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COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

February 1, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2008-737
v.	:	
MANALAPAN MINING COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

DECISION

BY: Jordan, Chairman, and Nakamura, Commissioner

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"). In part, Administrative Law Judge Jerold Feldman concluded that two section 104(d)[1] orders issued by the U.S. Department of Labor's Mine Safety and Health Administration ("MSHA") to Manalapan Mining Company, Inc.

[1] Section 104(d)(1) provides in pertinent part:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

30 U.S.C. § 814(d)(1).

("Manalapan") for combustible coal accumulations in violation of 30 C.F.R. § 75.400[2] were not the result of the operator's unwarrantable failure to comply with mandatory health or safety standards. 32 FMSHRC 690, 701, 703, 705 (June 2010) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's decision. For the reasons that follow, we vacate the judge's decision and remand for further consideration consistent with our decision.

I.

Factual and Procedural Background

From 2000 until 2008,[3] Manalapan operated an underground coal mine, Mine No. 10, in Pathfork, Kentucky. 32 FMSHRC at 692; Tr. 16. The mine had one production day shift that began at 6:00 a.m. and ended at 4:00 p.m. 32 FMSHRC at 691-92. There was no second shift. *Id.* at 692. The third shift was a maintenance shift that operated from 9:00 p.m. until 5:00 a.m. *Id.* The coal seam height underground varied from approximately 5½ to 3½ feet. *Id.* Coal was extracted from the working face by a continuous miner. Tr. 54-55. The material extracted from the working face consisted of approximately 70% rock and clay and 30% coal. 32 FMSHRC at 692. After extraction, the coal along with the extraneous material was loaded onto a series of conveyor belts designed to transport it to the surface. *Id.*

In October 2007, at the time of the inspection at issue in this case, the mine had four belt lines going from the face to the entry that were approximately 2,300 feet in total length. *Id.* The conditions in the mine were constantly wet because of percolation of water through old works, the mine floor and ribs, and dust control at the face. *Id.*; Tr. 226-30. Despite the presence of water pumps, water was never completely removed, and the mine floor remained muddy at all times. 32 FMSHRC at 692. The extracted material was transferred from the No. 4 belt at the face to the No. 3 and No. 2 belts and ultimately to the No. 1 belt nearest the surface. *Id.*

On October 7, 2007, at approximately 9:00 a.m., MSHA Inspector Daniel Lewis commenced an inspection of the mine. *Id.*; Tr. 50. Joe Miniard, the mine superintendent, accompanied Lewis on the inspection. Tr. 50-51. Initially, Lewis reviewed the preshift and onshift examination books. 32 FMSHRC at 692. Lewis observed notations under the column

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[2] 30 C.F.R. § 75.400 states that "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

[3] The judge stated in his decision that the mine closed in 2008. 32 FMSHRC at 692. David Partin, Manalapan's operations manager, testified at trial in January 2010, that the mine had closed about two years ago. Tr. 222. We note, however, that Jim Brummett, Manalapan's safety director, testified that the mine closed in March or April 2009. Tr. 248.

entitled "Hazardous," entered from August 30 through October 2, 2007, that, as a general matter, reflected wet and muddy conditions on a daily basis along the four belts. *Id.*; M. Ex. 7. The recordation began on that date because an MSHA inspector had previously advised Miniard that he could no longer record the conditions as "none observed." Tr. 343. The books noted "working on" and "shoveling" as actions taken to correct the conditions. 32 FMSHRC at 692.

The mine had been producing coal for approximately two to three hours prior to the beginning of the inspection. *Id.* at 693. Inspector Lewis began his inspection by traveling with Miniard to the working face. *Id.* After completing his inspection of the face, Lewis traveled outby the conveyor belt entry to inspect the belts. *Id.* Lewis inspected the belt lines, beginning with Belt No. 4, then traveling outby to Belt No. 3, Belt No. 2, and Belt No. 1. Tr. 100, 331-39. The inspection occurred prior to Miniard's onshift examination. 32 FMSHRC at 693. At that time, four men were assigned to work on the beltline, concentrating on the conveyor head drives where water and mud had accumulated. *Id.*

Regarding the conditions at issue on appeal, on Belt No. 3, which was 400 feet long, *id.* at 699, Lewis noted one to nine-inch deep accumulations, and that at least 20 of the rollers were in the accumulations. *Id.*; Gov't. Ex. 2. He noted that the belt was beginning to become more damp than Belt No. 4. *Id.* at 700. In his testimony, Lewis explained that the belt became wetter as it progressed outby towards the head drive. *Id.*; Tr. 87-88. Lewis initially denied that the area along Belt No. 3 was wet and slippery, but ultimately conceded that there was enough water to make it difficult to walk. 32 FMSHRC at 700. Lewis testified that the accumulations were "combustible enough to cite." *Id.* Around Belt No. 3, there was a buggy charger cable that had been run over. Tr. 335-36. The cable was not properly hung and was caught in a man door. Tr. 109.

Belt No. 2 was 500 feet long. 32 FMSHRC at 702. In the order, Lewis noted that the accumulations along Belt No. 2 were one to 12 inches deep and ten bottom rollers were rubbing on the accumulations. *Id.*; Gov't. Ex. 3; Tr. 91. Inspector Lewis testified that the conditions along Belt No. 2 were so wet and muddy that they constituted a "borderline situation" in terms of establishing a violation. 32 FMSHRC at 702. Superintendent Miniard testified that there was no coal spillage along the belt. *Id.* at 703. Photos of the area depicted a "wet, soupy mixture of mud and water." *Id.*; M. Ex. 9.

Upon completing his examination of the belts, Lewis traveled to the surface whereupon he telephoned his supervisor Jim Langley. 32 FMSHRC at 693. After consulting with Langley, Lewis issued Citation No. 7511467 (Belt No. 4) as well as Order Nos. 7511472 (Belt No. 3), 7511478 (Belt No. 2), and 7511479 (Belt No. 1) for violations of the mandatory safety standard in section 75.400. *Id.* Lewis designated the cited violations as "significant and substantial"[4] and

[4] The "significant and substantial" ("S&S") terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could (continued...)

attributable to Manalapan's unwarrantable failure to comply.[5] *Id.* The Secretary proposed $60,000 penalties for each violation. *Id.* at 691. Upon the issuance of the citation and orders, the belts were shut down, and abatement took 18 employees seven to eight hours. *Id.* at 698; Tr. 365.

The judge determined that the accumulations along Belt No. 3 were an S&S violation. 32 FMSHRC at 700. He relied on the testimony indicating that although the conditions were wetter than on the previous belt, there were still areas of combustible material that could dry out and create a risk of explosion and serious or fatal injuries. *Id.* However, the judge declined to find that the violation resulted from an unwarrantable failure. *Id.* at 701. Considering the preshift and onshift examination books to determine the duration of the accumulations as several shifts, the judge found that the operator did not have sufficient notice of the condition because the condition was recorded as "wet and muddy" instead of "accumulations of coal." *Id.* He reasoned that even though the rollers were turning in the accumulations, there was not a high degree of danger because of the muddy consistency of the material. *Id.* The judge acknowledged the operator's 27 previous section 75.400 violations but found that, because 40% of them were non-S&S and because not all of them involved conveyor belts, they did not support an unwarrantable failure finding. *Id.*

The judge determined that the violation along Belt No. 2 was not S&S because the testimony indicated that the accumulation was soupy and more liquid than muddy, and thus the hazard posed by the condition was unlikely to cause serious injury. *Id.* at 702-03. The judge also declined to find that the violation was an unwarrantable failure, relying on the inspector's testimony that the violation was "borderline," that it was unlikely to cause a fire, and that the evidence reflected no more than a moderate degree of negligence. *Id.* at 703.

As to his determination on conditions at the two remaining belts (which are not the subject of this appeal), the judge vacated the order alleging a violation of section 75.400 on Belt No. l. *Id.* at 704-05. However, he found that the section 75.400 violation along Belt No. 4 was an S&S violation caused by the operator's unwarrantable failure. *Id.* at 697-98.

Consequently, the judge affirmed Citation No. 7511467 (Belt No. 4), modified Order Nos. 7511472 (Belt No. 3) and 7511478 (Belt No. 2), and vacated Order No. 7511479 (Belt

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[4](...continued)
significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

[5] The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation.

No. 1). *Id.* He assessed penalties of $20,000 for Citation No. 7511467 (Belt No. 4), $12,000 for Order No. 7511472 (Belt No. 3), and $4,000 for Order No. 7511478 (Belt No. 2). *Id.* at 699, 702, 704.

II.

Disposition

The Secretary contends that the judge erred in concluding that the coal accumulation violations on Belt Nos. 3 and 2 were not the result of the operator's unwarrantable failure. She requests that the Commission vacate the judge's unwarrantable failure determinations and remand the case to him to apply the correct legal test and consider all the evidence.

In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, including (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *See IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp*., 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). These seven factors need to be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular factual scenario. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Nevertheless, all of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated, or whether mitigating circumstances exist. *Id.*; *IO Coal*, 31 FMSHRC at 1351.

At issue here is whether the judge erred in his unwarrantable failure analysis of Manalapan's conduct in violating section 75.400 on the No. 3 and 2 belts. In evaluating the unwarrantable failure designations for these violations, the judge committed a number of errors. Accordingly, we vacate these unwarrantable failure determinations and remand this case to the judge. Because the evidence in this case involving the two violations is interrelated and similar with regard to many of the unwarrantable failure factors, we address both violations together in discussing each factor.

A. Degree of Danger of the Violations

With regard to the degree of danger, the judge relied on the testimony of both the inspector and the operator's witnesses as to the generally wet and muddy conditions to support the conclusion that the circumstances were mitigating and thus Manalapan's conduct was not sufficiently aggravated to constitute an unwarrantable failure. 32 FMSHRC at 701-03. Addressing the unwarrantable failure designation of the No. 3 belt violation, the judge reasoned that the evidence was "insufficient to demonstrate that this muddy mixture posed the requisite high degree of danger to justify unwarrantable failure findings in this case." *Id.* at 701. Because he determined that the violation on Belt No. 2 was "borderline" and not S&S, he concluded that the muddy conditions did not pose a high degree of danger and that "the evidence reflects no more than a moderate degree of negligence." *Id.* at 703.

We are troubled by the judge's statement implying that there is a "requisite high degree of danger" that must be present to support an unwarrantable failure determination. *Id.* at 701. The degree of danger, although a relevant factor, is not a threshold requirement for determining whether a violation is unwarrantable. The level of danger is but one factor to be considered in evaluating whether a violation is unwarrantable. *See, e.g.*, *Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999) (stating that the Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure). The factor of dangerousness may be so severe that, by itself, it warrants a finding of unwarrantable failure. However, the converse of this proposition – that the absence of significant danger precludes a finding of unwarrantable failure – is not true. The judge should have considered the evidence relating to the danger factor, determined whether it was an aggravating or mitigating circumstance, and weighed it against the other relevant factors to determine whether the operator's conduct under the circumstances amounted to an unwarrantable failure. Because the judge did not sufficiently address the other factors and seemingly based his unwarrantable failure finding on the danger factor alone, we are unable to evaluate whether he erred in determining that Manalapan's conduct was not unwarrantable.

Additionally, in considering the degree of danger, it is not clear whether the judge considered the evidence of potential ignition sources presented by the Secretary. On Belt No. 3, the Secretary presented evidence that there was an energized charger cable that had been run over and was stuck in a man door. Tr. 109, 335-36. Also, as to both violations, the Secretary presented evidence that a number of belt rollers were turning in coal accumulations. 32 FMSHRC at 699, 702. Because the judge did not directly address this evidence, we cannot determine how he viewed it in light of his conclusion that the wet and muddy conditions presented a mitigating circumstance. Moreover, in considering the accumulations around Belt No. 3, the judge affirmed the inspector's S&S designation, 32 FMSHRC at 700, which requires a finding that the hazard contributed to by the violation has a reasonable likelihood of causing a serious injury. *See Cement Div., National Gypsum Co.,* 3 FMSHRC 822, 825 (Apr. 1981). Accordingly, the judge on remand must also address these issues.

B. Extent of the Violative Conditions and Efforts to Abate the Violative Conditions

While the judge found the low level of danger to be a mitigating factor, he did not make explicit findings as to the extent of the violations and whether the factor constituted a mitigating or aggravating circumstance. The judge found the violation as to Belt No. 4 extensive, and in doing so noted that it took a whole crew of 15 or 18 miners two shifts to clean up the accumulations for the entire belt system. 32 FMSHRC at 698; Tr. 346-47, 365. However, the judge found the evidence on the extent of the violations on both Belt Nos. 3 and 2 equivocal because the conditions were wet and muddy. 32 FMSHRC at 701-03. We are unable to discern from the record how the judge viewed and weighed the evidence on the extent of the violations.

Similarly, the judge did not analyze Manalapan's efforts to abate the violative conditions prior to the issuance of the citation and orders in this case. The evidence of the number of miners and time necessary to clean up the accumulations after the issuance of the citation and orders is relevant to this issue, as it is to the factor of extensiveness of the violative condition. Also relevant is Miniard's testimony that prior to the inspection, he had assigned four miners to work on the four belts by shoveling spillage and using buckets to dip the mud and place it back on the belt. *Id.* at 693; Tr. 329, 343-45.

On remand, the judge must make explicit findings on the extent of each of the violations on Belt Nos. 3 and 2 and whether this served as a mitigating or aggravating factor. The judge must also make findings on Manalapan's efforts to abate the violative conditions prior to the issuance of the citations and orders.

C. Whether Manalapan was on Notice that Greater Efforts for Compliance were Necessary

The judge considered Manalapan's history of past accumulation violations inconsistently within his decision and contrary to Commission precedent. Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007); *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997). Despite finding Manalapan's history of violations to be an aggravating factor with regard to the unwarrantable designation of Belt No. 4 (32 FMSHRC at 698), the judge erroneously discounted the operator's history in his consideration of the unwarrantable nature of Belt No. 3 (*id.* at 701). The judge reasoned that 40% of the 27 prior violations relied on by the Secretary were not designated as S&S and that not all of them concerned accumulation violations on conveyor belts. *Id.* This is contrary to Commission precedent.

In evaluating an operator's history of violations for unwarrantable failure purposes, the Commission does not require past violations to also have been caused by unwarrantable failure and "has declined to limit 'the circumstances under which past violations may be considered by a judge in determining whether an operator's conduct demonstrated aggravated conduct.'"

Consolidation Coal Co., 23 FMSHRC 588, 595 (June 2001) (quoting *Peabody Coal Co.*, 14 FMSHRC 1258, 1263 (Aug. 1992) (rejecting contention that only past violation involving the same area may be considered for unwarrantable determination)). Just as the past violations need not be designated as unwarrantable failures to comply, it is not pertinent to the analysis of the notice factor in unwarrantable failure determinations that the prior violations were not designated as S&S. Thus, had the judge considered the operator's history consistently and under the correct standard, he presumably would have found it likewise to be an aggravating factor as to the violations of Belt Nos. 3 and 2, as he did with regard to Belt No. 4.

D. Duration of Violative Condition, Whether the Condition was Obvious, and Manalapan's Knowledge of Condition

The judge's finding as to how long the conditions existed is unclear. The citation and orders state that the conditions "existed for at least several shifts." 32 FMSHRC at 696, 699, 702, 704; Gov't. Exs. 1-4. The judge noted the "duration" of the accumulations along Belt No. 4 as being attributable to "at least a high degree of negligence evidencing an unwarrantable failure," without discussing the length of time the conditions existed. 32 FMSHRC at 698. In his discussion of the violation on Belt No. 3, he stated that the testimony and preshift and onshift books reflect that the accumulations were present "for at least several shifts," consistent with the language in the citation and orders. *Id.* at 700, 701. The Secretary contends that the notations of "wet and muddy" under the hazards column of the operator's preshift and onshift examination books indicate that there were violative accumulations of combustible coal material for at least five weeks. PDR at 6, 13 & n.3; S. Post-Hrg. Br. at 17, 18. Inspector Lewis testified that he interpreted these entries as admissions of violative coal accumulations. Tr. 94. He also admitted that his contemporaneous notes indicated that the duration was unknown and that he was not sure how long the violative conditions existed. When pressed by the judge as to how long it would take for these conditions to arise, he stated about two weeks. Tr. 118, 128. Manalapan contends that the notations in the examination books only signify wet and muddy conditions and not violative coal accumulations. M. Br. at 4; M. Post-Hrg. Br. at 24-25. Miniard testified that the notations in the books refer to general conditions and travel hazards, not violative coal accumulations, and were made under the instruction of MSHA's inspectors, who, as previously mentioned, told him to write down "wet and muddy" instead of "none observed." Tr. 342-43, 362-63.

The notations in the examination books relate to the duration of the violations, whether the condition was obvious, and the operator's knowledge of the violative conditions. The judge considered the evidence of the examination books in the context of evaluating the unwarrantable designation of Belt No. 4, and specifically noted the "repeated reference to accumulations, albeit muddy, in the preshift and onshift books" as an aggravating factor in his unwarrantable failure analysis. 32 FMSHRC at 698. However, he did not consider this evidence in similar fashion

with regard to Belt Nos. 3 and 2.[6] Given the judge's inconsistent treatment of this evidence, his failure to reconcile the conflicting testimony regarding the examination books, and his lack of a finding as to the duration of the violations, we are unable to discern the effect of the factors of duration of violative condition, whether the condition was obvious, and Manalapan's knowledge of the violations' existence on the issue of unwarrantable failure as to Belt Nos. 3 and 2. On remand, the judge must address and reconcile the evidence as to the duration of the violations, whether they were obvious, and the operator's knowledge of them. He must then weigh these factors, along with the other relevant factors, to ascertain whether the operator's conduct rises to the level of an unwarrantable failure as to both violations.

In sum, in concluding that the violations for Belt Nos. 3 and 2 did not constitute unwarrantable failures to comply by Manalapan, the judge failed to address evidence on certain relevant factors, and failed to make necessary findings and consider other relevant factors. As set forth in our decision, on remand, the judge must explicitly consider and weigh all the relevant factors as to whether Manalapan's conduct constituted unwarrantable failures as to Order Nos. 7511472 (Belt No. 3) and 7511478 (Belt No. 2).

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[6] Regarding Belt No. 3, the judge stated, ". . . although the examination books reflect the duration of the accumulations was at least several shifts, the accumulations were described as 'wet and muddy' rather than accumulations of coal. (Gov['t]. Ex. 7)." *Id.* at 701. However, "wet and muddy" was also the examination books' description of the conditions on Belt No. 4. Gov't. Ex. 7. Since the judge found that the books' use of the phrase "wet and muddy" when referring to Belt No. 4 included accumulations of coal and was an aggravating factor, 32 FMSHRC at 698, his treatment of exactly the same words in the context of Belt Nos. 3 and 2 was inconsistent.

III.

Conclusion

For the foregoing reasons, we vacate the judge's unwarrantable failure determinations as to Orders No. 7511472 and 7511478 and remand for reconsideration of the evidence under the correct legal standard.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

Commissioner Young, concurring in part and dissenting in part:

I agree with my colleagues that the ALJ's decision concerning Order No. 7511472 (Belt No. 3) should be vacated and remanded for the reasons cited in our opinion. However, I disagree with my colleagues concerning Order No.7511478 (Belt No. 2), and I write separately because the judge correctly applied the standard for significant and substantial violations to the facts on Belt No. 2, and because I believe my colleagues have misunderstood how the judge below determined that the operator's violation of the accumulations standard in 75.400 did not result from the operator's unwarrantable failure. Because I believe the judge's decision on those conditions within this order is supported by substantial evidence and consistent with the law, I would affirm.

A. Significant and Substantial[1]

Contrary to the majority, I find the judge's discernment of the relative dangers found in the area of Belt No. 2 to be clear, consistent with a logical theory of the case, and supported by substantial evidence. As the judge notes, the uncontradicted testimony at hearing established that the conditions along the No. 2 belt were wetter than those along Belt Nos. 3 and 4. 32 FMSHRC at 702 (citing Tr. 91,144, 337). The judge also noted that Inspector Lewis himself conceded that the conditions here comprised a "'borderline situation' as far as a violation was concerned." *Id.* (citing Tr. 150-52).

The judge further relates, in some detail, testimony by witnesses for the operator about the wet and muddy conditions, corroborating this with additional evidence from inspector Lewis about the unlikelihood of a fire arising in those conditions. 32 FMSHRC at 703 (citations omitted). While the judge found the evidence "adequate" to sustain the violation, he applied the correct standard for S&S to the facts as he found them and deleted the S&S designation. In so doing, he demonstrated a basis in the evidence for distinguishing the conditions along the No. 2 Belt from those along Belt Nos. 3 and 4. I agree with the judge's analysis, and no further exposition is necessary.

B. Unwarrantable Failure

The majority also contends that the judge erred by failing to properly balance all of the factors relevant to the determination of whether or not an unwarrantable failure occurred. In

[1] Although the S&S designation for Order No.7511478 (Belt No. 2) was not challenged on appeal, I find the judge's findings and analysis of the S&S designation to be highly relevant to and supportive of his conclusion that the violation did not result from the operator's unwarrantable failure to comply. Therefore, I consider the record on S&S for the limited purpose of reviewing the judge's unwarrantable failure finding.

their view, the judge essentially determined that an absence of extreme danger alone precluded a finding of unwarrantable failure.[2]

On close reading, however, the judge has not relied solely on the diminished degree of danger. Rather, the reduced danger is a circumstance which affects two factors, and one of those factors has repeatedly been upheld as uniquely determinative on the issue of unwarrantable failure. In holding that the reduced degree of danger arising from the "extremely muddy nature of the accumulations [was] a mitigating factor" (32 FMSHRC at 699, 701), the judge clearly connects this circumstance to a reduction in the operator's level of negligence, or culpability, by concluding: "*Consequently*, the failure to promptly remove these accumulations does not rise to the level of aggravated conduct." *Id.* at 701 (emphasis added).

Further emphasizing this logical connection, the judge sums up the negligence issue: "Although the negligence attributed to Manalapan is moderate to high, Manalapan's conduct *is not sufficiently aggravated or unjustified to warrant an unwarrantable failure*." *Id.* (emphasis added). Thus, it is clear that the judge did not dismiss the unwarrantable failure finding solely based on the relative danger of conditions on the Number 2 belt. Rather, he viewed those conditions as mitigating the operator's negligence in failing to address them more promptly.

Aggravated conduct reflecting more than ordinary negligence on the part of the operator has long been held to be a prerequisite for any finding of unwarrantable failure. *See, e.g., Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1998) ("[W]e conclude that unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act."). It is obvious from context that the judge was discussing the wetness of the accumulations not merely as a circumstance that made those conditions less dangerous than on Belt Nos. 3 and 4, but as a factor that affected his consideration of the operator's negligence. Unlike the other factors, which may have relative weight which must be evaluated against other aggravating or mitigating circumstances, a finding of moderate negligence, alone, forecloses an unwarrantable failure determination. *See Emery Mining*, 9 FMSHRC at 2001 (unwarrantable failure must constitute more than ordinary negligence).

The judge's reasoning is consistent with that expressed elsewhere in his opinion on the issue of unwarrantable failure, and is in fact directly drawn from our jurisprudence. In regard to the No. 4 belt, the judge in fact sets the stage for his analysis of the other belts. After recounting the aggravating factors, the judge observed that "these and all other relevant factors must be viewed in the context of the factual circumstances of this case and *all material facts and circumstances must be examined to determine if a mine operator's negligence is mitigated*." 32 FMSHRC at 698 (citing *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000)) (emphasis

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[2] I would find that the majority of factors discussed at length in the opinion, including the duration, obviousness, violation history and notice requiring greater efforts arising therefrom, and the operator's corrective measures (or lack thereof) are also applicable to this order and are adequately supported by the judge elsewhere.

added); *see also Eagle Energy Inc.*, 23 FMSHRC 829, 834 (Aug. 2001) (citations omitted) (same language and analytical framework). Continuing in that vein, the judge further noted that "resolving the unwarrantable failure issue is a matter of degree," requiring a determination of whether the accumulations at issue "posed a high degree of danger that warranted a greater standard of care." 32 FMSHRC at 698.

Thus, the judge has cogently expressed the essence of an unwarrantable failure analysis for the entire case. There was no need for him to restate and re-evaluate elements that maintained their relative value, and there is certainly no error in rejecting an unwarrantable failure designation solely on the grounds that the operator's misfeasance represented, at worst, ordinary negligence – provided there is evidentiary support for that determination. I believe there is, and I therefore respectfully dissent.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

February 11, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. SE 2011-360-M
	:	A.C. No. 31-00037-238802
v.	:	
THE N.C. GRANITE CORP.	:	

BEFORE: Jordan, Chairman; Young 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 March 1, 2011, the Commission received from The N.C. Granite Corp. ("N.C. Granite") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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).

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).

The record shows that Proposed Assessment No. 000238802 was issued on November 18, 2010 and delivered to N.C. Granite on November 29, 2010. N.C. Granite did not contest the proposed assessment, and it became a final order on December 29, 2010.

In its motion to reopen, N.C. Granite stated that Citation No. 8546405 (which was later assessed in Proposed Assessment No. 000238802) was issued by MSHA on September 14, 2010, and timely contested by N.C. Granite, together with a Motion for Expedited Hearing, on September 21, 2010. The case was assigned to a judge, who denied the Motion for Expedited Hearing, but directed the parties to conduct discovery and report back at a later date. The parties then exchanged written discovery and conducted extensive depositions on December 3, 2010. When N.C. Granite's safety manager received the proposed assessment on November 29, he thought that because the parties were already in litigation over the citation, it was not necessary to also contest the proposed assessment.

The Secretary opposed the March 1, 2011, motion to reopen, and argued that N.C. Granite had not made a showing of exceptional circumstances so as to justify reopening. The Secretary pointed out that it is clearly explained on the face of every proposed penalty assessment that pursuant to 30 § C.F.R. 100.7, the operator has 30 days after receipt of the proposed assessment to either pay the penalty or exercise its right to contest the proposed assessment and request a hearing on the violations in question. However, the Secretary acknowledged that N.C. Granite had timely contested Citation No. 8546405, and that litigation on this citation was pending before the judge.

On September 28, 2011, the Commission sent a notice to counsel stating that the motion to reopen was deficient because it did not explain what office procedures are generally used to prevent failures to timely contest penalty assessments, how those office procedures were ineffective in this instance due to unusual circumstances, and how new office procedures have been implemented to prevent future defaults. The notice informed counsel that a revised motion must be received by the Commission within 45 days of the date of the notice, or else the motion would be denied with prejudice.

N.C. Granite's counsel failed to respond to the Commission's notice. Accordingly, on November 22, 2011, the Commission issued an Order dismissing N.C. Granite's motion to reopen.

On December 22, 2011, the Commission received from N.C. Granite's counsel an "amended motion" seeking to reopen the penalty assessment.[1] The amended motion contained an affidavit from the Safety Manager which described a new procedure which N.C. Granite has instituted, including assigning responsibility to more than one individual, to make sure that future contests will be submitted in a timely manner.

The amended motion also included an affidavit by counsel which stated that upon receiving the Commission's September 28, 2011 notice, counsel re-drafted the motion and an affidavit for the Safety Manager and emailed it to him. The Safety Manager signed and returned the affidavit by email on October 6, 2011. Counsel states that she immediately sent the package containing the motion, affidavit and attachments to her law firm's front office staff for faxing and mailing to the Commission. Counsel states that she believed that the motion had been filed. Counsel further states that on November 22, 2011, she received the Commission's Order of Dismissal. Counsel states that she then investigated and discovered no evidence that the amended motion had ever been submitted. After talking with the front office staff, counsel was uncertain what had happened to the package, but thought it might have been mislaid in the course of office renovations.

In evaluating this motion, we note that counsel failed to respond to the Commission's September 28, 2011 notice informing N.C. Granite that the original motion was deficient. Counsel's explanation – that her law firm's front office staff somehow lost the package containing the amended motion and affidavit of the Safety Manager – bespeaks a completely inadequate and unreliable internal processing system. However, we note that counsel has implemented new procedures in her law office.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1061, 1062 (Dec. 2008). The fact that it was counsel who had the inadequate or unreliable internal processing system does not affect our analysis, because a client may be held responsible for the acts and omissions of its attorney. *M3 Energy Mining Co.*, 33 FMSHRC 1741, 1746 (Aug. 2011)*; Keokee Mining, LLC*, 32 FMSHRC 64, 66 n.1 (Jan. 2010).

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[1] We construe this amended motion as a petition for reconsideration of the Commission's November 22 Order of Dismissal. Commission Procedural Rule 78 provides that a petition for reconsideration must be filed with the Commission within 10 days after a decision or order of the Commission. 29 C.F.R. § 2700.78. N.C. Granite's amended motion was filed 30 days after the order of the Commission, and was therefore untimely. Nonetheless, in light of the equitable considerations discussed below, we accept this submission.

Nevertheless, in this case we conclude that the balance of equities favors reopening the penalty assessment. Clearly, N.C. Granite had contested the underlying citation and was actively litigating it, with both written discovery and depositions. In this posture, the failure of the Safety Manager to realize that the proposed penalty assessment must also be contested is excusable. *See Clean Energy Mining Co.,* 28 FMSHRC 87 (March 2006) (failure to contest proposed penalty held excusable where operator contested underlying citation but inadvertently paid proposed penalty). Moreover, N.C. Granite has explained how it has instituted a new procedure to ensure that proposed penalty assessments will be timely contested.

Therefore, we hereby reopen this matter[2] 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 G. Young
Michael G. Young, Commissioner

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

[2] Our reopening of the proposed penalty assessment is limited to Citation No. 8546405.

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February 12, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2012-701
v.	:	A.C. No. 15-18982-253464
STURGEON MINING CO., INC.	:	

BEFORE: Jordan, Chairman; Young 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 March 12, 2012, the Commission received from Sturgeon Mining Co., Inc. ("Sturgeon") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the request 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).

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 Sturgeon's request and the Secretary's response, 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 G. Young
Michael G. Young, Commissioner

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

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February 12, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2012-881
v.	:	A.C. No. 15-19242-280611-02
REDHAWK MINING, LLC	:	

BEFORE: Jordan, Chairman; Young 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 April 19, 2012, the Commission received from Redhawk Mining, LLC ("Redhawk") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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).

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).

Redhawk asserts that it filed a timely notice of contest but mistakenly marked the wrong box. Redhawk discovered its mistake after receiving the Department of Labor's Mine Safety and Health Administration's ("MSHA") petition for assessment of civil penalty. The Secretary does not oppose the request to reopen.

Having reviewed Redhawk's request and the Secretary's response, 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 G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
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February 12, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2012-808-M
v.	:	A.C. No. 42-01247-277547
BOLINDER RESOURCES, LLC	:	

BEFORE: Jordan, Chairman; Young 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 April 20, 2012, the Commission received from Bolinder Resources, LLC ("Bolinder") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the request 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).

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 Bolinder's request and the Secretary's response, 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 G. Young
Michael G. Young, Commissioner

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

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February 12, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2012-919-M
v.	:	A.C. No. 35-03510-274340
HOOVER EXCAVATING, INC.	:	

BEFORE: Jordan, Chairman; Young 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 May 16, 2012, the Commission received from Hoover Excavating, Inc. ("Hoover") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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).

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).

Hoover asserts that it did not receive the proposed assessment. The delinquency was discovered by Hoover's counsel on May 4, 2012, during a search on the Department of Labor's

Mine Safety and Health Administration's ("MSHA") Mine Data Retrieval System. The Secretary does not oppose the request to reopen, and states that the proposed assessment was mailed to Hoover's address of record and returned unclaimed to MSHA. The Secretary urges the operator to ensure that its address of record is accurate, so that future penalty assessments can be received at that address. The Secretary cautions that she may oppose future motions to reopen penalty assessments that are not timely contested.

Having reviewed Hoover's request and the Secretary's response, 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 G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
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February 12, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2012-1090
v.	:	A.C. No. 46-01436-283559
CONSOLIDATION COAL COMPANY	:	

BEFORE: Jordan, Chairman; Young 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 May 4, 2012, the Commission received from Consolidation Coal Company ("Consol") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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).

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).

The Department of Labor's Mine Safety and Health Administration's ("MSHA") record indicates that the proposed assessment was delivered on March 21, 2012, and became a final order of the Commission on April 20, 2012. Consol asserts that the assessment was placed in its safety supervisor's mailbox with copies of other assessments which had already been contested. Consol's safety supervisor only determined on April 23, 2012 that this proposed assessment had not been contested. Consol changed future procedures to ensure that the clerk personally delivers proposed assessments to the safety supervisor, who completes the contest form and forwards it to the corporate office for processing within 24 hours of receipt. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Consol's request and the Secretary's response, 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 G. Young
Michael G. Young, Commissioner

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

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February 13, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of RUSSELL RATLIFF	:	
v.	:	Docket No. WEVA 2013-368-D
COBRA NATURAL RESOURCES, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This proceeding arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2006) ("Mine Act"). On January 14, 2013, Administrative Law Judge William S. Steele issued an order requiring Cobra Natural Resources, LLC ("Cobra") to temporarily reinstate Russell Ratliff pursuant to section 105(c)(2). On January 22, 2013, Cobra filed a petition for review of that temporary reinstatement order under Commission Procedural Rule 45(f), 29 C.F.R. § 2700.45(f). This appeal is currently pending before the Commission.

On February 4, 2013, the judge received an unopposed motion by the Secretary of Labor to incorporate an economic reinstatement agreement into the January 14 order. Commission Procedural Rule 45(e)(4), 29 C.F.R. § 2700.45(e)(4), provides that the Commission has jurisdiction over a temporary reinstatement proceeding during the appellate review of an order to temporarily reinstate a miner. Thus, the Commission will rule on the motion.

The proposed agreement provides in pertinent part:

> 1. Cobra shall economically temporarily reinstate Mr. Ratliff rather than physically placing him back to work at the mine . . . . Cobra's obligations under this agreement shall end upon the earlier of (i) a determination by the Secretary, an Administration Law Judge, or the Federal Mine Safety and Health Review Commission ("the Commission") that Cobra did not violate § 105(c) of the Federal Mine Safety and Health Act, 30

> U.S.C. 815(c) when it terminated Mr. Ratliff's employment on October 24, 2012, or . . .

The provision of the proposed agreement that Cobra's obligations shall end if and when an administrative law judge concludes that Cobra did not violate section 105(c) of the Mine Act when it terminated Ratliff's employment is contrary to section 105(c)(2). This section provides that if the Commission, upon application by the Secretary, determines that the miner's complaint was not frivolously brought, it "shall order the immediate reinstatement of the miner *pending final order on the complaint.*" 30 U.S.C. § 815(c)(2) (emphasis added).

In *Secretary of Labor on behalf of Bernardyn v. Reading Anthracite Co.,* 21 FMSHRC 947 (Sept. 1999), the Commission held in a section 105(c)(2) case that the judge erred in dissolving the order of temporary reinstatement. The miner had been temporarily reinstated, the administrative law judge later found that the operator had not discriminated against the miner, and the Commission granted the Secretary's petition to review the judge's decision. *Id.* at 947-48. The Commission held that "the language of the Mine Act *requires* that a temporary reinstatement order remain in effect while the Commission reviews the judge's decision" on the complaint of discrimination. *Id.* at 949 (emphasis added); s*ee also Sec'y of Labor on behalf of Pendley v. Highland Mining Co.,* 32 FMSHRC 745 (July 2010).

The proposed agreement as currently drafted would permit Ratliff's temporary economic reinstatement to end if the judge finds no discrimination on the underlying complaint regardless of whether the Commission had agreed to review the judge's decision. For this reason, the Commission denies the Motion to Incorporate Economic Reinstatement Agreement into Order of Temporary Reinstatement.[1]

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

[1] The Commission reminds the parties that the judge's order of January 14, 2013, which provided for "immediate reinstatement" of Mr. Ratliff, continues to be in effect.

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February 14, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2012-646-M
v.	:	A.C. No. 16-00358-275969 KMA
OLDENBURG GROUP, INC.	:	

BEFORE: Jordan, Chairman; Young 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 8, 2012, the Commission received from Oldenburg Group, Inc. ("Oldenburg") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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).

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).

MSHA's record indicates that Oldenburg's proposed assessment was delivered on December 27, 2011, signed for by J. Brokaw, and became a final order of the Commission on

January 26, 2012. Oldenburg asserts that it did not receive the proposed assessment because it was sent to its previous address in Colorado. Oldenburg further states that it has notified MSHA of its current mailing address in New Hampshire, and that its new address is listed on MSHA's Data Retrieval System. The Secretary does not oppose the request to reopen, and states that a delinquency notice mailed to the Colorado address on March 12, 2012, was returned undelivered. The Secretary urges the operator to ensure that its address of record is accurate. The Secretary cautions that she may oppose future motions to reopen penalty assessments that are not timely contested.

Having reviewed Oldenburg's request and the Secretary's response, 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 G. Young
Michael G. Young, Commissioner

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

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February 14, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2012-706-M
v.	:	A.C. No. 23-02311-274540
WHITE ROCK QUARRY, LLC	:	

BEFORE: Jordan, Chairman; Young 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 29, 2012, the Commission received from White Rock Quarry, LLC ("White Rock") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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).

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).

The record indicates that the proposed assessment was delivered on December 15, 2011, signed for by R. Hall, and became a final order of the Commission on January 17, 2012. MSHA mailed a delinquency notice on February 29, 2012, and the case was referred to the Department of Treasury for collection on June 21, 2012. White Rock asserted that its owner never received the proposed assessment or the delinquency notice. White Rock maintained that it filed this motion to reopen within 30 days of discovering the delinquency on MSHA's Mine Data Retrieval System on May 29, 2012.

The Secretary opposed the request to reopen, stating that the penalty assessment and delinquency notice were mailed to the operator's address of record. Moreover, the Secretary asserted that Ms. Hall signed for previous MSHA documents, and that the operator did not explain the internal procedures failure in this instance.

On September 19, 2012, the Commission sent White Rock a letter asking it to explain how it had addressed the office procedures that were ineffective in this instance and what procedures it had implemented to prevent future defaults. In response, White Rock disputes that its office procedures were defective and asserts that due to unusual circumstances the proposed assessment never reached the specifically marked folder for MSHA penalty assessments, and that it implemented additional procedures to prevent such mistakes in the future.

Having reviewed White Rock's requests and the Secretary's response, 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 G. Young
Michael G. Young, Commissioner

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

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February 14, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2012-269
v.	:	A.C. No. 36-01977-282891
READING ANTHRACITE COMPANY	:	

BEFORE: Jordan, Chairman; Young 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 April 30, 2012, the Commission received from Reading Anthracite Company ("Reading") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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).

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).

MSHA's record indicates that the proposed assessment was delivered to Reading on March 9, 2012, and became a final order of the Commission on April 9, 2012. Reading's notice of contest was postmarked April 10, 2012. Reading asserts that it was one day late in filing the contest form because its safety director received the proposed assessment on March 13, and believed he had until April 12 to contest. Reading further states that it received MSHA's delinquency notice on April 17, and filed this motion to reopen on April 27, after additional correspondence with MSHA. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Reading's request and the Secretary's response, 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 G. Young
Michael G. Young, Commissioner

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

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February 14, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2012-439-M
v.	:	A.C. No. 40-00827-270458 A
TRAVIS ALEXANDER, employed by TYCON EXCAVATING CONTRACTOR, INC.	:	

BEFORE: Jordan, Chairman; Young 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 April 30, 2012, the Commission received from Travis Alexander, employed by Tycon Excavating Contractor, Inc. ("Alexander") a motion seeking to reopen a penalty assessment under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission.

Under the Commission's Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

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).

Alexander asserts that he did not receive the proposed assessment or delinquency notice because MSHA mailed them to the wrong address. The Secretary does not oppose the request to reopen, and states that the proposed assessment was returned undelivered to MSHA.

Having reviewed Alexander's request and the Secretary's response, 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.[1] 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 G. Young
Michael G. Young, Commissioner

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

[1] Alexander's motion to reopen the penalty assessment also contained a motion to dismiss the penalty assessment. The motion to dismiss should be directed to the administrative law judge.

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February 14, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2012-489-M
v.	:	A.C. No. 40-03223-280453
ROCKY POINT ROCK QUARRY, INC.	:	

BEFORE: Jordan, Chairman; Young 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 May 22, 2012, the Commission received from Rocky Point Rock Quarry, Inc. ("Rocky Point") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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).

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).

The Department of Labor's Mine Safety and Health Administration's ("MSHA") record indicates that the proposed assessment was delivered on February 15, 2012, and became a final order of the Commission on March 16, 2012. Rocky Point asserts that while its president was out of the office, the administrative personnel left any mail addressed to the president on his desk. Rocky Point further states that it has changed future procedures to permit administrative personnel to open MSHA correspondence in an effort to avoid late or missed filing deadlines. The Secretary does not oppose the request to reopen, and notes that MSHA mailed a delinquency notice on May 1, 2012. The Secretary cautions that she may oppose future motions to reopen penalty assessments that are not contested in a timely manner.

Having reviewed Rocky Point's request and the Secretary's response, 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 G. Young
Michael G. Young, Commissioner

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

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February 14, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. SE 2012-531-M A.C. No. 08-01231-280533 A
v.	:	Docket No. SE 2012-532-M A.C. No. 08-01231-280994 A
MATT RUDNIANYN and JEFF D. FARLEY, employed by COMMERCIAL INDUSTRIAL CORP.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On June 13, 2012, the Commission received a motion seeking to reopen two penalty assessments against Matt Rudnianyn and Jeff D. Farley under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become final orders of the Commission. The motion was filed by Mr. Rudnianyn, President of Commercial Industrial Corp. ("Commercial"), on behalf of himself and Mr. Farley.[1]

Under the Commission's Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders. *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers SE 2012-531-M and SE 2012-532-M. 29 C.F.R. § 2700.12. Also, pursuant to Commission Procedural Rule 3, we grant Mr. Rudnianyn permission to represent Mr. Farley for the narrow purpose of reopening these cases.

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).

Mr. Rudnianyn asserts that Commercial and its agents were unaware of these assessments until they received delinquency notices from MSHA on May 14 and 21, 2012. He suggests that if the assessments had been received, they may have erroneously been considered to be part of its settlement negotiations of a related case against the operator during February 2012. The Secretary does not oppose the requests to reopen. We note that these section 110(c) proposed assessments and notices of delinquency were mailed to the operator's address of record.

Having reviewed these requests and the Secretary's responses, in the interests of justice, we hereby reopen these matters and remand them 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 G. Young
Michael G. Young, Commissioner

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

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February 14, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2012-1001-M
v.	:	A.C. No. 26-01621-286858
QUEENSTAKE RESOURCES, USA, INC.	:	

BEFORE: Jordan, Chairman; Young 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 8, 2012, the Commission received from Queenstake Resources, USA, Inc. ("Queenstake") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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).

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).

MSHA's record indicates that the proposed assessment was delivered on April 26, 2012, and became a final order of the Commission on May 29, 2012. Queenstake asserts that its new compliance manager was not aware of this proposed assessment because his administrative assistant paper clipped it behind another assessment. The compliance manager discovered his mistake and notified counsel on June 5, 2012. The Secretary does not oppose the request to reopen, but notes that Queenstake did not indicate which penalties it seeks to reopen. In response, Queenstake clarified that it wishes to contest all 65 penalties contained in A.C. # 000286858.

Having reviewed Queenstake's request and the Secretary's response, 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 G. Young
Michael G. Young, Commissioner

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

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February 14, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2012-1030-M
v.	:	A.C. No. 04-04075-284284 NPN
APPLIED CONVEYOR TECHNOLOGY, INC.	:	

BEFORE: Jordan, Chairman; Young 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 7, 2012, the Commission received from Applied Conveyor Technology, Inc. ("Applied Conveyor") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary does not oppose the request 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).

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 Applied Conveyor's request and the Secretary's response, 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 G. Young
Michael G. Young, Commissioner

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

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February 14, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
	:	Docket No. WEST 2012-1059-M
v.	:	A.C. No. 26-02228-281979
	:	
BLACK MOUNTAIN INDUSTRIAL MINERALS, LLC	: :	

BEFORE: Jordan, Chairman; Young 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 18, 2012, the Commission received from Black Mountain Industrial Minerals, LLC ("Black Mountain") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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).

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).

Black Mountain asserts that upon receiving MSHA's delinquency notice, dated May 21, 2012, it discovered that the proposed assessment has been delivered on March 5, 2012, and became a final order of the Commission on April 4, 2012. Black Mountain found the assessment paper-clipped to the back of a magazine and, as a result, revised its procedures for handling MSHA correspondence. The Secretary does not oppose the request to reopen.

Having reviewed Black Mountain's request and the Secretary's response, 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 G. Young
Michael G. Young, Commissioner

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

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February 14, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2012-1062-M
v.	:	A.C. No. 04-04075-281461 NPN
APPLIED CONVEYOR TECHNOLOGY, INC.	:	

BEFORE: Jordan, Chairman; Young 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 7, 2012, the Commission received from Applied Conveyor Technology, Inc. ("Applied Conveyor") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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).

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).

The record indicates that the proposed assessment was delivered on February 29, 2012, signed for by Y. Rangel, and became a final order of the Commission on March 30, 2012. MSHA mailed a delinquency notice on May 15, 2012. Applied Conveyor submitted this motion to reopen with an explanation for its late contest in another case, Docket No. WEST 2012-1030-M. The Secretary opposed the request to reopen, stating that Applied Conveyor provided no explanation for failing to timely contest the proposed assessment.

On September 19, 2012, the Commission sent Applied Conveyor a letter asking it to explain why it did not timely contest the proposed assessment and what office procedures were implemented to prevent future defaults. In response, Applied Conveyor asserts that the employee responsible for MSHA assessments left without notice, and that the motion to reopen was filed as soon as the assessments were found. Moreover, Applied Conveyor states that new procedures were implemented to prevent future defaults.

Having reviewed Applied Conveyor's requests and the Secretary's response, 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 G. Young
Michael G. Young, Commissioner

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

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February 14, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2012-1238
v.	:	A.C. No. 46-09060-281823
TEN-MILE COAL COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Young 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 4, 2012, the Commission received from Ten-Mile Coal Company, Inc. ("Ten-Mile") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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).

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).

MSHA's record indicates that the proposed assessment was delivered on March 8, 2012, and became a final order of the Commission on April 9, 2012. Ten-Mile mailed a contest to MSHA on May 15, 2012, MSHA responded on May 22, 2012, and the motion to reopen was filed within 30 days, on June 4, 2012. Ten-Mile asserts that its superintendent inadvertently mixed the proposed assessment with other paperwork due to a high rate of terminations and new hires at the mine. Ten-Mile's office manager discovered and contested the proposed assessment on May 15, 2012. The Secretary does not oppose the request to reopen and notes that MSHA received payment for the uncontested citations by check dated May 15, 2012.

We note that similar inadequate office procedures were evident in Ten-Mile's recent motion to reopen. *Ten-Mile Coal Co., Inc.*, 33 FMSHRC 2188 (Sept. 2011). We reopened the previous motion in part due to Ten-Mile's office manager's statement that she had created a computer system for timely processing assessments in the future. *Id.* at 2189-90. The Commission has made it clear that where a failure results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1061, 1062 (Dec. 2008). We urge Ten-Mile to take all steps necessary to ensure that future penalty contests are timely filed.

Having reviewed Ten-Mile's request and the Secretary's response, 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 G. Young
Michael G. Young, Commissioner

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

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February 14, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2012-173-M
v.	:	A.C. No. 43-00031-269463
TARAN BROTHERS, INC.	:	

BEFORE: Jordan, Chairman; Young 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 May 22, 2012, the Commission received from Taran Brothers, Inc. ("Taran") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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).

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).

MSHA's record indicates that the proposed assessment was delivered on October 19, 2011, and became a final order of the Commission on November 18, 2011. Taran asserts that it filed a timely notice of contest. Taran further states that it discovered the delinquency on May 4, 2012, after receiving notice from the Department of Treasury. The Secretary does not oppose the request to reopen, and notes that MSHA received a signed but otherwise unmarked copy of the form from Taran on November 15, 2011, but it was not processed because it was not correctly filled out. The Secretary also states that MSHA received payment through Treasury collection by check dated May 14, 2012.

