

## FEBRUARY 2004

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## **FEBRUARY 2004**

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

Secretary of Labor, MSHA v. Plateau Mining Corporation, Docket No. WEST 2002-207 and WEST 2002-278. (Judge Manning, December 22, 2003)

Secretary of Labor, MSHA v. Martin County Coal Corporation and GEO/Environmental Associates, Docket Nos. KENT 2002-42-R, et al. (Judge Schroeder, January 14, 2004)

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

Secretary of Labor, MSHA v. Original Sixteen to One Mine, Inc., Docket No. WEST 2002-224-M(A) and WEST 2002-226-M. (Judge Melick, January 5, 2004)



## **COMMISSION DECISIONS**



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

February 4, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEST 99-342-R
	:	WEST 99-384-R
RAG SHOSHONE COAL	:	WEST 2000-349
CORPORATION	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski and Young, Commissioners<sup>1</sup>

DECISION

BY: Duffy, Chairman; Suboleski and Young, Commissioners

This consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (the “Mine Act”), involves the validity of enforcement action taken by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) against RAG Shoshone Coal Corporation (“Shoshone”) based on the change of the designated occupation at Shoshone’s mine.<sup>2</sup> Administrative Law Judge August Cetti affirmed the citations. 23 FMSHRC 407, 421-22 (Apr. 2001) (ALJ). Shoshone filed a petition for discretionary review, challenging the judge’s decision, which the Commission granted. In addition, the Commission granted leave to participate as amicus curiae to ten operators (“industry amici”).<sup>3</sup> The Commission also heard oral argument in the matter. For the reasons that follow, we reverse the judge’s decision.

<sup>1</sup> Commissioner Beatty recused himself in this matter and took no part in its consideration.

<sup>2</sup> The designated occupation is “the occupation on a mechanized mining unit that has been determined . . . to have the greatest respirable dust concentration.” 30 C.F.R. § 70.2(f).

<sup>3</sup> Those operators include Canyon Fuel Co., LLC; CONSOL Energy Inc.; Eastern Associated Coal Corporation; Energy West Mining Company; Genwal Resources, Inc.; Mettiki Coal, LLC; Mingo Logan Coal Company; Mountain Coal Company, LLC; Peabody Coal Company; and West Ridge Resources, Inc.

Factual and Procedural Background

Shoshone operates the Shoshone No. 1 mine, an underground coal mine in Hanna, Wyoming. Stip. 1. Shoshone produces coal at MMU 008-0 through longwall mining.<sup>4</sup> Stip. 7; 23 FMSHRC at 407. The longwall shearer cuts coal in two passes. Tr. 29-31. The “main-cut pass” occurs when the longwall shearer makes its initial pass, moving from the tailgate to the headgate, and cutting the full diameter of the shearer’s drums, which is approximately seven feet of the ten-foot coal seam. Tr. 29-30. The “cleanup pass” occurs when the shearer reverses direction, moving from the headgate to the tailgate, and cuts the remaining three feet of coal. Tr. 30-31, 331. As the shearer cuts coal from the face, shields extending from the intake along the entire face advance. Tr. 22. The face conveyor or pan line takes the coal that has been cut and transfers it to the stageloader. Tr. 22. A crusher at the stageloader crushes large pieces of coal, and the stageloader transfers the coal to a belt. Tr. 21-22.

On MMU 008-0, approximately nine miners worked at the face. Tr. 285. Those miners generally included five jacketters (who advanced the shields), the tailgate-side longwall operator, the headgate-side longwall operator, the headgate operator, the foreman and, occasionally, a mechanic. Tr. 25, 27, 264, 285; Gov’t Ex. 12.

In accordance with the provisions of section 70.207(a), Shoshone is required to “take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period.” 30 C.F.R. § 70.207(a); 23 FMSHRC at 408. Since at least October 11, 1983, Shoshone had sampled the tailgate-side longwall operator (code number 044) as the designated occupation on MMU 008-0. 23 FMSHRC at 409.

MSHA inspectors also sample other occupations on the MMU in addition to the designated occupation. *Id.*; Stip. 18. MSHA inspectors compare the results of the different occupations in those sampling surveys in order to determine which occupation should be selected as the designated occupation. Tr. 72.

In April 1988, Jerry Spicer, MSHA’s Administrator for Coal Mine Safety and Health, sent a memorandum to district managers introducing the 060 code for the “Longwall Return-Side Face Worker.” Gov’t Ex. C to S. Mot. for Summ. Dec., at 3-4 (the “Spicer memorandum”). In the memorandum, Spicer stated that when the 060 designated occupation is sampled, the sampling device must remain with the miner working nearest the return air side of the longwall face at all times. *Id.* at 4.

