:

While I was issuing a citation to the Contractor for working men in the face of an order, Jon Marusich, drove up in his pickup and bumped me in the hip with his left front headlight. This was witnessed by two Spiro Mining, LLC, employees. Also another MSHA Inspector witnessed this act. This incident happened at the north end of the mining area on the north side of the sediment pond.

(Petition, Ex. A.) My Denial Order summarized the content of MSHA's Program Policy Manual, as well as related Commission precedent, which unambiguously emphasizes the seriousness and illegality of interfering with an MSHA inspector. *Spiro*, 34 FMSHRC \_\_\_, slip op. at 3–4. The Order concluded that based on the record of this case, the Secretary had alleged interference with her duty to inspect the Nation's mines. *Id.* at 4. Because Spiro failed to demonstrate the absence of a justiciable issue of fact, Spiro's request for dismissal was denied. *Id.*

As with its jurisdictional argument, Spiro's Motion for Consideration does not cite legal authorities or offer factual information supporting its request for reconsideration.<sup>2</sup> Rather, Spiro explains that "the way the Order infers and determines that an allegation of potential *interference* exists when that was not, but perhaps should have been, pled is of most concern to my client." (Mot. Cons. 2 (emphasis in original).) Spiro argues that "a four corners reading of MSHA's pleading and citation can support many diverse scenarios" and creatively suggests a few non-violative conclusions that could be drawn from the citation narrative. (*Id.*)

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<sup>2</sup> Spiro's argument that the Secretary failed to state a claim by not citing to a section of the Code of Federal Regulations may be dismissed summarily. (Mot. Cons. 2.) The Secretary is authorized to cite violations of the Mine Act itself in addition to any violations of regulations promulgated under the Mine Act. 30 U.S.C. § 814(a). As discussed in the Denial Order, the plain text of the citation alleges a violation of section 103(a) of the Mine Act. *Spiro*, 34 FMSHRC \_\_\_, slip op. at 3–4.

Here, Spiro overlooks the fundamental rule that in deciding any motion for summary decision this Court must evaluate the evidence, and any inferences that may be drawn from that evidence, in the light most favorable to the non-moving party. Unfortunately, Spiro offers only mere assertions in support of its position. Therefore, in evaluating the record of this case in the light most favorable to the Secretary, I must conclude that Spiro has not demonstrated an absence of a genuine issue of fact with regard to this citation. Of course, my conclusion does not deny Spiro the opportunity to prove its side of this case. Spiro may certainly introduce any legal arguments or evidence supporting its position at a hearing on this matter.

C. Recusal

The final issue raised by Spiro's Motion for Consideration is my impartiality. Spiro takes issue with the Denial Order's rejection of its arguments as "meritless" and my citation to Commission Rule 80 governing the standards of conduct in Commission proceedings.<sup>3</sup> (Mot. Cons. 1–3.) Spiro also objects to my Denial Order's citation to the procedural history of three dockets pending before Judge Andrews. (*Id.* at 1.) Spiro further suggests that the Denial Order's analysis of the Secretary's claim reveals judicial bias: "[T]he Order infers and determines that an allegation of potential *interference* exists . . . may indicate potential judicial bias existing in this case to predispose the tribunal's rulings towards the government's perspectives and away from fair considerations of Respondent's positions that deserve equal, even-handed treatment." (Mot. Cons. 2.)

As for the role of the Administrative Law Judge, the Commission has stated:

[A] judge is an active participant in the adjudicatory process and has a duty to conduct proceedings in an orderly manner so as to elicit the truth and obtain a just result. Among a judge's specific obligations in this regard is a duty to admonish counsel, when necessary, during the course of proceedings . . . .

*Sec'y of Labor ex rel. Clarke v. T.P. Mining, Inc.*, 7 FMSHRC 989, 993 (July 1985) (citations omitted). The Commission has reviewed the question of whether an Administrative Law Judge properly decided not to recuse himself from a case in the face of accusations of bias for rebuking the Respondent's counsel during the trial in a prior, unrelated proceeding. *Medusa Cement Co.*, 20 FMSHRC 144 (Feb. 1998). In *Medusa Cement*, the Commission found guidance in the Supreme Court's decision *Liteky v. United States*, 510 U.S. 540 (1994). 20 FMSHRC at 148–49. In *Liteky*, the Court stated:

First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. . . . Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of . . . current proceedings . . . do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism

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<sup>3</sup> Spiro also objected to my Prehearing Order's request that the Secretary's counsel report the status of settlement negotiations and discovery to my Law Clerk, and it requested a joint status conference call. (Mot. Cons. 3.) On January 25, 2012, I issued an Amended Prehearing Order granting Spiro's request.

or antagonism that would make a fair judgment impossible. . . . *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display.