Having reviewed Taran's request and the Secretary's response, 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 G. Young
Michael G. Young, Commissioner

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

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February 22, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. WEVA 2012-853
v.	:	WEVA 2012-1690
	:	WEVA 2012-1697
COAL RIVER MINING, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These consolidated proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006)("Mine Act" or "Act"). On December 21, 2012, Coal River Mining, LLC, ("Coal River") filed with the Commission a document entitled "Petition to Enforce 'Law of the Case Doctrine' and to Set Aside Erroneous Order Lifting Stay and Amended Notice of Hearing." Coal River seeks review of a Corrected Order of Assignment issued by Chief Administrative Law Judge Robert J. Lesnick on November 30, 2012, and of an accompanying Prehearing Order issued by Administrative Law Judge Margaret A. Miller on that same date. Coal River also seeks review of Judge Miller's December 13, 2012, Order Denying Motion to Stay, Order Lifting Stay and Amended Notice of Hearing. The basis of the petition is that in two of these three dockets, Judge Lesnick had previously granted the Secretary's motion to stay assignment for 180 days.[1]

We have determined that none of these orders are final decisions ending the judge's jurisdiction over this matter. Section 113(d) of the Mine Act, 30 U.S.C. § 823(d), only allows for review of final decisions. Accordingly, we treat these orders as interlocutory in nature.

Pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76, the Commission may review a judge's ruling, prior to the judge's final decision in the case, only if certain conditions

[1] We note that in these proceedings Coal River's counsel did not bring this issue to Judge Lesnick's attention after the issuance of the November 30 Corrected Order of assignment, or file a motion for certification of interlocutory review before Judge Miller after the issuance of the December 13 Order Denying Motion to Stay, Order Lifting Stay and Amended Notice of Hearing. Rather, Coal River submitted the petition at issue to the Commission.

are met. First, pursuant to Rule 76(a)(1), either the judge must certify that his or her interlocutory ruling involves a controlling question of law and that immediate review will materially advance the final disposition of the proceeding, or the judge must deny a party's motion for certification of the interlocutory ruling to the Commission and the party must file with the Commission a petition for interlocutory review within 30 days of the judge's denial of such motion for certification. Second, under Rule 76(a)(2), a majority of the Commission may grant review upon a determination that the judge's interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding.

The first condition was not met, because the judge did not certify review on her own accord, and Coal River failed to ask the judge to certify the rulings for interlocutory review. However, even if these requirements were met, we have concluded that review is not warranted because the orders do not involve a controlling question of law and immediate review would not materially advance the final disposition of the case.

For the reasons set forth above, the petition filed by Coal River is denied.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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February 25, 2013

CLINTWOOD ELKHORN MINING COMPANY, INC.	:	Docket Nos. KENT 2011-40-R
	:	KENT 2011-41-R
	:	KENT 2011-53-R
v.	:	KENT 2011-54-R
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

DECISION

BY THE COMMISSION:

These contest cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"). In these proceedings, Administrative Law Judge L. Zane Gill vacated a citation issued to Clintwood Elkhorn Mining Company ("Clintwood") by the Department of Labor, Mine Safety and Health Administration ("MSHA") for an alleged failure to maintain control of a haul truck as required by the mandatory safety standard in 30 C.F.R. § 77.1607(b).[1] 32 FMSHRC 1880, 1896 (Dec. 2010) (ALJ). The Secretary filed a petition for discretionary review ("PDR"), which was granted by the Commission.

For the reasons that follow, we reverse the judge's decision and remand the case.

[1] The judge vacated the two orders and the two citations at issue in these consolidated contest proceedings. 32 FMSHRC at 1896. The Secretary sought review of the judge's decision to vacate Citation No. 6660595 (contest proceeding KENT 2011-41-R). PDR at 4. She did not seek review of the judge's decision to vacate Order Nos. 8247761 and 8247767 and Citation No. 8247768, which are discussed in more detail, *infra*.

I.

Factual and Procedural Background

Clintwood operates a coal preparation plant in Pike County, Kentucky. 32 FMSHRC at 1882. A steeply graded haul road runs from the plant to a nearby deep coal mine. *Id*. at 1882-83;
Gov. Ex. 1. Clintwood contracted with Hubble Mining Co. ("Hubble") to operate this mine. Tr. 38. Hubble contracted with Tattoo Trucking to haul the coal mined from this property to the plant. 32 FMSHRC at 1884; Tr. 38-39.

During the morning of October 6, 2010, Shane Bishop, an employee of Tattoo Trucking, was hauling coal from the mine down to Clintwood's plant in a 20-ton Mack 800 haul truck. 32 FMSHRC at 1882-84; Tr. 121-22. On his ninth trip to the plant, Bishop encountered mine equipment occupying the road. 32 FMSHRC at 1883; Gov. Ex. 7. He applied the brakes and waited for the equipment to clear. 32 FMSHRC at 1883. Bishop then continued on his way. *Id*. at 1884. While descending the hill, he once again attempted to apply the brakes. *Id*. This time the brakes failed. *Id.* Without the brakes, the truck continued to accelerate for about 100 to 150 feet before crashing through a berm and utility pole at the base of the hill. *Id.* The truck rolled over onto its passenger side, where it came to a stop with its front axle suspended over the 30-foot dropoff to the plant's dump area. *Id.*; Tr. 32.

Bishop suffered only an abrasion and some bruising, despite not wearing his seatbelt. 32 FMSHRC at 1884; Tr. 190-94. He was taken to a hospital emergency room, examined by a doctor, and released without treatment. 32 FMSHRC at 1884.

Homer Sullivan, the superintendent at Clintwood, notified the local MSHA office of the incident. *Id*. at 1885. Sullivan spoke with Inspector James Holbrook, who immediately issued Order No. 8247761 pursuant to section 103(j) of the Act, 30 U.S.C. § 813(j).[2] *Id.*; Gov. Ex. 1. Holbrook then traveled to the plant and modified the order to reflect MSHA's authority pursuant to section 103(k) of the Act.[3] 32 FMSHRC at 1885. The order required Clintwood to obtain the Secretary's approval prior to restoring operations on the haul road. Gov. Ex. 1. Clintwood was, however, permitted to continue dumping activities at the plant. *Id.*

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[2] Section 103(j) provides, in pertinent part, that "[i]n the event of any accident occurring in any coal or other mine . . . the Secretary shall take whatever action he deems appropriate to protect the life of any person . . . ." 30 U.S.C. § 813(j).

[3] Section 103(k) provides that "[i]n the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine . . . ." 30 U.S.C. § 813(k).

On October 8, 2010, Keith McCoy, Clintwood's safety manager, submitted an action plan to MSHA and sought approval to resume traffic on the haul road. Gov. Ex. 13. Clintwood proposed that it would provide gravel to maintain existing truck "run-a-way ramps," implement a no-shift policy, and limit the amount of coal hauled on the road to the amount permitted under Kentucky state law. *Id.*

Inspector Holbrook and Inspector Robert Bellamy did not find Clintwood's action plan to be sufficient to terminate the section 103(k) order. Tr. 52-53, 165. The inspectors believed that Bishop's haul truck had been loaded beyond its weight capacity, and that this alleged overloading contributed to the driver's loss of control.[4] Tr. 63-64, 167, 170. As a result, MSHA requested that the operator develop a plan to provide the haul trucks' gross vehicle weight rating ("GVWR") on the weigh tickets[5] or to otherwise make the information available. 32 FMSHRC at 1886; Tr. 140.

On October 13, 2010, Clintwood submitted a second action plan stating that it would provide additional gravel for the contractors to use to maintain the "run-a-way ramps" on the haul road. Gov. Ex. 14. Clintwood did not include in the revised action plan a method to disclose the GVWR of the haul trucks which dumped at the plant. 32 FMSHRC at 1886; Gov. Ex. 14.

On October 14, as a result of the findings of MSHA's investigation, Inspector Bellamy issued Citation No. 6660595 pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1). 32 FMSHRC at 1886; Tr. 150. The citation alleged that the driver of the haul truck had failed to maintain control of the vehicle in violation of 30 C.F.R. § 77.1607(b), which provides that "[m]obile equipment operators shall have full control of the equipment while it is in motion." Gov. Ex. 12. The citation also alleged that the violation was significant and substantial and the result of the operator's unwarrantable failure to comply with the mandatory safety standard. *Id*.

On October 15, Inspector Holbrook observed trucks that he considered to be overloaded continuing to dump at the plant. Gov. Ex. 8; Tr. 41. He issued Order No. 8247767 pursuant to section 104(b) of the Act, 30 U.S.C. § 814(b), thereby halting all coal haulage to the plant. Gov. Ex. 8. On the same day, Holbrook also issued Citation No. 8247768 pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), following Clintwood's failure to comply with MSHA's document request for truck weigh tickets. Gov. Ex. 9.

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[4] The inspectors testified that a Mack 800 haul truck is rated to haul 20 tons. Tr. 43, 137, 157. Inspector Bellamy alleged that Bishop's previous loads on October 6 averaged 44 tons. Tr. 137, 157, *see* Gov. Ex. 7 (truck number 292 lists eight loads with an average weight of 43.95 tons).

[5] A weigh ticket identifies the haul truck, its operator, the weight of the truck, and the weight of the coal being hauled. Tr. 46.

Clintwood requested an expedited hearing pursuant to Commission Procedural Rule 52, 29 C.F.R. § 2700.52. 32 FMSHRC at 1880. The hearing was held on October 19, 2010. *Id*. At the conclusion of the Secretary's direct case, Clintwood moved to vacate the citations and orders. *Id.* at 1881.

The judge granted the operator's motion and vacated the two citations and the two orders. *Id*. at 1881, 1890-92. He vacated the citation that is at issue on review (Citation No. 6660595) for two independent reasons. *Id*. at 1890. The judge concluded that the Secretary had exceeded her authority by issuing the citation during an accident investigation for a violation that no longer existed. *Id*. Furthermore, he concluded that the Secretary had failed to prove that the haul truck at issue was overloaded. *Id.*

II.

Disposition

The Secretary asserts that the judge erred in declining to accept her interpretation of section 104(d)(1) of the Act as authorizing her to cite an operator for conditions that have since expired. Also, she alleges that the judge further erred in interpreting section 77.1607(b) to require the Secretary to prove that the truck at issue was overloaded.

Clintwood argues that the judge's decision to vacate the citation should be affirmed because the citation was issued in an arbitrary and capricious manner in that it was entirely predicated upon the unproven allegation that the haul truck at issue was overloaded. The Secretary responds that a failure to establish that the truck was overloaded is not sufficient grounds to vacate the citation.

A. The Secretary's authority pursuant to section 104(d)(1) of the Act

Section 104(d)(1) of the Mine Act provides that "[i]f, upon any *inspection* of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that . . . such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator . . . ." 30 U.S.C. § 814(d)(1) (emphasis added).

The judge concluded that "by using the term 'inspection' alone, Congress reserved and confined [section 104(d)(1)] to current existing violations . . . Congress did not intend this authority to be used as a post hoc sanction for violations no longer extant or previously abated . . . ." 32 FMSHRC at 1889 (citing *Nacco Mining Co.,* 9 FMSHRC 1541, 1565 (Sept. 1987) (Chairman Ford, dissenting)). The judge further opined that the Secretary's authority pursuant to

section 104(d)(1) is reserved for existing violations which require "prophylactic mine closure." 32 FMSHRC at 1889-90.

Contrary to the judge's analysis, it is well established that the Secretary has the authority to issue a citation pursuant to section 104(d) for both "existing and expired conditions and circumstances." *Nacco Mining,* 9 FMSHRC at 1548; *see also Emerald Mines Co. v. FMSHRC*, 863 F.2d 51, 59 (D.C. Cir. 1988); *BethEnergy Mines, Inc.,* 14 FMSHRC 1232, 1243 (Aug. 1992). The judge's analysis was flawed, as he relied on a dissenting opinion in *Nacco Mining* which lacks any precedential value.

In *Nacco Mining,* the Commission considered whether the term "inspection" in section 104(d)(1) of the Mine Act limits the Secretary's authority to issue citations pursuant to that section to presently existing circumstances observed by an inspector. 9 FMSHRC at 1542-43. The Commission concluded that neither common usage of the term "inspection," the Act's purposes, nor its legislative history supports such a restrictive interpretation. *Id*. at 1547-50. Furthermore, the Commission noted that

> detection of a violation after it has ceased to exist is not uncommon. Many violations by their very nature cannot be, or are unlikely to be, observed or detected until after they occur. For example, the failure to perform a required pre-shift examination, 30 C.F.R. § 75.303, is usually detected after the shift has commenced, and most health violations are determined after the fact of violation through the analysis of samples and other data. *See, e.g.*, 30 C.F.R. § 70.100.

Id. at 1547. Accordingly, the Commission concluded that "a section 104(d) sanction may be based upon a prior violation." *Id*. at 1550.

In *Emerald Mines Corp*., 9 FMSHRC 1590 (Sept. 1987) (issued simultaneously with *Nacco Mining*), the Commission reaffirmed *Nacco Mining* in both its holding and its rationale. The operator appealed this case to the D.C. Circuit. On review, the court affirmed the Commission, holding that the Secretary may issue citations pursuant to section 104(d)(1) for violations that had been previously abated. *Emerald Mines*, 863 F.2d at 59. The D.C. Circuit stated that "[t]he gravity of the mine operator's conduct does not turn on whether the operator was caught in or after the act." *Id.*

Accordingly, we conclude that in the present proceedings the judge erred in concluding that the Secretary did not have the authority to issue a citation pursuant to section 104(d)(1) for a violation that no longer existed.

B. The alleged overloading of the haul truck

The judge also vacated the citation for a second, independent reason: he believed that the citation was "predicated on the unproved allegation that overloading existed." 32 FMSHRC at 1890 (Citation No. 6660595 states, in part, that "the contract driver of a loaded coal haulage truck failed to maintain control of the truck . . . . Overloading of the truck contributed to the driver losing control." Gov. Ex. 12). The judge concluded that the citation must be vacated because the Secretary failed to prove that the truck at issue was overloaded. *Id*. at 1888-90.

We conclude that the judge erred in his interpretation of 30 C.F.R. § 77.1607(b). In order to establish a violation of section 77.1607(b), the Secretary must only demonstrate, by a preponderance of the evidence, that the operator failed to maintain full control of a piece of equipment while it was in motion. Nothing in the language of the standard requires the Secretary to prove a causal or contributing factor for the loss of control, as suggested by the judge.[6] *Id*. at 1888.

It is undisputed that Bishop was unable to stop his truck as it rolled down the haul road, crashed through a berm, knocked over a pole, and flipped onto its passenger side. *Id*. at 1884. The judge concluded that "[i]t is obvious that the driver here lost control of his truck. . . . Mine operators are strictly liable for violations such as this." *Id.* at 1882 n.2. This is where the analysis should have ended.

We conclude that the judge made a finding that is both necessary and sufficient to affirm the citation: the driver lost control of his truck. Thus, it is clear that Clintwood violated the mandatory safety standard in section 77.1607(b). *See Ames Construction, Inc*., 33 FMSHRC 1607, 1611 (Jul. 2011), *affirmed,* 676 F.3d 1109 (D.C. Cir. 2012) (the Mine Act imposes strict liability for violations which occur at a mine without regard to the operator's fault) (citations omitted).

[6] The allegation that "overloading of the truck contributed to the driver losing control," if proven, might be a relevant consideration when evaluating the operator's negligence.

III.

Conclusion

In summary, we conclude that the Secretary acted within her authority in issuing the citation pursuant to section 104(d)(1). We also conclude that Clintwood violated the mandatory safety standard in 30 C.F.R. § 77.1607(b).

Accordingly, the decision of the judge is reversed. Citation No. 6660595 is remanded to the judge so that he may consider whether the Secretary established that the violation was significant and substantial, and whether it was the result of an unwarrantable failure to comply by the operator. Additionally, the judge is to assess an appropriate penalty.[7]

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

[7] On remand, the contest proceeding for Citation No. 6660595 should be consolidated with the related civil penalty proceeding in Docket No. KENT 2011-515.

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February 27, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2012-679-M
v.	:	A.C. No. 23-01889-266406
BARBER & SONS AGGREGATE	:	

BEFORE: Jordan, Chairman; Young 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 19, 2012, the Commission received from Barber & Sons Aggregate ("Barber") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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).

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).

Barber received Proposed Assessment No. 000266406, which is the subject of this motion, shortly after its issuance on September 8, 2011. Barber asserts that its office manager believed she had forwarded the proposed assessment to counsel, but counsel never received it. During this period, Barber's counsel was negotiating a global settlement agreement with MSHA of all outstanding violations against Barber. The global settlement was concluded in February 2012. It was the intention of Barber and MSHA that all violations issued by MSHA through the date of the global settlement would be included in it.

Barber's office manager notified counsel of the delinquency after she was contacted by a Treasury Department collection agency on April 9, 2012. During April and June 2012 counsel attempted to contact a Treasury Department representative and an attorney for the Secretary of Labor to include this case in the global settlement. The Secretary does not oppose the request to reopen.

Having reviewed Barber's request and the Secretary's response, 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 G. Young
Michael G. Young, Commissioner

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

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February 27, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 2010-1316-RM
	:	Citation No. 8574124
v.	:	
	:	Docket No. WEVA 2010-1317-RM
KEMPER EQUIPMENT, INC.	:	Order No. 8574125

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

DECISION

BY THE COMMISSION:

These captioned contest cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On June 7, 2010, the Mine Safety and Health Administration ("MSHA") issued Citation No. 8574124 and Order No. 8574125 to Kemper Equipment, Inc. ("Kemper") pursuant to section 104(d)(1), 30 U.S.C. § 814(d)(1). Subsequently, Kemper filed notices of contest pursuant to section 105(d), 30 U.S.C. § 815(d). On July 15, 2010, the Commission docketed the contest cases as WEVA 2010-1316-RM and WEVA 2010-1317-RM and issued an order staying the cases pending the issuance of the proposed assessment of civil penalties. The issue presently before us arises from Kemper's failure to timely contest these proposed civil penalties pursuant to section 105(a), 30 U.S.C. § 815(a).

The Mine Act sets forth a scheme of dual filing relating to contests of citations and orders (29 C.F.R. Part 2700, Subpart B), and contests of proposed penalties (29 C.F.R. Part 2700, Subpart C). The filing of a contest of a citation does not constitute a challenge to a proposed penalty for that citation. *See* 29 C.F.R. § 2700.21(a) ("The filing of a notice of contest of a citation or order issued under section 104 of the Act . . . does not constitute a challenge to a proposed penalty assessment that may subsequently be issued by the Secretary under section 105(a) of the Act . . . which is based on that citation or order."); 29 C.F.R. § 2700.26 ("A person who wishes to contest a proposed penalty assessment must provide such notification regardless of whether the person has previously contested the underlying citation. . . ."). Thus, after filing the notices of contest for Citation No. 8574124 and Order No. 8574125, the operator was still required to file contests of the associated proposed penalties within 30 days of receipt.

On January 18, 2011, MSHA issued Proposed Assessment No. 000244466 for the aforesaid citation and order. The record indicates that the proposed assessment was delivered to Kemper on January 24, 2011. When Kemper failed to contest the proposed assessment within 30 days of delivery, it became a final order of the Commission. 30 U.S.C. § 815(a). On May 16, 2011, after receiving documentation from MSHA indicating that the time for contesting the civil penalties had lapsed, Chief Judge Lesnick issued an order dismissing the contest proceedings.

On June 8, 2011, the Commission received Kemper's requests to reopen both the contest and civil penalty cases for the citation and order.[1] The Commission construed the motion as a petition for discretionary review of the dismissal order and a request to reopen the associated civil penalty proceeding. On June 27, 2011, review was granted. On July 13, 2011, the Commission ordered Kemper to submit a statement supplying further information regarding the circumstances surrounding its failure to timely contest the proposed assessments. On August 12, 2011, the Commission received Kemper's opening statement. Kemper asserts that its counsel requested that all correspondence be sent to his office, but never received the proposed assessments. Kemper acknowledges that its vice president received the proposed assessments on January 24, 2011, but did not send them to counsel because she believed they had already been contested.

The Secretary does not oppose the motion to reopen, but notes that it is the responsibility of the operator to contest the proposed assessment or forward it to counsel to contest within 30 days of receipt.

We have held 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).

[1] On July 5, 2011, the Commission received an amended request from Kemper which corrected an error in the caption of its June 8 request.

Having reviewed Kemper's requests and the Secretary's response, in the interests of justice, we hereby reopen Proposed Penalty Assessment No. 000244466 relating to Citation No. 8574124 and Order No. 8574125, and vacate the order dismissing the subject contest cases. We remand these matters 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, relating to Proposed Penalty Assessment No. 000244466, and the operator shall file an answer to that petition within 30 days after service of the petition. *See* 29 C.F.R. §§ 2700.28, 2700.29.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ Patrick K. Nakamura
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February 28, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 2010-408-R
THE AMERICAN COAL COMPANY	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

DECISION

BY: Jordan, Chairman, and Nakamura, Commissioner

In this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"), Administrative Law Judge Avram Weisberger vacated an order issued by the Department of Labor, Mine Safety and Health Administration ("MSHA"), to The American Coal Company ("American") pursuant to section 103(k) of the Mine Act, 30 U.S.C. § 813(k).[1] 32 FMSHRC 1387, 1391 (Sept. 2010) (ALJ). He concluded that the Secretary of Labor had failed to establish that MSHA inspectors had observed an "accident" at American's mine before issuing the section 103(k) order. *Id*. We vacate the decision of the judge and remand this matter for further proceedings.

I.

Factual and Procedural Background

The New Future coal stockpile is located in American's Galatia mine complex in Galatia, Illinois. *Id*. at 1387-1388. Coal from an underground mine is stored on the stockpile before it is moved to the preparation plant. *Id.* at 1387; Tr. 114-16.

[1] Section 103(k) provides that "[i]n the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine . . . ." 30 U.S.C. § 813(k).

On January 19, 2010, MSHA inspectors Michael Rennie and Wendell Crick visited the New Future stockpile. 32 FMSHRC at 1387-88; Tr. 50-53. At the time, the stockpile was about 60 feet high and about 1,000 feet by 300 feet wide. 32 FMSHRC at 1387-88; Tr. 50-53. The inspectors testified that they observed five separate areas of the stockpile where coal was "smoldering" and/or "smoking." 32 FMSHRC at 1388; Gov't Ex. 7; Tr. 25, 27, 28, 54, 67-68. Crick testified that he observed "whitish brownish" smoke and "heat waves and . . . a whitish coat of ash around the areas that smoke was rising from." Tr. 54. He smelled a "hot coal sulfur smell," which he attributed to burning coal. Tr. 56, 58. He stated that the smell grew stronger when he approached the smoke. Tr. 57-58, 83-84. Crick did not observe a flame at any of the five identified areas.[2] Tr. 92-93.

As a result of his observations, Crick issued Order No. 8418503 pursuant to section 103(k) of the Mine Act. Gov't Ex. 7. The order prohibited activities on the stockpile and required the operator to "obtain prior approval from an authorized representative for all actions necessary to restore operation to the affected area." Gov't Ex. 7; Tr. 119-20.

Section 103(k) provides, in pertinent part: "[i]n the event of any *accident* occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine . . . ." (emphasis added). Section 3(k) of the Act defines the word "accident" to "include[] a mine explosion, mine ignition, *mine fire*, or mine inundation, or injury to, or death of, any person." 30 U.S.C. § 802(k) (emphasis added).

Before the judge, the parties stipulated that the dispositive issue in this proceeding was whether a fire existed on the New Future stockpile on January 19, 2010. 32 FMSHRC at 1388-89; Tr. 12-13. The judge determined that sections 3(k) and 103(k) are not ambiguous and that, according to standard dictionary definitions, the word "fire" plainly requires the presence of a flame. 32 FMSHRC at 1390 (citing *Webster's Third New Int. Dictionary* 854 (2002); *Random House Dictionary of the English Language, unabridged* 721 (2nd ed. 1987)). No witness testified that he observed a flame on the New Future stockpile on January 19. Therefore, the judge concluded that as a matter of law, there was no "fire" and thus no "accident." *Id.* at 1391. Accordingly, the judge vacated the order. *Id.*

[2] Michael Smith, American's safety inspector, accompanied Rennie and Crick. 32 FMSHRC at 1388; Tr. 120. Smith testified that he observed neither flames nor the "white ash" identified by Crick. Tr. 120-21.

II.

Disposition

The Secretary contends that the judge erred in his analysis. She alleges that section 3(k) is silent or ambiguous with regard to whether the presence of a flame is required for a fire to exist pursuant to this provision. She maintains on appeal that the judge should have deferred to her interpretation of the word "fire," which includes "both events marked by flaming combustion and events marked by smoldering combustion that reasonably has the potential to burst into flames." PDR at 17-18.

American asserts that the word "fire" in section 3(k) plainly means that a flame is being produced. American further contends that the Secretary's proffered interpretation is not reasonable because it fails to distinguish between underground mine fires and surface mine fires.

It is well established that the threshold issue in any case involving statutory construction is "whether Congress has directly spoken to the precise question in issue." *Chevron, U.S.A., Inc., v. Natural Res. Def. Council*, *Inc.*, 467 U.S. 837, 842 (1984); *Twentymile Coal Co.*, 30 FMSHRC 736, 750 (Aug. 2008); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, then the court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43; *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990).

In analyzing whether Congress expressed a specific intent on a particular issue, "courts utilize traditional tools of construction, including an examination of the 'particular statutory language at issue, as well as the language and design of the statute as a whole.'" *Twentymile,* 30 FMSHRC at 750 (quoting *K Mart Corp. v. Cartier, Inc*., 486 U.S. 281, 291 (1988)). The statute's legislative history and purpose as well as related judicial precedent are also relevant to this analysis. *Twentymile*, 30 FMSHRC at 750-52; *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987). The examination to determine whether there is such a clear Congressional intent is commonly referred to as "*Chevron* Step I" analysis. *See Coal Employment Project*, 889 F.2d 1127, 1131 (D.C. Cir. 1989); *Thunder Basin*, 18 FMSHRC at 584. If the statute is ambiguous or silent on the point in question, a second inquiry, commonly referred to as "*Chevron* Step II" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Coal Employment Project*, 889 F.2d at 1131; *Thunder Basin*, 18 FMSHRC at 584 n.2.

A. The Mine Act is silent or ambiguous as to whether a "mine fire" requires the presence of a flame.

At the outset, we note that the complete term which appears in section 3(k) of the Act is "mine fire." We conclude that the word "mine" is not superfluous; rather it provides context for an interpretation of the word "fire."

In *Twentymile*, the Commission considered the meaning of the word "trapped" as used in section 316 of the Mine Act. 30 FMSHRC at 750. In determining the meaning of the word "trapped," the Commission first considered the ordinary meaning of the word as set forth in a standard dictionary. However, the Commission went further and considered the context in which the term "trapped" was used in the Mine Act, as well as the relevant legislative history. *Id.* at 750-52. In particular, the Commission considered whether the interpretation involved "is consistent with the primary purpose of the legislation and experiences from the mine disasters that led to the legislation." *Id.* at 751.

In this case, the judge exclusively relied on two standard dictionary definitions to interpret a statutory term, instead of employing traditional tools of construction to determine whether Congress had directly addressed the issue. We conclude that the judge's analytical approach is inconsistent with the Commission cases addressing *Chevron* Step I. Reference to a technical dictionary as well as the Mine Act's legislative history and purposes indicate that the statute is silent or ambiguous regarding whether a "mine fire" requires the presence of a flame.

A dictionary definition of a term cannot provide plain meaning when reliance on a different dictionary would provide "different or uncertain outcomes." *See Alarm Indus. Communication Comm. v. FCC*, 131 F.3d 1066, 1069 (D.C. Cir. 1997) (rejecting the FCC's exclusive reliance on *Black's Law Dictionary* to interpret the word "entity"); *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1680 (Dec. 2010) (regulatory term is ambiguous where dictionary definitions are open to alternative interpretations). In the case before us, the choice of dictionary changes the result of the analysis. The *Dictionary of Mining, Minerals and Related Terms* (2d ed. 1997) ("*DMMRT*") defines a "mine fire" as a "very dangerous occurrence [that] may arise as the result of spontaneous combustion, the ignition of timbers by gob fires, electric cable defects, or the heating and ignition of conveyor belts due to friction." *Id*. at 346; *Wolf Run Mining Co.*, 32 FMSHRC at 1685 ("The technical usage of a term is quite relevant in determining its meaning, and the *DMMRT* is a recognized authority for such usage."). Absent from the technical definition is any mention as to whether a "mine fire" requires the presence of a flame. Therefore, it is apparent to us that the statutory term "mine fire" presents a puzzle "that the wooden use of a dictionary cannot solve . . . ." *See Alarm Indus.,* 131 F.3d at 1070.

Turning to the Act's legislative history, we find that the issue before us was not directly addressed. Congress did note, however, that fatal mine fires had recently occurred at a salt mine, a silver mine, and a coal mine.[3] Such mine disasters are described as "varied and diverse, both

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[3] The Introduction section of the 1977 House Report provides several concrete examples of the disasters, including mine fires, that prompted Congress to pass the Mine Act. For example, "[i]n 1968, there was [a] fire in the Cargill salt mine in Belle Isle, La. Twenty miners died of carbon monoxide poisoning." H. Rep. No. 95-312, at 5 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 361 (1978). Additionally, the House Report references a (continued...)

in the type of mine that [they] attack and in the way the disasters manifest themselves." H. Rep. No. 95-312, at 3 (1977); *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 359 (1978). Therefore, at a minimum, Congress understood that "mine fires" may manifest themselves differently in different environments or scenarios.

Importantly, the purpose of the Mine Act is to enhance safety standards "to prevent death and serious physical harm." *See* 30 U.S.C. § 801(c). Construing the term "mine fire" to require a flame would undermine this basic objective. It is simply not "consistent with the primary purpose of the legislation and experiences from the mine disasters that led to the legislation." *See Twentymile*, 30 FMSHRC at 751 (Commission concluded that the purposes of the MINER Act and the Mine Act required the term "trapped" to be read broadly).

B. The Secretary's interpretation of the term "mine fire" is reasonable.

The second inquiry – "a *Chevron* Step II" inquiry – concerns whether the agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 834-44; *Thunder Basin*, 18 FMSHRC at 584 n.2. Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC,* 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). When the Mine Act is silent on an issue, the Secretary's interpretation which reasonably effectuates the health and safety goals of the Act is controlling. *Sec'y of Labor ex rel. Wamsley v. Mutual Mining, Inc*., 80 F.3d 110, 115 (4th Cir. 1996).

The Secretary interprets the term "mine fire" to include "both events marked by flaming combustion and events marked by smoldering combustion that reasonably has the potential to burst into flames." PDR at 17-18. The operator challenges the use of this interpretation because it was not introduced at the hearing before the judge. A. Br. at 16. Indeed, this interpretation is somewhat different from the interpretation the Secretary presented at the hearing. Before the judge, she articulated an interpretation that included "both events marked by flaming combustion and events marked by smoking combustion." Sec'y's Points of Authority at 6; Tr. 131-32, 136. In other words, the Secretary's interpretation at the hearing did not require that the smoking or smoldering combustion "reasonably [have] the potential to burst into flames."

We will consider the altered interpretation on review despite the aforementioned discrepancy. The Secretary's interpretation remains consistent with her general argument at the

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[3](...continued)
"smoldering" silver mine fire in 1972 "where carbon monoxide inhalations snuffed out the lives of 91 miners in Kellogg, Idaho." H. Rep. No. 95-312, at 6 (1977); *reprinted in Legis. Hist.* at 362. The Senate Report also referenced a mine fire, specifically the 1972 fire in Blacksville, West Virginia, which contributed to the death of nine miners. S. Rep. No. 95-181, at 4 (1977); *reprinted in Legis. Hist.* at 592.

hearing, namely that "one does not need the presence of flames in order to have a fire." Tr. 132. Furthermore, it is not the first time she has proffered this interpretation to the Commission. In fact, she presented the same interpretation for the term "fire" in 30 C.F.R. § 50.2(h)(6) in *Phelps Dodge Tyrone, Inc*., 30 FMSHRC 646, 659 (Aug. 2008).[4] We also note that the alteration does not burden the operator in that it requires the Secretary to prove an additional element.

We conclude that the Secretary's interpretation of "mine fire" is reasonable and consistent with the statute's language, purpose, and legislative history concerning fires in mines. Regarding the language of the statute, as previously stated, the definition of "mine fire" contained in the *Dictionary of Mining, Minerals and Related Terms* does not require the presence of flames.

The Secretary's proffered interpretation is also aligned with the purposes of the Act. *See Sec'y of Labor v. National Cement Co. of Cal.,* 573 F.3d 788, 796 (D.C. Cir. 2009) (finding that Secretary's interpretation of the Mine Act's definition of the word "mine" was reasonable, in part, because it was "perfectly aligned with a key objective of the Mine Act. The Secretary must act to ensure the 'health and safety of [the mine industry's] most precious resource the miner.'"). Time is of the essence when dealing with a fire, and requiring an inspector who observes smoldering coal to wait to observe a flame before evacuating an area may cause a delay that is the difference between life and death. Furthermore, a flameless smoldering mine fire is dangerous in and of itself. For instance, Inspector Crick testified that the smoldering coal could burn a "voided out area" into the stockpile, creating a hazard of a collapse for a miner operating a bulldozer on the pile. Tr. 59-63. Smoldering fires clearly present a safety hazard to miners, and therefore must fall within the parameters of a "mine fire." *See Whirlpool Corp. v. Marshall,* 445 U.S. 1, 13 (1980) (a statute that is intended to protect the health and safety of individuals must be interpreted in a broad manner to actually achieve that goal); *see also Sec'y of Labor ex. rel. Bushnell v. Cannelton Indus., Inc*., 867 F.2d 1432, 1437 (D.C. Cir. 1989) ("Congress intended the Act to be liberally construed.").

In addition, interpreting the term "mine fire" to necessarily require a flame could lead to results that are inconsistent with the Act's legislative history, which shows Congress's great concern about the history of fires in the mining industry. *See* H. Rep. No. 95-312 at 5-6 and S. Rep. No. 95-181 at 4, *reprinted in Legis. Hist*. at 361-62, 592. Indeed, the House Report specifically referenced the hazard of "smoldering mine fires." H. Rep. No. 95-312, at 13 (1977)*; reprinted in Legis. Hist.* at 369. If we were to hold that a "mine fire" required the presence of a

[4] *Phelps Dodge* involved a citation issued pursuant to 30 C.F.R. § 50.10, which alleged that MSHA was not notified within 15 minutes of a failure to extinguish a fire. 30 FMSHRC at 649. While all Commissioners concluded that it was not necessary to determine if the Secretary's interpretation was reasonable in order to decide the issues (id. at 657, 663), Commissioners Jordan and Cohen, writing separately, stated that they believed that the Secretary's interpretation was reasonable. *Id.* at 659.

flame, the Secretary would be unable to issue an order after observing the very type of event which, in part, prompted Congress to pass the Mine Act.

Moreover, this case arises in the context of section 103(k) of the Mine Act, which empowers an authorized representative of the Secretary to issue such orders as he deems appropriate to insure the safety of any person in a mine in the event of an "accident" at the mine. We find it persuasive that in a recent section 103(k) case the definition of "accident" in section 3(k) of the Mine Act was read broadly by the Eighth Circuit. In *Pattison Sand Co. v. FMSHRC*, 688 F.3d 507, 513 (8th Cir. 2012), the court determined that the Secretary reasonably interpreted the word "accident" to include roof falls. The court referenced Congress's use of the word "includes" to describe the types of events which are classified as accidents, stating that "[includes] is usually a term of enlargement, and not of limitation." *Id.* The court read the definition expansively, noting that "the Secretary's interpretation of the term 'accident' to include events that are similar in nature to the listed events or that have a similar potential to cause death or injury is reasonable." *Id.* The case presently before us differs somewhat from *Pattison Sand* in that the Secretary is not seeking to directly expand the definition of "accident." Instead, she is offering a broad interpretation of one of its enumerated examples. However, the basic principle relied upon by the Eighth Circuit – that the definition should be read broadly to carry out Congress's objective – applies in this case as well.

Additionally, we note that the Senate Report describing section 103(k) suggests that a result of the "unpredictability of accidents in mines and the uncertainty as to the circumstances surrounding them requires that the Secretary or his authorized representative be permitted *to exercise broad discretion*" when issuing section 103(k) orders. S. Rep. No. 95-181 at 29; *reprinted in Legis. Hist. at* 617 (emphasis added). The Commission has previously recognized this broad level of discretion. *See Island Creek Coal Co.*, 20 FMSHRC 14, 23 (Jan. 1998) (stating that "[c]ongress recognized that the Secretary must have maximum latitude to take protective measures in response to mining accidents").

III.

Conclusion

We conclude that the existence of a "mine fire" does not require the presence of a flame. We find the statute to be silent or ambiguous as to whether a flame is required. We further conclude that the Secretary has reasonably interpreted "mine fire" to include "both events marked by flaming combustion and events marked by smoldering combustion that reasonably has the potential to burst into flames."

Accordingly, the decision of the judge is vacated, and the case is remanded. On remand, the judge is to apply the Secretary's reasonable interpretation of the term "mine fire" as set forth above, to the facts of the case.[5]

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

[5] We note that Judge Weisberger has retired and that Docket No. LAKE 2010-759, currently before Administrative Law Judge William Moran, involves the same facts and circumstances as the captioned matter. Specifically, it involves Citation No. 8418504, which alleges that American failed to timely report the incident herein as required by 30 C.F.R. § 50.10. Consequently, this case should be consolidated with the case before Judge Moran.

Young, Commissioner, concurring in part and dissenting in part:

I agree that the decision of the judge must be vacated and remanded. However, for the reasons that follow, I would decline to adopt the definition proffered by the Secretary in this case.

In essence, the Secretary has committed the same error as the judge below – namely, she has chosen to define "fire" instead of "mine fire." It is a distinction with a critical difference for those who spend their working days surrounded by fuel and explosive gases and dust. Indeed, the special hazards portended by mine fires cry out for the very expertise Congress intended the Secretary to exercise in the promulgation of safety standards to keep miners from harm.

Rather than dedicate collective agency wisdom to the task, the Secretary has decided to outsource an important definition pivotal to the application of key safety standards. The selected definition of "fire" has not been promulgated in light of the unique hazards of underground mining or the specific dangers of surface coal mining, including coal stockpiles such as the one at issue in this case. The definition was not developed by an organization involved and experienced in mining and the threats posed by mine fires. Indeed, there is no evidence that mining was considered at all by the National Fire Protection Association, upon whose interpretations she chiefly relies. *See* PDR at 13-15 (citing three different publications of the Association in support of definition of "fire").

In sum, the Secretary's choice to employ a definition of "fire" without considering that definition in the context of mining activities regulated under the Mine Act and the choice of Congress to use the term "mine fire," is clearly erroneous. As the Secretary is well aware, the propensity of coal to burn, the difficulty of responding to surface coal stockpiles and the hazards posed by coal fire stockpiles vary greatly. *See, e.g.,* Stephan, Clete E., "Coal Dust Explosion Hazards," 3-5 (http://www.msha.gov/S&HINFO/TECHRPT/P&T/COALDUST.pdf) (discussing relevant and variable coal characteristics and stockpile conditions as contributing to risk of fire and explosion).[6] Yet, despite having been on notice since the Commission's 2008's *Phelps-Dodge Tyrone, Inc.,* decision, 30 FMSHRC 646 (Aug. 2008), that the absence of a definition of the term "mine fire" created doubts and a potential gap in anticipating and responding to such incidents, the Secretary has elected not to promulgate a definition. Instead, her attorneys have adopted a definition of "fire" which leaves unanswered too many important questions to stand as a reasoned exercise of the agency's judgment.

The judge's interpretation must be reversed because it, too, focuses on a definition of "fire" that is unsuited to the regulatory purpose at hand. Flames are hardly the most dangerous

[6] It is proper to consider relevant information available to the agency, as its own publications obviously are, in determining whether the agency acts reasonably by adopting a definition without considering such sources.

aspect of a mine fire. For example, in the Aracoma disaster in January 2006, the observed conditions did not include flame but smoke and glowing embers. *Report of Investigation – Fatal Underground Mine Fire – Aracoma Alma Mine #1, Jan. 19, 2006,* at 15 (MSHA, 2007). Regardless of any reasonable "potential to burst into flames," or whether flame ever materialized under the conditions in the Alma No. 1 mine, visibility was so poor in the mine, due to smoke from combustion, that some miners reported being able to see only about one foot. *Id.* at 11. Two miners were killed, not by flame, but by heavy smoke which first disoriented them and then poisoned them with carbon monoxide. *Id.* at 11-13; App. I.

It is obvious, then, that mine fires may have fatal consequences regardless of flame. The real enemies are combustion and its effects on the mining environment. In an underground mine, those effects may be compounded by the confines of the environment and the difficulty of responding to a mine emergency in the presence of thick smoke, panic and confusion. Because underground mines must import their breathable air, smoke inundations are especially deadly, as they may overwhelm ventilation systems.

While surface mine fires may not present the same difficulties, they may afford unique challenges. As the majority has correctly observed, coal stockpiles may be subject to smoldering mine fires. Slip op. at 6. In that event, there is, as the inspector noted, a very real danger of a coal pile collapse as solid coal is consumed and reduced to ash within the pile. Tr. 54-56, 59-61. This could have disastrous consequences for miners working on or near the pile.

This is the context in which the Secretary's definition must be applied.[7] It is, on the facts before us, impossible to tell the point at which a combustion event "reasonably has the potential to burst into flames." More importantly, it is not even relevant to decide the issue. Rather, the focus should be on the point at which the combustion event in question poses a discrete safety hazard that requires urgent intervention and the involvement of the agency.

This point may be reached at a surface coal stockpile without regard to whether flames might be reasonably likely to occur. In fact, the Secretary's own case undermines her reliance on the definition before us. First, the Secretary's own brief notes that smoldering is a "significant fire hazard." PDR at 15, *citing* Ohlemiller, T.J., National Fire Protection Association, *SFPE Handbook of Fire Protection Engineering*, at 2-229 (4th ed. 2008). However, none of the materials she cites attach special significance or danger – in or outside of a mining context – to the "potential to burst into flames." Thus, instead of focusing on indicators of conditions to hazards to miners unique to the mining context, the Secretary needlessly shifts the focus to one particular hazard, i.e., the risk of flaming combustion.

This raises the second fallacy in her position. The definition before us is the same one urged in *Phelps Dodge*, 30 FMSHRC at 659 (Jordan and Cohen, concurring). While the

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[7] *See*, somewhat ironically, PDR at 7, *citing Bell Atl. Tel. Cos. v. FCC,* 131 F.3d 1044, 1047 (D.C. Cir. 1997) (stating that "[t]extual analysis is a language game played on a field known as 'context.'")

Secretary was unable to persuade a majority of the Commission of the propriety of that definition then, at least in *Phelps Dodge* flaming combustion was the actual hazard occasioned by a stubborn grease fire ignited by cutting a piece of mining equipment with a torch. *Id.* at 647. Two Commissioners rejected then the imposition of a *relevant* broader definition, in part based on a reasonable concern about unintended consequences. *See id.* at 663 (Duffy and Young, concurring) ("Far-ranging conclusions, not necessary to the disposition of issues presented to the reviewing court in one case, may, ironically, end up constricting the court's discretion in subsequent cases where the facts may be significantly different.")

The case at bar is a perfect example, as the Secretary's own witness attested. After explaining the danger of a smoldering coal fire bursting into flames, Inspector Crick was asked:

> Q: Is there *any other hazard* aside from what you just explained about bursting into flames on the surface?
>
> A: Yes. I mean, if the coal is smoldering down in there, it can create a voided out area, and like the dozer operator, if he comes across it or something, he could fall in with the dozer down into it.

Tr. 59-60 (emphasis added). Upon further examination, the witness elaborated, explaining that the "*smoldering coal* can create a voided out area in the stockpile. The weight of the dozer and stuff passing over that area, it could just collapse." Tr. 60-61 (*emphasis added*). Thus, in this very case, the agency's own witness has identified a discrete safety hazard that might not be addressed by the Secretary's own definition.[8]

While the eruption of flames was anticipated in *Phelps Dodge*, and was the particular hazard with which the agency and the operator were concerned, here the scope of the danger posed by a coal stockpile fire is broader and not dependent on the presence or potential for eruption of flames. This is to say nothing about the insufficiency of the definition in the face of the complexities and dangers of underground mine fires, as the discussion of the Aracoma disaster, above, suggests.

Unlike a rulemaking proceeding, which would allow the broad consideration of expert testimony, input from experienced outsiders and thorough staff review of the history of mine

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[8] While it is true that Mr. Crick testified that the smoldering coal in this case could have "burst into flame at any time," Tr. 59, in the absence of such testimony, or in its contradiction by other competent evidence concerning the potential to burst into flame, the definition offered by the Secretary here would not encompass a smoldering event without such potential, despite a clearly-articulated hazard arising from smoldering alone. Because the Secretary is urging adoption of a broadly-applicable definition, this glaring oversight refutes the purported reasonableness of her position.

fires and characteristics of deadly fire-related events, litigation depends on a limited set of facts. Deciding a case should in most cases decide only as much of the case as the facts require. Yet instead of urging that we determine whether the combustion *in this* case should have been treated as a "mine fire" due to the hazards presented *this time*, the agency suggests we impose a definition for *all* mine fires in the future.[9]

The proffered definition is inadequate to the task. The definition of "mine fire" has significance beyond the determination of violative conditions. It is integral to the application of provisions related to accidents, including the reporting requirements at 30 C.F.R. § 50.10 and those, relevant to the case at bar, governing response by the Secretary's agents, pursuant to section 103(k) of the Mine Act, 30 U.S.C. § 813(k), to a mine accident or emergency.

In both instances, a keen understanding by operators of the circumstances which constitute a mine fire is necessary to appropriate anticipatory safety measures. Operators should properly focus on conditions arising from combustion events that may threaten the health and safety of their employees. Diversion of that focus by injecting a lawyerly, imprecise "definition" centered on one type of hazard is thus counterproductive to the safety purposes of the Act.

At argument, the solicitor urged our approval, noting that such vague definitions, with spongy terms such as "reasonably," are "ubiquitously used in Commission case law." Oral Arg. Tr. at 68-69. This assertion cannot withstand logical scrutiny. The term "reasonably" will necessarily be open to subjective interpretations by safety inspectors, district managers and administrative law judges. The definition is, therefore, ultimately useless to operators, who must now divine its actual meaning without the sort of clarity the regulatory development process affords.

We must bear in mind that operators are responsible for ensuring the safety and health of their miners every day. Operators therefore must be able to anticipate when a combustion event may transition from a nuisance to a real danger, such that it must be managed as a reportable accident, responded to as a serious emergency and dealt with by engaging MSHA. The Secretary's definition brushes past this responsibility and leaves resolution to the aftermath, when the inevitable disagreements arise. This is not a prescription for thoughtful execution of sound public policy.

The Commission should therefore more prudently hold that a "mine fire" does not necessarily require the presence of flame, where the combustion and smoke and other adverse effects it creates pose a significant threat to the health and safety of miners. I would, in remanding this case, direct a fact-specific analysis, limited to *this* case, on the question of whether the operator and the inspector should have reasonably believed a "mine fire" existed in *these circumstances.*

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[9] By directing the judge to apply this definition on remand, the Commission is adopting it as the definition of "mine fire" as a matter of common law. Slip op. at 7.

While the judge below short-circuited the analysis, and thus never reached the necessary conclusions that would support or refute such a determination, the record reveals sufficient evidence to decide the issue on remand without resort to the term kludged by the Secretary.[10] I therefore depart from the reasoning of my colleagues in approving of the Secretary's own short-circuit of the regulatory process.

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

[10] I recognize that the ALJ who heard the case has retired, a circumstance which may complicate the resolution of conflicting testimony on the conditions, but I agree with the majority that the case must be remanded. I offer no opinion on whether the record below establishes that there was, in fact, a "mine fire" in this case.

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February 28, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of RUSSELL RATLIFF	: : : : :	
v.	:	Docket No. WEVA 2013-368-D
COBRA NATURAL RESOURCES, LLC	: :	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

DECISION

BY THE COMMISSION:

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On January 14, 2013, Administrative Law Judge William S. Steele issued an order temporarily reinstating Russell Ratliff to employment with Cobra Natural Resources, LLC ("Cobra") pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). 35 FMSHRC __, slip op. at 20. Cobra has filed a petition for review of the judge's temporary reinstatement order with the Commission. For the reasons that follow, we grant review and affirm the judge's order requiring the temporary reinstatement of Ratliff.

I.

Factual and Procedural Background

The facts of this case are set forth in detail in the judge's January 14, 2013 decision and order. *Id.* at 4-19. On October 31, 2012, Ratliff filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that his discharge from Cobra amounted to discrimination in violation of section 105(c) of the Mine Act. The Secretary filed an Application for Temporary Reinstatement on December 12, 2012, requesting an order requiring Cobra to temporarily reinstate Ratliff to his former position. Cobra requested a hearing, which was held on January 7, 2013.