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<sup>4</sup> The term “MMU” refers to a “mechanized mining unit,” or a “unit of mining equipment including hand loading equipment used for the production of material.” 30 C.F.R. § 70.2(h).

On April 9, 1999, John Kuzar, District Manager for Coal Mine Safety and Health District 9, notified Shoshone that the designated occupation for MMU 008-0 would be changed from the tailgate-side longwall operator (044) to “the miner who works nearest the return air side of the longwall working face” (060), effective during the May – June 1999 bimonthly sampling period. Gov’t Ex. 12 at 1, 2. In the letter, District Manager Kuzar noted that sampling results showed that several other occupations were exposed to significantly higher concentrations of respirable dust than the then-designated occupation. *Id.* at 1. However, Kuzar did not direct the designation of any of these positions. Thus, while the sample results referred to by Kuzar revealed that the position of jacksetter had been exposed to the highest concentrations of respirable dust, Gov’t Ex. 12, the notification instructed that, when collecting samples from designated occupation 060, “the sampling device shall remain at all times on the miner who works nearest the return air side of the longwall face.” *Id.* at 2 (emphasis omitted). The letter also provided that the failure to sample in such a manner would result in invalid samples. *Id.*

Shoshone wished to challenge the requirement that it sample the 060 designated occupation. 23 FMSHRC at 410. Accordingly, during the May – June 1999 bimonthly sampling period, it sampled the designated occupation of the tailgate shearer operator (044) rather than the 060 occupation. *Id.*

On July 8, 1999, MSHA issued Citation No. 9895049 to Shoshone which alleged a violation of section 70.207(a). *Id.* The citation stated that MSHA had not received five valid respirable dust samples of the 060 designated occupation. *Id.* On July 16, 1999, District Manager Kuzar subsequently sent a letter to Shoshone stating that its ventilation plan would not be approved because the designated occupation in the plan had not been changed to reflect the 060 occupation code. Gov’t Ex. 14, at 1. The letter provided that Shoshone should make the appropriate revisions to its plan and submit a suitable plan amendment by July 23, 1999. *Id.* On July 26, MSHA sent a second letter, extending the period for submitting a revised plan until July 30. *Id.* at 2. On August 2, 1999, MSHA sent a third letter stating that because it had not received a response to the first two letters, MSHA was rescinding Shoshone’s ventilation plan. *Id.* at 3. On August 3, 1999, MSHA issued Citation No. 4073211 alleging a significant and substantial (“S&S”) violation of section 75.370(a)(1)<sup>5</sup> because Shoshone was operating without an approved ventilation plan. 23 FMSHRC at 407; Tr. 194, 204.

Shoshone abated the citations by sampling the 060 designated occupation and incorporating that designated occupation into its ventilation plan. Tr. 172, 195. Shoshone then filed notices of contests of the citations. The matter went to hearing before Judge Cetti.

The judge concluded that Shoshone had violated sections 70.207(a) and 75.370(a)(1), and that the violation of section 75.370(a)(1) was not S&S. 23 FMSHRC at 424. He reasoned that in mandating the change in the designated occupation, MSHA acted within its authority and in

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<sup>5</sup> 30 C.F.R. § 75.370(a)(1) provides in part that “[t]he operator shall develop and follow a ventilation plan approved by the district manager.”

compliance with the procedures set forth in section 70.207. *Id.* at 421. The judge rejected Shoshone's argument that the Secretary's adoption of the 060 designated occupation required notice and comment rulemaking. *Id.* at 421-22. He determined that MSHA acted reasonably and carried out the intent of Congress that miners are to be protected from excessive concentrations of respirable dust. *Id.* at 422. Because the judge determined that imposition of the 060 designated occupation was valid, he concluded that Shoshone had violated section 70.207(a) by failing to submit samples of that designated occupation, and that it had violated section 75.370(a)(1) by operating without an approved ventilation plan, incorporating the designated occupation. *Id.* at 422-23. The judge further concluded that the violation of section 75.370(a)(1) was not S&S because the citation had been issued as a technical violation resulting from an impasse between the parties in negotiating the ventilation plan, and because there was not a reasonable likelihood of injury. *Id.* at 423.

The Secretary subsequently proposed a civil penalty of \$55 for each violation. S. Br. at 7 n.4. The civil penalty proceeding was consolidated with the contest proceedings.

## II.

### Disposition

Shoshone argues that the judge erred in affirming the citations. It submits in part that imposition of the 060 code is inconsistent with sections 70.207 and 70.2(f), and the purpose of designated occupation samples. Sh. Br. at 8-20. Shoshone explains that the 060 code does not sample a designated occupation because it is not taken in the environment of a selected occupation on an MMU but, rather, samples an amalgam of occupations. *Id.* at 16-17. It further submits that because imposition of the 060 code as a "designated occupation" represents a substantive regulatory change, the Secretary was required to engage in notice and comment rulemaking before imposing the code.<sup>6</sup> *Id.* at 8-24, 33-34; Sh. Reply Br. at 8-10.