510 U.S. at 555–56 (citation omitted).

As noted above, my Denial Order summarized and applied the law pertaining to Spiro’s arguments. Noting the dearth of legal or factual support in Spiro’s pleadings, the Denial Order concluded that Spiro’s arguments lacked merit. Spiro may certainly ask the Commission to review this decision. However, a run-of-the-mill denial of a request for summary decision is not a proper ground for recusal.

My Denial Order also noted the Secretary’s citation to Judge Andrews’s Order Denying Respondent’s Motions to Dismiss for Failure to State a Claim, for Default Order and Dismissal Order, to Dismiss Multi-Defaulted Civil Penalty Petition and for “Judicial” Notice of Chronic Pattern of Lateness and Request for Dismissal (“Multi-Denial Order”) in CENT 2011-554, CENT 2011-563, and CENT 2011-610. *Spiro*, 34 FMSHRC \_\_\_, slip op. at 4 n.1. My Denial Order further noted the Secretary’s citations to Judge Andrews’s denial of Spiro’s request for certification of interlocutory review and the Commission’s denials of Spiro’s Petition for Interlocutory Review and Petition for Reconsideration. *Id.* In the Motion for Consideration before me, Spiro explains that the decisions in Judge Andrews’s case following the Multi-Denial Order involved an issue different from the ones in this case. (Mot. Cons. 1.)

With over 15,000 cases pending in the Commission’s Office of Administrative Law Judges and approximately 500 cases on my docket alone, my Denial Order sought to encourage Spiro to conserve the limited sources of this Commission by substantiating its positions with factual submissions and the discussion of relevant legal authorities. Unfortunately, the six pleadings submitted by the parties since the issuance of my Denial Order continue to raise a lot of sound and fury signifying nothing.<sup>4</sup> Indeed, Spiro fails to advance its cause by not producing any evidence that would support the actions it wants this Court to take. Rather, Spiro attempts to cast doubt on the Court’s impartiality instead of accepting that it failed to meet its burden to prevail in its pretrial motions. This Court will not shirk from its responsibility to follow the law or to educate counsel on the law. Moreover, admonishing counsel not to waste this Court’s time with hollow arguments is a proper function of the Administrative Law Judge and not a reason for recusal.

WHEREFORE, based on the foregoing, Spiro’s Motion for Consideration is **DENIED**.

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<sup>4</sup> Indeed, counsel for both parties spill a great deal of ink over whether they properly attempted to resolve their disagreements prior to filing their pleadings with me pursuant to Commission Rule 10. 29 C.F.R. § 2700.10. This ancillary issue is not germane to the substantive legal questions posed by Spiro. Both parties’ counsel are strongly encouraged to resolve such disagreements with each other instead of seeking the Court’s assistance.

## II. Respondent's Motion for Certification

Spiro seeks certification for interlocutory review of the denial of its Motions to Dismiss, as well as the Commission's review of its concerns of judicial bias. (Mot. for Certification.) Commission Rule 76 permits the Commission's discretionary review of interlocutory Administrative Law Judge decisions. 29 C.F.R. § 2700.76. Review may be granted where "[t]he 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." *Id.* § 2700.76(a)(1)(i).

The issues raised by Spiro involve controlling questions of law, as a decision in its favor may result in the dismissal of this case. However, other than general citations to the Mine Act and the Supreme Court decision *United States v. Lopez*, 514 U.S. 549 (1995), which did not concern the Mine Act, Spiro offers no concrete factual or legal support revealing the substance of its arguments. Indeed, as noted *supra* p. 2, the Supreme Court has twice denied certiorari in appeals from circuit court decisions passing upon the breadth of the Secretary's subject matter jurisdiction under the Mine Act and the Commerce Clause. With no cognizable evidence demonstrating that the Commission would reach a different decision than the Denial Order, Spiro has failed to show that immediate review by the Commission would advance the final disposition of this proceeding.

WHEREFORE, based on the foregoing, Spiro's Motion for Certification is **DENIED**.

/s/ Alan G. Paez

Alan G. Paez

Administrative Law Judge

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