At the time of his discharge, Ratliff was working as a scoop operator and shuttle car operator at the Mountaineer Alma A. Mine. *Id.* at 6; Tr. 10. On October 9, 2012, Ratliff spoke out at a daily safety meeting, stating, in effect, that he believed that recent operations at the mine were not being conducted in accordance with the approved ventilation plan. Slip op. at 14. Thereafter, he documented his concerns on ten "Running Right" cards, and on October 15, he deposited the cards in a designated box at the mine.[1] *Id.* at 4, 15. On October 15, subsequent to his shift Ratliff was also involved in a verbal altercation in the bathhouse with an assistant mine foreman. *Id.* at 8. On October 17, 2012, Ratliff was discharged from his position at Cobra, purportedly for his insubordination and his use of profanity toward the assistant mine foreman. *Id.* at 4-5.

On November 16, 2012, Cobra circulated a letter to employees announcing a reduction in the workforce at the mine, effective as of January 15, 2013. C. Ex. D; C. Ex. E. A total of 14 Cobra employees at the Mountaineer Mine were affected by the layoff.[2] Slip op. at 13. Nine of these employees was transferred to work at other mines operated by Alpha Natural Resources (Cobra's parent company) and five were laid off entirely. *Id*. at 8, 13. Cobra asserts that these decisions were exclusively based on employee evaluations, which had been completed in March 2012. *Id*. at 13. The five employees who received the lowest scores on their evaluation did not receive other assignments and were terminated completely. *Id.*; C. Ex. H.

Ratliff was terminated prior to the layoff. However, he received an overall score on his March 2012 evaluation which would have ranked him among the five lowest-scoring employees employed at Cobra at the time of the layoff. C. Ex. B; C. Ex. H. At the hearing, the operator contended that had Ratliff been employed at Cobra at the time of the layoff, he would have been included in the layoff. Tr. 123-24. Thus, Cobra contended that any "award of temporary reinstatement should be tolled no later than January 15, 2013," the date when employees affected by the layoff would cease being paid. *See* C's Request for Hearing on Appl. for Temporary Reinstatement.

On January 14, 2013, the judge issued a decision concluding that Ratliff's complaint was not frivolously brought. Slip op. at 20. More specifically, the judge concluded that Ratliff engaged in protected activity both in speaking at the safety meeting and in submitting the "Running Right" cards. *Id*. at 14-15. The judge also concluded that the operator was aware of Ratliff's activities, showed animus toward Ratliff's activities, and that there was a close connection in time between these activities and his discharge. *Id*. at 19-20. Accordingly, the judge directed Cobra to temporarily reinstate Ratliff to his former position or to a similar position 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. *Id*. at 20.

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[1] "Running Right" cards are forms that Cobra provides to employees so that they may anonymously document safety concerns. Slip op. at 4 n.4.

[2] In addition, 16 contractors were affected by the layoff. Slip op. at 13.

The judge noted that the Commission has previously held that an economic layoff may toll an operator's obligation to temporarily reinstate a miner. *Id.* at 19 (citing *Sec'y of Labor on behalf of Gatlin v. KenAmerican Res., Inc.*, 31 FMSHRC 1050, 1055 (Oct. 2009) (stating that the duration of a temporary reinstatement of a miner may be modified if the operator can prove that the complainant's inclusion in a layoff, at an idled mine, was entirely unrelated to his protected activity)). The judge held that the operator failed to prove that work was unavailable to Ratliff. The judge found that "a mere 14 employees were laid off out of a total of 106, and only five employees were permanently severed from service." *Id.* The judge concluded that Cobra's obligation to reinstate Ratliff was not tolled by the layoff because the operator continued to mine coal, and work was available for shuttle car operators. *Id.* 18-19.

On review, Cobra asserts that the judge erred in determining that Ratliff's temporary reinstatement order should not be modified to reflect that he would have been laid off by Cobra in January 2013, as part of a reduction in force. PDR at 6.

The Secretary argues that the judge exceeded the scope of a temporary reinstatement hearing when he considered whether a remedy should be tolled due to changed circumstances. S. Br. at 5. The Secretary maintains that the consideration of changed circumstances should be considered in a hearing separate from the temporary reinstatement hearing, after the parties have been provided an opportunity for discovery and to fully argue the matter in pleadings. *Id*. at 5-9. The Secretary contends that this separate evidentiary hearing may in some circumstances be merged into the hearing on the merits. *Id.* at 8.

II.

Disposition

Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The Commission has repeatedly recognized that the "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *See 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 (11th Cir. 1990). It is "not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings." *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). In reviewing a judge's temporary reinstatement order, the Commission has applied the substantial evidence standard. *See id.* at 719; *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993).

While the scope of temporary reinstatement proceedings is limited to determining whether the complaint is frivolously brought, we have permitted a limited inquiry to determine whether the obligation to reinstate a miner may be tolled. In *Gatlin*, the Commission held that

the judge erred in concluding "that a temporary reinstatement order requires a miner to be employed under any circumstance, regardless of changes that occur at the mine after issuance of the temporary reinstatement order." 31 FMSHRC at 1054. The Commission has thus recognized that "the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation." *Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 996, 1000 (May 2012) (citations omitted).

We reject the Secretary's argument that the judge necessarily exceeded the scope of the temporary reinstatement hearing by considering whether the layoff tolled Cobra's obligation to temporarily reinstate Ratliff. In the hearing in a temporary reinstatement proceeding, the judge may appropriately consider evidence offered by an operator seeking to affirmatively show that reinstatement should be tolled because of a layoff due to business contractions or similar conditions. *See Gatlin*, 31 FMSHRC at 1054.

As we also noted in *Gatlin,* in order for an operator to establish that temporary reinstatement should be tolled based on a subsequent layoff, the operator must demonstrate that "the layoff properly included" the miner who filed the complaint of discrimination. 31 FMSHRC at 1055. Thus, it follows that the judge may also consider any challenges the Secretary is prepared to assert that the miner's inclusion in the layoff was, or might have been, related to protected activity engaged in by the miner.

An operator generally must affirmatively prove that a layoff justifies tolling temporary reinstatement by a preponderance of the evidence. *Gatlin,* 31 FMSHRC at 1055. However, if the objectivity of the layoff as applied to the miner is called into question in the temporary reinstatement phase of the litigation, judges must apply the "not frivolously brought" standard contained in section 105(c)(2) of the Mine Act to the miner's claim. This is because the layoff itself, as a termination of employment, must at that point be evaluated as a potentially wrongful adverse action. In other words, temporary reinstatement should be granted and not tolled unless the operator shows that the claim that the layoff arose at least in part from protected activity is frivolous.

For example, in *Sec'y of Labor on behalf of Ondreako v. Kennecott Utah Copper Corp.*, 25 FMSHRC 585, 586-87 (Oct. 2009), *aff'g,* 25 FMSHRC 612 (Oct. 2003) (ALJ), a miner who had made safety complaints was included in an extensive layoff based on an evaluation system very similar to the one used by Cobra in the present case. *See* 25 FMSHRC at 616. In finding that the miner's discrimination complaint was not frivolously brought for purposes of temporary reinstatement, the judge noted, "[i]t would be easy to figure out how to give an employee that is complaining about safety conditions a poor score under this system." *Id*. at 619.

Of course, the ultimate determination concerning the appropriate remedy for any alleged discrimination, including the duration of an operator's reinstatement obligation, if any, is made in the proceeding on the merits.[3]

In the present case, the judge focused on whether work was available to Ratliff. However, in the section of the Decision and Order which discussed hostility or animus towards the miner's protected activity, the judge noted that a miner's reputation for being "difficult" may represent animus toward his safety concerns. Slip op. at 16 (citing *Sec'y of Labor on behalf of Turner v. National Cement Co. of California,* 33 FMSHRC 1059, 1069 (May 2011)). In discussing animus, the judge noted that Ratliff had a reputation for being "difficult" because he was "a stickler on safety rules." *Id.* This finding is supported by Ratliff's testimony that he has a reputation of being "hot-headed over . . . safety issues." Tr. 71. The judge also noted Ratliff's testimony that he had spoken up many times at safety meetings, and that he was the only miner who spoke up frequently at safety meetings. Slip op. at 16; Tr. 57-58, 71.

Thus, the judge concluded that "to a certain degree, Ratliff's reputation for being difficult was caused by his insistence on safety matters." Slip op. at 16. Additionally, the judge found that "[t]his evidence of animus is bolstered by the fact that another employee that participated in the October 9 safety meeting, Jon Lewis, was among the five employees laid off a month later." *Id.* We have reviewed the judge's findings and have determined that they are supported by substantial evidence.

We recognize that these findings were made in the context of the judge's discussion of the animus that may have motivated the discharge, but such animus is also relevant in determining whether the layoff was discriminatory, at least as it was applied to Ratliff. Cobra concedes that the ranking on which it relied to justify the inclusion of Ratliff in the layoff was based in part on subjective factors such as "attitude." C. Ex. B ("areas of improvement" column).

There is conflicting evidence in the record concerning whether the March 2012 evaluations were entirely unrelated to miners' protected activities. As previously established, it is "not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings. *Albu,* 21 FMSHRC at 719. The ultimate determination concerning whether Ratliff's ranking in the March evaluation was related to his protected activities should be made following a hearing on the merits, after the parties have had an opportunity for discovery and to fully develop their positions.

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[3] We do not foreclose the possibility that there may be circumstances in which a judge, prior to the hearing on the merits, may appropriately order an intermediate hearing regarding changed circumstances. However, in the temporary reinstatement phase of the litigation during which the parties may not have completed discovery, the burdens of proof, and the standard against which the evidence is evaluated, should be no different than if the issue had been heard during the initial temporary reinstatement hearing.

At this stage, we intimate no view on the ultimate merits of the case. We find that the record compels the conclusion that the Secretary's claim (that Ratliff's placement in the March evaluation resulted at least in part from his protected activity) is not frivolous. *See American Mine Services, Inc.,* 15 FMSHRC 1830, 1834 (Sept. 1993) (remand not necessary when record supports no other conclusion). Accordingly, we affirm in result the judge's order temporarily reinstating Ratliff.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

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February 1, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2008-477
Petitioner,	:	A.C. No. 12-02258-150575
	:	
v.	:	
	:	
BLACK BEAUTY COAL COMPANY,	:	
Respondent.	:	Mine: Somerville Central

DECISION ON REMAND

Before: Judge Miller

This case is before me on remand from the Commission's decision in *Black Beauty Coal Co*., LAKE 2008-477, 34 FMSHRC 1733 (Aug. 2012). This case was initially heard on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Black Beauty Coal Company, 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). The case involved one citation and two orders, all three of which I affirmed as significant and substantial and attributable to the operator's unwarrantable failure. *See* 32 FMSHRC 356 (Mar. 2010) (ALJ). Black Beauty filed a petition for discretionary review, which was granted by the Commission. The Commission has affirmed in part, and reversed and remanded in part my previous decision. I will address the sections reversed and remanded below.

I. BACKGROUND

Black Beauty Coal Company ("Black Beauty") operates a surface coal mine, the Somerville Central Mine (the "mine") near Gibson, Indiana. 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. 30 U.S.C. § 813(a). The parties stipulated that Black Beauty is an operator as defined by the Act, and is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission. Trial Stip. ¶¶ 1-3.

On September 11, 2007, Vernon Stumbo, an MSHA inspector, conducted a regular inspection at the Somerville Central Mine. He was accompanied during most of his inspection

by Chad Wirthwein, the mine's safety director. Stumbo, along with his supervisor at the time, traveled to the mine to address issues involving berms and to terminate citations that had been previously issued for failure to provide berms on elevated roadways. While at the mine, Stumbo issued one citation and one order for berm violations. He determined that both violations were the result of an unwarrantable failure to comply with the cited standard. Stumbo returned to the mine a few weeks later and issued another unwarrantable failure order for a berming violation. The testimony at the hearing in this case addressed these three berm violations: two issued on September 11, 2009 and one issued on September 27, 2009.

II. THE VIOLATIONS

a. Citation No. 6671134

Facts and Commission Decision

As a result of the first inspection at Somerville Central Mine on September 11, 2007, Inspector Stumbo issued Citation No. 6671134 as a 104(d)(1) citation alleging a violation of 30 C.F.R. § 77.1605(k), which requires that "[b]erms or guards shall be provided on the outer bank of elevated roadways." The citation described the violation as follows:

> The dragline bench travel road does not have a berm for a distance of approximately 2/10 of a mile where a service truck with two miners traveled within 18' of the outer banks of a bench with approximately a 50' vertical drop to the pit floor. The mid-axle height of the largest vehicle traveling this road at this time is approximately 21 inches. In addition, four company full size pick-up trucks also traveled the bench travel road. Two management personnel were also in the area and having traveled the road were fully aware that there was no berm. Management was put on notice of berm issues by MSHA within the past week during a previous visit on 09/06/2007.

Gov. Ex. 4. At the time of the inspection, Black Beauty was in the process of moving a dragline across the bench.[1] During the move, the dragline suffered electrical problems and came to a stop on the bench. As a result, miners had driven a service truck onto the bench and were beginning maintenance work, during which Stumbo observed that they did not have the protection of berms along the roadway as required. Stumbo determined that it was reasonably

[1] As the Commission stated in its decision, a dragline is defined as "[a] type of excavating equipment that casts a rope-hung bucket a considerable distance; collects the dug material by pulling the bucket towards itself on the ground with a second rope; elevates the bucket; and dumps the material on a spoil bank, in a hopper, or on a pile." *Black Beauty Coal Co*., LAKE 2008-477, 2012 WL 3255590 at FN 3 (FMSHRC) (Aug. 2, 2012) (citing *Dictionary of Mining* at 67).

likely that the violation would result in an injury that would be permanently disabling, that the violation was significant and substantial, that two employees were affected, and that the operator's negligence was high. A civil penalty in the amount of $4,329.00 has been proposed for this violation. *See* 32 FMSHRC 356.

In my original decision after the hearing, in determining that the bench constituted a "roadway" pursuant to section 77.1605(k), I relied on the fact that rubber-tired equipment had begun operating on the bench in close proximity to the edge. 32 FMSHRC 356, 359. However, the Commission concluded on review that "in finding that the bench was a roadway simply because a rubber-tired vehicle began operating on it, the judge did not use the proper inquiry." 34 FMSHRC at1735. Commission cases have previously held that the relevant inquiry for whether an elevated area is a roadway is whether a vehicle commonly travels its surface during the normal mining routine. *Id.* The presence of a rubber-tired vehicle on a bench is not a dispositive indication that the bench is a roadway.

However, the Commission held that the use of the incorrect inquiry in determining the bench was a roadway was ultimately harmless error. When evaluated under the correct legal standard, the bench in this case would still be considered a roadway. *Id.* Evidence from the hearing indicates that vehicles commonly traveled on the bench during normal mining operations. Tr. 79, 93. In addition, the Commission found that the bench remained a "roadway" during the dragline move.

Despite holding that the bench in this case was a "roadway," the Commission found several inconsistencies between the testimony at the hearing, the parties' briefs, and my previous decision that caused them to vacate and remand the decision for clarification of whether or not there were adequate berms on the bench. Below, I will expand the factual basis for my previous decision and re-evaluate whether a violation existed at the time.

<u>There were no berms on the side of the temporary roadway, in violation of 30 C.F.R. § 77.1605(k)</u>

At the hearing, Black Beauty asserted that the bench contained a remnant berm that was adequate because it was as high as the mid-axle height of the largest rubber tired vehicle present. Tr. 10-11. In contrast, both the Secretary's post-hearing brief and Inspector Stumbo's trial testimony claimed that there were no berms at all. Tr. 29, 31; Sec'y Trial Brief at 3. Thus, the statement in my 2010 decision that neither party disputed the presence of "only a remnant berm," did not accurately reflect the parties' assertions about the berms on the bench.

Upon re-examination of the trial transcripts, I find that Inspector Stumbo testified convincingly that he did not observe *any* berms at all on the section of the bench in question. Tr. 29. He detailed the procedure he used to verify measurements on the bench and conversations with management in which he verbally expressed concern regarding the complete lack of berms on the bench. As Stumbo testified regarding the operator, "[h]e'd been put on high notice and yet there was (sic) *zero* berms…" Tr. 31 (emphasis added).

As a result, Inspector Stumbo issued a 104(d)(1) citation for a violation of 30 C.F.R. § 77.1605(k). I affirm his citation as written, and find that there were no berms on the bench for approximately 2/10 of a mile, at a point where a service truck had traveled within 18' of the outer banks of the bench, to a 50' drop. Inspector Stumbo issued the citation as significant and substantial and as an unwarrantable failure, and I will address those designations below.

Significant and Substantial Analysis

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

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

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

As noted above, I find that there is a violation of the mandatory safety standard as alleged by the Secretary. Further, I find that the violation, a lack of berms, contributes to the discrete safety hazard of a vehicle veering off the elevated roadway and rolling, or falling, down the spoil incline. The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula, in which the Secretary must establish that there is a reasonable likelihood that the hazard will result in an injury. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the

> language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in consideration of the length of time that the violative condition 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 1573, 1574 (July 1984). In addition, the question of whether a particular violation is S&S is a circumstantial inquiry that must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). In the present instance, the Secretary must show that there was a reasonable likelihood that a vehicle would go over a section of the roadway with no berms, resulting in an injury. An inquiry into the particular circumstances of this violation shows that the conditions created a reasonable likelihood that the lack of berms would contribute to a hazard resulting in injury.

While the duration of time the condition existed was short, there is no indication that in the normal course of mining, a berm would have been provided. The temporary nature of the road, the extent of the operator's berm violations, the number of vehicles traveling the road and the rough terrain of the roadway support the finding that it was likely an accident would occur resulting in an injury. Evidence presented at trial shows that a service truck drove within approximately 18 feet of the edge of the inadequately-bermed bench. Stumbo testified that the closer a vehicle travels to the edge of a highwall, the more unstable the ground becomes. Tr. 32. It is likely that the fresh ground on the edge of the bench could slip, causing the driver to lose control of the vehicle. *Id.* The poor conditions on the road were later confirmed through the testimony of the operator's witness, Terry Traylor, who stated that the road was so rough that he would not drive on it. Tr. 71. When a truck drives near the edge on rough roads, the bumping and unevenness can cause the truck to be difficult to handle. In addition, there is always a possibility that a truck may experience mechanical difficulties or that the driver may over correct or misjudge the distance and his ability to steer through the area. The service truck and four company pick-ups had traveled the road shortly before the inspector's arrival. It is likely that if one driver moved over to allow an oncoming vehicle to pass, the truck would be close to the edge without a berm for protection. The road was not barricaded and was available for anyone to use. The risk of driver error and mechanical failure add to the likelihood that a truck will travel close to the edge without a berm and steer over the edge.

Black Beauty argued at trial that vehicles would be traveling at such low speeds that it was unlikely that one would have driven close enough to the edge to go over. However, this argument fails to account for the rough and unstable nature of the road, and that vehicles within 18 feet of the edge could easily be thrown off by bumps or ground instability at any speed. Thus, the berm violation in this particular situation made it reasonably likely that a truck would go close to, and over, the edge of the elevated roadway, falling approximately 50 feet.

If a truck, traveling along an elevated roadway on a section with no berms, was to go over the edge and fall the estimated 50 feet to the surface below, it is reasonably likely that the driver and any passengers would sustain broken bones and injuries of a serious and potentially fatal nature. *See e.g., Gatliff Coal Co.,* 13 FMSHRC 368 (Mar. 8, 1991) (ALJ). Stumbo testified that, in determining that the injuries sustained would be serious, he accounted for the weight and material of the trucks traveling the road and the distance of the potential fall. Berms exist to prevent exactly such an occurrence. There is no question that a service truck did travel along the bench, in close proximity to the edge, in a section with difficult terrain and no berms present. This was a situation in which serious injuries were likely to occur, and I find that the Secretary has satisfied the four *Mathies* criteria and established that this violation is significant and substantial.

Unwarrantable Failure Analysis

This citation was issued as an "unwarrantable failure," which has been defined by the Commission as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987). The Commission has stated that whether a citation is an "unwarrantable failure" is a question that should be evaluated based on the facts and circumstances in each case, and in light of each of the following factors: 1) the length of time that the violation has existed; 2) the extent of the violative condition; 3) whether the operator has been placed on notice that greater efforts were necessary for compliance; 4) the operator's efforts in abating the violative condition; 5) whether the violation was obvious or posed a high degree of danger; and 6) the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.,* 22 FMSHRC 340 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009).

With respect to the first two factors, the condition was not likely to have existed for a large amount of time given the temporary nature of the bench. While the berm was low for a distance and did not exist for two –tenths of a mile, it was probably not extensive but there were not barricades and in that regard, the violation was extensive in that anyone could access and travel the road. Additionally, the operator was on notice that greater efforts were required for compliance because they had just recently received citations for inadequate berms at the same mine. On September 6, 2007, just five days before the citation at issue was written, the mine had received a citation for inadequate berms at the dumping locations on the dragline bench roadway. Gov. Trial. Ex. 2. In addition, Stumbo testified that, based on past berm violations, the Somerville Central Mine had been placed on "high alert of berm issues at [the] mine" prior to the September 11, 2007 inspection. Tr. 27. The mine's history of similar citations shows the operator knew that more efforts were required to comply with berm requirements on the dragline bench, and more generally across the mine.

The condition was abated on the same day the citation was issued but the operator had not made any effort to abate the violation prior to the inspection. Additionally, the inspector found that there were no berms at all for a distance of two tenths of a mile, which should have been obvious to the operator since berms to mid-axle height were required. There were several

management trucks in the area, so Black Beauty management should have known that the berms necessary to protect workers in the area were not in place. The operator had several opportunities to place berms or otherwise block off the road for safety purposes, and yet did not do so. Tr. 37-38. The condition was obvious and the fact that no berm was present resulted in a high degree of danger to miners driving in the area.

After considering all the relevant factors, I find that the operator's repeated failure to maintain adequate berms, the obviousness of the violation, and the ease with which it could have been corrected indicate a level of negligence that rises to an "unwarrantable failure." Accordingly, I affirm Citation No. 6671134 in its entirety, as written.

b. Order 6671135

Facts and Commission Decision

As a result of the inspection on September 11, 2007, Stumbo issued Order No. 6671135 as a 104(d)(1) order alleging a violation of 30 C.F.R. § 77.1605(k), which requires that "[b]erms or guards shall be provided on the outer bank of elevated roadways." The order described the violation as follows:

> A new drill travel road was created from the #001 pit #6 bench up to the top level of the pit on the west side of the pit that has an inadequate berm. The travel road has no berm on the outer bank from the base of the elevated travel road, where there is a grade of approximately 30% for a distance of approximately 75 feet with a subtle curve at the downgrade base. From the #6 bench to the top level of the pit is approximately 40 vertical feet. From the #6 bench to the pit floor is approximately 50 vertical feet. Two sets of tire tracks indicate that the road has been traveled by mobile equipment.

Gov. Ex. 6. Inspector Stumbo determined that it was reasonably likely that this violation would result in an injury that would be permanently disabling, that the violation was S&S, that one employee was affected, and that the operator's negligence was high. A civil penalty in the amount of $4,440.00 was proposed for this violation. At trial, I credited Stumbo's testimony and held that there were inadequate berms on part of the drill road, and that this was a significant and substantial violation attributable to unwarrantable failure to comply with the cited standard. *See Black Beauty Coal Co.*, 32 FMSHRC 356 (Mar. 2010)(ALJ).

On review, the Commission upheld my determination that there was a violation, stating that a judge's credibility determinations are entitled to deference and should not be overturned lightly. *Black Beauty Coal Co*., 34 FMSHRC at 1739 (citing *Farmer v. Island Creek Coal Co.,* 14 FMSHRC 1537,1542 (Sept. 1992) and *Penn Allegh. Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1982)).

The Commission also found that substantial evidence supported my designation of the violation as significant and substantial. To determine that the citation was significant and substantial, the Commission examined the facts of the violation and my original findings in light of the four *Mathies* factors.[2]

Having affirmed the violation (and thus, the first *Mathies* factor), the Commission then upheld my original analysis of the second factor and found that there was a discrete safety hazard created by inadequate berms, in that a vehicle traveling along the elevated roadway could veer off and fall down the spoil incline. The Commission also found that substantial evidence supported my determination that the hazard at issue was reasonably likely to cause an injury, since a truck over-traveling the side of the road would fall approximately 50 feet down a steep incline. *Black Beauty Coal Co*., 34 FMSHRC at 1742-43. All parties agreed that this injury would be of a reasonably serious nature. Thus, my S&S designation stands. In addition, the Commission held that the inclusion of testimony regarding the operator's negligence in "setting a poor example" when a supervisor traveled the road, while irrelevant, was a harmless error and did not affect the validity of the S&S analysis. *Id.* at 1743-44.

"Unwarrantable Failure" Determination on Remand

Upon review of my previous unwarrantable failure determination, the Commission found that the previous analysis failed to consider relevant evidence. In particular, the Commission held that evidence regarding the temporary nature of the road and the supervisor's testimony suggesting that management was not aware of the lack of berms should have been considered. However, the Commission specifically disagreed with Black Beauty's assertion that the judge erred in relying on the operator's history of violations. Instead, the Commission stated that "[r]epeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard." *Black Beauty Coal Co*., 34 FMSHRC at1745 (citations omitted).

As stated above, the Commission has held that each of the following six factors must be considered when determining whether a specific violation is an unwarrantable failure: 1) the length of time that the violation has existed; 2) the extent of the violative condition; 3) whether the operator has been placed on notice that greater efforts were necessary for compliance; 4) the operator's efforts in abating the violative condition; 5) whether the violation was obvious or posed a high degree of danger; and 6) the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.,* 22 FMSHRC 340 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009).

[2] As stated previously, these four factors include: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1994).

In this case, the drill travel road was created for the exclusive use of the drill approximately two hours before the inspection, and would have been removed after the drill had been moved. Tr. 107, 123. The road would have been in existence for one to three days. Under these circumstances, the length of time the violation could have existed was short, as such roads are typically in existence for approximately one day. Tr. 114. The Commission explained that the temporary status of the road is relevant to both the length of time the violation existed and the degree of danger posed by the violation. The extent of the violation was also limited, since Inspector Stumbo stated only one person had driven on the road. Witnesses for the mine explained that the road had only one purpose, i.e. to move the drill. However, the road was used just prior to the inspection, not to move the drill, but by the drilling supervisor in his pickup because it was a shorter distance to the area below.

The Commission has also indicated in the decision that the mine management may not have knowledge of the existence of the road and the lack of berms based upon the testimony of Alano, the drilling and blasting supervisor. Alano had asked for the road to be built and traveled the road. He testified that he did not believe there was a problem with the berms on the road, that berms had been in place in part of the area and he believed them to be adequate, or at least not to pose a hazard. The Commission indicated that the relevant, and possibly mitigating evidence presented by Alano, that he found the road adequate, as to the berms, when he traveled it about the time Stumbo arrived, must be considered. The berm was lacking on part of the road, but Alano believed the berm to be adequate, at least on the part he traveled. In order to rely on the evidence of a good faith mistake as alleged by the mine, I must find Alano to be a credible witness and I do not. A person reasonably familiar with mining, and certainly the drilling and blasting supervisor at this mine, should be aware of the condition of the road and realize when berms are inadequate.

Black Beauty's safety manager, Chad Wirthwein, testified that he felt the berms in place were adequate given the height and likely speed of the pickup truck that traveled the road. He explained that he believed that the berm was sufficient for the vehicles that would travel the area, the drill and pick-ups. Tr. 125. I do find this testimony to be credible and therefore agree that there was a mistake on the part of the mine which mitigates against the unwarrantable failure finding. Wirthwein also believed that the secondary berms from the previous road would adequately protect a driver. While, I do not agree with Wirthwein's belief, given the testimony of Stumbo, it appears to be a good faith belief that the road was safe. Though I credit Inspector Stumbo's testimony as to the existence of the violation itself, the obviousness of the violation, as it relates to the operator's unwarrantable failure, was not demonstrated.

As stated in my significant and substantial analysis, this violation did pose a high degree of danger, since the lack of berms meant that a vehicle that veered off of the roadway would go over the side and cause serious and possibly fatal injuries to the driver. Black Beauty's history of citations for similar berm violations prior to this particular inspection indicates that they were on notice that greater efforts were needed for compliance.

Upon re-examination of the testimony in this case and the six factors used by the Commission in determining whether a violation is an "unwarrantable failure," I find that the Secretary has not met her burden of proof in showing that the violation was unwarrantable. While the evidence does demonstrate high negligence on the part of the mine, there is not sufficient evidence to support an unwarrantable failure. The short, limited use of the roadway in this particular context and the mine's belief that the road was safe for those vehicles that would be used on the road in that short time, mitigate against the unwarrantable nature of the violation as does the limited danger posed by a temporary road. While there was a violation that was likely to result in serious injury, and the operator's negligence was high, I find that this violation does not rise to an unwarrantable failure.

c. Order 6671177

Facts and Commission Decision

On September 27, 2007, Stumbo returned to the mine and observed that Black Beauty was operating three haul trucks to transport material from a shovel to a dumpsite. He noted that parts of the dumpsite lacked the protection of any berms, and other sections had inadequate berms given the size of the vehicles in use. In addition, Stumbo observed that there was no miner acting as a spotter at the dumpsite. As a result, Stumbo issued Order No. 6671177, alleging a violation of 30 C.F.R. § 77.1605(k). The citation described the violation as follows:

> On the 001 pit south end spoil bank, haul trucks are traveling and dumping in an area with an inadequate and non-existent berm. On the east side of the spoil bank, an inadequate berm measuring approximately 45" tall for a distance of approximately 38'. Another area has no berm for a distance of approximately 60'. Both areas are where three haul trucks, with a mid-axle height of approximately 66", are traveling and dumping spoil. The vertical height of the spoil bank down to the dragline bench ranges from approximately 115' on the east side to 129' on the west side with a slope of approximately 40% grade.

Gov. Ex. 8. Prior to the hearing, the Secretary filed a Motion to Amend Petition and Order to Plead in the Alternative proposing that, if the facts at trial did not demonstrate a violation of 77.1605(k), which addresses elevated roadways, then the Judge should consider them as a violation of 30 C.F.R. § 77.1605(l), which applies to dumping locations. The alternative standard requires that "berms, bumper blocks, safety blocks, or similar means shall be provided to prevent over-travel and overturning at dumping locations." At trial, I granted the Secretary's Motion to Amend. On appeal to the Commission, Black Beauty argued that allowing the amendment was an error, but the Commission held that the amended petition complied with section 104(a) of the Mine Act, which states that "[e]ach citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated." 30 U.S.C. 814(a).

The Commission noted that the purpose of this requirement is to allow the operator to discern what conditions need abatement and to prepare for hearing. *Black Beauty Coal Co*., 34 FMSHRC at 1746-47 (citations omitted). In the context of this purpose, the Commission affirmed my decision to allow the amended petition and found that Black Beauty had not been prejudiced since it was able to abate the violation completely and adequately prepare for trial. *Id.* at 1747.

The Commission also held that substantial evidence supported my finding of a violation, emphasizing that it is within a judge's discretion to credit the testimony of one witness over another. In addition, they found that substantial evidence supported my conclusion that this violation was significant and substantial. *Id.* at 1748-49.

"Unwarrantable Failure" Determination on Remand

The Commission held that my finding that this violation was attributable to an unwarrantable failure to comply was not adequately supported. *Id.* at 1749-50. In particular, the Commission noted the evidence that a supervisor ordered the trucks to halt dumping after the spotter left is a mitigating circumstance and must be considered during analysis of whether the violation is an unwarrantable failure. On remand, I will consider the evidence regarding this violation in its entirety in the context of the six factors used by the Commission.

The operator did show that the length of time that the violation has existed was short, and that a supervisor testified that he had ordered the trucks to halt dumping after the spotter left. Tr. 176-78. The fact that the supervisor ordered the trucks to halt while the spotter, who operated the grader, was called to another job, could indicate that the mine made some effort to avoid the violation. However, the driver Stumbo spoke with at the dumpsite made it clear that he knew there should have been a spotter, and yet admitted that there was not and continued to dump. I cannot credit Sams' testimony that he ordered the hauling to stop given that the grader operator told the inspector there was no order to stop, and the truck driver continued to dump. In addition, this particular mine had a history of past berm violations, which should put them on notice that, in general, berms are an important part of preventing over-travel and must be consistently in place.

The difference between the required berm height and that of the highest berms in the area was significant enough that this violation was obvious. The dangers associated with such lack of berms, or any other means to prevent over-travel, are severe and include the possibility of a fatal accident.

With respect to the operator's knowledge of the cited condition, I credit Stumbo's testimony that the mine was on notice regarding its berm issues, and that the condition of the dumpsite was as he described it. This violation was particularly careless in light of the fact that on September 6, 2007, this mine had been issued a citation for the exact same problem (i.e., lack of means to prevent over-travel at the dumpsite), and had abated that citation by providing a spotter at the dumpsite. Gov. Ex. 3. A pattern of berm violations has begun to emerge at this

mine, which indicates an indifference of management to the dangers associated with over-travel on elevated roadways and at dumpsites. Mine management knew that spotters or other means of preventing over-travel were necessary, and yet neglected to either provide them or completely ensure that work was halted when preventative measures were not present. In either case, the mine operator exhibited more than ordinary negligence, and I will therefore uphold the unwarrantable failure designation on the citation.

III. 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 "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) and 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" 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).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green,* 22 FMSHRC 616, 620 (May 2000).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business. The violations were abated in good faith, and no evidence has been presented to the contrary. The history shows a number of violations associated with inadequate berms, including the violations discussed above. I find that the proposed penalties for Citation Nos. 6671134 and 6671177 remain as initially determined, at $4,329.00 and $7,774.00 respectively. Since Order No. 6671135 has been reduced from an unwarrantable failure to a 104(a) citation with high negligence, I assess a reduced penalty of $3,330.00. Thus, the total penalty is $15,433.00.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. 820(i), I assess the penalties listed above for a total penalty of $15,433.00 for the citations decided after hearing. Black Beauty Coal Company is hereby **ORDERED** to pay the Secretary of Labor the sum of $15,433.00 within 30 days of the date of this decision.

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

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February 1, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket Nos. SE 2009-401-M
Petitioner,	:	SE 2009-402-M
	:	A.C. No. 09-01036-179032
	:	
v.	:	Docket No. SE 2009-553- M
	:	A.C. No. 09-01036-184807
	:	
	:	
MIZE GRANITE QUARRIES, INC.	:	Docket No. SE 2009-554-M
AND ROBERT W. MIZE III, AND	:	A.C. No. 09-01013-184807
CLAYBORN LEWIS,	:	
Respondents	:	Docket No. SE 2010-849-M
	:	AC No. 09-01036-219258
	:	
	:	Docket No. SE 2010-850-M
	:	A.C. No. 09-01036-219259
	:	
	:	Mine: Mize Granite Quarries

Appearances: Charna C. Hollingsworth-Malone, Esq., Sophia E. Haynes, Esq., and Angela R. Donaldson, Esq.,Office of the Solicitor, U.S. Department of Labor, Atlanta, GA, on behalf of the Secretary of Labor;
Robert W. Mize, III, President, *pro* se, for the Respondents

Before: Judge Rae

DECISION ON REMAND

This case came before me on consolidated civil penalty proceedings on petitions for penalties filed by the Secretary of Labor ("Secretary") against Mize Granite Quarries ("MGQ"), Robert W. Mize, III ("Mize") and Clayborn Lewis ("Lewis") pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et se. (2006) ("Mine Act" or "Act") and 30 U.S.C. §820(c) of the Act, respectively. Of the eleven proposed penalties against MGQ, I reduced five, affirmed four as proposed and vacated two. Of the four penalties proposed against Mize and Lewis individually, I reduced three and dismissed one. 33 FMSHRC 886, 914-18 (Apr.

2011)(ALJ). I ordered MGQ to pay a total of $25,811.00; Mize to pay a total of $1500.00; and Lewis to pay a total of $900.00. *Id.* at 916.

I. Statement of the Case

On a petition for discretionary review, the Commission granted review only as to the issue of whether the basis for substantially reducing the penalties proposed against MGQ and for substantially reducing or dismissing the penalties proposed against Mize and Lewis individually were adequately explained. In a decision issued by the Commission dated August 7, 2012, my determination regarding the eleven violations against MGQ was upheld. The Commission remanded for further analysis the penalties I assessed against Mize and Lewis under §110(c) of the Act.[1] 34 FMSHRC 1760 (Aug. 2012). Specifically, the Commission determined that with respect to Mize, I took into consideration a double payment situation as if Mize were the owner of a partnership or an individual proprietorship rather than a corporation when determining the amount of the penalties imposed upon him. I am directed to reevaluate these penalties solely on his personal financial status. *Id.* at 1765.

The Commission also directed that I provide Lewis with the opportunity to submit financial information for my consideration. I issued an Order dated March 4, 2011, to reopen the proceedings for the submission of financial information from the parties. The reason for doing so was that neither Mize nor Lewis presented this information at the hearing. At the time my decision was issued, Mize had responded on his own behalf but, despite representing Lewis as well in this matter, submitted nothing on Lewis' behalf. The Commission noted in its remand that my Order was sent to Lewis at his work address at Mize Granite Quarries. The Commission directed that I obtain Lewis' home address and issue a second order to him stated in plain and easily understood language, requesting his financial information and an affidavit or declaration of his financial position. Should he fail to respond, I may assume that the imposition of the proposed penalties will not adversely affect his financial obligations. 34 FMSHRC 1760, 1766. (Aug. 2012).

On December 4, 2012, I issued an Order to Clayborn Lewis addressed to him at personal address, his work address and to Robert W. Mize, III, as his representative. My order informed Lewis of the proposed penalties assessed against him, that I must determine what he can afford to pay, that I needed his income information and any other information he wished to submit for me to consider in assessing the appropriate amount of penalties against him. He was also informed that if he failed to respond, I could assume the fine proposed by the Secretary is appropriate and that he can afford to pay it. He was ordered to respond within 20 days of receipt of my Order. Mr. Lewis, to date, has not responded to my Order after more than 50 days since its issuance.

I address herein only those issues which I have been ordered by the Commission to reevaluate with respect to the penalties imposed. pursuant to Section 110(c).

[1] My dismissal of the penalties associated with Order No. 6505714 was affirmed. 33 FMHSRC at 917.

II. Findings of Fact and Conclusions of Law

A. Penalties under Section 110(c) of the Act

An individual may be personally liable for penalties when a corporate agent in a position to protect employee safety and health has acted 'knowingly,' in violation of section 110(c) when, based upon facts available to him, he either knew or had reason to know that a violative condition or conduct would occur, but he failed to take appropriate preventative steps." "A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence." 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 68 F. 2d 632 (6 Cir. 1982), *Kenny Richardson , cert denied*, 461 U.S. 928 (1983). *Secretary of Labor v. Roy Glenn Agent of Climax Molybdenum Co*., 6 FMRSHR 1583, 1586 (July 1984). The level of proof required of the Secretary to sustain personal liability is more than the assertion that, at the time of assignment of a specific task, the task could have been performed in either a safe or unsafe manner and the agent failed to prevent the miner from employing the unsafe one. The agent has the obligation to prevent those hazards which he or she has reason to know will occur. *Roy Glenn* at 1588.

Section 110(c) of the Act, which provides in relevant part, that whenever a corporate operator violates a mandatory health or safety standard or knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d). Section 110(i) requires the Commission to consider six criteria in assessing appropriate civil penalties: [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).

Findings of fact on each of these statutory criteria must be made. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd,* 736 F.2d 1147 (7th Cir. 1984); *Cantera Green,* 22 FMSHRC 616, 620 (May 2000.) Such findings not only provide the required notice as to the basis upon which a particular penalty is assessed, but also provide the Commission and the courts, in their review capacities, with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient. *Sellersburg* at 292-93. With respect to individual respondents under section 110(i), Commission judges must make findings on each of the criteria as they apply to individuals. *Sunny Ridge Mining Co*., 19 FMSHRC 254, 272 (February 1997). The "relevant inquiry with respect to the criterion regarding the effect on the operator's ability to continue in business, as applied to an individual, is whether the penalty will affect the individual's ability to meet his financial obligations . . . [w]ith respect to the 'size' criterion, . . . as applied to an individual, the relevant inquiry is whether the penalty is appropriate in light of the individual's income and net worth." *Ambrosia Coal and Construction Co.*, 18 FMSHRC 819, 824 (May 1997) (*Ambrosia I*).The Commission further held that, if an individual is married, the judge should consider the individual's share of the household net worth, income, and expenses. *Ambrosia Coal & Construction Co*., 19 FMSHRC 381, 385 (April1998) (*Ambrosia II*).

The Commission has also stated with respect to the individual liability that an individual should not bear the brunt of a corporate violation nor should "inordinately high penalties" be assessed against an individual. *Sunny Ridge* at 272.

B. Robert W. Mize

The Secretary proposed penalties in the amount of $17,600 for four violations against Mize. Taking into consideration the 110(i) factors, I make the following findings with regard to the individual penalties assessed against Robert Mize: 1) Mize has no history of previous violations being assessed against him. The Secretary stipulated that the mine has not had any injuries or lost workdays and was the recipient of two safety awards; 2) Mize derives his income from MGQ which is a small operation. I have reviewed the tax returns for the business for years 2007 and 2009 and found the assessed penalties against the corporation to be disproportionate to its size and income. Likewise, having reviewed Mize's individual income tax returns and his personal financial responsibilities from the information provided, I find he does not have sizeable personal net worth and the amount of the penalties proposed is disproportionate to his income; 3) Mize's negligence with respect to Citation No. 6507102 and Order No. 6505709 was high. However, I reduced the penalties against MGQ for these same violations because based upon the 110(i) criteria; the proposed penalties were disproportionately high. I find the same with respect to the individual penalties proposed. His negligence with respect to Order No. 6505715 was moderate; 4) Mize has provided financial information regarding him and his wife as stated in my previous decision which I have taken into account in assessing a penalty which will allow him to meet his financial obligations. The proposed penalties would not have done so; 5) I have found the gravity involved in Citation No. 6507102 and Order No. 6505709 to be serious and the gravity of Order No. 6505715 to be moderate; and 6) The Secretary has stipulated that Mize demonstrated good faith in attempting to achieve rapid compliance after notification of a violation.

Accordingly, I assess the following penalties against Robert W. Mize, III: 1) Citation No. 65057102, $500.00; 2) Order No. 6505709, $500.00 and, 3) Order No. 6505715, $500.00.

C. Clayborn Lewis

The Secretary proposed penalties in the amount of $17,600 against Lewis. As discussed above, despite my attempts to obtain Lewis' financial information to determine his ability to pay the proposed penalties, none has been received. Pursuant to the Commission's remand Order, I am at liberty to find that the proposed penalties will not affect his ability to meet his financial obligations. However, I find while Lewis was a foreman with the ability to exercise managerial direction over the few unskilled laborers, I find it safe to assume his income would be no greater than Mize's and most likely sizably less and he is of modest means and should not be the one to bear the brunt of the corporation's liabilities. With respect to the six statutory criteria, I make the same findings as set forth above for Mize.

Accordingly, I assess the following penalties: 1) Citation No. 6507102, $300.00; 2) Order No. 6505709, $300.00; 3) Order No. 6505715, $300.00.

III. ORDER

Robert W. Mize, III, is ORDERED to pay a sum of $1500.00 within 30 days of this decision.

Clayborn Lewis is ORDERED to pay the sum of $900.00 within 30 days of this decision.

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

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February 5, 2013

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 2010- 1491
Petitioner	:	A.C. No. : 15-02709-228532-01
	:	Docket No. KENT 2010-1492
v.	:	A.C. No. : 15-02709-228532-02
HIGHLAND MINING COMPANY LLC	:	Mine Name: Highland # 9 Mine
Respondent	:	

DECISION

Appearances: Brian D. Mauk, Esq., Rachel E. Levinson, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner
Jeffrey K. Phillips, Esq., Steptoe & Johnson, Lexington, Kentucky for the Respondent

Before: Judge Moran

Three citations remain at issue in these Dockets.[1] From Docket No. KENT 2010 1491, is Citation No. 8499247. Highland concedes there was a violation but challenges the significant and substantial allegation and that it was specially assessed. From Docket No. KENT 2010 1492, and Citation No. 8498458, Highland also concedes that violation, but challenges the high negligence designation. After testimony was received, by the parties' agreement, the third Citation, No. 8501024, for which the violation was conceded, the Court determined it was not S&S and the parties then left the penalty determination for the Court to resolve.

[1] At the hearing Citation No. 8497693 was vacated by the Secretary.

The Significant and Substantial designation

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. See *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, 6 FMSHRC 1, the Commission further explained that "In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard;[2] (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation;[3] (3) a reasonable likelihood that the hazard contributed to will result in an injury;[4] and (4) a reasonable likelihood that the injury in question

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[2] The first requirement, a violation of a standard *or* a violation of the Mine Act itself, is straightforward. Inclusion of violations of the Act itself, not simply safety and health standards promulgated under it, makes sense because the Act has its own safety and health provisions established in its text.

[3] The second requirement, the identification of a discrete safety hazard, means that there is a measure of danger to safety contributed to by the violation. For each violation alleged to be "significant and substantial," the relevant hazard associated with the violation must be identified. Accordingly, to provide a few illustrative examples, in a case involving a violation for the lack of berms on a roadway, the judge cited the hazard of a vehicle veering off the roadway and rolling or falling down the incline. *Black Beauty Coal,* 2012 WL 3255590, (Aug. 2012). So too, in *Cumberland Coal*, 33 FMSHRC 2357, 2366 (Oct. 2011), the Commission held that an operator's failure to install lifelines that could not be used effectively contributed to *the hazard* of miners not being able to escape quickly. Accordingly, in *Cumberland Coal* the Commission made a point of emphasizing that the Secretary need not show a reasonable likelihood that the violation itself will cause injury. Therefore, one does not analyze whether *the violation* will cause injury, because the violation is distinct from the hazard. This means that one is to determine if there is a reasonable likelihood that the hazard would cause injury. As applied in that case, that meant that an analysis of the likelihood of a mine emergency actually occurring is not part of the analytical equation. Thus, it is not the absence of a berm or the improper positioning of hooks along a lifeline that is the focus. Rather, for the second element, it is *the hazard* associated with the absence of those devices that is the subject for this part of the S&S analysis. Accordingly, an inspector, in determining if a matter is S&S would, upon finding a violation, identify the hazard associated with that violation by articulating the underlying hazard that was the genesis for the standard's creation and then inquiring whether there is a *reasonable* likelihood, given the violation's contribution to the risk, that the hazard will occur and cause injury and, if so, whether it would be a reasonably serious injury.

[4] As for the third element, the Mine Act itself requires only that the violation of a standard make a significant and substantial *contribution* to the cause and effect of the identified

(continued...)

will be of a reasonably serious nature.[5] Id. at 3-4 In Musser Engineering, Inc. and PBS Coals, Inc., 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("PBS"), affirming an S&S violation for using an inaccurate mine map, the Commission held that the "test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation . . . will cause injury. . . . the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." It also observed that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." Id. at 1281.

Finally, the fourth element, that the injury must be a reasonably serious one, has not been difficult to apply.[6] Another way to express this is that negligible mining mishaps, such as

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[4](...continued)
mine hazard. It therefore may be thought of as a violation which has the effect of advancing matters towards the creation of a hazard and therefore moving events towards a hazard's emergence. *U.S. Steel Mining Co.,* 6 FMSHRC 1834, 1836 (Aug. 1984). While this third element, that there be a reasonable likelihood that the hazard contributed to will result in an injury seems, in practice, to be the most difficult to apply, the applicable test, that there be "a reasonable likelihood" that an injury will result, is not as complex as it seems. It also may be helpful when viewed from the perspective of what is not required. Thus, the test does not require that it be demonstrated that it is more probable than not that an injury will result. Instead, only a reasonable likelihood is required to be shown. Whether that reasonable likelihood of an injury occurring has been shown is evaluated in the context of assuming continued normal mining operations. *U.S. Steel Mining Co.,* 7 FMSHRC 1125, 1130 (Aug. 1985).

[5] Regarding the "continued normal mining reference" for S&S determinations, the evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 6 FMSHRC 1824, 1836 (Aug. 1984). The determination of "significant and substantial" must be based on the facts existing at the time the citation is issued but also in the context of continued normal mining operations without any assumptions as to abatement, *Secretary of Labor v. U.S. Steel Mining Company, Inc*., 6 FMSHRC 1573, 1574 (July 1984). Thus, it cannot be inferred that the violative condition will cease. *Secretary of Labor v. Gatliff Coal Company*, 14 FMSHRC 1982, 1986 (December 1992).