The Secretary responds that the judge correctly affirmed the citations. She submits that her interpretation of section 70.207 is entitled to acceptance in part because it is consistent with the language of that regulation and its purpose, and section 70.2(f). S. Br. at 7-20. The Secretary explains that, when sampling the 060 occupation, the sampling device must be transferred from miner to miner so that it will always be on the miner who is working nearest the return air side of the longwall face at any particular time. *Id.* at 10. She states that, in effect, the 060 code measures the respirable dust of a "hypothetical miner" in a fixed location. Oral Arg. Tr. at 37. The Secretary contends that rulemaking was not required for imposition of the 060 code because it does not reflect a change in interpretation of section 70.207(e), and that her position is an "interpretative rule" which is exempt from the requirement of notice and comment rulemaking. S. Br. at 31-32 & n.15.

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<sup>6</sup> The industry amici filed a brief supporting Shoshone's position. Amici Br. at 1-3.

A. Regulatory Interpretation

Section 70.207 provides for the bimonthly designated occupational sampling of mechanized units in the following manner:

(a) Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit. . . .

\* \* \* \*

(e) Unless otherwise directed by the District Manager, the designated occupation samples shall be taken by placing the sampling device as follows:

\* \* \* \*

(7) Longwall section. On the miner who works nearest the return air side of the longwall working face or along the working face on the return side within 48 inches of the corner. . . .

30 C.F.R. § 70.207 (emphasis omitted). Part 70 further defines “designated occupation” as “the occupation on a mechanized mining unit that has been determined by results of respirable dust samples to have the greatest respirable dust concentration.” 30 C.F.R. § 70.2(f). “Miner” is defined in the Mine Act as “any individual working in a coal or other mine.” 30 U.S.C. § 802(g) (emphasis added).

We begin, as we must, with the terms of the regulations. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)) (“The language of a regulation . . . is the starting point for its interpretation.”). By the terms of sections 70.207 and 70.2(f), the Secretary has clearly tied her sampling program of the designated occupation on an MMU in a longwall section to the miner who works nearest the return air side of the face and is exposed to the greatest respirable dust concentration.

We conclude that the Secretary’s imposition of the 060 code at Shoshone’s mine ignores the specific requirements of the regulations. Section 70.207(e)(7) requires sampling “[o]n the miner” in a designated occupation in a mechanized mining unit. 30 C.F.R. § 70.207(e)(7) (emphasis added). However, the 060 code requires dust sampling from a *progression of miners* who, at any time during a shift, are nearest the return air side of the longwall face. Gov’t Ex. 12, at 2. Indeed, during one 8-hour shift, use of the 060 code at Shoshone resulted in the transfer of the dust pump forty times, with one miner having the pump for 2 minutes and a non-employee, the MSHA inspector at the mine, having the pump for 34 minutes. Sh. Ex. 6.

Furthermore, while sections 70.2(f) and 70.207(a) and the prefatory language of section 70.207(e) require the sampling of the designated occupation, the 060 code does not sample an “occupation.” The 060 code is not connected to any specific job, or even to an area associated with the work position of any miner. Tr. 335, 370, 471-72. In addition, the 060 code does not reflect sampling of the miner assigned to the occupation that is shown by respirable dust samples to be exposed to the highest concentration of dust. The record in this proceeding indicates that MSHA conducted respirable dust surveys between August 1997 and February 1999 that revealed that the jacksetter (code 041) rather than the tailgate-side longwall operator (code 044) was exposed to the most respirable dust during the sampling periods. Gov’t Ex. 12, at 4. Notwithstanding those results, MSHA required Shoshone to change its designated occupation to the 060 code rather than to the jacksetter code. *Id.* at 1-2.

We must also consider the regulations in context.<sup>7</sup> *See Morton Internat’l, Inc.*, 18 FMSHRC 533, 536 (Apr. 1996) (“[R]egulations should be read as a whole, giving comprehensive, harmonious meaning to all provisions.”). Section 70.207(e)(7) is part of a comprehensive regulatory scheme designed to ensure that the level of respirable dust in the mine atmosphere “to which each miner in the active workings of such mine is exposed” is at or below 2 milligrams per cubic meter of air (“mg/m<sup>3</sup>”). 30 C.F.R. § 70.100(a); *see also* 30 U.S.C. § 842(b)(2). In order to accomplish the goal of ensuring that the level of dust in the mine atmosphere to which each miner is exposed is below the permissible level, the Secretary designed a two-part sampling program that relies on designated occupational sampling, 30 C.F.R. § 70.207, and designated area sampling, 30 C.F.R. § 70.208. Designated occupational samples measure the dust of the “occupation on a mechanized mining unit” determined to have the greatest respirable dust concentration, while designated area samples measure dust associated with “dust generation sources in the active workings” of the mine. 30 C.F.R. §§ 70.2(f), 70.208(e). It would have been difficult for the drafters to express the delineation between the two sampling programs, and the distinct purpose of each, more clearly.