[6] As noted in *Topper Coal* there may be circumstances when it is impossible to determine the particular hazard contributed to by the violation. *Sec. v. Topper Coal* 20 FMSHRC 344, 1998 WL 210949 (1998). *Topper* focused on the applicability of an S&S finding in the context of an MSHA spot inspection where mine management alerted a working section that the inspectors were present. Thus, one could not tell, because of the warning, what violations the inspectors might have uncovered had there been no advance warning given. It is noted that although three Commissioners agreed that the violation was S&S, only two of them did so on a "presumption theory," that is, some violations may be deemed "presumptively"
(continued...)

bumps, bruises and small cuts, do not constitute reasonably serious injuries. It's important to appreciate that when a standard is violated, the absence of an injury producing event actually occurring does not mean that the violation was not S&S. Restated, no injury need occur for the violation to be S&S. *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005).

The inspector's opinion in determining S&S

The Commission and courts have observed that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995).

Docket No. KENT 2010 1491

Citation No. 8499247

MSHA Inspector Jimmy Dev Owens issued Citation No. 8499247. Highland concedes the standard was violated. Inspector Owens has been an MSHA Inspector for about five years and he has about 11 years of coal mining experience. Tr. 15. He identified GX P 1 and P 2, as pertaining to this Citation, which was issued May 15, 2010. Tr. 17. At that time, Owens, while traveling the supply road, "observed . . . exposed gaps in the . . . coal ribs."[7] Tr. 18. These loose ribs were on the supply road, the first main west supply road, which road is heavily traveled. Tr. 21, 63. Noting that there are four different locations, or coal ribs, in this general area, he observed loose ribs on both sides of the supply road. Tr. 20. The supply road width is approximately 19 to 20 feet. Tr. 21. Regarding the rib problem, he described the "first rib [as] gapped from the pillar 4 inches for a distance of 11 feet. It measured 2 to 4 inches in thickness at a height of 5 foot, and it was undercut[8] . . . approximately 3 f[ee]t." Tr. 21. The supply road

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[6](...continued)
S&S. Those two Commissioners then cited other examples in which such a presumption had previously been applied in S&S matters. For example, those Commissioners noted that all violations of the respirable dust standard are presumed to be S&S, *Consolidation Coal Co.,* 8 FMSHRC 890 (June 1986) *aff'd,* 824 F.2d 1071 (D.C. Cir. 1987) and that an S&S presumption has been applied to the preshift standard. *Manalapan Mining Co.,* 18 FMSHRC 1375, 1394-95 (Aug. 1996).

[7] The Inspector was at the mine that day to run respirable dust sampling, as part of an E01 inspection. He is familiar with the Highland mine. Tr. 20, 66.

[8] By "undercut" he meant that the miner cut the supply road down, that is, it "ramped down," then leveled, then ramped back up, for a distance of about 3 to 5 feet. This was created because of an overcast; therefore the undercut allowed the miners to travel under the area, as the roof height was lowered by virtue of the undercut, i.e. the undercut provided additional, needed,
(continued...)

also served as a secondary escapeway. Owens stated that, because he requested that the loose material be pulled down, he observed the rib fall and that it fell out into the travelway, blocking it. Tr. 23. Thus, the fall occurred when it did because the inspector required the mine to scale the rib, making it fall, in order to abate the cited condition. Tr. 24. As noted, Owens saw four loose ribs in this area. The second one was an "exposed [ ] gap between the loose rib and pillar approximately 3 inches for a distance of 7 feet . . . measur[ing] approximately 1 to 14 inches in thickness at a height of 5 f[ee]t . . . [and] [t]his was on the other side of the supply road." Tr. 24. Thus, the first one was on the left hand side, while the other one was on the right hand side. Owens took measurements there too. In this instance, once the ribs had been scaled, he took the measurements. As mentioned, Owens saw a total of four such areas. The others were located at the third and fourth rib and, given his direction of travel at the time, he described these as "ramp up" areas, with one on the left-hand side entry and the other on the right-hand side, and they were across from each other. The conditions were essentially the same as for the first two areas he described. In all four instances, the Inspector took measurements.[9] Tr. 26.

The Inspector confirmed that when he arrived at the site and observed the loose ribs, they had not, at that point, fallen down. His concern was that, at some point, the ribs would fall. This could happen all at once or piece meal. Rubber tired mobile equipment does travel on this route. Tr. 33-34. He observed a four inch gap which went from the bottom of the mine floor to the top, located through the rib horizontally. Tr. 36. Owens explained that the four inch gap, as it was separated from the pillar, would fall, eventually. And while four inches doesn't sound like much to a non-miner, Owens considered it to be a significant gap. Tr. 36. Based upon his experience, the Inspector expressed that, if viewed during a pre-shift exam, one could not ignore it. Thus, it is something that needs to be attended to right away. Tr. 37. To abate the violation, the loose rib was scaled down. Tr. 38. Owens was there when that scaling was done and, upon seeing it, expressed that the amount of material which was scaled was consistent with his weight estimates. While he had not done math calculations then, just observing it, he concluded that he was viewing a lot of weight. Tr. 38. The Court finds the Inspector credible on these details and concurs with his conclusions about the hazard they presented.

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[8](...continued)
clearance. In general the roof height is 6 to 7 feet, but where an overcast requires an undercut, that height is 10 to 15 feet. Tr. 22.

[9] Owens related that coal weighs about 84 pounds a cubic foot, if a solid piece, and about 52 pounds if it's broken up. It would be heavier if rock is also in the coal. Tr. 27. Using the most conservative measure, a cubic foot of coal weighs at least 52 pounds, although if it is solid coal, or if anthracite, that can rise to more than 90 lbs. Owens calculations were based on average thickness, and the length and width, as measured. Tr. 31. For the first rib, he came up with 32.08 cubic feet. Using the 52 pounds per cubic foot weight for coal, that amounted to 1,668 pounds. Tr. 33. While challenged about his numbers, his estimates were not contradicted by other witnesses. Further, the Court notes that, even if it was half that weight, 834 pounds is still a significant figure.

In citing 30 C.F.R. § 75.202(a)[10], a provision requiring that the roof and ribs be controlled to protect miners, Owens confirmed that the loose ribs he observed presented a hazard. Tr. 39. For gravity, the inspector marked it as "reasonably likely," because it was a "heavily traveled area in the mine." Tr. 40. There was at least one unit inby that location, and possibly two. Even with one unit, this meant the area would be traveled with supply men and rock dusters, belt mechanics and others. Thus, there would be from 8 to 12 miners traveling through the area. They would be traveling on rubber tired equipment. He also marked that an injury would reasonably be expected to result in lost work days or restricted duty, as crushing injuries and broken bones could result. Even a fatality was possible. Tr. 42. From his experience, Owens knew that loose ribs falling have caused injuries, though such an event has not occurred at Highland. Tr. 42. He also marked the violation as "high negligence" because the operator had been put on notice about the issue, and because the pre-shift examiner should have seen the problem. Further, because it was in a supply road, various foremen should have observed it. Thus, because the condition was obvious, capable of being seen frequently during the course of a shift, as well as during the three daily preshifts, the Inspector found no mitigating circumstances. Tr. 43. However, Owens couldn't state how long the condition had existed with any precision but he opined that it would have been for a shift, at a minimum. This estimate was also based on the extent of what he observed: four ribs in one general area, with each loose rib within 20 feet of another. The extent of the gaps also informed his opinion. Tr. 45. However, he admitted that he did not know how long it takes for such a gap to develop. Tr. 45. Owens also confirmed that, while the area had been rock dusted, the gaps in the ribs did not have rock dust on them.[11] That is, there was no rock dust between the rib and pillar. Tr. 47.

To abate the problem, the mine used a battery scoop to scale the ribs and this took about 35 minutes to accomplish abating all four loose ribs areas.[12] Tr. 48, 83. The scoop's bucket had a depth of about 6 feet and a 10 to 12 foot width. Tr. 84. More important, the amount of material that came down was "enough to block travel." Tr. 84, 94. In fact, they could not continue to the section until it was cleaned up. Tr. 94. Also, Owens made it clear that the four loose ribs were "easily" observed and that the condition had existed for a minimum of 8 hours. Tr. 91, 95. As Counsel for the Respondent noted though, that estimate was not in his notes and that ordinarily he includes such information. Tr. 101. This did not cause the Court to conclude

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[10] 30 CFR § 75.202, entitled "Protection from falls of roof, face and ribs," provides: "(a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts. (b) No person shall work or travel under unsupported roof unless in accordance with this subpart."

[11] The Inspector agreed that if he had observed rock dust between the cracks, he would have included that information in his notes. Tr. 60. The Respondent did not present evidence as to the most recent time the cited area had been rock dusted.

[12] One could not hand scale the loose ribs safely. There was no pry bar available to allow that task to be done safely, so the battery scoop was employed. Tr. 53.

that the Inspector's testimony was suspect. While the mine's preshift notes did not reflect finding the problem, that begs the question, as it does not demonstrate the conditions just arose. Inspector Owens did request that the violation be specially assessed, because of his finding that the conditions were so close together, that is, there were four problems in the general 70 foot area and because he considered it to be a heavily traveled area, which is preshifted every working shift. Further, he factored into his analysis that roof and rib-related problems are a leading cause of injuries to miners. Tr. 99.

While the Inspector marked the problem as "high negligence," he did not list it as an "unwarrantable failure." Tr. 49. Further impacting his evaluation, the Inspector noted that the standard had been cited 62 times in the past 2 years at this mine.[13] Tr. 49. Inspector Owens' supervisor informed him about the mine's notice with this problem. This type of violation had been listed by MSHA as one of the more serious safety issues, as it was included within the Agency's "rules to live by list."[14] Tr. 51. As he believed that the condition was obvious, Owens concluded that the preshift exam had not been adequate on the day he cited the violation.[15]

The outby preshift book would be the book in which the conditions the Inspector observed would have been recorded. Owens did not examine that book before he went underground, but he did later, when he returned to the surface. Tr. 64. When he did so, that book contained no indication of the problem which had been observed by the inspector. Tr. 64. Because Owens agreed that he did not know how long the condition had existed, no conclusion could be drawn about the absence of any notation of the loose ribs in the preshift book. Tr. 65. However, he noted the condition at 7:24 a.m., and the shift started at 7:00 a.m. That meant the preshift would have been done 3 hours before the shift's start, that is, between 4 and 7 a.m. Tr. 86. Had the rib "rolled," i.e. fallen, Owens believed it would likely have fallen as a single piece. Tr. 88.

Owens did not agree to the suggestion that the respirable dust tests he was there to conduct were the real reason he stopped in the area where he cited the loose ribs. Instead, he stopped his travels in the golf cart, *because of* the rib conditions he observed. Tr. 67. In fact, though the Inspector then did take an air quality reading at crosscut 92, he had first observed the rib issue and decided that, since they were already stopped, he might as well do an air quality

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[13] Because the standard is not limited only to loose ribs, the 62 prior citations could've involved the other matters addressed by the standard. Tr. 62. However, as the Court has noted, those other problems are of the same ilk.

[14] Owens too agreed that 75.202(a) violations are not limited to loose ribs; other problems are encompassed within that provision, such as issues with the face and roof. Tr. 6 1. However, he stated that his supervisor was specific with him to be alert for rib conditions. Tr. 62.

[15] Although, on cross-examination, the Inspector's experience was challenged, the Court finds that, for this citation, he had sufficient experience and training to be able to competently assess the conditions he observed. Tr. 54-56.

reading there. Tr. 67-68. In an attempt to show that the condition could not have been present for an inordinate period of time, Inspector Owens agreed, as presented by Respondent's counsel , that despite the area being well-traveled, no one else had noted the condition. Tr. 69. Despite that concession, for the reasons expressed in his earlier testimony, he listed the condition as "high negligence." Tr. 70.

As he stated earlier, in at least one area, the rib, where it had been pulled down, was 5 feet from the mine floor. This was where there was a 3 foot undercut.[16] Tr. 72. The Inspector's notes did not express how long the condition had existed. Tr. 82. Owens also stated that, for those using the travelway, typically they will travel in the middle of it. Regarding the absence of rock dust in the cited rib area, Owens agreed that he had no idea if they had rock dusted that day, nor how often the area is rock dusted. Tr. 89.

Michael Menser was called as a witness for this matter by the Respondent. At the time of the hearing Menser was employed by Highland Coal. Tr. 103. His mining experience covers about 7 years and he has worked for various coal mine companies during that period. He is not a part of management and is a union miner. Tr. 105. He is experienced with rib and roof issues. Shown Ex. P-1, he stated that he recalled the events surrounding the citation reflected in that exhibit. Highland is a union mine and he elected to go with Inspector Owens on that day. His role in attending with the Inspector is to represent the union. Tr. 106. Menser recalled that the Inspector was there that day to run a dust evaluation on the number 3 unit. Tr. 107. While on their way to do that, Owens had Menser stop their transport vehicle so that he could inspect some ribs. Tr. 107. Upon Owens' further examination of the ribs he noted some cracks in them. Although a pry bar is typically sufficient to pull down loose ribs, that attempt failed, as the pry bar "wouldn't budge" the loose rib. Tr. 109. Normally, from Menser's perspective, that means that the rib is not ready to come down and for that reason he did not view the condition as a hazard. Tr. 109.

Asked if he knew what the term "S&S" meant, Menser stated it involved "[c]ircumstances which would make it more serious of a citation because more people were involved. I think." Tr. 110-111. Though he recalled that the Inspector cited 4 locations with the

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[16] Although the purpose and usefulness of that inquiry was elusive, the Inspector's measurements were made from where the mine floor *would usually be*, that is, not counting the undercut. Thus, his measurement was from the *top of the undercut* and then up, as if the underpass had never been there. Tr. 73-74. Normally, the height would be 5 feet, but in these locations, because of the undercut, which was created for the overcast, the height was actually 8 feet. The overcast was in the intersection and there are ribs on both sides of the overcast area. Tr. 76. The gapping observed by the Inspector was about 9 feet from the pillar but he did not measure the distance from the intersection to the pillars and the loose ribs. In the Court's view this is a distraction from the more important point that a large, heavy, quantity of coal had to be brought down from the ribs. Further, the Inspector had no doubts about whether the ribs were loose. Tr. 80.

rib issue, he stated that they were only able to pull down the rib with a pry bar for one of them. Tr. 111. Thus, Menser believed that only one rib was involved and that it took a scoop to bring it down. Tr. 112. On cross-examination, Menser agreed that he is not a certified mine examiner, nor does he have foreman's papers. Tr. 114. Menser stated that there were *many* ribs like the one in issue at the mine and that he previously had tried to pull on ribs like that "in that general area." He was unsure if that was the same rib that was pulled down, per the citation. Tr. 115. He then acknowledged the rib issue "[c]ould be a hazard, yes. *Any crack* in the rib could be a hazard." Tr. 115. (*italics* added). Further, Menser could only speak to one of the four ribs described by Owens. He explained that he "spoke to the gentleman that afternoon and he said he did get [the rib Menser saw] taken care of. He didn't specify he took care of *all of them.*" Tr. 117 (*italics* added). Despite his different take on the condition from the inspector's, Menser stated he was not surprised that a violation was cited. His only surprise was that it was also "S&S" and high negligence. Tr. 122. In the Court's view, given the tenor of his testimony, one would have expected that he did not think there was any violation. Despite his disagreement with the S&S designation, Mr. Menser admitted that he did not know the legal definition of that term and when asked what "high negligence" meant, he responded, "No. I mean. . . . I know that . . . [there] has to be mitigating circumstances." Tr. 124.

Accordingly, there is a conflict to resolve, as Mr. Menser stated he was with Inspector Owens for the entirety of the inspection and yet their recountings were quite different. Among other conflicts, Menser stated that neither was present when the scoop knocked down the rib. Tr. 121.

The Parties' Contentions

As noted, the Respondent concedes that the standard was violated, but takes issue with the Inspector's S&S finding that it was "highly negligent," and that the matter was specially assessed. R's Br. at 3. For the S&S issue, Respondent asserts that the Secretary failed to prove that the condition "was reasonably likely to cause a reasonably serious injury to any miner." Respondent maintains that the rib was not reasonably likely to fall. *Id.* It points to the absence of rock dust seepage behind the "allegedly" loose rock. Without such rock dust seepage, Respondent submits the "rocks were not actually that loose," and the "alleged gaps" had not been present for long. *Id.* at 4. It adds that pry bars were unsuccessful in removing the "allegedly loose rock in all four areas," and that it took a scoop to finish the task for one rib. Nor, Respondent contends, was there any genuine likelihood of injury occurring because miners traveled the area in vehicles traveling the center of the 20 foot travelway.[17] Respondent also

[17] Respondent offered its math that, with vehicles at a maximum of 8 to 10 in width and the gaps in the ribs at 5 feet in height, it asserts that any rock would have fallen *a foot* (12 inches) short of any mantrip. R's Br. at 5. Smaller vehicles, it submits, such as golf cart style transports, would have less exposure to loose rib falling on them. The Court would comment that if life worked with the clockwork precision Respondent posits, its argument could be

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believes that, to establish the S&S nature, the Inspector should have presented calculations to show how the loose material would have fallen out into the middle of the travelway. R's Br. at 6. As to the last assertion, the Court would comment that no calculations were needed, as the Inspector saw that the roadway was blocked when the loose rib was taken down.[18]

As to the "high negligence" designation, Respondent challenges the Inspector's contention that the condition existed for at least 8 hours and therefore should have been discovered. It notes that the Inspector, while opining that the conditions had lasted for at least 8 hours, could not state whether a gap could occur in a moment's time or gradually. To this, Respondent adds that there is no claim that Highland failed to perform its preshift exam and it was not cited for an inadequate exam either. The absence of rock dust behind the scaled rock, Highland submits, supports the position that the gaps had not existed for much time.[19]

The Secretary supports its S&S designation on the basis that the area was heavily traveled, that it presented a serious hazard to the miners passing that area and that any injuries would be serious, and include harm ranging from crushing injuries up to fatalities.[20] In terms of the negligence involved, the Secretary maintains that, given the mine's history of violations of this standard, that it had been put on notice about rib issues, and the Inspector's opinion that the rib issue cited here had existed for at least a shift, a high negligence finding is justified. The Secretary seeks a civil penalty in the amount of $12,500.00 for this admitted violation.

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[17](...continued)
theoretically persuasive. However, the idea that vehicles always travel along the roadway center and that rib fall material would miss a mantrip by 12 inches, distracts from the fact that when the material was brought down, it filled the roadway and that travel was blocked until it was cleaned away.

[18] Respondent cites "11 FMSHRC 89, 298" *Union Oil*, for the undisputed proposition that the Secretary bears the burden of proof to establish the S&S characteristic. It meant to cite 11 FMSHRC 289, 298.

[19] Respondent also maintains that a special assessment was unwarranted because, while Highland received some 62 violations of the cited provision in the past 2 years, that information does not disclose the number that involved rib problems. The standard, it notes, applies to roof and face problems too and the Respondent apparently feels that more specificity was due. The Respondent's complaint about the special assessment is overtaken by the posture of the case, as it is now before the Court and the statutory criteria apply, not Part 100.

[20] The Secretary analogizes the conditions in this matter with those found by another judge who upheld the S&S finding in a similar loose rib violation, citing *Knox Creek Coal,* 2010 WL 5619977 (Dec. 2010), and she contends that the same factors relied upon by the judge in *Knox Creek Coal* apply here too. As it must be, the Court's findings here are made independent of that case. Sec. Br. at 8-9.

Discussion

In resolving conflicts in the testimony, among other factors, the detail provided by Inspector Owens over the circumstances of his discovery of this admitted violation, and the conditions he noted, leads the Court to ascribe greater credence to his recounting. The Inspector's S&S determination is affirmed. The first two elements of *Mathies* are not in dispute, as the Respondent concedes the violation and the parties agree that the discrete hazard is a rib fall. Given the amount of coal associated with *each* of the *four* cited loose rib areas, impacting both sides of the roadway, there can be no doubt that a serious injury would be the result if miners were traveling there at the moment a rib fell. That leaves only the third element, the reasonable likelihood that an injury would result, for further comment. In concluding that the third element was established, the Court relies, in part, upon the Inspector's view of that. This includes the obvious and significant gaps associated with the loose ribs and that the gap ran from the floor to the mine top. The fact that the area is a heavily traveled supply road also supports this conclusion, as does the Inspector's seeing the extent of the material that filled the roadway when brought down. Nor can MSHA's experience with rib and roof falls, this mine's own experience with those problems, and the fact the agency elevated it to a "rules to live by" status, be ignored. While Respondent has noted that, among the some 62 citations for this standard, some number may have dealt with face or roof issues does not mean that it is anything other than appropriate to group those hazards together along with rib control, as the cited standard does, given that they all involve ground falls, from one direction or another.

The "high negligence" designation is also appropriate, as the Court finds that the condition was obvious and detected by the Inspector while traveling to another location in the mine to address a different and distinct issue. That not just one, but four areas, were found supports this conclusion as well. As the Inspector testified and the Court finds as fact, Highland was on notice about this issue and the condition should have been noted by the preshift examiner. Foremen, too, should have noted the hazard, just as the Inspector did. The idea that the four problematic ribs, within 20 feet of one another, could have just developed is not a reasonable conclusion, and the Court declines to make it. The condition, at a minimum, existed for a shift. Given the above, and in consideration of the statutory criteria, the Court imposes a civil penalty of $12,500.00.

Docket No. KENT 2010 1492

Citation No. 8498458

The Respondent's dispute with this citation pertains to the high negligence designation and listing the number of people affected as four. Tr. 1077.

MSHA Inspector Tim Gardner testified regarding this matter. Inspector Gardner began working in coal mines in 1979, began working for MSHA in March 2007, and presently is a roof

control specialist. Tr. 1074 -76. He has a Kentucky mine foreman's certificate as well. The Inspector advised that his experience had included working as a belt examiner. His experience also includes working as a mine foreman. Tr. 1094-1095. He also acted as the company representative accompanying the MSHA inspector during an inspection. Tr. 1096.

On June 8, 2010, Inspector Gardner issued the Citation in issue, No. 8498458. P 40 and P 41. Tr. 1077. The citation, which was issued during the day shift, cited 30 C.F.R. Section 75.400, which section prohibits the accumulations of combustible material. Tr. 1085. Inspector Gardner was at the mine that day because there had been a roof fall there a week or so earlier and he had been there investigating that event. The mine was in the process of supporting the roof at that location. When he was outby the 4A head drive, at crosscut 2 and 3, there was a ventilation control, that is an air lock, to control the ventilation around the head drive. He also described it as a ventilation curtain, which was a heavy curtain on a wood frame around the belt. Tr. 1079. It was then that he observed a coal pile, by which he meant accumulations of combustible material, consisting of loose coal, and coal fines, on the back side of the belt. The Inspector measured the accumulations, finding them to range from 4 to 16 inches in depth and 2 to 5 feet wide, coming away from the belt, and 16 feet in length, running parallel with the belt line. Tr. 1079.
He concluded that when the belt traveled under the curtain, *and when it was heavily loaded*, that it was getting the coal suspended, or as he described it, it was "sort of rolling, and pieces would roll off on to the ground or the mine floor." Tr. 1079-80. Thus, the curtain itself was knocking some of the coal off the belt.[21] Tr. 1079. The Inspector observed coal coming through that area and it was being dragged and would start rolling and from that it would roll off the belt and on to the back side of the belt. Tr. 1080.

No surprise, the Inspector considered the condition to be a safety hazard because the coal, being a fuel, can catch fire. This can occur because, eventually, as the coal builds up in the belt, it would start to dragging through it and rollers could start turning in it as well. If the rollers started burning in it, there would be an ignition source and a fire would start. Tr. 1081.
The Inspector marked the gravity as unlikely and non S&S, because he found an absence of ignition sources. Tr. 1082.

However, he marked the citation as high negligence. His reasoning was that he talked to the belt examiner, which examiner had just made the belt. When Inspector Gardner asked the examiner if had seen the problem, the examiner told him *that he had* indeed. Tr. 1082. The examiner explained that it was the first time he had examined that belt and that he had the accumulation pile in his notes and that it was his intention to put that finding in the record book, when he got outside, and that the condition needed to be corrected. However, Gardner added that, as there was not a then-present ignition source, the examiner did not need to stop the belt right then and clean it up. Tr. 1082. The negligence was that Inspector Gardner had checked the

[21] The curtain has a flapper like area where it is cut out for the area where the belt travels under it. The coal, Inspector Gardner explained, was hitting that flapper. Tr. 1080.

books before he went underground and did not see any such notation about the problem listed in the other shifts. Yet, seeing the condition he observed, the Inspector concluded that the problem had been ongoing for some 3 or 4, or even as many as 5, shifts prior. The Inspector noted he observed coal dragging off the belt at a rate of some 2 to 3 pieces a minute. The sizes of coal dropping off were about 2 to 3 inches or less. Tr. 1085. Supporting that observation, as noted, he found the pile to run some 16 feet in length, and ranging 4 to 16 inches of depth. Tr. 1083. The Inspector added that his mining experience informed him that, with what he observed, the condition had lasted that long.[22] Therefore, he concluded that other examiners had walked by that area and took no action to correct the condition. Tr. 1084.

The Inspector wrote that lost workdays or restricted duty would be the expected injury or illness and that four persons would be affected due to carbon monoxide, smoke inhalation, and burns. The "four persons affected" number was based on the working section having ten persons working. Tr. 1087. Further, there are miners traveling up and down the travelways outby. He noted that when a fire gets started, it spreads quickly and it presents the potential to affect everyone in the immediate area and inby. Tr. 1088. Also, there is a travelway, or supply road, adjacent to the cited belt and those areas share common air. Tr. 1088.

Mr. Randy Duncan was traveling with the Inspector when the condition was found and the Inspector informed him that it was a violation. Tr. 1089. The Inspector's computer program alerted him that this standard had been cited 241 times at the mine in the past two years. Tr. 1090. That number does not mean that management should have been aware of those conditions on each of those 241 occasions. Tr. 1090. In this instance, the Inspector's conclusion about the mine's awareness was based on the conditions he observed, seeing the coal roll off, and then forming his opinion about how long that problem had existed. Tr. 1091. Not only had the area been preshifted, and therefore with several prior opportunities to see it, but also it had been on-shifted too. Tr. 1091. Belts are required to be on-shifted during coal producing shifts and those occur twice a day. Tr. 1091. As noted, the Court adopts the Inspector's conclusions about the time period the condition had existed.[23]

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[22] The Court inquired whether it was possible that the accumulation could have developed in a much shorter period of time. Gardner responded that the belt had to be extremely loaded for the pieces to start raking off, and therefore it would not rake off continually.

[23] In terms of the accumulations the Inspector observed, when asked if it was on the "non-travel" side of the belt, the Inspector also noted that both sides of the belt are required to be travelable. Tr. 1096. The Inspector informed that loose coal is the size of lump coal, whereas coal fines are smaller. Spillage refers to material falling off the belt. Tr. 1103. The Inspector affirmed that what he observed was "an accumulation from spillage." The standard cited does not prohibit spillage. Rather, it prohibits the situation he found: accumulations which are not cleaned up. Tr. 1116-1117.

The Inspector defined "high negligence" as the circumstance where no mitigating circumstances were present. Tr. 1107. His high negligence marking was based on the length of time the condition had existed. Tr. 1111. Here, had the pile been simply a little one, he would have considered that to have been a mitigating circumstance. Tr. 1107. The Inspector did not necessarily adopt that the mine simply cleaned the accumulations as a best practice, as he noted that the curtain was creating the problem, and his focus was upon the accumulations. Once the accumulations were removed, the citation was terminated. Tr. 1110. When asked if the accumulation was on the outby side, going toward the surface or the inby side, the Inspector informed that it was on the outby side. Tr. 1111. The four miners that the Inspector listed as potentially affected were on the outby side too. Tr. 1112. The Inspector advised that his reference to 10 miners related to the presence of that number of miners working on the Number 4 working section, that is, inby the location cited. Also, the belt examiner, mine foremen, and maintenance people are using that travelway consistently. Tr. 1113. Because no one could state precisely which miners would be at that location when a problem arose, it was impossible to identify *the exact* four persons at a given time. Therefore, it could be maintenance people, or if a fire started, it could be the miners arriving to put out the fire. Other scenarios could develop too. For example, the air courses could fill up rapidly from smoke. Thus, there was the potential for *all those on the section* to be affected. Tr. 1114. Accordingly, the Inspector's listing of "four individuals affected" was a reasonable estimate of the number. Tr. 1114. The troublesome curtain, which the Inspector likened to an air lock, was not likely there as a required air lock under the mine's ventilation plan because it was so close to the head drive. Tr. 1118. The Inspector agreed that the section he cited also appears as a statutory provision at 30 U.S.C. Section 864 and that it provides essentially the same requirements as the standard he cited. Tr. 1118.

As mentioned, Randy Duncan was present when the violation was observed, and he agreed that the accumulation was present. Tr. 1120. He advised that the problem was due to the belt running out of line and that he and Steve Collier, the union representative, who also was with them, then lined up the top rollers to stop the spilling. Tr. 1121. Mr. Duncan maintained to the Inspector that they what they were viewing was spillage, not accumulations but his chief disagreement was the Inspector's characterizing the condition as "high negligence." Tr. 1122.

Mr. Duncan stated that he has significant experience with belts and that belts can spill very quickly and it can become "pretty intense very quickly." Tr. 1123. It can develop in a matter of as little as five minutes. Duncan stated that the coal was coming off the belt "pretty good," therefore implying that it developed very fast, and not over several shifts as the Inspector had concluded. Tr. 1126. Duncan agreed that there was a curtain present, but he denied that it was an air lock. Tr. 1126. It is noted that the Inspector also doubted that it was an air lock. In any event, Mr. Duncan did not believe that the curtain was causing the spillage at all. Rather, he attributed the problem to an alignment issue and stated that once the alignment was done, the spillage ceased. Tr. 1126- 1127. No change was made to the curtain either. Duncan also believed that the accumulation had occurred that morning; that it was a fresh spill which happened sometime between 8:00 a.m. and when he arrived at the site. Tr. 1128. He added that

if it had been present for a longer time, the mine's belt walkers would have noted it in their books. Tr. 1128.

As mentioned, Mr. Duncan took issue with the high negligence designation listed in the Citation. He based this view on the absence of anything in the belt book to alert the mine of the issue and therefore he contended that Highland had no notice of the problem. In support of that assertion, he noted that the belt walker is a union person. Tr. 1129-1130. Duncan then reconsidered his initial view - his acceptance that there was a violation - expressing at the hearing that no violation should have been cited at all, as a mine is to be afforded some time to deal with a recent accumulation before being cited for the condition.[24] Tr. 1132. The Court observes that premise relies upon a finding that the accumulation was in fact very recent, a conclusion the Court declines to adopt here.[25]

It is also noted that, in terms of how long it took to clean up the problem, Mr. Duncan agreed that it took two men to do it, but he couldn't illuminate as to how long it took to do that task, as he did not observe the clean-up process. Given his perspective that the condition was not a hazard, when asked if it was necessary to have it recorded in the books, he provided a non-answer, stating only that he doesn't tell people what to include in the books. Tr. 1139. However, he then admitted that he would have put the matter in the books, if he had been the belt examiner, even though he did not consider it to be a hazard.[26] Tr. 1139.

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[24] As noted above, though Mr. Duncan did not dispute *the amount* of the accumulations, he believed that there is a distinction between spillage and accumulations. He maintained that an accumulation occurs over a period of time, but that spillage is effectively a sudden event. Tr. 1137. Here, he believed the problem was from fresh spillage. Tr. 1136. However, he did agree that when spillage occurs it creates an accumulation. Tr. 1137.

[25] In questioning by the Court, Mr. Duncan agreed that he has considerable experience with belts. Tr. 1145. When asked to assume coming across a situation with the accumulations found here, if he would consider that to be a minimal amount of spillage or a significant amount, he responded that he was not "going to necessarily say it was significant." He then added that, he considered it to be "[n]ot so much compared to what [he has] seen in other places," and that he considered the amount to "not [be] a real big deal." Tr. 1146- 1147. If it had "been there for 2 or 3 weeks" he would have a different view of it. Tr. 1147. The Court also asked him if he were to come upon the same amount of accumulation, or as he described it, spillage, whether in his experience this would *typically* be something that would develop in a matter of minutes. Mr. Duncan maintained that it could have happened in minutes, offering in support his view that it was fresh coal. Tr. 1148. The Court does not adopt this rendition.

[26] Mr. Duncan agreed that the belt area is traveled at least once a shift, but he did not think the examiner here would have been at the location by 8:00 a.m. Tr. 1139. He did concede that the examiner would have been there before Duncan and the Inspector arrived, but not long before that. Tr. 1140. Later, confirming that the examiner was there before he and the Inspector

(continued...)

The Parties Contentions

As noted, the Respondent's objection to this Citation is that it was listed as high negligence.[27] It believes that there was only low or no negligence involved. To be high negligence, the Secretary must show the Respondent knew or should have known of the problem and that there was no mitigation. Respondent asserts that the Inspector's high negligence designation rested upon the grounds that it existed for two or more shifts and that the mine's examiners either missed the conditions or failed to note it in the books. As to the time the condition existed, Respondent points to its witness' testimony that it was present for less than 2 hours. R's Br. at 9. It also asserts that the Inspector had "limited belt inspection experience." *Id.* In support of its contention that the coal was spilling off the belt in a fast and furious manner, Respondent further submits that the Inspector was inconsistent in his testimony regarding the rate at which coal pieces were being knocked off the belt. In contrast, its witness could tell that the spillage was fresh and new and therefore was not present two hours earlier. R's Br. at 10-11. Last, Highland submits that only one person was affected, the belt walker.

The Secretary notes that the Inspector's experience includes 20 years in coal mining before joining MSHA. Addressing the Respondent's contentions[28] concerning the level of negligence and the number of miners affected, it notes that although the Inspector spoke of a high rate of spillage per minute, that high rate occurred *only* when the belt was heavily loaded. Thus, he concluded that the amount of spillage he observed would not have developed in a flash, but would have taken time to build up. As to Highland's witness' assertion that the coal spillage was "fresh," the Secretary agrees that the *top most* layer would be fresh but that is not indicative that it would be fresh some 8 to 16 inches below that. Sec. Br. at 62. In terms of the number of miners affected, the Inspector considered that four of the ten employees who worked on that unit would be impacted. Finally, as for the Inspector's negligence finding, he concluded there were no mitigating circumstances present, a determination based upon his view that the accumulations would have taken some 3 to 5 shifts to create what he found. The Secretary seeks a penalty of $1,795.00 for this citation.

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[26](...continued)
arrived. Tr. 1143. As to whether the spillage would have continued had Duncan and the Inspector not come through the area, he offered only that it could, or could not, have continued. Tr. 1140. Duncan stated that the belt in issue here would start up between 6:30 and 7:30 a.m. and that coal would then start running on it around 7:50 to 8:00 a.m. Tr. 1142.

[27] The Citation was *not* denominated as "significant and substantial."

[28] The Secretary noted that Highland's witness referred to the citation as "spillage" as opposed to an "accumulation," and for that reason addressed the distinction. However, Respondent's brief did not claim that mere spillage was involved. Accordingly, Respondent does not contest that there was an accumulation.

The subject of high negligence

The Commission has noted that " 'Highly negligent' conduct involves more than ordinary negligence and would appear, on its face, to suggest an unwarrantable failure. Thus, if an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence." *Eagle Energy, Inc.* 23 FMSHRC 829, at * 839, 2001 WL 1003313, and *Eastern Associated Coal Corp*., 13 FMSHRC 178, 187 (Feb. 1991) . It is noteworthy that the Commission has also discussed the importance of preshift and on-shift examinations and that the failure to conduct adequate inspections, can be the result of high negligence. *Quinland,* 10 FMSHRC 705, 708-09 (June 1988), *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010-11 (Dec. 1987), *Black Beauty Coal,* 33 FMSHRC 1482, 2011 WL 3794320, (June 2011, Judge Miller), *Eastern Associated Coal Corp*., 13 FMSHRC 178, 187 (Feb. 1991). Conditions which are obvious and extensive, fit the high negligence designation. *Mountain Edge Mining,* 33 FMSHRC 1272, 2011 WL 2745786 (May 2011, Judge Moran).

Discussion

Having considered the testimony for this Citation, as described above, the Court concludes that the high negligence designation was appropriate and that the number affected was reasonably listed as four. Inspector Gardner provided detailed, and credible, testimony on these issues and the Court concludes that the accumulations he witnessed did not develop shortly before he arrived, but rather had been present for several prior shifts. His personal observations of the problem confirmed his estimation. Further, there was no dispute over the amount of the accumulations so found, nor that it took two miners to clean up the problem. It is also troublesome that Highland's apparent view is that matters such don't amount to a "big deal" unless they continue to exist for two or three weeks. Remarks such as that may explain that the mine had been cited some 241 times in the past when this instance was cited. Upon consideration of the statutory criteria, a civil penalty of $1.795.00 is appropriately imposed here.

Citation no. 8501024

Inspector Paul Hargrove testified regarding this matter. Tr. 996. He issued Citation No. 8501024, on July 12, 2010, for a violation of 30 C.F.R. §75.512. Tr. 996. That standard provides: "All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine. "

With the Inspector at that time were section foreman Jim Gass and miners' representative Bernie Alvey. Tr. 996-997. The Inspector, when at the mine's golf cart charging station, noticed a light bulb missing from a string of 110 volt light circuits. With no bulb, nor plastic outer guard for one of the light sockets in the string of lights, the inner copper part of that socket was exposed. Tr. 999. The hazard is indistinguishable from a typical home's table lamp, if it

were plugged in and no bulb was in the socket. One sticking a hand in such a socket would receive a shock.

As a large number of miners travel in this area (40 to 50, the Inspector estimated) and as they may be carrying hand tools when doing so, and because they park their mobile equipment in the area of the exposed light socket too, Hargrove cited the condition. Tr. 1000. The socket was located 6 feet 2 inches above the mine floor. The entry at that location is 20 feet wide and bulb-less socket was near the center of that entry. Upon questioning by the Court, Hargrove agreed that one would have to have one's hand or a tool go right up into the socket for the hazard to occur, as the outer part of the socket does not present a shock risk. Tr. 1003. However, Hargrove stated that, as 110 volts are involved, which is the same voltage in a house, if one were to make such contact, an electrocution would result. Tr. 1003. In terms of the Inspector's S&S finding, he conceded that, short of intentional conduct, directly inserting a hand into the socket, the only other way an electrocution can occur would be if a miner's tool comes into contact with the socket. Tr. 1007. Hargrove conceded that he knew of no instance where a miner has walked by such an open socket, had a tool make contact with the inner portion of that socket and then die from a shock. Tr. 1010. However, because of the area's high traffic and because it was, low enough for contact to occur, he marked it as S&S. Tr. 1014.

Hargrove marked the violation as "moderate negligence," in effect giving the operator a break, because of the contention that miners had been stealing bulbs and taking them home. Tr. 1012- 1013. Thus, Hargrove considered this to be a mitigating circumstance. Tr. 1013. The condition was abated by installing a bulb in the socket. Tr. 1017. The Inspector would have marked the negligence as low, only if the circuit had been deenergized. Tr. 1018. Think of the table lamp analogy with the lamp unplugged.

At that point, the Respondent having acknowledged that its concern with this citation was the S&S designation, the Court announced the violation was not S&S. Tr. 1019. The Court stated that while there was a likelihood of electrocution, there was no "reasonable likelihood" of that occurrence Tr. 1021. At hearing, the Court determined that the matter, assessed at $873.00, was not S&S and it was agreed to leave it to the Court to impose the penalty. Upon consideration of the statutory criteria, the Court imposes a penalty of $100.00 for this violation.

Conclusion[29]

Docket No. KENT 2010 1491

Citation No. 8499247, an admitted violation, was S&S and the negligence associated was high. A civil penalty of $12,500.00 is imposed.

Docket No. KENT 2010 1492

Citation No. 8498458, an admitted violation, is found to have the negligence associated as high. The number of miners affected was four. A civil penalty of $1,795.00 is imposed.

Citation No. 8501024, an admitted violation, was not S&S. A civil penalty of $100.00 is imposed.

ORDER

Within 40 days of the date of this decision, Highland Mining **IS ORDERED** to pay a civil penalty in the total amount of $14,395.00 for the violations identified above. Upon payment of the civil penalty imposed, this proceeding is DISMISSED.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

[29] As noted earlier, Citation No. 8497693 was vacated. Sec. Br. at 64.

Distribution (E-mail and Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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February 5, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2010-176
Petitioner	:	A.C. No.46-01438-200063
	:	
	:	Docket No. WEVA 2010-631
	:	A.C. No. 46-01438-209558
	:	
	:	Docket No. WEVA 2010-940
	:	AC. No. 46-04138-216359
	:	
	:	Docket No. WEVA 2010-1078
	:	A.C. No. 46-01438-219233
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Ireland River Loading Facility

SUMMARY DECISION

Before: Judge Koutras

STATEMENT OF THE PROCEEDINGS

The captioned civil penalty proceedings pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802 et. seq. (2000), concern four (4) Section 104(a) citations served on the Respondent on September 1, and November 5, 2009, following a fatal accident that occurred on December 29, 2008.

The Respondent has filed a Motion for Summary Decision challenging the Secretary's enforcement jurisdiction at the location where the fatality occurred. The dispute concerns three distinct geographic mine property and non-mine property areas described by the Respondent as (1) the Ireland River Loading Facility (IRLF); (2) the Ireland Dock; and (3) the river portion of the dock. The Respondent does not dispute the Secretary's enforcement jurisdiction over its IRLF operations. The Respondent's jurisdictional dispute is with the Secretary's enforcement claims over the dock and the river portion of the dock.

The Secretary filed a brief in support of Mine Act coverage of the Respondent's IRLF, including the Ireland dock, the river portion of the dock, including the empty barges moored at the dock in preparation for being loaded with coal, and takes the position that all activities taking place at these locations are an integral part of the mining cycle and constitute a mine. The Secretary concludes that

her determination that the facility is a mine subject to her jurisdiction is reasonable and warrants deference.

The Respondent has filed a response to the Secretary's brief and the Secretary has filed a reply brief, and the matter has been submitted for summary decision by agreement and joint stipulation of facts as discussed in the course of this decision.

STIPULATED FACTS

The McElroy Coal Company

The mine produces bituminous coal that is sent to the McElroy preparation plant for processing to customer specifications by cleaning, breaking, crushing, sizing, washing, drying, mixing, and blending. McElroy Coal Co. and the Respondent are wholly-owned subsidiaries of Consol Energy, Inc., and are separate legal entities with separate MSHA Mine I.D. numbers.

The Ireland River Loading Facility (IRLF)

The Respondent's facility stockpiles, loads, and on rare-occasions blends quantities of completely processed coal received from the preparation plant located 1.5 miles away by a continuous conveyor belt. The processed coal has been cleaned, sized, and crushed at the plant The facility operates pursuant to a state of West Virginia mine permit, is bonded, and the land is owned by the Respondent. The IRLF has a separate MSHA I.D. number.

The IRLF facility includes a series of coal beltlines which carry the processed coal from the McElroy Plant to a coal transfer building where it is transferred from one conveyor belt to another. The facility also includes a surge stockpile and silo, a pump house, office, MCC building, and laboratory.

At the time the citations were issued, coal was mixed or blended, layer-loaded, and stored at the IRLF. Coal is not cleaned, sized, dried, or crushed at the IRLF, except for crushing of samples of coal for the purpose of laboratory analysis. Decisions regarding the mixing or blending and layering and storing of the coal at the IRLF are made by McElroy management. The shift supervisors employed by the prep plant are responsible for the transfer of coal onto barges at the Ireland Dock pursuant to the instruction of Consol Energy's shipping department.

The processed coal from both the stockpile and silo is transferred on a conveyor belt to the final load-out belt that is controlled by the load-out operator who controls the flow and speeds of the silo and stockpile feeder belts. The processed coal is loaded onto a barge by an elevated belt conveyor that drops it directly into the barge.

The processed coal received by the IRLF from the McElroy plant is analyzed to ensure customer specifications. A few times a month, processed coal arriving from the plant is, for various

reasons, diverted to the stockpile, where, at times, it is subsequently blended with other processed coal of a different quality at IRLF by controlling the flow of coal onto belts to be loaded into specific barges. The blending of stockpiled coal with a coal of a different quality is done to ensure customer specifications are met. Coal from the "old and new" preparation plants are sometimes mixed. The IRLF blending and mixing of coal was taking place in the 2008 timeframe.

The chief health and safety officer of McElroy Coal Co. is responsible for safety and safety training at the IRLF. At the time of the accident, IRLF employed 19 hourly employees and the hiring, payroll, and personnel functions at IRLF were handled by McElroy Coal Co.

The General Plant Foreman of the McElroy plant was also responsible for IRLF, including the loading of processed coal, the scheduling of personnel, inspection of conveyors, equipment and barges, as necessary, and the supervision of the shift supervisors who provide first level supervision at IRLF.

Ireland Dock

The Dock is an un-bonded river bank area below the high water line at the IRLF. It includes a walkway to a fixed barge, the fixed barge, and the moving barges onto which the processed coal is loaded. The Dock was in operation on the day of the accident pursuant to a permit issued by the U.S. Army Corps of Engineers, but it was neither bonded nor permitted by the State of West Virginia as a coal mine.

Tow boats at the IRLF dock are registered with the Coast Guard, and the two tow boats at the dock are owned by the Respondent and operate to move and position barges at the dock. The dock consists of a control room for periodic communications with the prep plant, a loading dock, a walkway to the dock, a storage building, a belt stand, several mooring cells, and electrical equipment.

The dock is not a surface coal mine, or the surface work area of an underground coal mine. It falls under the jurisdiction of OSHA, MSHA, or the Coast Guard. Absent the assertion of jurisdiction of MSHA or the Coast Guard, the dock falls under OSHA jurisdiction.

McElroy prep plant shift supervisors' duties required them to inspect the beltlines and to walk on the barges several times a week in order to inspect the cargo box of the barges for any foreign material or water. The plant provides directions to the loader operator to control the flow of coal to achieve certain coal specifications for individual customers, and the loader operator controls the belts at IRLF and directs the flow of coal from the surge silo or the stockpile to be loaded into specific barges in order to meet customer specifications.

The loader operator receives information on the customer specifications of coal to be loaded into each barge via communications from the prep plant as well as from Consol Energy. Both the prep plant operator and the loader operator monitor the coal analysis to ensure that the coal being loaded on a barge meets customer specifications that are provided to the loader operator via computer screens in the loader operator compartment.

Up to approximately twice per year, the Ireland dock partially fills a barge with coal of one quality, and then tops the barge off with coal of a different quality. This occurs when analysis of the coal shows the specifications to be incorrect for a specific customer. Rarely, coal from Shoemaker Mine, another Consol Energy Mine, was transported to the Ireland dock in barges to be topped off with coal from the McElroy Mine Prep Plant because the quality of Shoemaker coal was too poor to meet customer specifications.

Beginning in 2011, coal from the Harrison Mine, which had undergone processing, was brought to IRLF because the McElroy Coal had hit a high sulphur area, affecting coal quality. The coal from the Harrison Mine, which had undergone processing, was stockpiled at IRLF and then mixed with McElroy Mine coal at IRLF at the direction of the Prep Plant Foreman to meet customer specifications.

River Portion of the Ireland Dock

The Ohio River portion of the dock consists of moveable barges in the river that are brought in loaded with coal and shipped down river. Coal is loaded onto the barges from an overhanging conveyer that comes from the IRLF, hangs over the dock, and drops the coal into the barges. The duties of the "deckhands" assigned to the dock include positioning and securing empty barges and inspecting and pumping excess water from the barges.

The barges are registered with the Coast Guard and assigned a number. MSHA does not register the barges that are owned by various shippers. After the loaded barges leave the river portion of the dock they deliver the coal to customers by tug boats registered by the Coast Guard and they are not owned by the Respondent.

MSHA has no jurisdiction over the coal that is unloaded from the barges that are loaded at IRLF. No breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, layer loading, or loading of coal takes place at the dock river portion location.

At the time of the accident, the dock river portion was operating pursuant to a permit issued by the U.S. Army Corps of Engineers, and it is not a surface coal mine, or the surface work area of an underground coal mine.

The Fatality and Investigation

On December 29, 2008, Jeff Seckmen, the preparation plant general foreman, sent plant foreman Mark McIntyre to check the moveable barges for excess water in the barges due to heavy rain and recent customer complaints.

Mr. McIntyre was last seen on one of the empty moveable barges in line to be located on the river portion of the Ireland Dock between 9:25 and 9:30 p.m. The next time someone looked for him he could not be found, a search commenced and his body was located at 2:35 a.m. the same day in the

Ohio River under a partially loaded barge. The assumption from the accident report is that he was standing on a moveable barge when he fell off into the Ohio River and drowned. When he was last seen, he was monitoring the amount of water in barges on the river portion of the dock. These empty barges were eventually to be loaded with coal. The moveable barge on which he was last seen was tied off at the timber head of the adjacent moveable barge, as was the normal practice.

On December 30, 2008, MSHA began an inspection of IRLF, the dock, and the river portion of the dock, as a result of the drowning of Mr. McIntyre. The Coast Guard also commenced an investigation and concluded that it did not have jurisdiction over the facility.

Following the completion of the investigation, MSHA served the Respondent with citations for alleged violations at the IRLF pursuant to Part 77, Mandatory Safety Standards for surface coal mines, for (1) failure to contact MSHA about the fatality; (2) failure to adequately train the accident victim; and (3) inadequate guarding of mechanical machine parts at the loading dock. The loading of coal on barges during the on-going investigation was cited as a violation of Section 103(k) of the Mine Act.

Copies of the MSHA citation forms reflect that the McElroy Mine, the McElroy preparation plant, and the Respondent's IRLF all have separate MSHA mine identification numbers 46-01437, 014371, and 46-01438. The River Dock, the Ireland Dock and river portion of the dock do not.

On July 30, 2000, another fatal accident occurred at the river portion of the dock. A deck hand (William Anderson) was on a moveable barge preparing to run a "crab line" used to pull the moveable barges into position for loading out to another moveable barge. He was walking on one of the barges that was tied off to the other barge and was fatally struck by lightning and fell forward into the barge.

The fatality was investigated by the Coast Guard, who assumed jurisdiction of the fatality. MSHA's District 3 manager, in an email dated July 31, 2000, stated that "Based upon the Coast Guard's investigation, the decision is to treat it as one of their cases. We will not count it therefore, non-chargeable". The law governing MSHA's jurisdiction over the IRLF, The Dock and/or the river portion of the dock, and the work performed at those locations has not changed in any significant manner since 2000.

Prior MSHA Inspections of IRLF

Prior to 2008, MSHA issued citations to the Respondent following inspections of the IRLF. Since 2000, MSHA inspectors inspected the IRLF on a bi-annual basis, including the loading dock, barge load-out, conveyor belts, draw-off tunnels, the sample building, the coal storage areas, the silo area, the pump house, the MCC Building, the bathhouse, the lab area, the office, storage areas, fire fighting equipment, haul roads and berms, equipment, potable water, sanitary facilities, communications, and SCSRs. At least eleven (11) different inspectors inspected the IRLF areas where employees work and travel, and inspectors have conducted safety talks with the employees, and have conducted noise and respirable dust sampling of the employees.

An MSHA review of its records back to the year 2000 found no record of any MSHA citations or orders issued to the Respondent for hazards at the IRLF river portion of the dock.

There is at least one coal load-out facility in Marietta, Ohio, over which MSHA does not exercise jurisdiction. OSHA and/or the U.S. Coast Guard exercise jurisdiction over that facility.

THE ISSUES

In support of MSHA's Mine Act jurisdiction, the Secretary frames and defines the critical issue as a contest over the Respondent's "Loading Facility", specifically "the dock area and barges tethered to the dock at the Loading Facility". In support of her case the Secretary argues that the definition of a "Mine" pursuant to Section 802(h) of the Mine Act is expansive and includes all of the structures, facilities, equipment, machines, tools, or other property used or to be used in the work of preparing coal. 30 U.S.C. § 803(h)(1)

The Secretary maintains that the loading, storing and mixing of coal performed at the loading facility is the type of coal preparation work which meets the definition of a "mine" as defined by the Mine Act. The Secretary concludes that the dock area and barges tethered to the dock are integral to the process of coal preparation performed at the loading facility, and that the entire loading facility, including the dock area and barges tethered to the dock, meets the definition of a "mine" as defined in Section 802(h) of the Act, and that MSHA has jurisdiction over the facility. Additionally, the Secretary concludes that the loading facility is a continuation of, and fully integrated with, the McElroy Coal Mine and prep plant and for that reason is also covered by the Mine Act due to its vital role in the preparation of coal for delivery to the ultimate consumer.

The Respondent does not challenge MSHA's enforcement jurisdiction over its IRLF facility located on mine-permitted real property that it owns, and clearly states that its challenge is limited to the two separate and distinct geographic areas not on mine property, namely, the loading dock, and the river portion of the dock. The Respondent asserts that the Secretary has ignored these separate areas that were stipulated to by the parties and described and located on the map attached as Exhibit A to the stipulation.

The Respondent points out that the fatality at issue in this proceeding took place on an empty barge on the Ohio River, an area that it does not own and where none of the work of preparing coal takes place. Respondent maintains that MSHA jurisdiction does not extend to property: (1) that is not owned by the operator, (2) where none of the work of preparing coal takes place; and (3) where MSHA admittedly has no applicable regulations. The Respondent finds it difficult to imagine how the Secretary can, in good faith, attempt to assert jurisdiction over the river portion of the dock, an area that she admits is neither a surface coal mine nor the surface work area of an underground coal mine and thus, an area for which she has no applicable regulations.

The Respondent's Arguments

The Respondent argues that unlike OSHA and the Coast Guard, MSHA has no regulatory authority over the Ireland Dock or river portion of the dock, and has promulgated no regulations governing vessels on navigable waterways, the safety measures for moveable barges, or the safe operation of Coast Guard registered tug boats used in moving the barges (Stip. Nos. 115-117).

The Respondent cites the deposition testimony of MSHA's designated representative who testified that the only regulations that arguably apply to a loading dock and that define the safety measures that must be employed while on a barge at a loading dock are contained in 30 C.F.R. § 77.205(a) and (b) and § 77.1710(h). However, the Respondent points out that MSHA's Part 77, Safety Standards are expressly limited to "surface coal mines...and to the surface work areas of underground coal mines..." 30 C.F.R. § 77.1 (emphasis added), and that during his deposition, MSHA's representative expressly conceded that the Ireland Dock, or the river dock portion, are not surface coal mines or the surface work areas of an underground coal mine and the Secretary has now so stipulated. (Stip. Nos. 14, 24). The Respondent concludes that these two regulations are thus inapplicable and the Secretary has no regulations governing the areas where the deaths of both Mr. Anderson and Mr. McIntyre occurred. The Respondent maintains that OSHA and the Coast Guard have promulgated applicable regulations and that jurisdiction is with one of these agencies.

The Respondent relies on the testimony of MSHA's representative that at the time of Mr. McIntyre's death, MSHA had no regulations: (1) defining the types of vessels on navigable waters over which it has jurisdiction; (2) addressing the safety measures that must be used while inspecting a moveable Coast Guard registered barge on a navigable waterway; or (3) concerning the safe operation or use of Coast Guard registered tugboats used in the moving of barges on navigable waterways (Stip. Nos. 115-17). Further, the Respondent asserts that the other standards cited in these matters (30 C.F.R. §§ 77.400, 48.31, and 50.10) only apply to "surface coal mines" and/or the "surface work area of underground coal mines." See 30 C.F.R. §§ 77.1,48.21. and 50.2 (work of preparing coal).

With regard to the prior fatal accident of July 30, 2000, where the victim was struck by lightning and fell into a moveable barge, the Respondent reiterates that the Coast Guard assumed jurisdiction over the incident and conducted an investigation, and MSHA declined to exercise jurisdiction over this fatality that occurred off mine property.

The Respondent points out that the December 29, 2008, fatality accident involving an employee of McElroy mine who drowned after apparently falling off a moveable barge that was tied off an adjacent moveable barge similar to the prior accident, was initially investigated by the Coast Guard and that after declining to exercise jurisdiction, MSHA assumed jurisdiction even though it had no regulations pertaining to the area where the incident occurred.

The Respondent states that 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. 44 Fed. Reg. 22827 (April 17,1979). Pursuant to the Interagency Agreement, "the primary basis for

determining jurisdiction between MSHA and OSHA depends upon which activities occur on mine property as opposed to milling or manufacturing operations which occur off of mine property." Secretary v. Old Dominion Power Co. 3 FMSHRC 2721, 2735 (Jan. 1981) (ALJ), aff'd in part and rev'd in part, 6 FMSHRC 1886 (Aug. 1984) (emphasis added).

The Respondent cites MSHA's Fatal Injury Guideline Matrix (Motion Ex-A), in support of its assertion that since the accident in question did not occur on a mine property, or was the result from activity on mine property, the incident is determined to be "not chargeable". The Respondent cites Paul v. P.K - K.B.B. Inc. 7 FMSHRC 1784,1787 (Nov. 1985), where the Commission found that a mine engineering office located off of mine property was not "a coal or other mine", and noted that while 'the definition of 'coal or other mine' provided in Section 3(h) of the Mine Act is expansive and is to be interpreted broadly, Oliver M. Elam. 4 FMSHRC 5,6 (January 1982), the inclusive nature of the Act's coverage is not without bounds". Id at 1787.

The Respondent notes that the Commission's decision in Paul was distinguished in Secretary v. Jim Walters Resources. Inc. 22 FMSHRC 21 (Jan. 2000), in which the Commission found both a Central Supply Shop and a Central Machine Shop owned and operated by the operator to be "mines" within the meaning of the Mine Act.

The Respondent concludes that in the instant case, the fatality did not occur on mine property or result from an activity taking place on mine property and, therefore, the incident is not chargeable. It notes that at the time of the fatality, the Ireland Dock and the river portion of the Ireland Dock were not real property owned by the Respondent and were operating pursuant to a permit issued by the Corps of Engineers and were neither bonded nor permitted as coal mines by the State of West Virginia (Stip. No. 10). The tow boats used to move and position moveable barges at the Ireland Dock are registered with the Coast Guard, not MSHA (Stip. No. 19). The Respondent does not own these barges and MSHA does not exercise jurisdiction over the coal that is unloaded from the barges (Stip. Nos. 18, 20). The Secretary has no record of an MSHA inspector ever writing a citation over a hazard involving the river portion of the Ireland Dock -where the fatality occurred (Stip. No. 22).

The Respondent further concludes that the situation in the instant case is comparable to the prior fatality where, under similar circumstances, the Coast Guard exercised jurisdiction. The Respondent cites an email dated July 31, 2000, by Tim Thompson, MSHA's District 3 Manager, regarding that incident, stating "Based upon the Coast Guard's investigation, the decision is to treat it as one of their cases. We will not count it therefore, nonchargeable" (Stip. No. 112).

The Respondent points out that the Secretary concedes that the law governing MSHA's jurisdiction over the IRLF, the Ireland Dock, and the river portion of the dock, as well as the work performed at those locations has not changed since 2000 (Stip. Nos. 113, 114). Respondent concludes that as in the prior fatality, the fatality that occurred in the instant case did not occur on mine property or result from an activity on mine property and MSHA does not have jurisdiction over the death.

The Respondent argues that none of the "work of preparing coal" is done at the river portion of the Ireland dock or at the dock itself. The work of extracting and preparing the coal was done by other entities before it reaches the IRLF. The McElroy Coal Company mines the bituminous coal that it sends

to the prep plant for processing by cleaning, breaking, crushing, sizing, washing, drying, mixing and blending the coal to meet the specification of McElroy and its customers (Stip. Nos. 1, 2). Information regarding coal specifications is communicated to workers at the prep plant who take the necessary steps to ensure that the coal is prepared pursuant to those specifications (Stip. No. 3).

The Respondent states that the Secretary admits that no breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, layer loading, or loading of coal takes place at the river portion of the Ireland dock (Stip. No. 21), and it is without question that none of the "work of preparing coal" as defined in the Mine Act takes place at the area where the fatality in this case occurred and that MSHA has no jurisdiction over that incident.

The Respondent notes that the coal arriving at the Ireland Dock has been fully processed at the McElroy prep plant to meet the specifications of McElroy mine and its customers before it is transported by belt conveyor to the IRLF, where it is dumped by an overhanging belt conveyor into barges (F.O.B. barge) at the Ireland docks, an unbonded river bank area below the high water line at the IRLF, whose purpose is to facilitate the transporting of processed coal to customers of McElroy Coal Mine (Stip. Nos. 7, 13). The coal leaving the conveyor belt and landing on the barge belongs to the customer, not to McElroy.

In response to the Secretary's attempts to exercise jurisdiction over the accident area based on rare occasions when coal has been loaded in two layers of processed coal onto barges at the Ireland dock, the Respondent states that even when that occurs, the physical characteristics of the coal are not altered, improved or changed in any way since the coal has undergone all of the necessary preparation/processing before arriving at the dock. The Respondent points out that it cannot alter the coal after it has been loaded on the barge because the coal belongs to the purchaser the moment each layer of finished, marketable coal lands on the barge. Once coal is loaded into barges at the Ireland dock, the loaded barges are transported along the Ohio River to the ultimate customer (Stip. No. 76). Under these circumstances, the Respondent concludes that none of the work of preparing coal is done at the Ireland dock.

The Respondent argues that the cases in which this Court has found MSHA jurisdiction involved citations over conditions or activities on mine property, did not involve conditions or activities off of mine property, and are uniformly distinguishable from the situation in the case at bar. The Respondent states that the issue in Marion Pocks. Inc. v. Secretary. 10 FMSHRC 1589 (Nov. 28,1988), was whether a loading facility was a mine subject to MSHA jurisdiction, and that all of the violations involved conditions on the permitted, bonded, mine property (i.e., diesel fuel storage tank next to a coal storage pile, slate picker platform and belt rollers). In that case, the Respondent points out that unlike the Respondent's IRLF facility, coal was cleaned, crushed, and sized and slate and other debris were removed from the coal at the loading facility which operated under an MSHA identification number, and protested jurisdiction only because other similar facilities in the area were not being inspected by MSHA.

Similarly, the Respondent points out that in affirming this Court's finding of MSHA jurisdiction in Secretary v. Mineral Coal Sales. Inc. 7 FMSHRC 615,621 (May 1985), the Commission pointed to the storing, mixing, crushing, sizing and loading of coal, all of which fell

within the statutory definition of coal preparation, and took place at the facility at issue - i.e., the permitted mine property.

Commenting on the Court's decision in Harman Mining Corp. v. Secretary. 3 FMSHRC 45 (Jan. 1981), aff'd 671 F.2d 794 (4th Cir. 1981), the Respondent suggests that it supports its position in the instant case. In that case, the issue was whether a fatal railroad haulage accident that occurred at the operator's coal prep plant was subject to MSHA jurisdiction. The Respondent notes that this Court framed the jurisdictional issues as to whether "the tipple and preparation plant (are) part of a coal mine within the meaning of the Act" and whether "the area of land where the N&W railroad tracks are located and where loaded coal cars are parked awaiting transportation by the railroad (is) part of a coal mine " Id. at 47. The Respondent comments that the Court noted that "the definition of 'coal mine' follows the mining process from extraction through preparation." Id at 48, and noted that the "railroad cars are loaded at the tipple preparation plant and dropped onto the tracks".

Reviewing the language of Section 3(h) of the Mine Act, which includes within the definition of "coal or other mine," "mining activities which take place at a tipple or preparation facility," the Court found the railroad track area was part of the operator's 'coal or other mine' for purposes of the Act." Id. at 50-51, emphasizing that the operator was the "legal owner of the land where the track system is located" and the fact that the railroad had been allowed to use the land for its tracks and equipment did not negate such ownership. The Court reasoned that although coal extraction did not take place at the prep plant, the work of loading the processed coal fell within the language of Section 3(h) in that the work of preparing coal "includes custom preparation facilities." Id. at 51. The Respondent concludes that the holding in Harman Mining is in complete contrast to the case at bar in which none of the cited activities took place on permitted mine property that it owns.

The Respondent concludes that none of the cases previously considered by this Court involve activities taking place on non-permitted, unbonded property below the high water mark of a river, and cites cases from other jurisdictions considering activities on non-permitted property, where none of the work of preparing coal takes place, that found such an area to be outside the realm of MSHA jurisdiction.

The Respondent cites Bush & Burchett Inc. v. Reich. 117 F. 3d 932 (6th Cert), Cert Denied 553 U.S. 807 (1997), where the Sixth Circuit determined that a road and bridge connecting a coal mine to a railroad load-out facility, the work site where two fatalities occurred, was subject to OSHA, rather than MSHA jurisdiction. Because MSHA had promulgated regulations broad enough to cover the work site at issue, the Sixth Circuit stated that OSHA would have been preempted if MSHA had jurisdiction over the work site. The Respondent concludes that the issue focused on whether the work site was a "mine" as defined in the Mine Act, and that the Court rejected the argument that the bridge work site fell within the definition of a mine because the road to it was appurtenant to a mine, reasoning that without some limitation on the meaning of the term "roads appurtenant to" as used in the Mine Act, MSHA jurisdiction could "extend to unfathomable lengths. . . " Id. at 937. In finding that MSHA had no jurisdiction, the Court reasoned that "a road and bridge are used in the transporting of coal, which, unlike loading, is not delineated as one of the tasks associated with the work of preparing coal," Id. at 939. The Respondent points out that the Mine Act does not include any reference to "rivers appurtenant to."

Like the road and bridge at issue in Bush & Burchett Respondent asserts that in this case, barges are used for the sole purpose of transporting the coal, and as noted by the Sixth Circuit, transportation is not part of the "work of preparing coal" as defined in the Mine Act and the barge on which the accident victim was last seen is not subject to MSHA jurisdiction. The Respondent notes that unlike the situation on Bush & Burchett, MSHA has not even promulgated regulations covering the work site where the victim was working when he died.

Citing a fourth decision finding that an employee was not entitled to Black Lung benefits, Director. OWCP v. Consolidation Coal Co. 923 F. 2d 38 (4th Cir. 1991), the Respondent states that the court focused upon the employee's work area in denying benefits. In that case, the claimant's deceased husband had worked at a dock house loading facility three hundred yards from the preparation plant where the coal was blended and prepared for market before being placed on a conveyor belt to the dock house. The Court found that the "work of preparing coal" does not include loading prepared coal onto barges, and quoting Collins v. Director. OWCP, 795 F. 2d 368,372, (4th Cir. 1986), observed as follows at 923 F. 2d at 42:

> Traditionally the tipple marks the demarcation point between the mining and marketing of coal. It is at that structure the screening of the coal occurs and the final product is loaded for transport. When coal leaves the tipple, extraction and preparation are complete and it is entering the stream of commerce.

The Respondent states that the Court concluded that "the coal which reached the dock house was not coal in preparation", and, accordingly held that involvement in the transportation and delivery of coal after it was processed and prepared for market was not the work of preparing coal within the definition of "coal mine" so as to entitle the claimant to benefits under the Black Lung Benefits Act.

Citing an Eighth Circuit case, Herman v. Associated Electric Cooperative. Inc. 172 F. 3d, 1078 (8th Cir. 1999), concerning a question of whether a coal-fired electric power generating facility was a "coal mine" subject to MSHA jurisdiction because it processed the coal in various ways before burning it, the Court, while acknowledging that the Mine Act is to be given the broadest interpretation possible, nevertheless held that "not all businesses that perform tasks under 'the work of preparing coal'... can be considered mines." Id. at 1082. Respondent states that while the court noted some decisions finding a utility to be subject to MSHA, because the coal in the case before it was already marketable when it reached the facility, the Court concluded that the facility's operations were more properly characterized as "manufacturing" rather than "mining." The court also noted OSHA's stated position that MSHA's policy was to inspect those areas of a power plant involving the handling and processing of "run-of-mine" coal while leaving the inspection of areas involving the handling of previously processed coal to OSHA. Id. at 1083.

Citing a Fourth Circuit case, United Energy Services. Inc. v. Federal Mine Safety and Health Administration. 35 F. 3d 971,975, (4th Cir. 1994), finding MSHA jurisdiction, the Respondent states that the Court noted that "(a)lthough delivery of coal to a consumer after it is processed usually does not fall under the coverage of the Mine Act, United Energy's activities occur a step earlier in the overall process." The Respondent finds it significant that cases such as United Energy and Consolidation Coal

refer to the act of loading and delivering processed coal to the consumer as falling outside the scope of "work of preparing coal".

The Respondent argues that the process followed at the Ireland dock of receiving processed coal and loading the coal onto barges for delivery, falls within the act of "delivering processed coal" and outside the "work of preparing coal", and that no processing-cleaning, sizing, drying, or crushing of coal occurs at the dock, and that no dock activities occur "a step earlier" in the overall process, as in United Energy. Rather, as in Oliver M. Elam, its dealings with the coal involve the loading of processed coal onto barges for delivery to the consumer, outside the jurisdiction of MSHA.

The Respondent asserts that the coal is finished when it leaves the McElroy prep plant, and when it is received at the dock it is a finished product in the stream of commerce, and in the course of being delivered to the customer. Its movement down the conveyor is the delivery of the coal to the customer, who legally owns the coal when it is loaded onto the barges. The Respondent states that the walkway is a structure used in the delivery of this coal, not in the work of preparing the coal, and that the barges, both fixed and moored, are vessels used in the delivery of the coal to the customer, not in the work of preparing coal. The Respondent concludes that the loading dock facility at issue in Consolidation Coal was not a "mine" as it was not involved in the "work of preparing coal" for purposes of the Black Lung Benefits Act. So too, the Ireland Dock, the non-permitted river bank area below the high water line, walkway and barge, does not fall within the definition of "mine" so as to give MSHA jurisdiction.

Acknowledging the Secretary's argument that rare layer loading at the Ireland Dock constitutes "work of preparing coal", the Respondent maintains that this cannot be said for the river portion of the dock, the area where Mr. McIntyre fell and drowned. Citing the holding in Associated Electric Cooperative 172 F. 3d at 1083, the Respondent asserts that one section of an operation may be under the jurisdiction of OSHA, and another under MSHA, and that even if any portion of the IRLF is found to be subject to MSHA jurisdiction, jurisdiction over The River Portion of the Ireland Dock is a separate issue. Respondent asserts that, without question, no work of preparing coal is done at the river portion of the dock, which consists of moveable barges in the Ohio River that are brought in, loaded with coal, and shipped down river. (Stip. No. 16). Further, no breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, layer loading, or loading of coal takes place in the river portion and certainly not on the empty barge where the decedent was last seen. (Stip. No. 21). Respondent points out that there is no record of an MSHA inspector ever writing a citation or order over a hazard involving the river portion of the dock, (Stip. No. 22), and concludes that MSHA simply does not have jurisdiction over the area where the incident involving Mr. McIntyre took place and the citations should be vacated, and that as in the case of the prior accident, jurisdiction belongs to OSHA or the Coast Guard.

The Respondent takes the position that OSHA has promulgated specific regulations governing barges, the loading of barges, ramps and other means of access to barges and riverbanks. (29 C.F.R. § 1918.26; 29 C.F.R. 1917.126), and that longshoring operations are defined in 29 C.F.R. § 1918.1, which states that "(a) The regulations of this part apply to longshoring operations and related employments aboard vessels. All cargo transfer accomplished with the use of shore-based material handling devices is covered by part 1917 of this chapter."

The Respondent states that under 29 C.F.R. § 1918.2, "longshoring operations" are defined as "the loading, unloading, moving or handling of cargo, ship's stores, gear, or any other materials into, in, on or out of any vessel." "Vessel" in turn, is defined as "every description of watercraft or other artificial contrivance used or capable of being used for transportation on water, including special purpose floating structures not primarily designed for or used for transportation on water." "Barge" is defined as "an unpowered, flat-bottomed, shallow draft vessel including river barges, scows, carfloats and lighters." The Respondent concludes that, by regulation, OSHA has staked its position that barges fall within its regulatory jurisdiction, citing Secretary of Labor v. Christie Constructors. Inc. 18 O.S.H.Cas. (BNA) 1559.1998 WL 758714 (OSHA jurisdiction found over a fixed barge and piles driven through it and into the river bed).

The Respondent argues that by OSHA definition, OSHA has further staked its position by way of regulation that a facility like the Ireland dock is a marine terminal over which it has jurisdiction. Respondent cites 29 C.F.R. § 1917(a), dealing with marine terminals and including within its scope "the loading, unloading, movement or other handling of cargo, ship's stores or gear within the terminal or into or out of any land carrier, holding or consolidation area..." "Marine terminal" is defined as:

> wharves, bulkheads, quays, piers, docks and other berthing locations and adjacent storage or adjacent areas and structures associated with the primary movement of cargo or materials from vessel to shore or shore to vessel including structures which are devoted to receiving, handling, holding, consolidating and loading or delivery of waterborne shipments or passengers, including areas devoted to the maintenance of the terminal or equipment. 29 C.F.R. § 1917.2 (emphasis added).

The Respondent further argues that the Coast Guard also has applicable regulations, and in Secretary v. St. James Stevedoing. Co. 18 O.S.H. Cas. 2042 (1999), the ALJ noted that the Coast Guard is the dominant federal agency with statutory authority to prescribe and enforce regulations affecting seamen aboard vessels. The Court noted that while Coast Guard regulation over inspected vessels is "expansive," regulating involving uninspected vessels is limited. Id. at *3. (Citing 46 U.S.C. Chapter 41; Tidewater Pacific. Inc. 17 BNA OSHA 1920 (No. 93-2529, 1997).

Respondent maintains that in order for OSHA's jurisdiction to be preempted, MSHA or another agency must have exercised its regulatory authority by issuing regulations governing the "environmental area in which an employee customarily goes about his daily tasks." Southern Railway. 539 F. 2d at 339. Respondent asserts that since the Ireland Dock and the river portion of the dock consisting of walkway, non-permitted area and barges, are "environmental areas" separate and distinct from the Prep Plant and McElroy's coal mining operations, and since MSHA has, by it own admission, promulgated no regulations of any kind governing these areas, it cannot assert jurisdiction in the instant cases.

In conclusion, the Respondent argues that the Ireland dock and river portion of the dock are not coal mines for purposes of the Mine Act, and are in fact unbonded, non-permitted areas where workers do not engage in the work of preparing coal. In support of its argument, the Respondent relies on the

deposition testimony of the Secretary's representative that none of the "work of preparing coal" is done at the area where the fatality occurred. (Stip. No. 21). The stipulation agreed to by the parties states that "No breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, layer loading, or loading of coal takes place in the river portion of the Ireland Dock." (emphasis added).

Citing the Commission's holding in Secretary v. Southern Nevada Paving, 2008 WL 4287781, 8 (FMSHRC Aug. 2008), that while definition of a mine is "very broad", the law governing MSHA jurisdiction should not be read "contrary to common sense", the Respondent concludes that extending MSHA jurisdiction to an unbonded, non-permitted river dock and barges on navigable waterways-areas that MSHA's own representative denies are surface coal mines or the surface work areas of underground coal mines likewise defies common sense.

The Secretary's Arguments

Based on the stipulation of facts by the parties, the Secretary asserts that it is clear that the Respondent's IRLF facility and the McElroy Mine and preparation plan are closely related, both operationally and as a result of shared management. The Secretary points out that at the time of the fatality, all supervision at the Respondent's loading facility, including safety training for facility miners, and all instruction as to the loading of coal by miners at the facility was provided by McElroy Coal Company preparation plant employees and management.

The Secretary further asserts that the activities taking place at the loading facility, the McElroy mine and preparation plant, constituted an integrated operation, and that the mine identity (ID) reports filed by these operations identify the same corporate officers and the same person in charge of safety and health at both facilities.

The Secretary discusses all of the relevant stipulated facts explaining the initial processing of coal from the McElroy mine at the preparation plant and transfer of the coal to the Respondent's coal transfer building at the loading facility by conveyer belt, and subsequent transfer to the surge silo or stockpile where it may be blended to customer specifications before transfer to the final load-out belt where it is loaded directly into the barges from that belt.

The Secretary relies on Stipulation No. 83, in support of the contention that customer coal specifications were also met by layer loading at the dock loading facility by pouring coal of one quality directly into a barge and then filling the rest of the barge with coal of a different quality by pouring the second quality of coal into the barge, and that this coal blending was performed at the loading dock into the barge tethered to the dock.

The Secretary confirms the stipulation that MSHA has been inspecting the Respondent's loading facility as a surface facility since at least the year 2000, and inspects the loading facility twice a year. The areas inspected have included the loading dock, barge load-out, conveyor belts, draw-off tunnels, the sample building, the coal storage areas, the silo area, the pump house, the MCC building, the bathhouse, the lab area, the office, storage areas, haul roads and berms, fire fighting equipment, potable water, sanitary facilities, communications, and other equipment. I take note of the fact that

MSHA's inspection areas that are listed do not include the river portion of the dock where the moveable barges or barges are loaded and located, or the boats that deliver the coal to customers, none of which are owned by the Respondent.

The Secretary further asserts that between 2002 and 2011, forty-seven (47) citations and one order were issued directly to the loading facility. However, no further information was forthcoming with respect to these violations and there is no evidence that any of them were issued at the river portion of the dock or the barges tethered to the dock.

Citing the statutory Mine Act jurisdictional language and the definition of a "mine", the Secretary argues that Congress intended a broad interpretation of what constitutes "a coal or other mine" and that any doubts must be resolved in favor of inclusion of a facility within the coverage of the Act.

Citing case precedent, RNS Services. Inc. v. FMSHRC. 115 F. 3d 182,184 (3rd Cir. 1997), the Secretary asserts that resolution of statutory coverage requires a "functional analysis" that determines whether a facility is covered based upon the nature of the functions at the facility, and that the Secretary's determination, as the policy maker and enforcer, is entitled to deference, and must be upheld as long as it is reasonable.

The Secretary asserts that the Respondent's loading facility, in and of itself, falls within the broad definition of a mine based on the fact that the coal preparation activities enumerated in Section 3(I) of the Mine Act, namely, mining, storing and loading of coal, and such other work of preparing coal as is usually done by the operator of a coal mine occur at the loading facility.

Citing Oliver M. Elam. Jr.. Co. 4 FMSHRC 5, 7 (1982), the Secretary points out that the Commission adopted a two-part inquiry to determine whether a facility is a "mine", namely, (1) whether the operation performs one or more of the activities listed in Section 3(I) of the Act, and (2) a consideration into the nature of the operation performing such activities. The Secretary acknowledges that in Elam, the Commission concluded that a commercial dock where coal and other products were loaded only on barges, was not a "mine" because even though Elam crushed coal, this activity was performed solely to facilitate the loading of coal and not to meet customer specifications.

The Secretary further relies on Mineral Coal Sales. Inc.. 7 FMSHRC 616 (1985), and Marion Docks, Inc. 10 FMSHRC 1598,1619 (ALJ), concerning the selective loading of coal from stockpiles under the direction and control of a coal broker in order to ensure its suitability for a particular use or to meet market specifications, and mixing of coal at a railroad siding that was tested by a coal broker for quality specifications and then taken from particular stockpiles and subsequently crushed and loaded onto railroad cars and sampled and tested again by the broker to ensure customer specifications, in support of her argument that the Respondent's loading facility meets the tests in the Elam case, and as applied in Mineral Coal Sales for Mine Act coverage.

Relying on the stipulations regarding the additional mixing and blending of coal after it arrives at the loading facility in order to meet customer specifications, the Secretary concludes that the facility meets the requirements enunciated in Elam for the loading facility to be treated as a "mine" subject to the Act. Further, given the fact that the Respondent analyzes and blends the coal it loads at the facility

to determine if it meets customer specifications, just as the broker did in Mineral Sales, the Secretary offers further support for a conclusion that the loading facility is a "mine".

The Secretary cites Sixth Circuit decision Kinder Morgan Operating. L. P. 78 Fed. App'x. 462, 2003 WL 22360971 (6th Cir. 2003), affirming the Commission's decision at 23 FMSHRC 1288,1293-94 (2001), that a marine loading facility was engaged in "the work of preparing the coal", and was therefore subject to MSHA jurisdiction. The court rejected Kinder Morgan's argument that it did not prepare coal, but rather merely stored and loaded already prepared coal, and adopted the Commission's conclusions that the layer-loading performed by Kinder Morgan was "mixing or blending" and constituted work of preparing the coal since its mixing was done to make the coal suitable for customer specifications. The Secretary concludes that this work was like the work performed by the Respondent in the instant case.

The Secretary cites her Program Policy Manual, Volume 1, 1.3-4 (2003) expressing jurisdiction over facilities that "prepare coal according to any specifications for benefit of either the operator of (sic) the customer". She further argues that the legislative history of the Mine Act indicates that the principal reason for its passage was to expand MSHA jurisdiction, and that any doubts should be resolved in favor of inclusion of a facility and that any ambiguous definitions of a "mine" should defer to the Secretary's reasonable interpretation of the true scope.

The Secretary cites several cases addressing the definition of a miner under the Black Lung Benefits Act that have held that the loading of coal by a preparation plant is itself sufficient to demonstrate the work on a coal mine required for establishing the Claimant seeking benefits is a miner, and that the courts have looked to the definition of a "mine" provided in the Mine Act.

Two examples of black lung decisions are Hanna v. Director. OWCP, 860 F. 2d 88, 93(3rd Cir. 1988) where the court held loading coal from a preparation plant into barges was a necessary step in the preparation of coal and concluded that the claimant was a miner. However, in Director. OWCP v. Consolidation Coal 923 F. 2d 38,41-42 (4th Cir. 1991), the court held that a river man loading coal was not working in a mine because the coal was completely processed before being placed on the conveyor belt to the loading dock. The Secretary asserts that this case is distinguishable because the dock and barges at the Respondent's loading facility, unlike the facility in Consolidated Coal, engaged in the processing of coal.

The Secretary disputes the Respondent's assertion that the facility dock and the river portion of the dock, (characterized by the Secretary as the "dock area and barges tethered to the dock"), are not subject to MSHA's jurisdiction because these areas are off of mine property where the incidents that resulted in the citations occurred. The Secretary maintains that the undisputed facts establish that these areas are part of the loading facility and that the Respondent engaged in coal preparation and the mixing and loading of coal at the dock and barges, and the coal is loaded into barges by a conveyor belt which dumps it directly into the barge. Further, during the course of a year, coal is mixed by layer loading of barges.

The Secretary asserts that the Respondent engaged in activities along the empty barges moored at the dock in preparation for loading in order to meet a customer's specifications. Miners

inspect and pump the barges of water in response to customers' complaints, and that the accident victim was engaged in the checking of a barge for water at the time of his death.

The Secretary cites a case involving the cleaning of railroad cars so they could be loaded with new coal at the preparation plant, similar to checking barges for water. The court held that the cleaning of the railroad cars was integral to the preparation of coal, Mitchell v. Director. OWCP. 855 F. 2d 485,490 (7th Cir. 1988).

The Secretary cites Harman Mining Corp. v. FMSHRC. 671 F 2d, 794 (4th Cir), holding that railroad siding tracks, owned by a railroad, but used by a mining company for loading coal, were part of the mine subject to Mine Act jurisdiction because the activities at the track facilities were incidental to loading and storage of coal and therefore part of the work of preparing the coal for market. The court further found that the railroad's ownership of the tracks to be immaterial because the coal company used the tracks in its daily operations.

The Secretary states that MSHA has adopted health and safety standards applicable to the activities conducted on barges and loading docks, including 30 C.F.R. § 77.1710(h), requiring life jackets or belts where there is danger of falling into water, and training standard 30 C.F.R. § 48.31(a) requiring mine operators to provide training in hazard recognition and avoidance.

The Secretary asserts that the accident victim, a foreman from the McElroy preparation plant, was assigned to perform regular duties on and along the loading dock and empty barges moored at the dock, and was not provided hazard training for those duties.

The Secretary further states that the Department's guidance regarding jurisdiction over docks and barges tethered to docks states unequivocally that MSHA "has authority over loading/unloading of coal or other minerals into/out-of vessels, including associated pier or dock facilities, when such transfer is integral to the extraction, preparation, or milling process. MSHA does not have authority once the vessel is loaded/unloaded and is underway."

The Respondent filed a response to the Secretary's brief and included a "corrective statement of facts". The Respondent points out that the joint stipulations cover three separate geographic areas that are at issue in this case and shown in the map attached to the stipulations. Respondent confirms that it is only challenging two areas, namely, river portion of the Ireland Dock and the areas that it claims are separate and distinct from its mine permitted real property.

The Respondent asserts that the Secretary's brief ignores the three separate geographical areas agreed-upon by stipulation. By ignoring these agreed-upon geographical distinctions the Respondent points out that the Secretary states facts and cites stipulations for matters not included in the stipulations. As an example, Respondent states the Secretary asserts that the accident victim, Mark McIntyre, on the night he was last seen, was sent to check "barges tethered to the dock at Ireland River Loading Facility," citing Stipulation No. 91 (Secretary's Brief, p. 1). Respondent states that Stipulation No. 91, in fact, makes no mention of the IRLF, and Stipulation No. 92 clarifies that Mr. McIntyre was last seen on an empty barge on the river portion of the Ireland Dock.

Further, Respondent cites the Secretary's statements that "MSHA has been inspecting the. Loading Facility as a surface facility since at least 2000" (citing Stip. No. 103), and that "(a)s with all surface facilities, MSHA inspects the IRLF twice a year" (citing Stip. No. 105*)*. (Secretary's Brief, p. 5) (emphasis added). The Respondent maintains that neither of the cited stipulations refers to a "surface facility" and the Secretary has stipulated that neither the Ireland Dock nor the river portion of the Ireland Dock are surface coal mines or the surface work areas of underground coal mines. (Stip. Nos. 14, 24). MSHA's Rule 30(b)(6) representative has so testified, in testimony binding upon the Secretary.

The Respondent challenges the Secretary's repeated references to the MSHA inspector's citation charging it failed to provide hazard training to Mr. McIntyre, as though such failure is an established fact (Secretary's Brief, pp. 2,14). Respondent states that it has disputed the basis of the citation pursuant to the agreement of the parties and is awaiting resolution of the jurisdictional issues to address the underlying citations. The Respondent concludes that since it is clear that it does not contest MSHA's jurisdiction over the IRLF, the Secretary's first eleven (11) pages of her brief are largely irrelevant.

The Respondent concludes that it is beyond dispute that it does not own the land under the Ireland Dock or the river portion of the Ireland Dock (i.e., the Ohio River). Respondent asserts that Stipulation No. 26, providing that it owns the Ireland Dock and river portion of the Ireland Dock, only refers to the equipment and platforms that it owns, and that the areas were not on mine-permitted property and were operating pursuant to U.S. Coast Guard permits. Respondent states it does not own the barges, the real property, or the waterway on which the Ireland Dock and the river portion of the Ireland Dock are located. (Stip. Nos. 10, 11, 13, 18). Furthermore, the Respondent conceded that no "work of preparing coal" takes place where Mr. McIntyre's accident happened on the river portion of the Ireland Dock. (Stip. No. 21).

The Respondent concludes that the Secretary is conclusively bound by her concessions that the Ireland Dock and the river portion of the Ireland Dock are neither surface coal mines nor the surface work areas of underground coal mines, and that she is further bound by her stipulation that no "work of preparing coal" takes place on the river portion of the Ireland Dock. In the absence of any applicable regulations, the Respondent concludes that the Secretary has no jurisdiction over those areas.

The Respondent states that since it concedes MSHA jurisdiction over the IRLF, the pertinent portion of the Secretary's Brief begins on page 12 wherein she argues that the Ireland Dock and river portion of the Ireland Dock, even considered in isolation, are covered by the Mine Act. In so arguing, Respondent maintains that the Secretary ignores the fact that the Ireland Dock is an unbonded, non-mine permitted area and that the fatality at issue took place on property not owned or operated by the Respondent - a moveable barge in the Ohio River. The Respondent asserts that none of the cases cited by the Secretary involve citations arising out of an incident that occurred on a barge. Referring to the decision in Kinder Morgan Operating. L.P. v. Chao 78 Fed. App'x. 462 (6th Cir. 2003), cited by the Secretary, involving MSHA's asserted jurisdiction over a marine loading facility, where the Sixth Circuit affirmed a divided Commission decision finding MSHA jurisdiction over the facility where coal was routinely layer-loaded and blended from different stockpiles, and then transferred to a conveyor belt and loaded onto barges, the Respondent distinguishes that decision from the issue presented in the instant case.

The Respondent argues that in Kinder Morgan the Commission reviewed the ALJ's determination that the terminal was subject to the Mine Act because it engaged in three of the functions listed in the definition of the "work of preparing coal - "storing", "mixing", and "loading", and that the jurisdiction determination pertained to the terminal and not to the barges themselves. The Respondent finds it significant that two of the Commissioners expressly noted that "there is no evidence in the record that MSHA has asserted jurisdiction over barges or railroad cars bringing coal to the Terminal, over barges transporting coal from the Terminal to other electric utilities, or over utilities that unload, handle, and consume the coal." Id. At 1297 (emphasis added).

The Respondent concludes that unlike Kinder Morgan, the Secretary in the instant case goes beyond asserting jurisdiction over the IRLF to asserting jurisdiction over the empty barges on the Ohio River, an area that is clearly beyond the definition of "mine" set forth in the Mine Act. Respondent further concludes that the Black Lung benefits cases cited by the Secretary further support its position, as even those findings a claimant eligible for benefits focus upon where the employee was working. In this regard, the Respondent points out that the cited Black Lung benefits decisions in Hanna and Spuria involved claimants that the courts found were on the mine site. The Respondent distinguishes those decisions with the Sixth Circuit decision in Ray v. Brushy Creek Trucking Co. 50 Fed. App'x. 659 (6th Cir. 2001), denying Black Lung benefits on the ground that the claimant worked on a barge located at a distance from the coal mine and/or tipple site, and that Congress did not intend to extend benefits to workers that far from the actual mine site. The Court affirmed the ALJ's determination that the claimant's employment on a barge did not qualify as work in the "preparation of coal".

The Respondent points out that in the instant case Mr. McIntyre was not working on mine property at the time of his death, was nowhere near the tipple and was on a barge 1 ½ miles from the coal mine. Under the circumstances, the Respondent concludes that MSHA jurisdiction does not logically extend this far and the case law does not support such extension.

In response to the Secretary's argument that jurisdiction extends to the empty barges because work on the barges was done to prepare them for coal, and her reliance on the Black Lung case of Mitchell v. Director OWCP. 855 F.2d 485, 490 (7th Cir. 1988) as an "analogous case", the Respondent states that the railroad cars in Mitchell were cleaned on mine property where the Secretary clearly has regulatory authority, and the case thus does not support the Secretary's position. In finding coverage, the court found that Mitchell performed work on mine property approximately 100 yards from the coal preparation plan and noted the ALJ's finding that he had worked at a coal mine location, thus satisfying the "situs" test for coal mine employment.

The Respondent argues that unlike the situation in Mitchell, Mr. McIntyre was not working anywhere in the vicinity of the prep plant, but on an empty barge on the Ohio River at the time of his accident The Respondent concludes that the Secretary's suggestion that Mr. McIntyre took MSHA jurisdiction with him and provided Mine Act coverage over any accident that occurred wherever he went defies common sense. Respondent notes that taking this argument to its logical conclusion would extend MSHA jurisdiction to an accident or mishap that occurred in a hardware store, located two miles from any mine property, where a miner went to purchase equipment or services to be used in

the preparation of coal. Respondent concludes that case law does not support such extension of jurisdiction to accidents that occur off of mine property.

The Respondent previously cited the Black Lung decision in Director. DWCP v. Consolidation Coal Co. 923 F. 2d 38 (4th Cir. 1991), where the deceased claimant had worked at a dock house loading facility 300 yards from the preparation plant where the coal was blended for market before being routed by conveyor belt to the dock house. The court concluded that the "work of preparing coal" did not include loading prepared coal onto barges", quoting Collins v. Director OWCP 795 F. 2d 368,372 (4th Cir. 1986), in part that "the tipple marks the demarcation point between the mining and marketing of coal",... and, when coal leaves the tipple, extraction and preparation are complete and it is entering the stream of commerce" (923JF.2dat42).

In response to the Secretary's argument that MSHA has adopted health and safety standards requiring the wearing of life vests (30 C.F.R. § 1710(h)), and requiring hazard training (30 C.F.R. § 48.32(a)), the Respondent asserts that these regulations apply only to surface coal mines and the surface work areas of underground coal mines and are inapplicable to the situation at bar.

In regard to the Secretary's reference to an OSHA instruction manual referencing MSHA's authority over the loading of coal into and out of barges, including associated piers and docks "when such transfer is integral to the extraction, preparation, or milling process", the Respondent states that in the instant case, even on the Ireland Dock, the loading of processed coal onto a barge is not essential to "the extraction, preparation, or milling process". The Respondent states that after the processed coal is loaded onto the barge the coal belongs to the purchaser and is not further handled in any way. Further, while the preparation plant may on rare occasion direct that layers of different qualities of coal be dropped onto a barge, each layer of coal that is dropped from the conveyor onto the barge is finished, marketable, coal which does not undergo any further processing on the barge or at the Dock. The Respondent concludes that such a transfer is no way integral to the "extraction, preparation, or milling process" and the cited provision is inapplicable. With regard to the river portion of the Ireland Dock, where the decedent was last seen, no loading or unloading takes place and the Respondent concludes that the cited OHSA manual is completely irrelevant.

The Respondent disputes the Secretary's conclusion that the loading facility is a continuation of, and a fully integrated operation with the McElroy Mine and preparation plant. Conceding MSHA's jurisdiction over the IRLF, the Respondent points out that the Ireland Dock, and river portion of the Ireland Dock are more than 1 ½ miles from the Prep Plant and McElroy Mine and thus, not part of a continuous and integrated operation of the McElroy Mine.

The Respondent argues that the Ohio River and the ground under the Ireland Dock are not owned by the Respondent, are not part of the mine-permitted property and operate pursuant to U.S. Corps of Engineers permits. The Respondent does not own the barges tied off and in line to be loaded; the barges and tug boats that deliver coal on the loaded barges to customers are registered with the Coast Guard, not MSHA; and that the loaded coal no longer belongs to McElroy Coal Company.

The Respondent disputes the Secretary's reliance on the ALJ decisions in Jeppensen Gravel. 32 FMSHRC 1749, 1750 (Nov. 2010), and Mineral Coal Sales. Inc. 7 FMSHRC 615, 620-621 (May

1985), in support of her "fully integrated contiguous mining operation" arguments. The Respondent points out that the cited cases involved equipment and mining operations taking place at a single operator owned mine site viewed as a "collective whole", and are distinguishable from the facts in the instant case involving a fatality not on mine property that took place on an empty barge on a public waterway more than 1 ½ miles from a preparation plant that are not part of a "single site that must be viewed as a collective whole". The Respondent suggests that the cited cases are not only distinguishable, and in fact support its position that a cited incident must occur on mine property.

The Respondent disputes the Secretary's assertion that her jurisdictional position "has been consistently applied by MSHA since at least 2000", and states that to its knowledge, the last time an analogous situation occurred on a barge on the river portion of the Ireland Dock was in the year 2000, and that MSHA treated that fatality differently, as fully discussed in its motion for summary decision. That incident (Anderson) concerned a deckhand working on a moveable barge who was fatally struck by lightning. In that matter, the Coast Guard assumed jurisdiction and MSHA declined to assume jurisdiction and issued no citations.

The Respondent argues that in the instant case, the death of the decedent, Mark McIntyre, occurred in 2008, under very similar conditions in that he was also working on a moveable barge in the Ohio River tied off and in line to be loaded at the Ireland Dock, when he fell into the river and drowned. Mr. McIntyre, like Mr. Anderson before him, was performing the duties of a deckhand at the time of his death. (Stip. No. 17; the duties of a deckhand include inspecting barges for water). The Respondent points out that unlike the death of Mr. Anderson, and despite no interim change in the law on jurisdiction, MSHA has issued citations and attempted to assert jurisdiction over the McIntyre fatality. The Respondent argues that as in the case of Mr. Anderson, however, jurisdiction belongs to the Coast Guard or OSHA, not to MSHA, and maintains there is no legitimate basis to treat the two accidents differently.

The Respondent concludes that if deckhand duties, such as checking barges for excess water, automatically give rise to MSHA jurisdiction, then MSHA's jurisdiction, again, would extend to "unfathomable lengths". In other words, MSHA's jurisdiction would follow the deckhand down the Ohio River and, ultimately, to the final delivery to the customer because deckhands (and others) will check for and work to prevent excess water all along the way. The Respondent asserts that such an extension of jurisdiction would contradict the Secretary's own stipulation as the Secretary has admitted that MSHA does not exercise jurisdiction over coal that is unloaded from the barges (Stip. No. 20).

The Secretary filed a reply brief and argues that the Respondent admits that the Loading Facility is covered by the Mine Act but attempts to isolate the dock area where the fatality occurred to create jurisdiction coverage issues based on assertions that the dock area does not meet the definition of a mine, that there are no MSHA regulations addressing dock areas, and that an unrelated fatality in 2000 which was not investigated by MSHA precludes MSHA's exercise of jurisdiction over the fatality. The Secretary concludes that Respondent's arguments have no factual or legal merit.

The Secretary addresses the Respondent's arguments that the dock area is not covered because (1) it does not own the barges which the Secretary states coal preparation takes place; (2) the dock area is not bonded or permitted as a mine by the State of West Virginia, and is therefore not a mine under the

Mine Act; and (3) the layer loading carried out by the Respondent does not constitute mixing of coal covered by the Mine Act.

The Secretary concludes that Mine Act coverage is not dependent on ownership of the barges into which coal is loaded, and that the relevant case law holds the opposite, citing Harper Mining Company, *supra*, finding Mine Act coverage based on the loading of coal into railroad cars despite the fact that the cars were owned by a third party, and Marion Docks, Inc. *supra* finding MSHA coverage for an entity that mixed, stored, and loaded coal onto barges from a dock, despite the fact that the barges were owned by a third party. The Secretary further argues that the fatal injury matrix relied on by the Respondent specifically provides that the property where a fatality occurs need not be owned by the mine because it clearly allows chargeability on the basis of the death occurring on mine property or resulting from activity on mine property.

The Secretary further cites Hanna v. Director, OWCP 860 F.2d 88, 89, 93 (3rd Cir. 1988), holding the loading of coal from a preparation plant into barges in the Monongahela River, a river which was not owned by the operator, was a necessary step in the preparation of coal and therefore the Claimant was a miner and coverage under the Act was established.

The Secretary rejects the Respondent's argument that the facility loading dock is not subject to Mine Act coverage because it is not a bonded or permitted coal mine by the state of West Virginia, and points out that the Respondent has not cited any statutory authority or case law holding that the definition of a coal mine for the purposes of the State of West Virginia's permit or bonding requirements is relevant to the court's determination whether or not the dock area of the Loading Facility is a "mine" within the meaning of the Mine Act.

The Secretary finds it appropriate to look to the Mine Act definition of a "mine" and the Court's interpretation of that definition, citing Cyprus Industrial Mineral Corp. 1 FMSHRC 2069, 2081 (ALJ 1980). In that case, the ALJ held that imminent danger is defined differently under state law than under the Mine Act, and the fact that the hazard did not constitute an imminent danger under state law has no bearing on the determination as to whether the hazard is an imminent danger under the Mine Act. Accordingly, the Secretary concludes that the Respondent's reliance on the lack of state bonding and permitting of the dock area is misplaced.

The Secretary argues that in addition to Mine Act coverage of the dock, because it is a fully integrated part of the facility which is engaged in the work of preparing coal, coverage also attaches because the Respondent engages in layer loading of coal by pouring prepared coal from different sources in horizontal layers directly into barges. The Secretary states that the Respondent admits that it engages in layer loading by pouring coal of one quality directly into a barge tethered to the dock and then filling the rest of the barge with coal of a different quality by pouring the second quality of coal directly into the barge (Stip. No. 83).

The Secretary concludes that the Respondent engages in layer loading in order to meet customer specifications, and cites Kinder Morgan Operating. L.P. v. Chao 78 Fed. App'x. 462, 2003 WL 22360971 (6th Cir.), affirming 23 MHRC 1288 (2001), adopting the Commission's holding that such layer loading, at a marine loading facility, constitutes "mixing or blending" of coal, and when

done to meet specifications, qualifies as the work of preparing coal. The Secretary concludes that, consistent with this decision, the Respondent's layer loading for the purpose of meeting customer specifications is also coal preparation sufficient to support a finding of Mine Act coverage.

The Secretary includes an argument denying the Respondent's assertion that no Part 77, MSHA regulations apply to the Loading Facility, and believes the Respondent has a "fundamental misunderstanding" of how Mine Act coverage is determined. The Secretary states that Mine Act coverage is based on a two-part inquiry: 1) an inquiry into whether the operation performs one or more of the work activities listed in Section 3(1) of the Act, and 2) an inquiry into the nature of the operation performing such activities, citing Oliver M. Elam. Jr. Co., 4 FMSHRC at 7.

The Secretary further argues that the Commission and the 6th Circuit have found that Part 77 applies to a loading facility similar to the dock area at Respondent's Loading Facility, citing Kinder Morgan. 2003 WL 22360971 at *3, adopting 23 FMSHRC at 1292. The Secretary thus concludes that the Respondent's argument that the Loading Facility is not covered by MSHA's regulations and the Mine Act is both legally and factually incorrect. However, I note that the Respondent does not dispute Mine Act or MSHA jurisdiction over the facility that it believes does not include the Dock, and the river portion of the dock, two areas that the Secretary has opted to ignore, and does not recognize, as separate non-MSHA regulated areas of an overall integrated surface mining operation.

The Secretary argues that any determination that a fatality is not chargeable to the mining industry pursuant to MSHA's matrix guidelines is not a determination that a mine is not covered by the Mine Act because the matrix lists multiple reasons for determining that a death is not chargeable to the mining industry, including deaths on mine property of unauthorized persons that do not require Mine Act coverage determinations.

The Secretary concludes that the fact that MSHA decided the prior unrelated fatality was not chargeable to the mining industry in no way indicates that all deaths on the dock area of the Loading Facility cannot be chargeable to the mining industry or that the dock area is not a Mine Act covered mine.

The Secretary points out that at the time of his death, Mr. McIntyre was engaged in a task that was integral to mining, and that he died while he was in the process of checking unloaded barges tethered to the dock area for excess water (Stip. No. 91, 94). The barges were being checked for excess water due to customer complaints about the water in the barges (Stip. No. 91), and Mr. McIntyre was ensuring that the coal met market specifications. The Secretary states this in contrast to the prior fatality where the victim died while trying to tether an arriving barge to the dock area (Stip. Nos. 108, 109), and his death was not related to the process of preparing coal to meet market specifications and, therefore, was not mining related. The Secretary asserts that in the present matter, she cannot be estopped from asserting Mine Act coverage and carrying out her statutory enforcement responsibilities simply because she found a prior, unrelated death not chargeable to the mining industry, and points out that MSHA has continuously inspected the Loading Facility since at least 2000 without objection by the Respondent.

FINDINGS AND CONCLUSIONS

The Respondent's coal loading facility located on the Ohio River operates under MSHA Identification No. 46-01438, and it does not mine or produce coal. The McElroy preparation plant, located 1.5 miles from the load-out facility is a subsidiary of Consol Energy, Inc., and operates under a different MSHA Identification No. 46-01437.

The preparation plant processes coal that it receives from the McElroy Mining Company, also a Consol Energy subsidiary, to customer specifications. The processed coal is transported to the loading facility via conveyor belts, and it is ultimately loaded onto barges at the load-out dock for shipment to customers.

The load-out facility geographic areas that frame the jurisdictional dispute are described by Stipulation. Nos. 4, 10, 16, and noted on the map attached as Exhibit "A". The map identifies the yellow shaded area as the loading facility; the shaded blue area as the dock; and the shaded purple area as the river portion of the dock.

The Respondent concedes that the operational activities taking place at the loading facility area designated and shaded in yellow on the map are related to Mine Act activities subject to MSHA's enforcement jurisdiction.

The Secretary's position, as argued in her briefs, is that the entire area encompassed by the three geographical locations identified on the map as the Loading Facility, Dock, and river portion of the Dock, is an inseparable and integrated operation, starting with and associated with the processing of coal that takes place at the McElroy preparation plant and the transfer and loading of the processed coal to the loading facility.

Although the principal purpose of the loading facility is the loading of processed coal on barges for shipment to customers, and notwithstanding the Secretary's assertion that the three areas described by the Respondent must be considered as one totally integrated operation, I find it appropriate to consider the particular work activities that were taking place at each of those areas in order to determine whether or not they fell within the activities stated in Section 3(1) of the Mine Act.

The Secretary's argument that MSHA has continuously inspected the loading facility since at least 2000, without objection by the Respondent must be considered in context. The parties stipulated that since the year 2000, MSHA has inspected the facility on a bi-annual basis (Stip. No. 105). Although the areas subject to these inspection include the "loading dock" and "barge load-out", it is not clear that the empty moveable barges located on the river are included in those inspections. The physical structures, buildings, and equipment that describe the IRLF location do not include the river portion of the dock.

Although the Secretary cited 47 citations and one order that were issued between 2000 and 2011 "directly to the loading facility", the details regarding these citations are not part of the record and there is no evidence they were issued at the river portion of the dock or to any empty moveable barge located on the river portion of the dock. Indeed, the parties agreed that a review of MSHA's records

reflects no record of any inspector writing a citation or order for any hazard involving the river portion of the dock. Two of the citations in Docket No. WEVA 2010-176, were issued at the loading dock.

Under all of the aforesaid circumstances, the Secretary's assertions and suggestions that the aforementioned citations were issued at the river portion of the dock ARE REJECTED. Indeed, the Secretary agreed that none of the prior citations were issued for hazards on the river portion of the dock.

The parties stipulated that there is at least one coal load-out facility in Marietta, Ohio, over which MSHA does not exercise jurisdiction (Stip. No. 9). The stipulation is based on the testimony of Mr. Joseph Facello, who I assume is an MSHA inspector. Mr. Facello was deposed and an excerpt was filed in response to my request (Tr. 97-105).

In response to a question requesting Mr. Facello to identify any handling of coal in any form or fashion, where MSHA does not assert jurisdiction, Mr. Facello cited a coal load-out facility on the river in Marietta, Ohio, that included the crushing and loading of coal before it is loaded into the barge. He explained that during his initial visit to that site, MSHA was denied entry in order to conduct an inspection, and that upon his return the next day, he issued an order for not allowing MSHA on the property, and no further action was taken pending further instructions from his Morgantown, West Virginia. He left the premises after receiving the following information (Tr. 99):

> When I received a call from Morgantown, and Morgantown had, from what I understand, consulted with the solicitor's office, and this guy apparently had documentation that he was not crushing the coal for the customer, he was crushing the coal because the barge owner did not want big pieces of coal flopping down in his barge. So, I thought it was bogus, myself, but, you know, I have a boss like everybody else. They told me, "No, we don't inspect these guys," so we left.

The prior accident of July 30, 2000, involved deck hand William Anderson, who was on an empty moveable barge on the river portion of the dock that was tied off at the timberhead of an adjacent moveable barge. Mr. Anderson was preparing to run a crab line that ran from a winch on a fixed barge at the dock to the moveable barge in order to pull that barge into position for loading. The line had not yet been affixed to the moveable barge, and due to heavy rain, Mr. Anderson started walking south on a platform on the moveable barge when he was fatally struck by lightning and fell forward onto the barge.

Mr. Anderson's death was investigated by the Coast Guard, who assumed jurisdiction over the fatality. MSHA's rationale in declining to investigate that incident is not fully explained. Stipulation No. 112 simply states that MSHA's District 3 Manager took the position that "Based upon the Coast Guard's investigation, the decision is to treat it as one of their cases. We will not count it. Therefore, nonchargeable."

MSHA's Fatal Injury Guideline Matrix (Exhibit A, to the Respondent's initial motion for summary decision), provides that incidents resulting in a death that did not occur on mine property or result from activity on mine property, or a death due to natural causes, are not chargeable to the mining industry. However, a death involving mine related work activities performed by the deceased or a death caused by mining activities or equipment are chargeable to the mining industry.

The Respondent cites the Matrix guidelines in support of its argument and inference that since the accident in this case did not occur on mine property and did not result from activity on mine property, it was therefore not chargeable to the Respondent. The Respondent's reliance on the Matrix prompted a response by the Secretary that any determination that a fatality is not chargeable to the mining industry pursuant to the Matrix guidelines is not a determination that a mine is not covered by the Mine Act because multiple non-chargeable reasons are listed, including deaths on mine property of unauthorized persons that do not require Mine Act coverage determinations.

I have no basis for determining whether MSHA's decision to decline jurisdiction to investigate the Anderson accident was based on the Matrix guidelines. If it was, I respectfully suggest that future decisions in this regard be fully stated and explained. The only reason of record in this case for declining MSHA jurisdiction is that the Coast Guard investigated the matter, and decided to treat it as one of their cases.

The December 29, 2008 accident in the instant case concerned the preparation plant foreman, Mark McIntyre, who was sent by the plant foreman to check the moveable empty barges on the river portion of the dock for excess water. The barges that are eventually loaded with coal and used to transport the coal are owned by various shipping companies. Once a barge moored at the dock is loaded at the dock, it is transported on the river to the consumer who owns the coal. At the time of the accident, Mr. McIntyre was checking the barges for water due to heavy rain and recent customer complaints about water in the barges (Stip. No. 91). Stipulation No. 73 reflects that barge examinations may include checking the barge for debris and pumping water from the barge.

The facts reflect that Mr. McIntyre was last seen between 9:25 and 9:30 p.m., on one of the moveable empty barges waiting in line monitoring the amount of water in the barge that was tied off at the timber head of the adjacent moveable barge. There is no evidence it was secured at the dock for loading. The investigative assumption was that he was standing on the moveable barge when he fell off into the Ohio River and drowned. His body was found the next morning at 2:35 a.m., downstream from the river portion of the dock under a partially loaded barge.

What separates the parties in this case with respect to the two accidents is the Secretary's position that Mr. McIntyre was performing a mine related task when checking a barge for water to ensure the coal met market specifications, and that Mr. Alexander's task in attempting to tether a barge to the dock was not related to the process of preparing coal to meet market specifications, and was therefore not mine related. The Respondent's position is that the McIntyre fatality is comparable to the Anderson fatality, where under similar circumstances, the Coast Guard, and not MSHA, exercised jurisdiction.

The Secretary's arguments that Stipulation Nos. 91 and 94, establish that Mr. McIntyre's death was a result of his role in preparing the coal in that he was examining the barge at the dock in order to assist the loading facility in meeting customer specifications are not totally accurate.

Stipulation No. 91 states that Mr. McIntyre was instructed to check the barges for excess water, due to heavy rain and recent complaints about water in the barges. It does not state that he did so to ensure meeting customer specifications.

Stipulation No. 94 states that when he was last seen, Mr. McIntyre was monitoring the amount of water in empty barges on the river portion of the dock. Stipulation No. 10 identifies the dock as the shaded blue area on the map (Exhibit A) that includes a fixed barge, a location adjacent to the river portion identified as the shaded purple area of the map. Stipulation No. 92 reflects that the barge that Mr. McIntyre was on when he was last seen was on the river portion and that the barge was in line to be eventually loaded (Stip. No. 94).

I find the Secretary's argument that the checking of an empty barge on the river for water to insure that coal is processed to meet market specifications is a mine-related activity subject to MSHA's enforcement jurisdiction, while the task of tethering a barge to a loading dock is not mine-related to be contradictory. Although the act of tethering a moveable barge to a fixed barge at the dock where the processed coal is finally loaded may not be directly related to insuring market specifications, I conclude and find that the task related to positioning the barge to the dock is mine related to the loading of processed coal. Accordingly, I find that the two accidents in question are comparable.

With regard to the aforementioned Marietta coal-loading facility that is not inspected by MSHA, I take note of the fact that notwithstanding the observations of the inspector that coal preparation was taking place by crushing and sizing, and then conveyed by a belt to the dock for loading on a barge similar to the coal preparation at the Respondent's IRLF, MSHA declined jurisdiction. The inspector stated that he was informed that the coal was crushed to a smaller size to comply with the objections of the barge owner who did not want large pieces of coal falling into its new barge. Under the circumstances, and in the absence of any further information, it would appear that the coal was processed to the specifications of the barge owner, and not the coal consumer customer, a rather bizarre and contradictory reason to decline enforcement jurisdiction.

Ireland River Dock

The parties stipulated that the dock is neither a surface coal mine or the surface work area of an underground coal mine. The dock includes a walkway to a fixed barge, the fixed barge, and the moveable barges onto which the completely processed coal is loaded. Two tow boats located at the dock which are owned by the Respondent are used to move and position barges at the dock, and they are registered to the Coast Guard.

The additional facilities at the dock include a control room for communicating with the McElroy preparation plant, a walkway to the loading dock, a storage building, a stand for a belt,

several mooring cells, and electrical equipment. The purpose of the dock is to facilitate the loading of processed coal onto barges for delivery to customers. The two contested citations issued in Docket No. WEVA 2010-176 for alleged violations of mechanical equipment guarding standard 30 C.F.R. § 77.400(a), were issued for allegedly failing to guard equipment located at the loading dock.

Although Stipulation No. 26 states that the Respondent owned the dock, it clarified this in its post-hearing brief and stated that the stipulation was intended to apply to the aforementioned equipment and platforms that it owns and that it does not own the real property on which the dock is located. Further, the parties stipulated that the dock was operating pursuant to a permit issued by the U.S. Army Corps of Engineers and that it was not bonded or permitted by the State of West Virginia as a coal mine.

I agree with the Secretary's arguments that the fact the dock is not bonded or permitted as a mine by the State of West Virginia is not relevant and unsupported by any statutory or case law, and the Respondent's argument is rejected. Further, I find that the Respondent's reliance on the fact that the cases cited by the Secretary in support of her jurisdiction concerned working activities that took place on mine property, are distinguishable from its activities that take place at the dock that it considers is not on any bonded, permitted, or property that it owns, and therefore support its position that no Secretarial jurisdiction attaches to property it does not own is likewise rejected.

I find that the fact that the Secretary has stipulated that the dock is not a surface coal mine or a surface area of an underground coal mine, does not Ipso Facto, divest the Secretary of jurisdiction, or conclusively establish the lack of dock jurisdiction. I conclude and find that the jurisdictional issues in these proceedings are determined by the definition of "coal or other mine" pursuant to Section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1), and the nature of the working activities that take place at the dock as described by Section 3(1), of the Mine Act, 30 U.S.C. § 302(1), as well as the operation performing such activities.

The Respondent maintains that the sole purpose of the dock operations, and the activities that take place there, are limited to the receipt of completely processed coal from the McElroy preparation plant, and the loading of the coal onto barges for delivery to customers who take title to the coal once it is loaded, and that no cleaning, sizing, drying, or crushing of coal occurs at the dock.

The operations that take place at the dock are covered by Stipulation Nos. 71 through 90. Instructions for the loading of the coal are communicated to the dock from the preparation plant. Other instructions communicated to the loader operator include the control of the flow of the coal and the monitoring of the coal analysis to ensure customer specifications, and ensuring the flow of coal into specific barges pursuant to customer specifications (Stip Nos. 71, 78 - 81).

Stipulation No. 83 states that up to approximately twice a year, the dock partially fills a barge with coal of one quality and then tops the barge off with coal of a different quality, and that this only occurs when analysis of the coal shows the specifications to be incorrect for a specific customer.

Stipulation No. 84 states that rarely, coal from Shoemaker Mine, another Consol Energy mine, was transported to the dock in barges to be topped off with coal from the McElroy preparation plant because the quality of Shoemaker coal was too poor to meet customer specifications.

In Kinder Morgan Operating. L.P. v. Chao 78 Fed. App'x. 462, 2003 WL 22360971 (6th Cir. 2003), the 6th Circuit adopted the Commission's holding at 23 FMSHRC 1288 (2001), that layer loading at a marine loading facility constitutes "mixing or blending" of coal, and when done to meet customer specifications, qualifies as the work of preparing coal (Emphasis added).

I take note of the following definition of "layer loading" found in the Dictionary of Mining. Mineral, and Related Terms. U.S. D.O.1.1968, which states in relevant part as follows:

> ...a procedure whereby the coal is placed in ... horizontal layers. It owes its inception to the fact that coal as it comes from the mine is not uniform in structure, chemical composition, water content, and presence of dust. Layer loading is a simple and inexpensive method for smoothing these irregularities... This results in a more uniform product.

Based on the aforesaid stipulations, I conclude and find that the activities taking place at the dock, and in particular the layer loading process, constitutes "work of preparing coal" within the meaning of the Mine Act. Accordingly, I find that the Secretary's enforcement jurisdiction includes the dock where coal layer loading and topping off takes place before the finally processed coal is loaded and shipped to customers.

River Portion of the Ireland Dock

Docket No. WEVA 2010-1078. concerns a Section 104(a), Non - S & S Citation No. 6610555, issued on November 5, 2009, alleging a violation of 30 C.F.R. § 50.10, for not reporting the accident that occurred on December 29, 2008, within 15 minutes, and it was served to the Respondent pursuant to the facility Mine ID #46-01438.

The parties stipulated that the river portion of the dock is neither a surface coal mine or the surface work area of an underground mine. On December 29, 2008, the river portion of the dock was operating pursuant to a U.S. Army Corps of Engineers issued permit. They further stipulated that no breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, layer loading, or loading of coal takes place in the river portion of the dock.

I incorporate by reference my findings and conclusions related to the dock jurisdictional issue and find they are equally applicable to the river portion of the dock. Accordingly, I deem it appropriate to consider the work activities that take place at the movable barges located on the river in determining whether they fall within the definition of "coal or other mine" as found in the Mine Act.

The moveable barges are located on the Ohio River and they are vessels registered with the Coast Guard, and are assigned registration numbers. They are not registered by MSHA and are owned by various shipping companies. The moveable barges are brought in, loaded with coal from an overhanging conveyer that hangs over the dock, and shipped down river. The delivery of the coal is accomplished by tug boats registered with the Coast Guard and they are not owned by the Respondent.

MSHA does not exercise jurisdiction over any coal that is unloaded from the barges that are loaded at the loading facility. Beginning in the year 2000, MSHA found no record of any inspector issuing a citation or order to the Respondent over a hazard involving the river portion of the dock.

I conclude and find that the activities connected with the processing of coal at the preparation plant and the transfer of that coal over conveyors in excess of a mile from the plant to the dock where it is finally dumped on the barges at the dock end and at the dock and do not extend to the moveable barges on the river where no coal is processed or loaded. Stipulation No. 76 states that once the coal is loaded at the dock it is transported along the river to the ultimate consumer.

I take note of the fact that the Section 103(k) order that was issued on December 12, 2008, stating in part that Mr. McIntyre was on the barge checking for water, describes the area affected by the order as follows:

> "Barge load out from the north end of the land barge extending to the three cells south of the load out, including the Quarto tug boat. The barges attached to the South cells will remain attached." (Emphasis added)

Exhibit A, the map attached to the stipulations, reflects that the Quarto barge was clearly located on the river, and that the barge load-out was at the north end of the land barge that I assume was the fixed barge at the dock where the barges are finally loaded with completely processed coal ready to be shipped. Accordingly, it would appear that the location of the McIntyre accident was on the river where no coal is processed or loaded.

The inspection of the moveable barge by Mr. McIntyre at the time of the accident was prompted by recent rain and customer complaints about water in the barges. The focus of the Secretary's jurisdictional argument is based on a conclusion that any empty barge that may be inspected as the result of rain or customer complaints about water in a barge is inspected to ensure that the coal meets customer specifications.

The empty barge inspections described by Stipulation Nos. 17 and. 73 reflect that they are checked for water and debris, and the pumping of any excess water. Stipulation No. 77 reflects that weekly inspections of the beltlines and barge cargo boxes are conducted for the presence of any water or foreign materials.

The Secretary's reliance on Stipulation Nos. 91 and 94, that the inspections and pumping-of water from barges were specifically in response to customer complaints about the effect of water on the quality of coal is inaccurate. The stipulations do not include any such statements.

Significantly, none of the aforementioned stipulations reflect that the barge inspections were due to customer complaints concerning coal specifications. Although the McIntyre accident referred to a complaint about water in the barges due to a recent rain, the weekly inspections of the barge cargo boxes for water could just as well be routine maintenance and barge preparation inspections unconnected to any customer complaints relating to coal specifications.

I take note of the fact that Stipulation No. 83 reflects that the layer loading of coal at the dock occurs when analysis of the coal shows the specifications to be incorrect for a specific customer. Further, Stipulation No. 84 reflects that coal from the Shoemaker Mine is topped off at the dock because that coal was too poor to meet customer specifications. Accordingly, I cannot conclude that any inspections of the empty barges located on the river were done in response to any specific complaints related to any specific coal specifications related to the coal layering and topping off activities that do not take place on the empty barges awaiting on the river.

The assertions that the barge inspections were made to meet or assure customer specifications is found in the Secretary's post-hearing brief arguments supporting an expansive view of MSHA's jurisdiction over a barge on a navigable river where no coal processing or final loading of processed coal takes place, critical Mine Act activities establishing jurisdiction.

Although one may assume that the presence of water in a barge due to a rain is a condition that may or may not affect coal specifications that are based on such factors as British Thermal Units (BTU's), ash, sulphur, and moisture content, as noted in Stipulation No. 42, I cannot conclude that this assumption, ipso facto, provides a reasonably credible basis supporting MSHA's asserted enforcement jurisdiction, a claim that I find is a speculative and unsupported conclusion.

The Secretary's assertion that MSHA has adopted health and safety standards applicable to the activities conducted on barges and loading docks, i.e., 30 C.F.R. § 77.1710(h), requiring life jackets where there is a danger of falling into water, and 30 C.F.R. § 48.31(a), requiring hazard recognition and avoidance, must be taken in context. While it is clear that these standards apply to surface mines and underground mines, I nonetheless conclude and find that subsection (h) of Section 77.1710 is a generic standard requiring the use of life jackets or belts where there is danger from falling into water and that the hazard training section, 48.32(a), includes hazard recognition and avoidance of potential hazards associated with any event that poses a danger of falling into water. I further find that although these standards may, of may not apply to work activities at barges and loading docks, they do not standing alone, extend MSHA's jurisdiction to an empty moveable barge on the river unless it is established that such activities fall within the statutory jurisdictional definitions found in the Mine Act.

I find that the Secretary has not promulgated any safety or health standards or regulations dealing with moveable barges operating on navigable waterways. I further find that the Secretary's jurisdictional positions taken in the McIntyre and Anderson incidents, as well as her denial of jurisdiction related to the Marietta, Ohio, coal load-out facility, to be inconsistent.

Based on all of the aforesaid findings and conclusions, I conclude and find that the enforcement jurisdiction related to the moveable empty barges located on the Ohio River is logically and reasonably

best suited for OSHA pursuant to its regulatory authority, or the U.S. Coast Guard, pursuant to its applicable maritime authority, and not with the Secretary (MSHA). Accordingly, the Respondent's Motion for Summary Decision with respect to the river portion of the facility IS GRANTED.

ORDER

Docket No. WEVA 2010-1078 IT IS ORDERED that Section 104(a), Non - S & S Citation No. 6610555, November 5, 2009, citing an alleged violation of 30 C.F.R. § 50.10, for not reporting the December 28, 2008, accident IS VACATED, and the proposed civil penalty assessment of $392.00 IS DISMISSED.

Docket No. WEVA 2010-940 concerning an alleged violation of an Order issued pursuant to Section 103(k), of the Mine Act for allegedly loading coal at the dock while the facility was subject to that Order remains for litigation.

Docket No. WEVA 2010-176 concerning two alleged violations at the loading dock, and a total civil penalty assessment of $276.00, remains to be litigated.

Docket No. WEVA 2010-631 concerning Section 104(a) Citation No. 6610556, issued on November 5, 2009, citing an alleged violation of training standard 30 C.F.R. § 48.31(a), and a proposed civil penalty assessment of $11,306.00, remains to be litigated.

/s/ George A. Koutras
George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 14, 2013

WOODROW WILSON COSBY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. VA 2009-322-DM
v.	:	NE-MD-09-01
	:	
	:	
SHAW MAINTENANCE GROUP,	:	King William
Respondent	:	Mine ID 44-06882 4TX

DECISION

Appearances: Woodrow Wilson Cosby, Hayes, Virginia, *pro se*;
Thomas Benjamin Huggett, Esq., Littler Mendelson, P.C., Philadelphia, Pennsylvania, for Respondent.

Before: Judge Bulluck

This case is before me on a Complaint of Discrimination filed pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("The Act"), 30 U.S.C. § 815(c)(3). The Complainant alleges that Shaw Maintenance Group unlawfully discharged Cosby at the Nestle-Purina site on or about January 9, 2009.

Prior to opening of the record, the parties reached a settlement. I tentatively approved their agreement pending my review of a motion to approve settlement.

I have reviewed the Joint Motion to Approve Settlement and conclude that it is appropriate and in the public interest. Under the terms of the agreement, Respondent is required to take the following actions:

1. Pay directly to Woodrow Wilson Cosby the sum of $5,000.00;

2. Expunge all records maintained by Shaw Maintenance Group in Cosby's personnel and company files of all information relating to the matters being litigated herein;

3. If contacted by a prospective employer of Cosby, Shaw Maintenance Group shall not give Cosby a negative reference regarding his job performance, and shall give such prospective employer only his job title and dates of employment;

4. Provide signed letters on corporate stationary to Cosby which shall state the dates of his employment and the jobs performed for Shaw Maintenance Group.

ORDER

WHEREFORE, the approval of settlement is **GRANTED** and it is **ORDERED** that Shaw Maintenance Group comply with the terms of the settlement agreement within 30 days of the date of this decision. Accordingly, this case is **DISMISSED.**

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

Distribution:

Woodrow Wilson Cosby, 8416 Little England Road, Hayes, VA 23072

Thomas Benjamin Huggett, Esq., Littler Mendelson, P.C., Three Parkway, 1601 Cherry Street, Suite 1400, Philadelphia, PA 19102-1321

/ss

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February 20, 2013

LAKEVIEW ROCK PRODUCTS, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 2010-1856-RM
v.	:	Citation No. 6580393; 09/08/2011
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Mine: Lakeview Rock Products Mine I.D.#: 42-01975
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2011-209-M A.C. No. 42-01975-235237
v.	:	
LAKEVIEW ROCK PRODUCTS, INC., Respondent	:	Mine: Lakeview Rock Products

DECISION ON REMAND

Appearances: Alicia A.W. Truman, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner

Kevin R. Watkins, Esq., Lakeview Rock Products, Inc., North Salt Lake, Utah for Respondent

Before: Judge Andrews

STATEMENT OF THE CASE

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (2006) ("the Act" or "the Mine Act"). This matter arose initially pursuant to a Notice of Contest of Citation No. 6580393 docketed as WEST 2010-1856-RM. On June 22, 2011 I granted Lakeview Rock Products' ("Lakeview") motion for Summary Decision. The Secretary of Labor ("Secretary") Petitioned the Commission for Discretionary Review, and by Decision dated December 16, 2011, a four-member panel of the Commission remanded the case

to the undersigned Administrative Law Judge for a determination in accordance with the Commission's analysis.

As will be discussed in greater detail below, following the Commission's Remand the parties filed several motions and oppositions. By Order of February 10, 2012, I denied the Secretary's Motion for Summary Decision, and her Motion in Limine to exclude evidence, and granted Lakeview's Motion to Withdraw the part of the Memorandum in Opposition that pertained to a concession that scales are part of a roadway. There was no motion or petition for interlocutory review of this order pursuant to 29 C.F.R. § 2700.76.

A hearing on remand was held on February 22, 2012 in Salt Lake City, Utah. The parties presented witness testimony and exhibits were admitted into the record. In March 2012 the Secretary submitted a dictionary definition of "roadway" and additional calculations. In April and May 2012 Post Hearing Briefs and Reply Briefs were submitted by the parties.

On June 22, 2011 Penalty Docket WEST 2011-209-M was assigned to me. The instant Contest Citation No. 6580393, along with eleven other citations was contained in this docket. On March 22, 2012 the Secretary filed a Motion to Approve Partial Settlement along with a Proposed Order for the eleven other citations in WEST 2011-209-M. On April 6, 2012, the partial settlement was approved, and jurisdiction was retained over the subject of this proceeding, Citation No. 6580393.

JOINT STIPULATIONS

The parties agreed to the following stipulations, submitted and marked as Exhibit JX-1[1] at the hearing:

1. These dockets involve a sand and gravel mine known as Lakeview Rock Products Mine (the "Mine"), which is owned and operated by Lakeview Rock Products ("Lakeview").

2. The Mine, located in Salt Lake City, Utah, MSHA ID No. 42-01975, is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. §§ 801-965.

3. The Administrative Law Judge has jurisdiction over these proceedings, pursuant to Section 105 of the Mine Act.

4. Lakeview is the "operator" as defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d), of the mine at which the Citations at issue in these proceedings were issued.

[1] Subsequent exhibits will be referred to as GX-# for Government Exhibits, RX-# for Respondent Exhibits.

5. Lakeview is engaged in mining operations in the United States, and its mining operations affect interstate commerce.

6. MSHA Inspector Mike Tromble ("Inspector Tromble"), who issued the Citation at issue in this proceeding, was acting in the official capacity and as authorized representatives [sic] of the United States Secretary of Labor when the Citation was issued.

7. On September 8, 2010, Inspector Tromble issued to Lakeview a Citation, numbered 6580393 ("Citation") for allegedly violating 30 C.F.R. 56.9300(b).

8. There are a total of six scales at Lakeview's pits; two at what is referred to as the "Thomas Pit," two at what is referred to as the "Lower Pit," and two at what is referred to as the "Upper Pit." All of the scales are elevated in order for Lakeview employees to perform annual maintenance and calibration work on each of the scales.

9. One of the two scales at the Thomas Pit is elevated to a height of 31.5 inches above ground level and the other scale at the Thomas Pit is 38 inches above ground level; both scales are steel plates with the north scale measuring eleven feet four inches wide and 120 feet long, and the south scale is ten feet six inches wide and 105 feet six inches long. Both scales have 8 inch high steel "rub rails" running the length of the scales.

10. At the Lower Pit one of the scales is 35 inches above the ground, and the other scale is 38 inches off the ground. Both scales are also steel plates with the north scale measuring eleven feet wide by 110 feet long, and the south scales [sic] measuring eleven feet wide and 105 feet six inches long. Both have 8 inch high steel "rub rails" running the length of the scales.

11. At the Upper Pit one of the scales is 54 inches above the ground, and the other is 54 inches on one side of the scale and is at ground level at the other side of the scale. The east scale measures ten feet wide by 70 feet six inches long, and the west scale measures ten feet wide by 104 feet long. The Upper Pit scales also both have 8 inch high steel "rub rails" running the length of the scales.

12. The trucks that use the scales include ten-wheeled dump trucks, ten-wheeled dump trucks with a "pup" trailer, single or double belly dump trucks, and tractors with end or side dump trailers. Their wheelbases range from 22 feet 8 inches to 61 feet 2 inches. The mid-axle height of these trucks range from 20 inches to 24 inches. Their loaded weights vary from 19,000 pounds empty to 80,000 pounds loaded. Between 15 and 100 trucks use the scales daily.[2]

[2] At hearing, Inspector Tromble testified that five to 100 trucks travel the scale daily. Tr. 26, 47. Taylor and Hughes also cited this figure. Tr. 111, 137.

13. At the Upper Pit, the trucks, after they are loaded, travel less than ¼ mile from a loading area and descend down a roadway, and to the west down a ramp to the scales. After driving on the scales, trucks then drive out of the mine area.

14. At both the Thomas and Lower Pits trucks are loaded with material at a loading area where other stockpiles are located. Trucks then travel across the loading area to a point that exits the pits where the scales are located; all vehicles must travel across the scales to exit the loading area.[3] The trucks drive on the scales, are weighed, and then exit the scales to turn onto a public roadway.

15. The proposed penalty will not affect Lakeview's ability to remain in business.

16. The certified copy of the MSHA Assessed Violation History reflects the history of the mine for fifteen months prior to the date of the issuance of the Citation at issue and may be admitted into evidence without objection by Lakeview.

17. The parties stipulate to the authenticity of their exhibits, but not to the relevance or truth of the matters asserted therein.

Ex. JX-1

FACTUAL AND PROCEDURAL HISTORY

On September 8, 2010, MSHA Inspector Mike Tromble determined that six elevated truck scales, located on Lakeview's mine property, did not have berms or guardrails that were mid axle height of the largest self-propelled mobile equipment that traveled across them. Tromble issued Citation No. 6580393 for the alleged violation of 30 C.F.R. 56.9300(b), determining that the violation was S&S, due to moderate negligence, and that permanently disabling injury to one person was reasonably likely to occur. GX-2.

Section 56.9300(a) requires that "[b]erms or guardrails shall 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." Section 56.9300(b) specifies that the required berms or guardrails "shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway."

Lakeview contested the Citation and in November 2010, the Secretary and Lakeview submitted cross-motions for Summary Decision. Relevant to these proceedings is that Lakeview, in its Memorandum in Opposition to Respondent's Motion for Summary Decision ("Resp. Opp. Memo"), stated in the prefatory section of its Argument the following: "The Petitioner acknowledges for purposes of this Memorandum in Opposition that the scales are part of a roadway, and that its scales in the instant case are not 'at least mid-axle-height." Resp. Opp. Memo, 2.

[3] At hearing, Hughes testified that not all trucks must use the scale when exiting the pits. Tr. 125-127. Inspector Tromble similarly testified that there were alternate entrances and exits. Tr. 63-65.

On June 22, 2011, I denied the Secretary's Motion and granted Lakeview's Motion for Summary Decision. *Lakeview Rock Products, Inc. v. Secretary*, 33 FMSHRC 1538 (June 2011) (ALJ) ("*Lakeview I*"). In granting Lakeview's Motion, I focused primarily on whether the scales presented a drop-down or tip over hazard to trucks, and included some discussion of previous ALJ decisions regarding whether scales are a part of the mine's roadways under the terms of the regulation. 33 FMSHRC at 1544. These previous decisions provided some guidance, but I noted that they were all distinguishable from the instant case because each of them involved elevated platforms and scales with no berms, guardrails, or guarding of any kind. 33 FMSHRC at 1544. *Lakeview I* turned on the finding that the scales presented no drop-off hazard to trucks, equipment, or personnel. 33 FMSHRC at 1545.

The Commission granted the Secretary's Petition for Discretionary Review and, by decision dated December 16, 2011, vacated *Lakeview I*. *Lakeview Rock Products, Inc.*, 33 FMSHRC 2985 (Dec. 2011) ("*Lakeview II*"). In its decision, the Commission set forth a new three-part test for finding violations of 30 C.F.R. § 56.9300. This test requires the following determination:

> (1) Whether the scales are part of a roadway; (2) whether each scale has a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment; (3) whether the scales are equipped with berms or guardrails that are at least mid-axle height of the largest self propelled mobile equipment which usually travels the roadway.

33 FMSHRC at 2988. In applying the test to this case, the Commission only addressed the second element, because Lakeview appeared to have conceded the first and third element in its Memorandum in Opposition to Respondent's Motion for Summary Decision.[4] 33 FMSHRC at 2989. The Commission found *Lakeview I* deficient in that there were no findings with regard to the second element. The Commission vacated the decision and remanded the proceeding for a determination of whether the record contains an unresolved dispute of material fact. In the Remand, the Commission stated that if there was an unresolved factual dispute regarding element number two, the proper course would be an evidentiary hearing. 33 FMSHRC 2985.

Following the Commission's remand, Lakeview filed a motion to withdraw its pleading regarding roadways in the original Memorandum in Opposition, and the Secretary filed an opposition to the withdrawal motion. Lakeview argued that the question of whether the scales were roadways was an unsettled point of law, illustrated by Commissioner Duffy's dissent, and the issue should be decided by the judge. The Secretary argued that the Operator was precluded from withdrawing its previous motion at this late stage because the "admission had been relied upon by this Court and the Commission and has become law of the case." Sec. Memo in Opp. to Mot. To Withdraw Plead., 2.

The Secretary further advanced this position in its Motion in Limine, where it argued that any evidence not directly related to the issue of the grade or depth of the scales' drop-offs should not be admitted. The Secretary also filed a contemporaneous renewed Motion for Summary

[4] In his dissent, Commissioner Duffy disagreed with the Commission's skipping over the first element, arguing that scales are not part of a roadway. 33 FMSHRC 2991.

Decision, where it argued that Lakeview never directly contested the Secretary's assertion that the drop-off was of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. As such, the Secretary argued that its Motion for Summary Decision should be granted. Lakeview opposed this motion, arguing that it did directly contest the Secretary's assertion that the drop-off was of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. Furthermore, Lakeview argued that the Secretary bears the burden of proving the violation, and Lakeview was not required to submit specific evidence proving the safety of the scales in its Motion Opposing Summary Decision.

In my Order on the post-remand motions, I found that there were questions of material fact because Lakeview had challenged any notion that there is a drop-off from their scales of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment in the Memorandum of November 2010. I also found that the issue of whether the scales were roadways was not the law of the case and, in the interest of justice, granted the Operator's Motion to Withdraw Pleading. Accordingly, I denied the Secretary's Motion in Limine in order to develop a full record at hearing. I also denied the motions for Summary Decision because there remained issues of disputed fact. As a result, at the time of the hearing full development of the Commission's new analytic framework for issues arising under 30 C.F.R. § 56.9300 was appropriate.

SUMMARY OF THE TESTIMONY

A. Testimony of Mike Tromble:

Mike Tromble has been an MSHA inspector and the district accident investigator since 2008. Tr. 19. He worked in mining for a decade before coming to MSHA. Tr. 20. He has worked as a truck driver, operating explosive, straight, and tractor-trailer trucks for Dyno Nobel. He also worked as a lead blaster, a member of the blast observation team, and a quality control manager at Kennecott. Tr. 20. He holds a degree in business management and has a certification in diesel technology. Tr. 20.

While conducting his semi-annual inspection on September 8, 2010, Tromble issued Citation No. 6580393 for "de-elevated" truck scales in violation of 30 C.F.R. 56.9300(b). Tr. 23-24. Tromble testified that he witnessed various types of trucks use the scales as they entered and exited each of the three pits on the mine property. Tr. 24-25. He estimated that the trucks ranged from 19,000 pounds to 80,000 pounds, and that mid-axle height would be approximately 24 inches. Tr. 26. He testified that he was told by the mining company that the number of trucks that traveled over the scales at Lakeview each day ranged from a minimum of five trucks to a maximum exceeding 100 trucks. Tr. 26.

Tromble testified that the scales at the Thomas Pit are beside the entrance to the pit, are elevated, and have eight-inch rub rails along the sides. Tr. 27. Between the north and south scales there is a drop-off. Tr. 31. Tromble testified that the area around the Lower Pit scales was similar to the area around the Thomas Pit scales, with the primary difference being that the south scale rub rail in the Lower Pit was damaged. Tr. 31-32; GX-5, GX-8, GX-12. The Upper Pit scales were similar to those at the Thomas Pit, with the west scale rub rail at the Upper Pit

similarly damaged. Tr. 35, 36; GX-5, 20. Tromble testified that the scales only had rub rails rather than guardrails. Tr. 36. He explained that the difference between the types of rails is that guardrails are intended to keep the truck on the scale, whereas rub rails indicate to the truck operator the location of the edge of the scale. Tr. 36-37.

Tromble testified that a MSHA PowerPoint presentation and program policy letter (PPL) articulated MSHA's position that scales are considered part of the roadway if there is a drop-off sufficient to cause a rollover. Tr. 39-40. He testified that PPL No. P10-IV-1 provided guidance to operators by advising that elevated scales are considered roadways. Tr. 40-41; GX-6. He also testified that MSHA distributed a PowerPoint presentation that explained that elevated scales were part of roadways. Tr. 41-42; GX-8. He explained that it is irrelevant to the inquiry whether a truck must stop on the scales, and that the main consideration was whether a drop-off exists. Tr. 42-43. Tromble testified that he determined that the drop-offs at Lakeview were sufficient to cause a vehicle to overturn. Tr. 44-45. Tromble testified that the drop-off could endanger a person by causing whiplash to the neck or lead to back injuries. Tr. 45-46. He did not consider the presence of rub rails or whether trucks came to a stop on the scales in issuing his citation. Tr. 46.

Tromble testified that a truck rollover would likely result in jarring injuries to the back, neck and head, and could be "permanently disabling". Tr. 54. He recalled that in March 2010 he had given general mine Foreman Gregg Flowers the PowerPoint presentation and warned him the truck scales were not in compliance. Tr. 56; GX-8, p. 2. On cross-examination, Tromble testified that Fowers responded that he did not agree with Tromble's application of Section 56.9300. Tr. 74.

On cross-examination Tromble testified that at each pit there were roadways by which a truck could enter and exit the pit, and that a truck does not have to go over scales unless there is material to be weighed. Tr. 63, 64, 65. He testified that a truck would have to travel over the scales in order for the mine to be paid for the rock. Tr. 65. However, he also testified that he was not aware of Lakeview's policy wherein companies could pay by the truckload, rather than by weight, and therefore not have to drive across the scales. Tr. 79.

B. Testimony of Terence Michael Taylor

Terence Michael Taylor has worked with MSHA for 24 years as a senior civil engineer in the mine waste and geotechnical engineering division at the Pittsburgh Safety and Health Technology Center. Tr. 81. In this position, Taylor works primarily with complex civil engineering projects, but has done work on occasion in the areas of geotechnical, hydrology, and hydraulic work. Tr. 82-83. Taylor has a Bachelor's degree in civil engineering from Pennsylvania State University, a Master's degree in civil engineering from the University of Colorado, and a Master's degree in business administration from the University of Pittsburgh. Tr. 82. As part of his duties with MSHA, Taylor is involved with field and accident investigations, where he performs calculations to substantiate findings and determine failures. Tr. 83-84. Taylor was also involved in developing the PowerPoint presentation dealing with scales and the PPL P10-IV-1. Tr. 85-86.

Taylor performed an analysis on whether the drop-off at Lakeview was sufficient to overturn a vehicle or endanger occupants. Tr. 90. In performing his analysis, he reviewed the inspector's photographs and notes, a Bureau of Mine study at GX-10, and a paper by Harry West entitled "Analysis of Structures," at GX-11. Tr. 90-91. Taylor first performed an initial static analysis and then updated it with a dynamic analysis that also adjusted the assumptions related to truck width. Tr. 90-93. The first analysis assumed a truck center of gravity of six feet and a truck width of eight feet, and simply built upon the Bureau of Mine calculations of a non-moving truck that is sitting in a position on a hill and a side slope. Tr. 94-95; GX-10, pp. 2-3. In this first analysis, Taylor simply assumed a scale instead of a hillside and ran his calculations. Tr. 94. This analysis concluded that there were tip over hazards at the east and west scales at the Upper Pit and the north scale at the Lower Pit. Tr. 96. Taylor testified that when he adjusted the center of gravity to make it at eight feet, all six of the scales presented tip over hazards. Tr. 96.

Taylor testified that he performed calculations for *Knife River Corp. v. MSHA*, 34 FMSHRC 1109, 1118 (May 2012) (ALJ), and as a result, revisited his analysis in the instant case.[5] Tr. 90. This second calculation was a dynamic tip over analysis where the change in the truck's energy as it falls off the scale was taken into account. Tr. 97-98; GX-10, pp. 4-8. The calculations were performed by Taylor's colleague, Michael Murawski, and checked by Taylor. Tr. 100. Based on these calculations, Taylor concluded that if a drop-off were in excess of 21 inches, there would be sufficient energy to tip the truck over. Tr. 100. Taylor testified that under this model, all six scales at Lakeview would pose tip over risks. Tr. 100.

In the third analysis, Murawski and Taylor looked at the Thomas Pit, which at 31.5 inches had the lowest drop-off, and tried to calculate the lowest the center of mass that would still pose a roll over hazard. Tr. 101. Their conclusion was that the center of mass could be as low as 4.5 feet above ground and still pose a roll over hazard, meaning that it would pose such a hazard on all other scales. Tr. 101-102; GX-10, p. 13. Taylor testified that it was safe to assume that all the trucks accessing the scales at Lakeview would have a center of mass of at least 4.5 feet above ground. Tr. 102.

In the fourth analysis, Murawski and Taylor considered whether there was a potential for roll over when they assumed that the axle strikes the deck of the scale as it tipped over. Tr. 102-103; GX-10, pp. 9-12. In performing this analysis, they assumed an eight-foot wide truck, with a five-foot center of mass, and that the clearance from the ground to the axle was 13 inches. Tr. 103.

Taylor testified that the analysis did not consider the variables of additional speed or shifting contents in the truck bed, but stated that each of these would cause more instability and increase the likelihood of a roll over. Tr. 104-105. Furthermore, the analyses did not consider the effect of the rub rails that exist on the scales at Lakeview. Tr. 105-106. On cross-examination, Taylor also stated that he did not consider various truck suspension mechanisms and how they might impact the potential hazards. Tr. 109-110. He did, however, admit that the rub rail would change the geometry of his models. Tr. 110.

[5] In *Knife River*, Judge McCarthy heard testimony from both Taylor and Dr. Dirk Smith. 34 FMSHRC 1109, 1116.

Taylor testified that his conclusion was that all six scales at Lakeview were roll-over hazards. Tr. 106. When asked whether guardrails could negatively impact truck tires, Taylor suggested that the guardrails should be placed outside the rub rails. Tr. 107.

C. Testimony of Scott Hughes:

Scott Hughes has been an employee at Lakeview since the 1970s, and currently works as the corporate vice president. Tr. 116. In the course of working for Lakeview, Hughes built and assembled the scales. Tr. 116-117. Hughes testified that in order to enter or exit the pit, the trucks have to drive along the main roadways, which they can continue along to get in or out of the pit. Tr. 124. In order to use the scales, the trucks exit the main roadway and use the alternate means of side roads to access the scales. Tr. 124-125.

Hughes testified that some of Lakeview's contracts with customers don't require the trucks to use the scales because the rock is sold by the yard rather than by weight. Tr. 126. He testified that in instances where the rock is sold by weight, the trucks usually only use the scales after they are loaded. Tr. 127. Because Lakeview keeps records of each truck's empty weight in its initial trip into the pit, it does not require subsequent empty reweighings. Tr. 127.

Hughes testified that trucks using the scales travel at a rate of speed slower than would an individual walking heel to toe in a field sobriety test. Tr. 127-128. He stated that trucks sometimes rub up against the rub rails, which causes damage to the rails but also keeps the trucks on the scales. Tr. 128-129. Hughes testified that he conducted a videotaped experiment where he tried to drive a truck off the scales, and was unable to do so because of the rub rails. Tr. 129; RX-M. He repeated the experiment with the truck empty and with the truck loaded with rock, and in each instance was unable to drive over the side of the scales. Tr. 129. On cross-examination, Hughes testified that the scale where he ran this test did not have damaged rub rails as do several of the scales at Lakeview. Tr. 140-141.

Hughes testified that he did not consider the scales to be part of the roadway because they are a "weighing machine," and are not used as an entrance or exit. Tr. 136. He testified that at each scale there are roadways to each side, and those roadways have axle-high berms in place. Tr. 136-137. On cross-examination, Hughes admitted that the inspector's estimates of between five and 100 trucks driving over the scales per day was accurate. Tr. 137.

CONTENTIONS

The Secretary argues that the scales at Lakeview were in violation of 30 C.F.R. § 56.9300(b) because they were lacking berms or guardrails that were at least mid-axle height of the largest self-propelled mobile equipment that usually travel across the scales. Following the analytic framework provided by the Commission, the Secretary addresses the first element by arguing that the scales were a part of the mine's roadways because (1) the Respondent already conceded this point in its earlier Memorandum in Opposition; (2) the determination has become the law of the case; (3) the regulations are clear and unambiguous; and (4) if an ambiguity in the regulations exist, the Secretary's interpretation is entitled to judicial deference.

Next, the Secretary argues that the drop-offs from the elevated truck scales are of sufficient grade or depth to cause a vehicle to overturn or endanger persons in the vehicle. Inspector Tromble testified that based on his experience he determined that the drop-offs were of sufficient grade or depth to cause trucks to overturn. Furthermore, Taylor conducted engineering analyses, including static and dynamic analyses, and determined that the drop-offs from the elevated scales presented an overturning hazard.

The Secretary also asserts that Lakeview admits that the scales did not have guardrails or berms that were mid-axle height of the largest vehicle that traveled on the roadways, thereby meeting the third element of the Commission's test. The Secretary argues that evidence concerning Lakeview's eight-inch rub rails is irrelevant to this analysis because rub rails and guardrails serve different purposes. She argues that the Commission's remand made clear that the presence of berms or rub rails may only be considered after the judge has established that a hazardous dropoff is present. Furthermore, the Secretary argues that Lakeview's video of a truck driving across the scales is irrelevant because it is neither a scientific study nor a representation of a realistic scenario. Instead, she asserts that if the elements of a violation of § 56.9300 are shown to exist, any arguments concerning the necessity or validity of the violation are misplaced.

The Secretary argues that Inspector Tromble's testimony concerning the likelihood of a truck coming in contact with the rub rails, along with the testimony concerning the damaged rub rails, show a reasonable likelihood that the hazard would result in injury. The Secretary asserts that based on Taylor's calculations, it is shown that the failure to provide adequate guardrails would lead a truck to turn over, leading to permanently disabling injuries. Therefore, the Secretary requests that Citation No. 6580393 be affirmed and a civil money penalty of at least $176.00 be assessed.

Respondent argues that Citation No. 6580393 was issued in error because 30 C.F.R. § 56.9300 is inapplicable to truck scales such as those at Lakeview. Further, if one reads scales into the regulations, an absurdity arises. The regulation requires berms or guardrails on the "banks of roadways" where there is a sufficient "grade or depth" to cause a vehicle to overturn. However, scales do not have "banks," and therefore cannot be in compliance with the regulation. Lakeview also argues that scales do not have "grades" that slope away, indicating that the drafters of the regulation neither contemplated scales nor intended it to apply to scales. The Secretary counters that these qualities are not necessary, as the Commission has held that bridges, which do not have traditional banks or grades, are roadways.

Respondent also argues that the scales at Lakeview should be distinguished from other scales that have been found to be parts of roadways in previous ALJ decisions. In this instance, the mine's scales were separated from all main roadways, and many trucks were not required to use the scales. Lakeview further asserts that the Secretary's interpretation of the regulation is unreasonable and should not receive judicial deference.

Respondent further argues that even if the scales are part of the roadways, the rub rails would prevent a vehicle from overturning. In support of this argument, Lakeview refers to the video submitted into evidence, which shows a truck unable to drive over the rub rails. Further, the Secretary failed to show that any truck at Lakeview has ever driven off the scales. In

addition, Taylor could not conclude that a truck would roll over if the eight-inch rub rails were present. Lakeview contends that the Secretary also failed to produce an expert with biomechanical training or expertise to show that a vehicle driving off the scales would cause an injury. In response, the Secretary argues that such an expert is unnecessary, and that the inspector is empowered to make such determinations.

ANALYSIS

1. The First Element:

According to the three-part analysis articulated by the Commission in *Lakeview II*, the first question that must be addressed is whether the scales at Lakeview are part of a roadway. 33 FMSHRC at 2988. It should initially be noted that any argument that scales are *per se* part of a roadway was implicitly rejected by the Commission when it established this first element. If scales should always be considered part of a roadway, then the Commission would have so stated and laid out a two-part analysis. *Knife River Corporation Northwest*, 34 FMSHRC 1109, 1121 (May 2012) (ALJ). Instead, this question is a mixed question of law and fact.[6]

a) The Law of the Case Doctrine does not Apply to the Issue of Whether Scales Are Part of a Roadway

The Secretary argues that Lakeview conceded that the truck scales were part of a roadway and that this court accepted the concession. It further argues that the issue was not appealed to the Commission and therefore became the law of the case. Sec. Post Hearing Br. At 5-6. The Secretary is correct that Lakeview conceded in its original Memorandum in Opposition that its scales were part of the roadway for purposes of Section 56.9300 and that it did not have guardrails or berms that were at least mid-axle height of the largest vehicle that traveled on the roadways. Resp. Opp. Memo. at 2. However, insofar as the Respondent was offering a legal conclusion, it was not authorized to concede or stipulate that its scales were part of a roadway.[7]

The Respondent stated in its Memorandum in Opposition, "The Petitioner acknowledges for purposes of this Memorandum in Opposition that the scales are part of a roadway, and that its scales in the instant case are not at least mid-axle-height." Resp. Opp. Memo. at 2.[8] The sentence has two distinct components, separated by a comma. The first part of the sentence (preceding the comma) is a legal conclusion, while the second part is a factual determination. The second part of the statement addresses the factual question as to the height of the guardrails or berms, and is within the parties' powers to stipulate. However, the concept of "roadway" is a

[6] For a description of the analysis for a mixed question of law and fact, See *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 269-70 (3rd Cir. 2005).

[7] The terms concession and stipulation are used interchangeably here because they have the same legal effect. However, it should be noted that Lakeview did not include this statement in its Joint Stipulations.

[8] The Respondent presumably meant that the guardrails or berms were not mid-axle height.

legal category that is within the judge's responsibility to define and apply. The question of whether scales are part of a roadway has not been definitively addressed by the Commission. Citing to a myriad of cases, Judge McCarthy recently stated, "The Commission has yet to decide whether a truck scale is a roadway for purposes of 30 C.F.R. § 56.9300." *Knife River Corporation Northwest*, 34 FMSHRC 1109, 1118 (May 2012) (ALJ). (*"Knife River-2012")*Therefore, not only is it a legal conclusion, but it is one without consensus.

Courts have been abundantly clear that parties may not simply stipulate to issues of law. The First Circuit has stated that, "[i]ssues of law are the province of courts, not of parties to a lawsuit, individuals whose legal conclusions may be tainted by self-interest. Courts, accordingly, "are not bound to accept as controlling, stipulations as to questions of law." *Estate of Sanford v. Commissioner,* 308 U.S. 39, 51, 60 S.Ct. 51, 60 S.Ct. 51, 59, 84 L.Ed. 20 (1939); *accord Dedham Water Co., Inc. v. Cumberland Farms Dairy, Inc.,* 972 F.2d 453, 457 (1st Cir.1992) (citing *RCI Northeast Servs. Div. v. Boston Edison Co.,* 822 F.2d 199, 203 (1st Cir.1987)); *In re Scheinberg,* 132 B.R. 443, 444 (Bankr.D.Kan.), *aff'd,* 134 B.R. 426 (Bankr.D.Kan.1992)." *TI Fed. Credit Union v. DelBonis*, 72 F.3d 921, 928 (1st Cir. 1995).

The first part of the sentence concerning whether the scales were part of the roadway is not a stipulation, and should not be treated as such. "A stipulation is an agreement between the parties as to a fact of the case, and, as such, it is evidence introduced by both of the parties." *U.S. v. Hawkins*, 215 F.3d 858, 860 (8th Cir. 2000).[9] As a legal conclusion, it has no weight. The judge is not bound to it, nor is he limited to the arguments made by the parties. "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Services, Inc.*, 500 U.S. 90, 99, 111 S.

[9] Courts have long held that a party may not stipulate to a legal conclusion. "If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by agreement of counsel on a subsidiary question of law." *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289-90 (1917) cited approvingly in *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993); see also *Sebold v. Sebold,* 444 F.2d 864, 870 n. 8 (D.C.Cir.1971) ("Since this is a question of law, however, the agreement of counsel is not binding on this court.").

In *Neuens v. City of Columbus*, the Sixth Circuit stated, "'Parties may not stipulate to the legal conclusions to be reached by the court,'" and held that the District Court erred when it "blindly accepted Bridges' stipulation without engaging in an independent review of whether he was acting under color of state law." 303 F.3d 667, 670 (6th Cir. 2002) (*quoting Saviano v. Commissioner of Internal Revenue,* 765 F.2d 643, 645 (7th Cir.1985)); see also *Longhorn Partners Pipeline L.P. v. KM Liquids Terminals, LLC*, 408 Bkrtcy.S.D.Tex. 90, 95 (2009) ("Though parties can stipulate certain facts, parties cannot stipulate conclusions of law or the legal effect of stipulated facts. *Kamen v. Kemper Fin. Servs. Inc.,* 500 U.S. 90, 99, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."); *Hankins v. Lyght,* 441 F.3d 96, 104 (2d Cir.2006) ("We are required to interpret federal statutes as they are written ... and we are not bound by parties' stipulations of law.")

Ct. 1711, 1718, 114 L. Ed. 2d 152 (1991). Though I granted Lakeview's motion to withdraw its Memorandum in Opposition, I would not have been bound by a party's assertion of a legal principle even if it remained a part of the record.

Furthermore, determination of the issue of whether the scales were part of the roadway never became the law of the case. The cases cited by the Secretary for the proposition that issues not appealed to the Commission become the law of the case are distinguishable from the instant case.

In *Douglas R. Rushford Trucking*, the ALJ made clear findings on negligence and unwarrantable failure in his initial decision. 23 FMSHRC 790 (2001). These issues were not appealed to the Commission, and the Commission affirmed the judge's finding of a violation, but remanded the case in order to consider the 110(i) criteria. 23 FMSHRC at 791. On remand, the ALJ reversed his earlier findings that the violation was the result of unwarrantable failure. 23 FMSHRC at 791-92. The Commission found error in the judge's retraction because the remand specifically "directed the judge to explain his reduction in the proposed penalty *in light of his finding of gross negligence*." 23 FMSHRC at 793 (emphasis added).

In the instant case, the Commission articulated a new analytic framework and remanded for a hearing and new decision. The Commission made clear in a footnote that it was not addressing the issue of whether scales were part of the roadway stating, "since the parties concede this issue and neither party raised it on review, we think it is not appropriate to address the issue of whether the scales were part of a roadway." *Lakeview II*, 33 FMSHRC 2985, n. 4.

The Secretary also cites *Hanna Boys Center v. Miller*, 853 F.2d 682 (9th Cir. 1998), for the proposition that issues decided by implication become the law of the case. However, *Hanna Boys Center* is also inapposite. In *Hanna Boys Center*, the Ninth Circuit held that the issue of subject matter jurisdiction was the law of the case because it was implicit in the motions panel's dismissal. The Circuit Court explained that though the motions panel did not specify that it dismissed the case for lack of subject matter jurisdiction, "it necessarily did so by implication." 853 F.2d at 685.

> The issue presented in the motion papers on appeal was the district court's lack of subject matter jurisdiction over the entire case, not just whether the district court had the power to grant a stay. Further, it is apparent that the district court interpreted the motions panel's order to preclude subject matter jurisdiction. Four days after the motions panel issued its order, the district court held a hearing to determine the meaning of the motions panel's order and dismissed the Center's complaint for want of subject matter jurisdiction…. The entire focus of these materials was the issue of the district court's jurisdiction.

853 F.2d at 685. However, in the instant case, the Secretary specifically states that Lakeview did *not* appeal the issue of whether truck scales were part of the roadway to the Commission. These situations are quite different, and the Secretary may not have it both ways. It cannot claim at once that the issue has become the law of the case specifically because it was not appealed to the Commission, while also arguing that the issue has become the law of the case because (as in *Hanna Boys Center*) the issue was presented clearly on appeal.

As the Commission noted, I accepted the guidance of past ALJ decisions concerning scales in *Lakeview I*, while distinguishing those cases because they all involved scales with no rub rails or berms. As such, my decision turned on the issue of whether the scales provided a drop-off or tip over hazard for trucks. Because I found that these scales did not present such a hazard, I performed minimal factual or legal analysis on the issue of whether the scales constituted part of a roadway. Therefore, unlike the cases cited by the Secretary, I find that the issue of whether the Lakeview scales are part of the roadway is not the law of the case.

b) The Scales at Lakeview Are Not Part of a Roadway

The Commission has not provided definitive guidance as to whether truck scales are part of a roadway, and there is not a consensus among ALJs that have considered the issue. The following cases have examined the issue to some degree.

In *Walker Stone Co.*, 16 FMSHRC 1955 (Sept. 1994) (ALJ), Judge Maurer found that an elevated scale approximately 3.5 feet above ground level with no berms or guardrails constituted a violation of § 56.9300. Similarly, in *Highway 195 Crushed Stone, Inc.*, 21 FMSHRC 800 (Jul. 1999) (ALJ), Judge Melick determined that though Section 56.9300 "suffers from ambiguity and vagueness," he found that truck scales elevated five to six feet with no berms or guardrails violated the regulation. In both these cases, the ALJs simply assumed that elevated truck scales fell under the definition of roadways without performing any analysis on the issue.

Several years later, in *APAC-Mississippi, Inc.*, 26 FMSHRC 811 (Oct. 2004) (ALJ), Judge Weisberger looked to the dictionary definition of "roadway" in order to determine if elevated truck scales were part of the roadway. The judge held that a roadway consists of "the entire route traveled by the trucks," and that a scale elevated 28-30 inches with no rubrail was a roadway. 26 FMSHRC at 814 (emphasis in original).

A year later, in *Carder, Inc.*, 27 FMSHRC 839 (Nov. 2005) (ALJ), Judge Manning held that scales with a 32-36 inch drop-off and no berms were part of the roadway, however he vacated the citation on notice grounds. Due to the low rate of speed by which trucks travel over the scales, the judge held that "a reasonably prudent person familiar with the mining industry and the protective purposes of section 56.9300(a) would not have recognized that the cited scale was covered by the standard." 27 FMSHRC at 858.

More recently, in *Knife River*, 2010 WL 2995087 (July 2010) (ALJ) ("*Knife River-2010*"), Judge Rae found that truck scales elevated 26-36 inches with nine inch high rub rails were roadways under Section 56.9300. The Respondent used the dictionary definition to argue that a roadway is used to travel to or from a destination, whereas the scales constitute a destination. In finding the Respondent's argument unpersuasive, the judge made much of the fact that all trucks carrying the product from the mine to the end user must cross the scales. "The scales are an integral part of the road used by the trucks and are an essential part of the commercial trek from the pit to the consumer." *Id.* at *3.

In the first post-*Lakeview* decision, Judge Manning applied the Commission's three-part test from *Lakeview II* and held that the scales were part of the roadway. *McMurry Ready Mix Co.*, 2012 WL 1242979 (March 2012) (ALJ). The judge reviewed previous ALJ decisions and found that the scale was "an essential part of the 'commercial trek from the pit to the consumer,'" and therefore met the definition articulated in *Knife River*. *Id.* at *5. The judge rejected the Respondent's argument that the scales were a stand-alone piece of equipment and held that, as in *APAC-Mississippi*, the "entire route traveled by the trucks is to be considered a roadway." *Id.*

Thus far, the case that has most fully considered the question of whether an elevated scale is part of a roadway has been *Knife River-2012*. In *Knife River-2012*, Judge McCarthy applied the Commission's new three-part test and provided a thorough analysis in determining that elevated truck scales with 10-inch rub rails were not part of the roadway. The judge found unpersuasive the argument that the scale is part of a continuous road and therefore, by definition, part of the roadway by definition. 34 FMSHRC at 1121. He noted that because the Commission required in *Lakeview II* an initial determination of whether the scales were part of the roadway, the judge must examine the "design, location, and use of the truck scale," in making his determination. *Id.* The judge agreed with the Secretary's position that the plain language of Section 56.9300 would apply to an area where vehicles must travel, but found that the Secretary failed to establish that the scales constituted such areas where the vehicles must travel. *Id.* at 1122. He noted that the scales at Knife River are not located on the main haulage road where all the vehicles entering or exiting the mine were required to travel, but rather are removed on single-lane access roads. *Id.* The only trucks that drove on the scales were those being weighed. *Id.* The judge found that:

> Drivers do not use the scale as one typically uses a road, bridge, bench, or ramp (i.e., as a means of traveling from one point to another)…Rather, the scale is used as a piece of equipment for the sole purpose of weighing vehicles, which slowly move across the scale with intermittent stops before proceeding back on course. The fact that trucks enter one end of the scale and exit on another is completely secondary to the scale's function and use.

Id. In advancing a functionalist approach, rather than a formal approach that would examine the scales superficially, the judge allows the first element of the Commission's test to have meaning. Under the previous approaches that simply applied the dictionary definition or looked at whether one used a roadway to drive onto a scale, it would be difficult to conceive of a scale that was not part of a roadway. I agree with Judge McCarthy's functional analysis towards truck scales at mines.

The notice and comment section for 30 C.F.R. 56 and 57 affirms this functionalist approach by having made clear that the regulation was being changed in order to allow for consideration of a roadway's function. The Rule noted that the change was from "the existing berm standard applied to all elevated roadways, regardless of their function or frequency of use." Safety Standard for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and

Nonmental Mines, 53 FR 32496-01, 32500 (proposed Aug. 25, 1988).[10] This change in looking at the function of a roadway indicates that function should also be considered in determining whether something qualifies as a roadway. Furthermore, the Commission later endorsed the approach of looking at the "nature of the use" of a ramp in determining that it was part of a roadway. *Capitol Aggregates, Inc.*, 4 FMSHRC 846, 847 (May 1982).

In order to illustrate the advantage of this approach, Judge McCarthy presented a *reductio ad absurdum* in his decision:

> Consider, for example, a self-propelled vehicle or piece of equipment that is loaded on the back of a flatbed truck for transportation to a mine site. When the vehicle is driven up the ramp and onto the flatbed truck, the truck does not become a "roadway" as the term commonly is understood. Instead, the flatbed truck is a piece of equipment, whose purpose and use is wholly independent of any adjacent roadway.

34 FMSHRC at 1121. Only a functionalist approach that looks at the purpose, location, and details of the scale can allow the judge to distinguish between scales, bridges, trucks or other areas that one may drive on.

Judge McCarthy concludes in *Knife River-2012* that the regulation does not cover truck scales. However, if the language of 30 C.F.R. § 56.9300(a) categorically excluded all truck scales, then the same problem would arise as if the regulation categorically included all truck scales-the first element of the Commission's *Lakeview* test would become irrelevant. Rather, I agree with Judge Melick's observation in *Highway 195 Crushed Stone, Inc.* that the regulation "suffers from ambiguity and vagueness", especially in the context of the function of scales equipment. There may be a situation where truck scales would fall under Section 56.9300, for example where there is no separate access road off of the haul road, but the scales at Lakeview are not part of the haulage roadways. Specifically, in the instant case, I find that the regulation is ambiguous and further find that the Secretary's interpretation is unreasonable and not entitled to judicial deference.

An agency's interpretation of its own regulation is entitled to "controlling weight," unless the interpretation is "plainly erroneous or inconsistent with the regulation," or unreasonable. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Martin v. Occupational Safety & Health Review Com'n*, 499 U.S. 144, 150-151 (1991). The Supreme Court has stated that an agency interpretation is reasonable when "the interpretation 'sensibly conforms to the purpose and wording of the regulations'" *Martin*, 499 U.S. at 150-151 (citations omitted).

In this instance, the Secretary's interpretation of Section 56.9300, as described in her brief, would cover all elevated truck scales. However, the clear wording of the regulation describes "banks of roadways" as part of the roadways contemplated. 30 C.F.R. § 56.9300(a).

[10] The discussion of function and frequency in the notice and comment section went on to discuss alternative methods for "service and secondary roadways, such as tailings dam roads." 53 FR at 32501. These infrequently traveled roadways are covered under 30 C.F.R. § 56.9300(d). Neither party has propounded the argument or presented evidence that this section should govern the truck scales.

Elevated truck scales such as those at Lakeview do not have banks, indicating that they do not sensibly conform to the wording of the regulation. Indeed, it is not clear how an operator would comply with the requirement that berms, in particular, or guardrails be provided and maintained on the "banks" of an elevated truck scales such as those at Lakeview.[11]

Following a functional approach to determine whether the truck scales here are part of a roadway, it is necessary to look at the placement of the scales, how trucks drive over the scales, and why trucks drive over the scales. There are elevated truck scales at each of the three pits at Lakeview. Tr. 24-25. Unlike the scales in *Walker Stone Co.* and *Highway 195 Crushed Stone, Inc.*, the scales at each of the three pits have eight-inch rub rails along the sides, with those at the Lower and Upper Pits having some damage. Tr. 27, 31-32, 36.

In order to access the truck scales, one must drive off the main haulage roadway and onto the access road leading to the scales. Tr. 124-125, 138. During his testimony, Hughes identified a number of haulage roadways that trucks may take into and out of the pits that do not involve using the truck scales. Tr. 124-125. Unlike the scales described in *Knife River-2010*, where all trucks had to use the scales, here a minority of the truck trips to the pits involve the scales. If the company purchasing rock from Lakeview has a contract where the rock is sold by weight, their empty truck must use the truck scale only the first time it enters the pit. Tr. 127. Lakeview keeps records of the weight of each empty truck, so that thereafter such trucks must only use the scale while exiting the pit loaded with product. Tr. 127. Additionally, some of the contracts that Lakeview has with customers sell rock by the yard, rather than by weight, so those trucks never have to use the truck scales. Tr. 126.

Inspector Tromble testified that he was told that between five and 100 trucks use the various scales daily. Tr. 26. Any truck approaching the scales would see several signs, including one requiring trucks to stop before proceeding onto the equipment. Tr. 126. The truck proceeds onto the scale extremely slowly. Tr. 127-128. Hughes described the rate of speed as slower than a field sobriety test where an individual walks heel to toe or the rate at which one enters a garage. Tr. 127-128. If a truck strays close to the edge of the scale, the rub rails keep the truck from going over. Tr. 128. The Secretary argued that Respondent's video recording showing a truck driving across the scales is irrelevant because it does not present a realistic scenario. But the Secretary's evidence does not present a realistic scenario, either. *See*, RX-M.

[11] Berms are defined as "A pile or mound of material along an elevated roadway capable of moderating or limiting the force of a vehicle in order to impede the vehicle's passage over the bank of the roadway." 30 C.F.R. § 56.9000. These would likely be very difficult or impossible to construct on the elevated truck scales here, and still provide an effective visual, tactile and physical impediment to movement, as well as allowing for access under the scales for periodic maintenance.

Guardrails could be retrofitted to the metal structure of the equipment, but in the absence of credible evidence that scales equipped with rub rails are hazardous pieces of equipment, and considering the construction cost of $30,000 or more for each set, the burden imposed on this industry would appear to be considerable. See, *Knife River-2012,* Footnote 15. Further, it is also not clear that Taylor's suggestion of placing guardrails outside the rub rails would comply with the language of the regulation that placement be on "the banks of roadways." Tr. 107.

It is clear from the record that the elevated truck scales at Lakeview constitute pieces of equipment to which some trucks travel, using a service or access road, and travel from, along a similar road. However the scales themselves are pieces of equipment, rather than part of the mine's haulage roadways. The purpose of driving over the scales is not the same as driving over a haulage roadway, which is a means to get from a location to a destination. In this instance, the scales are the destination and once trucks stop at the entrance to the equipment, idle forward to the weighing platform, stop and are weighed, and idle back to the access road, the trucks then travel to a new destination.

Though the Commission has not yet addressed the question of whether truck scales are part of a roadway, it has in the past described a truck scale as equipment in a list that included a mobile tipple, a stationary grading tipple, and front-end loaders. *Mineral Coal Sales, Inc.*, 7 FMSHRC 615, 615 (May 1985). Furthermore, the scales at issue here were designed and installed in order to weigh trucks, not as a means of facilitating travel.

Having determined that the scales here do not meet the first element of the Commission's test, the evidence also shows the second element is not met.

2. The Second Element

In addition to the issue of whether the truck scales were part of a roadway, the Secretary has the burden of showing, according to the second element of the Commission's test, that each scale has a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. *Lakeview II*, 33 FMSHRC at 2988. Here, the evidence submitted at hearing was insufficient to show that each scale had a drop-off of sufficient grade or depth to cause a vehicle to turn over or endanger persons in equipment.

The Secretary presented expert testimony and calculations by Terence Taylor to show that the drop-off could cause a vehicle to overturn. Taylor first performed a static analysis that had a truck sitting in a position where more than half the width of the truck was hanging over the side of the truck scales. GX-9, pp. 2, 3. Taylor concluded that there was a tip over hazard for the two scales at the Upper Pit and for the north scale at the Lower Pit. Tr. 96. Taylor then conducted a second static analysis where he adjusted the center of gravity from six to eight feet, and concluded that all six of the scales presented tip over hazards. Tr. 96.

I find the assumptions as to the position of the truck, underlying the calculations, to be problematic. It would seem to be impossible for a truck to either attain or come to rest in a position that Taylor assumed. Even if a truck somehow idled onto the scales in such a manner that only the drivers' side tires were somewhere on the deck, and the opposite tires were on the ground, it would not seem possible to continue forward because at some point the suspension mechanisms, undercarriage structures, and/or wheels would come into contact with the rub rail and restrict further forward movement. Particularly problematic is any assumption that a truck, initially properly on the scales, could move into a position with the tires on one side *simultaneously* off the scale.

When Taylor and Murawski assumed that a truck at the scales is the same as a truck on a hill with a rather severe side slope, ranging from 34 degrees to 48 degrees, this is consistent with the truck drawings in the Summary of Calculations and reinforces that the underlying assumption of the truck with one side completely off the scale deck. GX-9, pp. 2, 9, GX-10.

After testifying at the *Knife River* hearing before Judge McCarthy, Taylor conducted additional analyses using a dynamic model. Tr. 90, 93.[12] In this dynamic analysis, Taylor assumed a truck with a center of mass six feet above the ground and tried to determine what type of drop-off would be a roll-over hazard for trucks, taking into account the change in energy that occurs once the truck begins falling. Tr. 97. Taylor described the process by which potential energy transforms into kinetic energy as a truck's velocity increases during a truck's fall. Tr. 97. Some of the energy is absorbed into the ground upon impact and some of the velocity "carries the center of mass in a rotational sense up toward the tipping point." Tr. 98. If it reaches the tipping point, the truck will roll over. However, the diagrams in Taylor's calculations show that he was still assuming the truck would begin in a position where only its left tires would be on the scale and the remainder would be suspended over air. GX-9, p. 5.

The unsupported assumption of such a compromised position of a truck as would permit tip over to occur, based on the calculations, cannot be accepted as probative of the Secretary's assertions on element two of the required analysis. The conclusions drawn in the Summary of Calculations, and Taylor's testimony, are not found persuasive when the premise on which they are based is flawed. It does not require an expert to make the simple observation that the starting point for a truck to tip over is speculative or even impossible to attain. Therefore, the calculations that proceed from that point have no value in determining whether the elevated scales present a rollover hazard.

In the next analysis, Taylor focused on the scale at the Thomas Pit because it was the lowest scale at the mine. Tr. 101. He reasoned that if the scale at the Thomas Pit presented a roll-over hazard, then all the other scales (which were higher) would necessarily present a roll-over hazard. Tr. 101. Taylor concluded that the center of mass could be as low as four and a half feet above the ground and still present a roll-over hazard for scales at the height of those at the Thomas Pit. Tr. 101-102. Taylor described four and a half feet as a "very low center of mass," and testified that it was reasonable to assume that any trucks accessing the scales at Lakeview would have at least such a center of mass. Tr. 102.

The final analysis that Taylor conducted added the assumption that as the truck fell, its axle would strike the deck of the scale. Tr. 103. Furthermore, it was assumed that the ground to the axle was thirteen inches and the center of mass was at five feet. Tr. 103. Taylor determined that if the truck dropped thirteen inches and struck the scale deck, there would be enough energy

[12] It should be noted that Judge McCarthy found Taylor's analysis flawed. Judge McCarthy wrote: "Although Taylor's static and dynamic analysis of the risk of a vehicle overturning appears to be mathematically and methodologically sound, Dr. Smith's critique establishes that both analyses are premised on the faulty and unrealistic notion that a truck would find itself in a position where either half of the wheels were on the scale and the other half were on the ground (static analysis) or suspended in air (dynamic analysis)." *Knife River*, 34 FMSHRC at 1132.

to move the truck beyond the tipping point and cause a roll-over. Tr. 104. However, these last two analyses suffer from the same problematic assumption as the previous ones. They have the truck beginning in a position where both tires on one side of the truck would be hanging over the scale. Taylor did not explain how a truck whose front side tire was not on the scale would be able to proceed to the point of getting both the front and rear side tires off the scale. Hence, Taylor's testimony that his diagram shows a truck "going off" the edge of the scale is not credible. Tr. 103. Just how a truck could "go off" scales in such a way that both driver's side tires or both passenger's side tires are able to *simultaneously* drop down is not explained. Since PPL No. P10-IV-1 was based on the same conclusions, and was advisory only, it will not be considered and discussed. There is also no reason to consider the testimony on specific types and effects of injuries.

Therefore, I find the assumptions underlying the engineering study and the testimony presented to explain the conclusions drawn materially deficient in showing that the Lakeview scales were a tip over hazard.[13] Accordingly, I cannot accept the calculations, however accurate they might be, as credible and probative of the requirements to be met in element two of the test.

The Commission in *Lakeview II* stated that the presence and effect of rub rails should only be considered after determining whether the drop-off fits within the scope of the safety standard. 33 FMSHRC at 2989. Here, the rub rails provide visible, tactile, and audible warnings of the scales' sides to truck operators. Tr. 112, 140. As the name implies, the tires of a truck that has strayed towards the edge of the scale rub against the rails. Several of the rub rails were damaged, indicating that trucks had rubbed against them; however, no truck has ever gone over a scale at Lakeview, indicating that the rub rails adequately warned the truck operator to direct the truck away from the edge. Tr. 140. Therefore, though not essential to my decision here, I find that the rub rails on the elevated scales at Lakeview adequately protect the safety of persons in equipment

3. The Third Element

The third element of the Commission's test requires a determination of whether the scales are equipped with berms or guardrails that are at least mid-axle height of the largest self propelled mobile equipment which usually travels the roadway. *Lakeview*, 33 FMSHRC at 2988. The parties stipulated to the fact that the mid-axle height of the trucks that travel the Lakeview scales range from 20-24 inches. JX-1, Stip. 12. Furthermore, it was clear from the testimony that the scales at issue have eight-inch rub rails, and no additional berms or guardrails. Tr. 36. Though the issue is moot at this point in the analysis, the scales at Lakeview did not have berms or guardrails that were at least mid-axle height of the largest self propelled mobile equipment that usually travels the roadways, and this element in the analysis is met.

[13] The Secretary submitted additional calculations on the Court's request after hearing that took into account the presence of the rub rails. However, these too did not address the problem discussed above.

CONCLUSION

The Commission's Remand, *Lakeview II*, was for a determination of whether material facts were in dispute in this proceeding. The Commission directed that if such disputed material facts were present, the proper course of action would be to provide an evidentiary hearing. In the Remand, the Commission also established the three-part test discussed above when applying the facts found to 30 C.F.R. § 56.9300. Following the Remand, I found there were material facts in dispute, granted withdrawal of Lakeview's roadway concession, denied motions seeking to restrict application of the new test, and held an evidentiary hearing to ensure a full and fair exposition of the facts and circumstances surrounding the issue presented.

I have found that elements one and two of the test are not met. Either of these findings would be sufficient to hold that the regulation does not apply to the equipment used to weigh trucks at the Lakeview Rock Products mine. Specifically, I find that:

1) The six pieces of scales equipment at Lakeview are not part of this mine's haulage roadways.

2) The Secretary has not established by a preponderance of the evidence that trucks using Lakeview's scales face the hazard of overturning or endangering persons in equipment due to drop-offs at the elevated scales.

3) Element three was stipulated and therefore met.

Since all three elements of the test must be met, 30 C.F.R. § 56.9300 was not violated by Lakeview, and the instant citation was not validly issued.

ORDER

Citation No. 6580393 issued to Lakeview Rock Products, Inc., on September 8, 2010 is **VACATED**.

/s/ Kenneth R. Andrews
Kenneth R. Andrews
Administrative Law Judge

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February 22, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2012-862-M
Petitioner,	:	A.C. No. 04-04819-286483
	:	
v.	:	
	:	
FOOTHILL MATERIALS,	:	
Respondent.	:	Mine: Hogan Quarry

DECISION

Appearances: Nadia Hafeez, Office of the Solicitor, U.S. Dept. of Labor, Denver, Colorado for Petitioner;
Charlie Haener, Safety Director, Foothill Materials, Valley Springs, California, for the Respondent.

Before: Judge Miller

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 Foothill Materials ("Foothill") 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 docket includes one 104(g)(1) order for an alleged violation of Section 46.7(a) of the Secretary's regulations, 30 C.F.R. § 46.7(a). The parties presented testimony and documentary evidence during a hearing held on January 31, 2013.

The parties agree that Foothill is an operator as defined by the Act, and is subject to the provisions of the Mine Safety and Health Act. This citation was issued at the Hogan Quarry near Lodi, California. The mine is a stone quarry but no evidence as to the size of the operator was presented. The parties stipulated that the citations were abated in good faith and that the penalty of $100.00 would not affect Foothill's ability to continue in business. Jt. Ex. 1. The history of assessed violations is admitted as Sec'y Ex. 4.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

On February 15, 2012 MSHA Inspector Steven J. Hagedorn issued Order No. 8603355, pursuant to Section 104(g)(1) of the Mine Act, to Foothill for an alleged violation of Section 46.7(a) of the Secretary's regulations. The regulation cited states as follows:

> You must provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects of the task to be assigned, including the safe work procedures of such task, information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program. This training must be provided before the miner performs the new task.

30 C.F.R. § 46.7(a). The citation described the alleged violative condition as follows:

> The miners; 7 each initials: R.P., K.P., J.B., D.C., J.H., J.S., J.T. The man lift operators had received task training on 12/15/2010. By and (sic) outside contractor. The miners were asked as a group to conduct a pre inspection examination of a 600S man lift. The observed demonstration of the pre op indicated that the training was not effective. When asked about cycling the functions of the ground controls the miners were not aware of what was to be done. The boom was fully extended and the cable tray was defective. When the boom was retracted the cable bounded up. This condition supports the need to fully cycle all of the functions of each system as per the operator's manual. The Federal Mine Safety and Health Act of 1977 declares an untrained miner a hazard to himself and others.

Hagedorn determined that injury or illness was unlikely to be sustained, but if one occurred it could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was not significant and substantial, that one employee was affected, and that the negligence was low. The Secretary has proposed a civil penalty in the amount of $100.00 for this alleged violation.

a. <u>The Violation</u>

While conducting an inspection at the Hogan Quarry, Inspector Hagedorn asked the miners, as a group, to conduct a pre-operation inspection of the JLG man-lift. Hagedorn has been an inspector with MSHA since 1998 and had twelve or more years mining experience prior to joining MSHA, including experience with man-lifts and other equipment. The seven miners who were present for the inspection conducted a pre-op as Hagedorn observed. When the miners were finished, Hagedorn asked to see the manual for the man-lift and worked through the pre-op process with the miners. Hagedorn, in going over the pre-op requirements, completely extended

the boom, something the miners failed to do, and, when bringing it back, observed a defect. Hagedorn testified that the miners told him they did not understand that "that is what they are supposed to do." (Tr. 8). Hagedorn explained that the miners should have used the manual during the pre-op, but they did not and, in his view, the failure to use the manual resulted in them missing a defect on the man-lift. As a result, Hagedorn concluded that the miners had not received adequate task training.

Hagedorn explained that one of the requirements of the pre-op inspection is that the operator of the equipment conduct a functionality test of the ground controls. The manual for the man-lift describes that function test. Sec'y Ex. 3 pp. 2-5. Although the test was partially conducted by the group of miners, it was not done in "full motion." (Tr. 9). In conducting a test of the ground controls, the miners are required to fully cycle through each function, such as rotating the man basket and extending the boom to its full position. In this case, when the boom was finally extended to its fullest, the cabling "balled up" on the return, thereby demonstrating a malfunction of the boom. Hagedorn explained that only by conducting a full functionality test can the miner be certain that the equipment is safe to operate. Based upon the miners' inability to conduct the pre-op, Hagedorn issued an order withdrawing the miners until they were adequately trained to conduct the pre-op inspection. Hagedorn did not issue a citation for the defective equipment, as he understood that the equipment had not been used for three months and was not often used. As a result of the citation, the man-lift was taken out of service. Hagedorn testified that, had the mine operator, instructed the miners that they must use the manual to perform the pre-op check and sign off on it, the training would have been sufficient to abate the violation. Hagedorn also opined that training on the Genie man-lift would not be sufficient for a JGL man-lift.

Charlie Haener, the safety director at the mine, testified that the subject man-lift was the only man-lift at the mine, and while he often conducts training at the mine, he did not feel qualified to conduct the training for this man-lift. Therefore, he hired an outside company to conduct the training. The company hired by Haener conducted the training on December 15, 2010 for the seven miners that were later cited by Hagedorn. During the training, the miners used a "participant's guide," Foothill Ex. A, for a Genie man-lift. Each miner filled out the guide and took the test shown at the end of the guide. In addition to going through the guide, the miners were trained on the equipment itself. The training on this piece of equipment took about two hours. In Haener's view, the use of the Genie handbook for a piece of JLG equipment makes no difference. He argued that the equipment is similar enough that the book, along with working on the equipment itself, assures the training is adequate. The pre-operational inspection is covered by the participant guide, *Id*. at p. 16, and refers the operator to the manual for the equipment as a basis for performing the inspection. The training guide also addressed the function tests, *Id*. at p. 17, and instructs the operator to "follow the step-by-step instructions to test all machine functions." Both the Secretary and Foothill introduced the manual for the JLG lift as an exhibit. Sec'y Ex. 3; Foothill Ex. B.

Robert Praster, the plant foreman, attended the December 2010 task training course with the other miners and was present when the inspector asked the miners to conduct the pre-operational test. Praster indicated that the seven miners used the steps in the manual when conducting the pre-operational test and that they did the functionality test as they were

instructed. According to Praster, they were not taught, and the manual does not require, that the boom be extended to its full position during the test. Praster confirmed that the seven persons who were involved in the group pre-op all operated the man-lift and said that the equipment was rarely used. It had been three months since someone last operated the subject man-lift. The training had taken place about a year prior to the inspection, and it did include standing at the machine and operating it. (Tr. 26). Praster testified that, at the time of the violation, the functions were all checked, just not to their fullest extent.

The manual for the JLG lift lists the elements that must be covered in the pre-operational check, including the use of the ground controls, as well as others. Foothill Ex. B p. 2-1. The manual also refers to a pre-start inspection and the "function check" requiring a functional check of all systems, *Id*. at p. 2-4, and describes that check for the ground control panel. *Id*. at p. 2-5. The check includes an examination of the guards and instructs the operator to "operate all functions and check all limiting and cut-out switches," as well as other checks. The manual also describes the limit switch and advises when checking the boom length switch to "telescope boom out to full extension." Presumably this is the function that was not done and caused the inspector to believe that the training was inadequate. That action, along with the fact that the miners did not use the manual and follow the steps as listed in such, points to inadequate training according to the Secretary.

Although the inspector did not address it in his citation, the Secretary argues that the use of the Genie training guide, instead of one for a JLG man-lift, demonstrates that the training was inadequate. I do not agree. The training guide refers the operator of the man-lift to the manual for the particular equipment being used at the mine and explicitly instructs the operator of that equipment to test all machine functions according to its own manual. The training does not instruct the miners to use the manual for the Genie man-lift, presumably because the manuals may vary as the equipment varies. Additionally, Hagedorn agreed that if the mine instructed the miners to use the manual to conduct for a full pre-op, he would be satisfied that the miners were trained and terminate the violation.

The mandatory standard requires the operator to provide training to any miner who is assigned a new task. In this case the new task was operating the JLG man-lift. The standard, as relevant here, requires the training to include the "health and safety aspects of the task to be assigned, including the safe work procedures of such task . . . ." Further, the standard implies that the training must be competently completed and some demonstration of the knowledge of the task demonstrated by the trainee. There is no dispute here that the miners did receive task training for the JLG man-lift. The question that remains is whether that training was adequate to meet the MSHA standards. The Secretary argues that it was not adequate solely on the basis that the miners, who conducted a pre-op inspection together, failed to use the manual and conduct the functionality test by fully extending the boom. The mine argues that it did everything it is required to do, that the check was done adequately and, in any event, the equipment had not been used for three months.

While I agree that the failure to competently conduct a pre-op examination can be some evidence of a failure of training, it is not dispositive of the issue. There is no evidence that the man-lift was going to be operated on the day of the citation, nor is there evidence of who would

have used the equipment or when the pre-op would have been done. Further, I must assume that extending the boom to its fullest extent is a required part of the task training as there is little credible evidence of that in the transcript. Furthermore, there is nothing to show that certain aspects of the training as demonstrated by the training booklet or the manual were overlooked. I agree with Hagedorn that adequate training is very important and that the lack of such training creates a high degree of danger at the mine when a miner is not trained as he/she should be. The mine operator is responsible to ascertain that the training received by the miners is adequate and that it assures that they can safely operate the equipment on which they are trained. However, in this case, there is simply not enough to prove that the training was inadequate.

The Secretary did not address the adequacy of the training in terms of the amount of time required and the tasks that must be included. The operator testified that the training took two hours and included the workbook and time operating the machine. It is quite possible that, because the equipment was not used often and had not been used for three months, a refresher training was necessary when it was operated. Moreover, I cannot determine whether a miner who was assigned to use the equipment would, when left to his own devices, would refer to the manual and conduct the pre-op inspection in a more thorough manner than the group as a whole. I take notice that the program policy manual of MSHA for this standard includes a statement that "Under Part 46 the written training plan must address each task for which training will be conducted. The training plan must include a general description of the teaching methods, course materials, evaluation methods and competent person(s) who will conduct the training. Additionally, the plan must list the approximate time or range of time to be spent on each task training." The training plan is not a part of the record in this case and, therefore, I cannot determine if the operator met its obligation under that plan.

While I agree with Hagedorn that the miners, as a group, probably were not proficient at the pre-operation inspection, that does not, in and of itself, prove a violation of the task training regulation. There is no evidence that any of these persons intended to operate the equipment, nor is there evidence as to whether more hands-on training is provided when the machine is started up every few months. Further, there is not sufficient evidence for me to determine whether the miners initially received adequate training, but simply did not recall the training when asked by Hagedorn more than a year later. I agree that the failure to understand how to operate the equipment is a serious matter, but the Secretary has not met his burden in proving a violation of the cited standard. Accordingly, Order No. 8603355 is **VACATED**.

II. ORDER

Order No. 8603355 is hereby **VACATED** and the above captioned docket is **DISMISSED**.

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

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February 26, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 2012-450 A.C. No. 01-03380-286740
v.	:	
CONRAD YELVINGTON DISTRIBUTORS, INC., Respondent	:	Mine: Calera

DECISION

Appearances: Thomas Grooms, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner

June Childress, APAC-MidSouth, on behalf of Respondent

Before: Judge David F. Barbour

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor on behalf of her Mine Safety and Health Administration (MSHA) against Conrad Yelvington Distributors, Incorporated, pursuant to section 105(d) and 100 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(d), 820.[1] The Secretary alleges that Conrad Yelvington Distributors is liable for two violations of the Secretary's mandatory safety standards for surface coal mines and surface work areas of underground coal mines, and proposes the imposition of civil penalties in the amount of $200.00. A hearing was held in Birmingham, Alabama and the parties informed me, the night before the hearing, that a settlement agreement had been reached. The terms of the settlement were read into the record and are stated below. The settlement motion was granted on the record. Tr. 11. Conrad Yelvington Distributors shall pay penalties in the total amount of $200.00 for the violations.

[1] Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Deputy Secretary Seth D. Harris is the Acting Secretary of Labor.

STIPULATIONS

The parties stipulated to the following:

The penalties are appropriate for the large size of Respondent's business. Tr. 10.

1. Respondent's history of previous violations did not affect the proposed penalties in a significant way. Tr. 10.

2. The Respondent demonstrated good faith in its attempt to achieve compliance after being notified of the violation. Tr. 10-11.

3. The penalty will not have an effect on Respondent's ability to continue business. Tr. 11.

SETTLEMENT TERMS

The terms of the settlement are as follows:

Citation No. 8523417

1. The Secretary agreed to reduce the level of negligence from "moderate" to "low." Tr. 9.
2. The Respondent agreed to pay the assessed penalty of $100.00. Tr. 9.

Citation No. 8523418

1. The Secretary agreed to reduce the level of negligence from "moderate" to "low." Tr. 9.
2. The Respondent agreed to pay the assessed penalty of $100.00. Tr. 9.

As stated at the hearing, I have considered the representations and documentation submitted in this matter, and I conclude that the proffered **settlement** is appropriate under the criteria set forth in Section 110(i) of the Act. Tr. 11. **WHEREFORE**, the motion for approval of settlement **IS GRANTED**.

ORDER

It **IS ORDERED** that Citation Nos. 8523417 and 8523418 be **MODIFIED** to "low" negligence.

It **IS ORDERED** that Conrad Yelvington Distributors, Incorporated pay a civil penalty in the amount of $200.00 within 30 days of the date of this decision.[2] Upon timely receipt of the payment, this case **IS DISMISSED**.

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

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[2] 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.

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February 26, 2013

TODD DESCUTNER, Complainant,	:	DISCRIMINATION PROCEEDING
v.	:	DOCKET NO. WEST 2011-523-DM
	:	No. WE-MD-2010-18
NEWMONT USA, Respondent.	:	
	:	Mine: Leeville Mine
	:	Mine ID: 26-02512

DECISION

Appearances: Larson A. Welsh, Esq., Cogburn Law Offices, on behalf of Todd Descutner

Kristin R. White, Esq. & Karen L. Johnston, Esq., Jackson Kelly PLLC, on behalf of Newmont USA

Before: Judge David F. Barbour

In my October 31, 2012 decision I found that the complainant, Todd Descutner, had established a discrimination claim under § 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act") and that he was entitled to relief, but that the record was insufficient to determine his monetary damages. Therefore, I retained jurisdiction over the case and ordered the parties to confer to determine whether they could reach an agreement regarding the remedies due to the complainant and the attorney's fees due to his counsel. The parties subsequently came to an accord on some, but not all of these issues. On January 09, 2013, I issued an order awarding partial remedies, providing some consultative guidelines and directing the parties to engage in further discussions regarding Descutner's overtime pay and reasonable attorneys' fees. On February 22, 2013, the parties submitted a Joint Motion to Approve Agreement to the Court, which resolved all outstanding remedial issues. The motion, which was signed by Descutner, his counsel and counsel for the Respondent, stated that the following agreements had been reached:

1. The parties have agreed [that the complainant is entitled] to a total of $3,103.92 in overtime pay.
2. The parties have agreed [that the complainant is entitled] to a total of $94,720.29 in back pay.

3. The parties have agreed [that the complainant is entitled] to a total of $3,801.24 in interest.
4. The parties have agreed to a total of $52,388.00 in attorneys' fees [payable] to the Cogburn Law Offices.

Jt. Mot. 1.

The signed motion also affirms that the Respondent, Newmont, "has submitted payment to Descutner and to the Cogburn Law Offices as outlined above." Jt. Mot. 2.

The joint motion is hereby **GRANTED**. This decision resolves all outstanding issues. **ACCORDINGLY**, this case is **DISMISSED**.

/s/ David F. .Barbour
David F. Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 27, 2013

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of RANDY WHITE, Complainant	: : : : : :	TEMPORARY REINSTATEMENT PROCEEDING Docket No. SE 2013-157-DM SE-MD 13-03
v.	:	
GS MATERIALS, INC., Respondent	: :	Lemon Springs Mine ID: 31-01990

ORDER GRANTING TEMPORARY ECONOMIC REINSTATEMENT

This matter is before me upon an Application of Temporary Reinstatement, filed by the Secretary on December 27, 2012, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2), for an order requiring GS Materials, Incorporated, to temporarily reinstate Randy White to his former position as sand plant superintendent at its Lemon Springs Mine, or to a similar position at the same rate of pay, with the same benefits, the same number of hours, and with the same or equivalent duties assigned to him. Section 105(c) prohibits operators from discharging or otherwise discriminating against miners who have engaged in safety related protected activity, and authorizes the Secretary to apply to the Commission for miners' temporary reinstatement, pending full resolution of the merits of their discrimination complaints.

The Application is supported by the Declaration of MSHA Special Investigator Larry David Smith, II, and a copy of the Discrimination Complaint filed by White on November 7, 2012. The Application alleges that White was fired in retaliation for having made a safety complaint to his supervisor regarding the inadequacy of an eight hour MSHA refresher training class held by GS Materials on October 12, 2012.

The parties negotiated a Settlement Agreement on Temporary Reinstatement, setting forth for my approval a proposal that resolves all issues in controversy respecting this proceeding. The essential provisions of the agreement are as follows:

1. GS Materials agrees to economically reinstate White to full pay and benefits at the current rate for his former position at GS Materials' Lemon Springs mine, consistent with his work schedule and average time on the

job during the twelve months preceding his termination from employment, effective January 7, 2013;

2. White will not report for duty at GS Materials' Lemon Springs Mine during the term of his temporary reinstatement. Instead, White is free to pursue any and all other employment opportunities other than with GS Materials;

3. GS Materials agrees to continue to provide benefits, if applicable, including but not limited to, 401(k) payments, health insurance, life insurance and accidental death or dismemberment insurance, in accordance with the terms of the settlement agreement;

4. Economic temporary reinstatement of White shall continue pending final order on White's related Discrimination Complaint, unless otherwise ordered upon motion of a party.

WHEREFORE, the Application for Temporary Reinstatement is **GRANTED**, and it is **ORDERED** that GS Materials, Incorporated, **TEMPORARILY ECONOMICALLY REINSTATE** Randy White to the position of sand plant superintendent, effective March 1, 2013, in accordance with all terms set forth in the parties' February 15, 2013, settlement agreement.

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

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/ss

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520-N
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February 5, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 2011-932 A.C. No. 46-01456-244760
v.	:	
EASTERN ASSOCIATED COAL LLC, Respondent.	:	Mine: Federal No. 2

ORDER COMPELLING DISCOVERY

Before: Judge Tureck

On May 4, 2010, Joseph C. Statler, who was the former General Manager of Production at Eastern Associated Coal's Federal No. 2 Mine, allegedly instructed two apprentice miners to shovel slop and spillage, and to remove debris from underneath and in close proximity to an unguarded belt tail pulley while the belt was in motion. As a result, 104(d)(2) Order No. 8025255 was issued against Eastern Associated Coal LLC ("Eastern"or "Respondent") for a violation of 30 C.F.R. 75.1722(c). It is an S&S order that alleges a reasonable likelihood of fatal injuries with a proposed penalty of $70,000.[1]

Following the incident and several interviews, MSHA initiated an investigation under §110(c) of the Act, 30 U.S.C. §820(c). On March 14, 2011, the Secretary filed a Petition for Assessment of Civil Penalty against Eastern. On April 12, 2011, Eastern filed its answer and served the Secretary with its First Set of Interrogatories, Requests for Admissions, and Requests for Production of Documents. This case was assigned to me on June 27, 2011, and I stayed the case on September 13, 2011 pending the resolution of the §110(c) investigation. Further extensions were issued, and the stay was lifted on March 1, 2012.

[1] In a related case which has been consolidated for hearing with this one, WEVA 2012-217, the Secretary is seeking a §110(c) penalty against Mr. Statler.

Eastern states in its Motion to Compel that it never received a complete response to its discovery requests from the Secretary. Eastern has filed a Motion to Compel Discovery and a Statement Supporting Motion to Compel Discovery ("Resp't Mot."). The Motion, filed on August 15, 2012, seeks to compel the Secretary to provide documents related to Eastern's discovery requests. The Secretary filed a Response in Opposition to the Respondent's Motion to Compel Discovery ("Sec'y Resp.") on September 10, 2012 and Eastern filed a reply to the Secretary's response on September 18, 2012. For the reasons which follow, the motion is granted.

The documents Eastern still seeks, which the Secretary has withheld on the ground of the work-product privilege, are as follows: hand-written notes of interviews of five miners conducted by MSHA inspector Stephen Wilt on May 11 and 12, 2010; notes of interviews of four miners who were interviewed on July 1, 2010, July 12, 2010, July 21, 2010, and September 13, 2010, respectively, apparently as part of the special investigation; and a report of an interview of Mr. Statler by the MSHA special investigator which took place on September 29, 2010.

Eastern argues that none of these statements and notes were prepared in anticipation of litigation and do not meet the requirements for protection under the work-product privilege. Resp't Mot. at 7-9. It also argues that even if the documents were prepared in anticipation of litigation, it should still be permitted to receive the information because it has a compelling need for the material and it lacks access to a fair substitute. *Id*. at 7.[2] Since I hold that the documents Respondent seeks are not work-product, I will not address the latter issue.

In her response, the Secretary states that she has provided counsel for Eastern a summary of the special investigator's interviews of the four miners and the interview of Mr. Statler. Sec'y Resp. at 4. She argues that the summaries should be sufficient to meet Eastern's needs; that the full documents are privileged under the work-product rule; that Eastern could obtain substantial equivalents of the materials with minimal effort; that Eastern cannot establish a substantial need for the documents; and that providing the full documents would violate the Informant's Privilege. Sec'y Resp. at 3-4, 9-12.

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[2] Under the Federal Rules of Civil Procedure, which under the Commission's Procedural Rules provide guidance where the Mine Act and Regulations do not cover a procedural question, *see* 29 C.F.R. §2700.1(b), a party seeking to obtain documents protected by the work-product privilege must show that it "has substantial need of the materials in the preparation of the party's case and . . . is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3). Furthermore, "[i]f the court orders that the materials be produced because the required showing has been made, the court is then required to 'protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.'" *Asarco* at 2558.

Work-Product Privilege

The first issue to be resolved is whether the work-product privilege is applicable to the reports of interviews of Mr. Statler and four miner witnesses by the special investigator. If these documents are not work-product, the notes of interviews conducted by the mine inspector as part of his inspection, which were prepared even earlier than the special investigator's, cannot be work-product. The Commission has held that the work-product rule protects "(1) documents and tangible things, (2) prepared in anticipation of litigation or for trial (3) by or for another party or by or for that party's representative." *Asarco, Inc*., 12 FMSHRC 2548, 2557-58 (Dec. 1990). The burden is on the party seeking to invoke the privilege to demonstrate that this three-part test has been met.

Here, the first and last aspect of the three part test apply since the special investigator's interview reports are clearly "documents" that were prepared "by or for another party or by or for that party's representative." Therefore, whether the work-product privilege applies hinges on whether the special investigator's witness statements were prepared in anticipation of litigation. *Asarco* involved a discovery dispute over the notes that a special investigator made while interviewing a supervisory MSHA inspector regarding his conversation with an attorney for the Secretary. The Secretary relies on the following quotation from *Asarco* to support her position:

> A major function of an MSHA special investigation is to determine whether litigation should be commenced under section 110(c) or (d) of the Mine Act. 30 U.S.C. § 820 (c) & (d). A special investigator does not know at the outset of his investigation whether charges will be filed in that particular case. Nevertheless, the purpose of his investigation is to allow the Secretary to determine whether a case should be filed.... [T]his civil penalty case, brought under section 110(a), 30 U.S.C. § 820(a), is closely related litigation and it further appears that it could fairly be said that the documents were prepared in anticipation of that litigation.

Asarco at 2558.

The Secretary argues that this holding in *Asarco* is dispositive of the issue of whether the notes and interview reports of the special investigator are privileged work-product. I disagree. First, the facts in *Asarco* which led the Commission to hold that the special investigator's notes are protected by the work-product privilege are significantly different from those in this case. For one thing, in *Asarco* an attorney was already involved in the case, which indicates that litigation was either under consideration or had begun; and the document sought through discovery was the special investigator's notes of a conversation a supervisory inspector had with an attorney, not simply notes and reports of witness interviews. The notes of the conversation with an attorney which were held to be protected in *Ansarco* were likely to show the attorney's mental impressions, conclusions, opinions and/or legal theories, the very things that the work-product privilege is intended to protect from disclosure. *See, e.g., Hickman v. Taylor*, 329 U.S.

495 (1947).[3] But the work-product privilege is not intended to apply to documents prepared prior to the involvement of an attorney which the attorney subsequently uses in his or her trial preparation or plans on proffering during litigation. Here, there is no indication that an attorney was involved during the special investigation. That in *Asarco* an attorney was already in the picture, and notes of a conversation with the attorney was the document in dispute, makes *Asarco* materially different from the matter at hand.

That brings me to the second critical difference between *Asarco* and this case. That an attorney was involved in *Asarco* indicates that the case was relatively far along when the special investigator's notes were prepared, at a point where it is likely that litigation was at least being considered even if the decision to litigate had not yet been made.[4] On the other hand, in this case, three of the four interviews conducted by the special investigator were conducted within a little more than two months of the initial inspection, and the fourth was conducted within four months. It is highly unlikely that an attorney was involved in the special investigation even on the date of the latest interview, September 29, 2010, since the *Petition of the Secretary of Labor for Assessment of Civil Penalty* against Mr. Statler was not issued until December 21, 2011, almost 15 months later. Even the *Secretary of Labor's Petition for the Assessment of Civil Penalty* against Eastern, assuming the penalty proceeding against Eastern is even relevant to determining whether the special investigator's interview notes are protected by the work-product privilege, was not issued until March 14, 2011, almost six months after the latest interview; and since the petition was prepared by a Conference and Litigation Representative, not an attorney, it can be stated with some certainty that an attorney was not involved in Eastern's case on September 29, 2010.

That the special investigation was not conducted on behalf of an attorney, and a penalty assessment against Mr. Statler was not issued until the very end of 2011, make it difficult to understand how the investigator's notes of interviews, the latest of which was conducted on September 29, 2010, could be have been prepared in anticipation of litigation. As the Commission held in *Asarco*:

> *[P]articular litigation* must be contemplated at the time the document is prepared in order for the document to be protected.

Asarco, supra, at 2558 (citation omitted) (emphasis added).

The Secretary also cited the Commission's decision in *Consolidation Coal Co.*, 19 FMSHRC 1239 (July 10, 1997), to support her position that the special investigator's notes of

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[3] That the privilege is now generally applied to documents prepared by non-lawyers as well as lawyers simply recognizes that attorneys often utilize the services of non-lawyers in preparing their cases for trial.

[4] Just how far the case had proceeded in *Asarco* at the time the conversation with the attorney occurred is unclear.

interviews were privileged. But rather than support her position, this decision actually supports a contrary conclusion. In *Consolidation Coal*, in holding that memoranda prepared by a special investigator were protected by the work-product privilege, the Commission stated:

> We further find that the documents have been 'prepared in anticipation of litigation or for trial,' because each was prepared *after MSHA had filed civil penalty proceedings against Consol* ....

Id. at 1243 (emphasis added). As was pointed out above, the civil penalty proceedings against both Eastern and Mr. Statler were filed well after the special investigator conducted the interviews in question.

Accordingly, the case law does not support the Secretary's assertion that the special investigator's reports of interviews in this case are protected by the work-product privilege, and I find that they are not protected. In addition to the factors discussed above, the Secretary's contention that special investigations are not conducted in the ordinary course of business is unsupported in the record. Although special investigations may be conducted in connection with only a relatively small percentage of mine inspections, it does not follow that they are conducted outside the ordinary course of the special investigators' work; and if they were conducted in the ordinary course of business, they cannot be held to be work-product. But regardless of whether the special investigations were conducted in the ordinary course of business, the above discussion shows that it is highly unlikely an attorney was involved in the special investigation, and "particular litigation" was not contemplated, when the interviews by the special investigator in this case were conducted. That the results of the special investigation could *lead* to litigation does not make the special investigators' interview reports work-product. Nothing in *Asarco* or *Consolidation Coal* leads to a contrary conclusion.

Thus, I conclude that the special investigator's interview notes of Mr. Statler and the four miners must be turned over to Respondent since they are not protected by the work-product privilege.[5]

The second issue to be resolved is whether Inspector Wilt's handwritten notes that document interviews conducted on May 11 and 12, 2010 of five miners are protected by the work-product privilege. Clearly, they are not. For they were prepared in the inspector's ordinary course of business, at a time when litigation could not possibly have been contemplated. Further, at that preliminary stage, an attorney could not have been involved in the matter. Accordingly, Inspector Wilt's notes of May 11 and 12, 2010 interviews must be provided to Respondent.

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[5] The Secretary's contention that her counsel's summaries of the interview notes, which she represents have been turned over to Eastern, are an adequate substitute for the actual interview notes, has no merit.

Finally, the informant's privilege is applicable to individuals furnishing information to government officials concerning possible violations of the Mine Act. *Secretary/Logan v. Bright Coal Co., Inc.*, 6 FMSHRC 2520, 2524 (Nov.1984). Here, the informant's privilege applies to both the special investigator and mine inspector's notes of interviews of the miners since their statements concern an alleged violation of the Mine Act. Thus, the Secretary may redact the names and other pertinent identifying information from the interview notes regarding the miners. The Secretary argues that producing the documents will require extensive redactions in order to protect the identities of the miners. Nevertheless, the Secretary must still provide the documents, and redact only what is absolutely necessary to protect the identity of the miners.

ORDER

Based on the analysis above, Eastern's Motion to Compel Discovery is **GRANTED**.

It is **ORDERED** that, within 10 days of this order, the Secretary shall provide copies of Mr. Statler's interview statements, MSHA inspector Stephen Wilt's notes of his interviews of miners on May 11 and 12, 2010, and the notes of the interviews of miners by the special investigator on July 1, 12 and 21, 2010, and September 13, 2010, provided that the names of the miners and other information clearly identifying them may be redacted.

/s/ Jeffrey Tureck
Jeffrey Tureck
Administrative Law Judge

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February 11, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2011-13
Petitioner	:	A.C. No. 11-02752-232235-02
v.	:	
	:	
THE AMERICAN COAL COMPANY,	:	New Era Mine
Respondent	:	

DECISION DENYING SETTLEMENT MOTION

Before: Judge William B. Moran

Before the Court is the Secretary's Motion to Approve Settlement ("Motion") in LAKE 2011-13, "The Ameriacan [*sic*] Coal Company."[1] The Court has reviewed the Motion and finds it seriously wanting. Accordingly, it is DENIED. Further, for the reasons which follow, the Court declines to accept the appearance of the Conference and Litigation Representative.

The Motion seeks an across-the-board reduction of 30 (thirty) percent for *each* of the 32 citations involved. That, in itself, is a red flag. The idea that *every one* of 32 citations could warrant a 30% reduction demonstrates, by that fact alone, that the reductions were more in the nature of yard sale, rather than any individualized review meriting, by some impossibly small odds, that each just happened to have earned such an implausibly uniform reduction.

The Motion itself did nothing to dispel this conclusion. The *entirety* of the justification provided: "After further review of the evidence, the Secretary has determined that a reduced penalty is appropriate in light of the parties' interest in settling this matter amicably without further litigation. In recognition of the nature of the citations at issue, and the uncertainties of litigation, the parties wish to settle the matter with a 30% reduction in the total assessed penalty with no changes in gravity or negligence for any of the citations at issue." If this were a satisfactory justification, then *every* case would warrant a 30% reduction to avoid the

[1] The parties were apparently unaware that the Commission moved as of late August 2012, now some 5 plus months ago, to the address listed above. The Commission no longer has its New Jersey Avenue address.

"uncertainties of litigation." The Secretary's Part 100 penalty regulations contemplate only a 10% reduction in its proposed penalty formula for an operator's good faith.[2]

Ironically, the Motion, as just noted, then proceeds to confirm what appears to be the case; on the basis of the motion itself, there is no legitimate basis to reduce any of these citations. The Motion states this is exactly the case, noting there are *no changes* in gravity or negligence for *any* of the *32* citations. Nor can it be said that the cited matters are all negligible violations. A few examples from among the 32 citations demonstrate this: a haul truck seriously leaking oil with an engine that could not be shut down (Citation 8424013); up to 5 feet of water in a longwall bleeder (Citation 8424511); inadequate roof and rib support, a problem which had been cited some 107 times at this mine in the past 2 years, (Citation 7579878); an outdated escapeway map and an incompletely installed life line in the primary escapeway (Citations 8424509 and 8424508); coal accumulations up to 20 inches in depth, and 18 feet wide for a distance of 165 feet, and another similar such situation (Citations 8424502 and 8424967).

The only thing that the motion gets right is the math; each of the 32 alleged violations was reduced by 30 percent. Motions such as these serve to demonstrate the great wisdom of Congress. It knew that without the fail-safe it installed in the Mine Act, through Section 110(k) of that Act, settlements such as this could occur. For reasons underlying exactly the kinds of unjustified reductions presented here, it provided that "No proposed penalty, which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). Submissions such as this lay bare the failures that would most certainly occur should the Secretary ever be able to have this protective provision removed from the Commission's oversight.

As the Commission most recently stated in *Secretary v. Black Beauty*, 2012 WL 4026640 (Aug. 2012), "The plain language of section 110(k) of the Mine Act explicitly authorizes the Commission to review a proffered settlement of a contested penalty." It noted that "[t]he legislative history of section 110(k) explains that Congress intended the settlement of a penalty to be a transparent process that is open to public scrutiny and that the Commission is authorized to approve contested penalties offered for settlement. The Senate Report recognized, in particular, the importance of an Administrative Law Judge's review of a proposed settlement of a penalty . . . . [t]o remedy this situation, section 111(l) [later codified as section 110(k)] provides that a penalty once proposed and contested before the Commission may not be compromised except with the approval of the Commission. . . . By imposing these requirements, the Committee intends to assure that the abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations are avoided. *It is intended that the Commission and the Courts will assure that the public interest is adequately protected before approval of any*

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[2] 30 CFR § 100.3 Determination of penalty amount; regular assessment. Subsection (f) provides: "Demonstrated good faith of the operator in abating the violation. This criterion provides a 10% reduction in the penalty amount of a regular assessment where the operator abates the violation within the time set by the inspector."

reduction in penalties. *Id.* (emphasis added by the Commission). To carry out this responsibility, the Judge must have information sufficient to establish that the penalty reduction does, in fact, protect the public interest." *Black Beauty* at *4-5.[3]

Accordingly, the Secretary's Motion is DENIED.

However, that does not end this matter. The Conference and Litigation Representative (CLR) has sought to be accepted to represent the Secretary in accordance with the notice of limited appearance he filed with the penalty petition. In support of that request, the CLR has cited *Cyprus Emerald Resources Corporation*, 16 FMSHRC 2359 (Nov. 1994). This decision is routinely cited by CLR's in these matters. The authority for this request stems from subparagraph (4) of section 2700.3 of the Commission's regulations which provides that, apart from attorneys, other persons may practice before the Commission "with the permission of the presiding judge or the Commission." For that exception, potentially allowing non-attorneys to practice, it is clear that competence is a *sine qua non* for such permission to be granted by the presiding judge. Regrettably, here that competence has not been demonstrated. The idea that there can be a wholesale, large, across the board reduction for a significant number of violations with no justification other than to achieve an amicable settlement and to avoid further litigation, demonstrates a lack of understanding about the operation of the Mine Act's requirements where civil penalty reductions are sought. Accordingly, in the exercise of the Court's discretion, it must decline acceptance of the CLR in this instance.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

[3] Given this statutory mandate to approve or disapprove proposed penalty reductions, the Commission has promulgated procedural rules which require parties to submit factual support for a proffered settlement agreement. Commission Procedural Rule 31 provides that a "proposed penalty that has been contested before the Commission may be settled only with the approval of the Commission upon motion," and expressly requires a party seeking the approval of a settlement to submit "[f]acts in support of the penalty agreed to by the parties." 29 C.F.R. § 2700.31(b)(3). Rule 31 further provides that any "order by the Judge approving a settlement shall set forth the reasons for approval and shall be supported by the record." 29 C.F.R. § 2700.31(c). Footnote Rule 65 provides in part that a "Judge may require the submission of proposed findings of fact." 29 C.F.R. § 2700.65.

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February 21, 2013

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. VA 2012-397 A.C. No. 44-06864-286093-01
v.	:	
DICKENSON-RUSSELL COAL COMPANY, LLC, Respondent	: : :	Mine: Cherokee Mine

ORDER REJECTING AMENDED SETTLEMENT MOTION
ORDER FOR CERTIFICATION FOR INTERLOCUTORY REVIEW

Before: Judge McCarthy

This case is before me upon a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). On August 23, 2012, the Secretary of Labor,[1] through its Solicitor's Office, filed a motion seeking approval of a proposed settlement pursuant to Commission Rule 31, 29 C.F.R. § 2700.31. The Solicitor requested that Citation No. 8190957 be modified to delete the significant and substantial designation and to reduce the proposed penalty from $971.00 to $500.00. The settlement, however, did not proffer any factual justification for the proposed modifications.[2]

[1] During the pendency of this proceeding, the Secretary of Labor, Hilda Solis, resigned her post as Secretary effective January 22, 2013. Pending Senate confirmation of her successor, Deputy Secretary Seth D. Harris is the Acting Secretary of Labor.

[2] The one citation at issue alleges that Respondent violated Cherokee Mine's Approved Emergency Response Plan by failing to provide multi-gas detectors at the Strata Refuge Alternative located on crosscut 116 along the No. 3 belt. The citation was designated as significant and substantial and MSHA proposed a penalty of $971.00. This case was originally designated for simplified proceedings pursuant to 29 C.F.R. 2700.102(b). After review of the record and discussions with the parties, it became apparent that this case was not appropriate for simplified proceedings. On December 3, 2012, I issued an Order Discontinuing Simplified Proceedings in accordance with 29 C.F.R. § 2700.104.

On October 9, 2012, my office requested that the parties provide an amended settlement consistent with Commission Rule 31(b)(1), 29 C.F.R. § 2700.31(b)(1), which provides, inter alia, "[t]hat a motion to approve a penalty settlement shall include . . . facts in support of the penalty agreed to by the parties." The Secretary declined to do so and expressed preference that the proposed settlement be rejected.

On October 15, 2012, I issued an Order rejecting the proposed settlement, which admonished the Secretary's Arlington counsel for a repeated refusal to comply with clear instructions from the Commission and the Office of Administrative Law Judges requiring factual support for proposed settlement submissions. This case was set for hearing on November 15, 2012, under separate cover.

On October 23, 2012, the Secretary filed an Amended Motion to Approve Settlement and Motion to Cancel Hearing. In the amended motion, the Secretary provided the following factual basis for the penalty reduction:

> . . . [t]he Secretary submits the fact that the Respondent contends that its practice is for every miner or group of miners to have a multi-gas detector accessible at all times. This practice, the Respondent contends, suggests that anyone going to the shelter would have a detector or be with a group that has one. The Secretary has determined that the violation was less likely to result in a serious injury. The Secretary also acknowledges that the number of people affected may have been lower than originally determined by the inspector because at least some of the miners the inspector observed near the refuge alternative may have been carrying multi-gas detectors in accordance with the company's practice.

Despite the Secretary's determination that less than three people may have been affected, the settlement did not propose that the citation be modified to reflect the Secretary's determination.[3] Similarly, the Secretary determined that the violation was "less likely to result in a serious injury," but did not request that the citation be modified accordingly. Instead, the Secretary unilaterally withdrew the S&S designation without seeking approval from the undersigned.

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[3] While the Secretary is not required to amend the citation when proposing a small reduction in the proposed penalty, doing so helps create context for the Commission to ascertain the appropriateness of a penalty settlement. Ideally, when a reduction in the proposed penalty is based on, for example, a reduction in negligence, the settlement should specify the level of negligence the parties are willing to accept as part of the settlement. To state that "the negligence is lower than the Secretary previously determined" is too vague. Without knowing where the parties agree that the negligence falls on the spectrum, the appropriateness of the proposed settlement is difficult to discern, particularly in light of the terse, factual basis often provided to justify a reduction in a proposed penalty.

On November 1, 2012, my law clerk, Jason Riley, convened a conference call with counsel for the Secretary, Scott Hecker; Associate Regional Solicitor, Douglas White; and Respondent's counsel, Cameron Bell. At the discretion of the Court, the transcript of the call was incorporated into the record. During the call, the Secretary was asked to expound upon the argument that the Secretary retained authority to modify citations and remove S&S designations in the context of a settlement, without leave of the Commission.

> Mr. Riley: . . . . Mr. Hecker, concerning the S&S designation, in the settlement you state that the Secretary has determined to delete the S&S designation but do not request that the S&S designation be removed by the judge. I believe you assert that it was within the prosecutorial discretion of the Secretary to do so. Can you please elaborate on the Secretary's position on this matter?
>
> Mr. Hecker: Yes. Our motion contains case law in paragraph eight addressing the unreviewable discretion of designation of S&S. *Mechanicsville* is cited there, also *RBK Construction*. We believe those cases, these Commission cases, point to the fact that it's the Secretary's discretion to designate in the first instance an S&S finding on a violation and that it's our right to do so and that the Commission's purview is over the approval of the assessment on that violation. That's the Secretary's position and I believe has been the Secretary's position. Those cases are from 1993 and 1996 so it's a consistent position for an extended period of time.
>
> . . . .
>
> Mr. White: It's long been our position that the judge has authority - and there's no question about this - has authority to make ultimate determinations of S&S and unwarrantable findings after a hearing, but *prior to the hearing*, it is solely within the Secretary's discretion to charge or to designate or un-designate S&S and unwarrantable findings . . . our position is that the judge's discretion is to approve penalty settlements and if for example Dickenson and Russell had filed a pre-penalty contest here and we negotiated with them and settled with them before there had ever been a penalty proposed and we'd agreed to remove the S&S, the Commission would have clearly no authority over that. It's only in the context of a penalty that the authority to review the settlement arises and it is the penalty, that our position it's the penalty that they have the authority to review, not the designation of S&S or unwarrantable.

Conference Call Tr. at 1-2 (emphasis added).

Citing the Commission's decision in *Mechanicsville*, the Secretary claims authority to change the S&S status of a contested citation at any time prior to hearing. *Id., citing*

Mechanicsville Concrete, Inc., 18 FMSHRC 877 (June 1996). Such authority, the Secretary argues, is consistent with the enforcement role delegated in the Mine Act and is analogous to the unreviewable prosecutorial discretion afforded when determining that a citation be vacated. As such, the Secretary claims that no factual basis is necessary for modification of the S&S designation prior to hearing.

In *Mechanicsville*, MSHA issued a citation for the operator's failure to install a windshield wiper on a front-end loader, and designated the citation as non-S&S. 18 FMSHRC at 878. After hearing, however, the judge determined that the danger posed by the violative condition warranted that the citation be designated as S&S. *Id.* On appeal, the Commission found that the S&S designation was an enforcement responsibility granted exclusively to the Secretary under the Mine Act, and that the judge erred in determining, on his own initiative, that the violation was S&S. *Id.* at 789. The Commission reasoned that, while section 104(d) gives the Commission authority to affirm, modify, or vacate a citation, a judge may not make additional findings and conclusions that are absent from the original pleading. *Id.*

The Secretary's reliance on *Mechanicsville* is misplaced. The question here is not whether the Secretary has the unreviewable discretion to designate a citation as S&S – it is clear that the Secretary is granted such exclusive authority. Rather, the issue presented is whether the Secretary can modify a citation offered in consideration for Respondent's acceptance of a contested civil penalty proposal without seeking approval from the Commission.

After an MSHA inspector issues a citation, the Secretary is afforded ample time to exercise prosecutorial discretion and modify a citation to correct for error or to more accurately reflect the conditions or practices at the mine. In accordance with MSHA policy, the Secretary may choose to pursue good-faith settlement efforts prior to contest or the formal filing of a civil penalty petition. Press Release, Mine Safety & Health Admin., US Dep't of Labor, MSHA to Start Using Pre-Assessment Conferencing Procedures, 11-1703-NAT (Dec. 1, 2011), *available at* http://www.dol.gov/opa/media/press/msha/MSHA20111703.htm. The Commission lacks jurisdiction to review such pre-contest settlements.

Once the operator contests the Secretary's proposed assessment of penalty, however, Commission jurisdiction attaches. 30 U.S.C. 815(d).

> . . . . When a proposed penalty is contested, the Commission affords an opportunity for a hearing, "and thereafter . . . issue[s] an order, based on findings of fact, affirming, *modifying*, or vacating the Secretary's citation, order, *or proposed penalty*, or directing other appropriate relief." *Id.* (Emphasis added). *See also* 30 U.S.C. § 810(i)("The Commission shall have authority to assess all civil penalties provided in this Act"). Thus, it is clear that under the Act the Secretary of Labor's and the Commission's roles regarding the assessment of penalties are separate and independent. The Secretary proposes penalties before a hearing based on information then available to him and, if the proposed penalty is contested, the Commission affords the opportunity for a hearing and assesses a

> penalty based on record information developed in the course of an adjudicative proceeding. *See* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 89, 632-635, 656-657, 666-662, 906-907, 910-911, 1107, 1316, 1328-29, 1336, 1348, 1360.
>
> The respective governing regulations adopted by the Commission and the Secretary regarding penalty assessments clearly reflect the Act's bifurcated penalty assessment procedure. Commission Rule of Procedure 29(b) provides:
>
> > In determining the amount of the penalty neither the judge nor the Commission shall be bound by a penalty recommended by the Secretary. . . .
>
> 29 C.F.R. § 2700.29(b). The Secretary's regulations in 30 C.F.R. Part 100 expressly apply only to the Secretary's proposed assessment of penalties. *See also* 47 Fed. Reg. 22287 (May 1982) ("If the proposed penalty is contested, the [Federal] Mine Safety and Health Review Commission exercises independent review and applies the six statutory criteria without consideration of these [MSHA penalty assessment] regulations.")

See Sellersberg Stone Co., 5 FMSHRC 287, 291 (Mar. 11, 1983) (emphasis in original).

Section 110(k) provides for Commission oversight of settlements where the Secretary has agreed to compromise or mitigate a proposed penalty. The Act provides for this independent review to guard against possible abuses of the Secretary in proposing settlements that are inconsistent with the public interest or the Act's objectives. *Knox County Stone Co.*, 3 FMSHRC 2478, 2479 (Nov. 1981).[4] In proposing a settlement, the Secretary historically has moved the Commission to amend the penalty and modify the citation itself. *See, e.g., Energy Fuels Coal, Inc*., 11 FMSHRC 78 (Jan. 1989) (ALJ) (approving Secretary's request that S&S designation be removed); *Consolidation Coal Co.*, 13 FMSHRC 473 (Mar. 1991) (ALJ) (approving Secretary's request that S&S designation be removed); *Jim Walter Resources, Inc*., 1992 WL 534707 (Aug.

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[4] After acknowledging the secretive nature of the settlements entered into by Mining Enforcement and Safety Administration (the predecessor to MSHA prior to 1978), Congress intended that any settlement of mining violations be in the public record. "The Committee recognizes that settlement of penalties often serves a valid enforcement purpose. The provisions of Section 111(1) only require that such settlements be a matter of public record and approved by the Commission or Court." S. Rep. No. 950181, 95th Cong. 1st Sess. 45 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 633 (1978). In granting the Commission review over settlements, Congress purposely curtailed the Secretary's enforcement role in favor of transparency and judicial oversight.

1992) (ALJ) (approving parties' joint motion to remove the S&S designation); *Harvey W. Buche Road Building, Inc.*, 27 FMSHRC 395 (Apr. 2005) (ALJ) (approving settlement modifying citation's negligence designation).[5] Such motions make eminent sense as the penalty and the citation allegations are inextricably linked.[6]

In assessing the appropriateness of a proposed settlement, the Commission and its judges must consider the operator's history of prior violations, the size of the operator's business, the operator's negligence, the effect of the operator's ability to continue business, the good faith of the operator to achieve rapid abatement of the violation, the penalty's deterrent effect, *and the gravity of the violation*. 30 U.S.C § 820(i)(emphasis added); *See Black Beauty Coal Co.,* 34 FMSHRC ___, slip op. at 10, Docket No. LAKE 2008-327 (Aug. 20, 2012). The S&S designation is an important indicator of gravity. While the S&S designation itself does not directly affect the proposed penalty under the Part 100.3 criteria that the Secretary uses to formulate proposed civil penalties,[7] the Commission has held that S&S determination must be premised on findings that the violation contributed to a discrete safety hazard that was reasonably likely to result in an injury of a reasonably serious nature. *See Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). By agreeing to remove the S&S designation in a proposed penalty settlement, the Secretary essentially concedes, for purposes of settlement, that injury was

[5] The Commission has created settlement templates. Although the parties are not required to use the Commission-created settlement templates, 29 C.F.R. §2700.31 requires parties to include all pertinent information, which is presumably outlined in the template. The templates instruct parties to provide changes to both the penalty and citation itself. Federal Mine Safety & Health Review Comm'n, *Settlement Order Flow Chart, Washington DC Office*, http://www.fmshrc.gov/flowchart.pdf (last visited February 21, 2013).

[6] In *Rock N Roll Coal, Inc.*, the Secretary argued that a change in penalty was justified if the Secretary simply stated that the citation was modified from a 104(d)(1) citation to a 104(a) citation and the level of negligence reduced from "high" to "moderate." 33 FMSHRC 3253 (Dec. 2011) (ALJ)**.** The Secretary made similar assertions in the present case prior to issuance of my first Order Rejecting Settlement. *See Dickenson-Russell Coal Company, LLC*, 2012 WL 6494599 (Oct. 2012). If the Secretary can also amend the citation in a contested matter without Commission review and approval, section 110(k) would be rendered meaningless. The Secretary would be able to amend the citation without review, and then use the fact that the citation was amended to justify the change in penalty.

[7] The Commission and its judges are not required to follow Part 100.3 penalty formulation when assessing a penalty. 29 C.F.R. § 2700.30(b). As the Seventh Circuit recognized, as an independent adjudicatory agency, the Commission is not bound by rules promulgated by the Secretary. *Sellersburg Stone Co.,* 736 F.2d 1147, 1152 (7th Cir. 1984) (The Commission "is governed by its own regulations, which explicitly state that, in assessing penalties, it need not adopt the proposed penalties of the Secretary.")

unlikely. Such a concession has direct implications on the appropriateness of the Secretary's proposed penalty and is subject to the same judicial review afforded proposed penalty revisions.[8]

In light of the foregoing, I reject the proposed settlement agreement in which the Secretary seeks to unilaterally remove the S&S designation after the proposed assessment of penalty has been contested before the Commission. I find that such action contravenes the intent of Congress set forth in the foregoing legislative history concerning Commission oversight of the settlement approval process, as sanctioned by the language in Section 110(k) of the Mine Act, which provides that no proposed penalty which has been contested shall be settled, except with the approval of the Commission. Accordingly, I conclude under *Black Beauty*, *supra*, that the Secretary may not modify a contested citation, including the S&S designation, in the settlement of a civil penalty proceeding, without Commission approval. Furthermore, as I found in *Rock N Roll Coal*, *supra,* I find that any such modifications offered in consideration for Respondent's acceptance of a contested civil penalty proposal should be supported by adequate factual foundation, as set forth in Commission Rule 31(b).

The Secretary has shown an unwillingness to accept this case law and the rationale supporting prior settlement rejections by Commission Administrative Law Judges. *See Black Beauty Coal Co.,* 34 FMSHRC ___, slip op., Docket No. LAKE 2008-327 (Aug. 20, 2012); *Rock N Roll Coal, Inc*., 33 FMSHRC 3253 (Dec. 2011) (ALJ); *Dominion Coal Corp.*, 34 FMSHRC ___, slip op., Docket No. VA 2012-227 (October 17, 2012) (ALJ); *Dickenson-Russell Coal Company, LLC*, 2012 WL 6494599 (Oct. 2012) (ALJ); *The American Coal Co.* 35 FMSHRC ___, slip op., Docket No. LAKE 2011-13 (February 11, 2013). Absent a ruling from the Commission on this matter, I do not expect the Secretary to abandon this position.

Commission Rule 76(a), 29 C.F.R. § 2700.76(a), provides that, upon the motion of the judge or a party, the Commission may grant interlocutory review where the judge's interlocutory ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. Although the parties have not moved that the issue presented by this case be certified for interlocutory review, the large number of settlement motions filed for approval with the Commission warrants further clarity as to the Commission's role in reviewing proposed settlements.[9] Further, the scope of the Commission's authority to review non-

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[8] Sometimes during settlement negotiations, an operator will accept an originally proposed penalty in return for removal of an S&S designation. In such cases, the appropriateness of the penalty is difficult to ascertain absent justification for removal of the S&S designation. Even if I were to adopt the Secretary's argument that section 110(k) limits the Commission's review of settlements to penalties alone, the fact remains that, in such an arrangement, the parties are still settling the underlining civil penalty and the Commission must review the parties' justifications for such settlement.

[9] While the Secretary has not moved for interlocutory review in the present case, the Secretary did so in *Black Beauty Coal*, *supra*. *See* Secretary's Unopposed Motion for

(continued...)

pecuniary settlement provisions is obscured by a split decision in *Madison Branch Management*, 17 FMSHRC 859 (June 1995).[10]

I find that it will materially advance the final disposition of the present case (and many others like it) by certifying for interlocutory review the issue of whether the Secretary can remove the *contested* S&S designation without leave of the Commission. If the Commission were to reverse my rejection of the settlement motion, it would be unnecessary to reschedule this case for hearing. Further, there would be no need for the Secretary to seek Commission approval when proposing to modify a citation that has been contested. Under the Secretary's theory, which I reject, Commission approval would merely extend to a proposed penalty settlement. Accordingly, I conclude that review by the Commission will materially advance resolution of this proceeding and possibly hundreds of other settlements pending before Commission judges.

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[9](...continued)
Certification for Interlocutory Review and for Continuance of Hearing, *Black Beauty Coal Co.*, 32 FMSHRC 714 (June 2010) (LAKE 2008-327**,** LAKE 2008-590**,** LAKE 2009-224) (Secretary moved to certify, inter alia, "whether, in a settlement context just as in an enforcement context, the Secretary has unreviewable prosecutorial discretion to modify: (a) a citation from 'significant and substantial' ("S&S') to non-S&S; and (b) a Section 104(d) citation/order to a Section 104(a) citation/order"). The judge, however, certified the following questions for review: (1) what requirements, if any, an administrative law judge may impose upon the Secretary to demonstrate the six penalty criteria as they relate to a modified penalty in a settlement context, and (2) whether an administrative law judge may consider the deterrent purposes that underlay the penalty scheme in reviewing a settlement proposal. Accordingly, the Commission did not have occasion to pass on the important issues presented here.

[10] In *Madison Branch*, *supra*, the judge rejected a settlement based on the inadequacy of the abatement measures and ordered the parties to provide additional information explaining why the proposed inspection program would be adequate to abate the hazard. 17 FMSHRC at 864. In a split decision, Commissioners Jordan and Marks found that section 110(k) "requires the judge to accord due consideration to the entirety of the proposed settlement package, including both its monetary and non-monetary aspects." *Id.* at 867, 868. Commissioners Doyle and Holen dissented, concluding that the plain meaning of the Act and the associated legislative history, which is limited to penalty settlements, proscribes the Commission from considering non-monetary settlement provisions. *Id.* at 870-73.

WHEREFORE, the Secretary's Amended Settlement Motion is **DENIED** and it is **ORDERED** that the following questions are **CERTIFIED** for review: (1) Whether the Secretary can remove the S&S designation without leave of the Commission in settlement of a proposed assessment of civil penalty that has been contested? (2) Whether the Act authorizes Commission review of non-pecuniary settlement provisions?

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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February 28, 2013

SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR ON BEHALF OF DOUGLAS A. PILON,	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	Docket No. LAKE 2010-766-D
Complainant	:	NC MD 2010-03
v.	:	
ISP MINERALS, INC.,	:	Mine: Kremlin Plant
Respondent	:	Mine ID 47-00148

ORDER DENYING RESPONDENT'S MOTION TO AMEND TEMPORARY REINSTATEMENT ORDER

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).[1]

On July 2, 2010, I issued an Order of Temporary Reinstatement, which ordered Respondent to reinstate Mr. Pilon "to the position he held on February 25, 2010." By mutual agreement the complainant was economically reinstated. On December 20, 2012, Respondent, ISP Minerals, Inc., filed a motion to amend the July 2, 2010 Order of Temporary Reinstatement issued in this matter. The Respondent seeks to suspend Mr. Pilon's economic reinstatement from December 17, 2012 to December 31, 2012 as part of a temporary work force reduction necessitated by economic conditions.

On December 31, 2012 the Secretary filed a Motion in Opposition to Respondent's Motion to Amend Temporary Reinstatement Order. The Secretary argued that the Respondent provided insufficient evidence to justify amending the temporary reinstatement.

An Administrative Law Judge retains jurisdiction to rule on any motions made to amend her underlying order of temporary reinstatement. *Sec'y of Labor on behalf of York v. BR & D Enterprises*, 23 FMSHRC 386, 389 (2001). Therefore, I have jurisdiction to rule on this motion.

Congress created the temporary reinstatement provision of section 105(c) because "complaining miners might not be in the financial position to suffer even a short period of

[1] Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Deputy Seth D. Harris is the Acting Secretary of Labor.

unemployment or reduced income pending the resolution of their discrimination complaint." *Sec'y of Labor on behalf of Kinnaman v. 3M Corp*., 26 FMSHRC 443, 445 (May 2004)(citing S. Rep. 95-181 at 37, *reprinted in* Senate Subcomm. on Labor, Comm. On Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977 at 625 (1978). Section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2) states that once it is determined that an application for temporary reinstatement has not been frivolously brought, the Commission shall order immediate reinstatement. *Sec'y of Labor on behalf of Gray v. North Fork Coal Corporation*, 33 FMSHRC 27, 34 (Jan. 2011). The Commission has recently interpreted Section 105(c)(2) to mean that a temporary reinstatement order must remain in effect until final order on the complaint. *Sec'y of Labor on behalf of Ratliff v. Cobra Natural Resources*, 34 FMSHRC __, slip op. at 1-2, No. WEVA 2013-368-D (Feb. 13, 2013).

Bona fide economic retrenchment or reduction in force tolls the discriminatee's right to back pay. *Chadrick Casebolt v. Falcon Coal Co., Inc*., 6 FMSHRC 485, 499 (Feb. 1984). The operator bears the burden of establishing facts, by a preponderance of the evidence, "which would negative the existence of [back pay] liability to a given employee or which would mitigate that liability." *Sec'y of Labor on behalf of Gatlin v. KenAmerican Resources, Inc*., 31 FMSHRC 1050, 1054 (Oct. 2009). The operator must show that work was not available for a discriminatee "whether through layoff, business contractions, or similar conditions." *Id*. 1054-55.

Here the Respondent did not establish bona fide economic retrenchment or reduction in force for the period of December 17, 2012 to December 31, 2012 by a preponderance of the evidence. Thus, my Order for Temporary Reinstatement must remain in effect until final order on the complaint. With its motion, the Respondent submitted two documents as evidence of a bona fide economic retrenchment for the period of December 17, 2012 to December 31, 2012. The first is a letter vaguely addressed "To whom it may concern [sic]", that states Mr. Pilon will be laid off due to low sales volumes. *Respondent's Motion to Amend Temporary Reinstatement Order Ex. A 1*. The letter is signed, not by the Human Resources Department, but by the Production Superintendent. *Id*. The letter includes Mr. Pilon's seniority date and a snippet from a labor contract between the Respondent and United Steelworkers, but includes no other personnel information about Pilon- or any other employees that will be laid off. *Id*. The letter "estimate[s]" that the layoff time will be two weeks, but notes that it "may be extended based on customer demand schedule." *Id*.

The second document is a list of employees who will be "indefinitely laid off" beginning on Monday, December 17, 2012. *Respondent's Motion to Amend Temporary Reinstatement Order Ex. A 2*. Mr. Pilon's name is on this list. *Id.*

This evidence is insufficient to prove a bona fide economic retrenchment or reduction in force for the period of December 17, 2012 to December 31, 2012. First, the documents provide no insight into the economic conditions of the company. The documents clearly indicate that Mr. Pilon and a number of other employees will be indefinitely laid off, but they fail to provide other pertinent economic information: what percentage of the workforce the laid-off constitute, the sales volume at the time of the temporary lay off in relation to prior sales volumes, personnel

files, or any other financial information about the company. While the letter provides proof of Pilon's seniority, it provides limited context for his seniority date. After reading through Respondent's motion, I am at a loss for why he was included on the list of those laid off "indefinitely." The Respondent has not provided how many people have been hired since Pilon, the types of jobs Pilon is capable of working, or the types of jobs that were eliminated in the layoff.

In *Gatlin*, the Commission found that the Respondent's obligation for temporary economic reinstatement was tolled due to a massive workforce reduction which laid off 290 of 370 employees. *See Gatlin*, 31 FMSHRC 1050 (Oct. 2009). In that case the Respondent attached an affidavit that clearly supported its factual allegations about its economic conditions-including information about the "performance, skill level, and years of service" of the laid-off employees. *Id*. at 1051-52. The instant case differs from *Gatlin* because Respondent did not submit any information about Pilon's performance and skill level. Furthermore, the Respondent did not submit *any* information its economic condition, what percentage of its employees were indefinitely laid off, and minimal, at best, proof of Pilon's seniority in relation to other employees.

Second, while the Respondent's motion states Mr. Pilon will be laid off for two weeks, the Respondent's exhibits underhandedly indicate that he will be laid off *indefinitely*. *Respondent's Motion to Amend Temporary Reinstatement Order Ex. A 2*. Therefore, I do not find that the Respondent provided sufficient evidence to prove bona fide reduction in force for the period of December 17, 2012 to December 31, 2012.

I assume that Pilon has not been temporarily laid off because up to this date I have not ruled on ISP's Motion (even though the Respondent's motion was filed *after* the temporary lay off would have begun). If Pilon was, or is currently, temporarily laid off then I would like to remind the Respondent that ISP may be liable for making Pilon whole for any loss of earnings and other benefits suffered as a result of the temporary layoff, less any net interim earnings, plus interest as prescribed by Commission precedent at the IRS "adjusted prime rate" for the period of temporary layoff. *Sec'y of Labor on behalf of Clapp v. Cordero Mining*, *LLC*, 2011 WL 7268153 (Dec. 5, 2011) at *50, *56, *rev'd on other grounds*, 2011 WL 7144301 (Dec. 16, 2011). *Sec'y on behalf of Bailey v. Arkansas-Carnoa Co.*, 5 FMSHRC 2042, 2049-54 (Dec. 1985).

Therefore, the Respondent's Motion to Amend Temporary Reinstatement Order is **DENIED**.

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

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