Designated occupation samples are taken in the face area, while designated area samples are taken in locations upwind, or outby, the face. Tr. 48, 50-51, 139; 45 Fed. Reg. 23990, 23991, 23998 (Apr. 8, 1980). The differences between the two types of samples are reflected throughout the regulatory scheme, which, for instance, sets forth different sampling schedules and different definitions of what constitutes a production shift for sampling purposes. *Compare* 30 C.F.R. § 70.207(a) *with* § 70.208(a) (setting forth different sampling schedules) and § 70.2(l) *with*

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<sup>7</sup> We do not dispute our dissenting colleague’s statement that the plain meaning of a standard governs unless such a meaning would lead to an absurd result or be at odds with the purpose of the underlying statute. Slip op. at 14. However, in order to discern a standard’s plain meaning, the standard must be read in context. *See Local Union 1261, UMW v. FMSHRC*, 917 F.2d 42, 45 (D.C. Cir. 1990) (“If the first rule of . . . construction is ‘Read,’ the second rule is ‘Read on!’”); *Borgner v. Brooks*, 284 F.3d 1204, 1208 (11th Cir. 2002), *cert. denied sub nom. Borgner v. Florida Bd. of Dentistry*, 537 U.S. 1080 (2002) (stating that in discerning a statutory provision’s plain meaning, court must construe the statute in its entirety).

§ 70.2(k) (setting forth different definitions of production shift). Thus, the complementary requirements of the designated occupational and area sampling programs serve distinct purposes, and each type of sampling has been treated in a different manner by MSHA.<sup>8</sup>

The Secretary's imposition of the 060 code effectively nullifies this distinction between designated occupation and designated area sampling. By regulatory definition, a designated occupational sample is distinct from a designated area sample in that the sample is tied to the occupation of a miner, and not to a location. *Cf.* 30 C.F.R. §§ 70.2(f), 70.208(e). The Commission has previously noted the connection between a designated occupation and a miner's work position, stating that a "designated occupation is the *work position* determined to have the greatest respirable dust concentration." *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 10 n.6 (Jan. 1994) (emphasis added). Similarly, the D.C. Circuit has stated with respect to designated occupation samples:

One occupation on each mechanized mining unit is designated as most hazardous in terms of exposure to respirable dust. The samples are collected by having *the miner who performs the designated occupation wear the sampling device or by placing the sampling device near that miner's normal work position.*

*Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1075 (D.C. Cir. 1987) ("*Consol*") (emphasis added). The 060 code abrogates the distinction between occupation and area sampling in that it is only associated with a location, which is not tied to the occupation of a miner.

Furthermore, while the Secretary's imposition of the 060 code eradicates the distinction between designated occupation and designated area sampling, it does not serve the purpose of either sampling scheme. Imposition of the 060 code does not focus on the primary concern of the designated occupation sampling program because the 060 code does not measure the average mine atmosphere to which each miner is exposed by selecting and measuring the miner exposed to the greatest concentration of respirable dust.<sup>9</sup> Nor does the 060 code advance the objective of designated area sampling: the identification and control of dust generation sources. 45 Fed. Reg. at 23991 (providing that designated area samples measure dust generation sources). It is

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<sup>8</sup> Both the Secretary and our dissenting colleague state that occupation sampling is simply area sampling. S. Br. at 22-23; slip op. at 19-20. While it may be argued that occupation sampling is a type of area sample, it does not follow that any form of area sampling may therefore be utilized when conducting occupation sampling. While all A may be B, it does not follow that all B are A.

<sup>9</sup> Sampling of the designated occupation is a continuation of the sampling program in effect prior to the promulgation of section 70.207, in which the miner in the "high risk occupation" was sampled. Tr. 48-51; *see* 45 Fed. Reg. at 23998; *AMC v. Marshall*, 671 F.2d 1251, 1254 & n.3 (10th Cir. 1982).

undisputed that dust from multiple dust generation sources, such as the stage loader, crusher, face conveyor, shields, and shearer, accumulates at the area where the 060 samples are taken as air flows from the headgate to the tailgate. Tr. 67-68, 159, 230. Thus, an elevated reading of the 060 code would not identify the area along the 800 or more feet of Shoshone's longwall that requires stricter respirable dust control.

Contrary to the Secretary's argument (S. Br. at 15-16), the Federal Register preamble accompanying the publication of section 70.207 does not support her use of the 060 occupation code. In addressing the substance of the final rule, the Secretary discussed the "two different types" of samples to be taken by operators under sections 70.207 and 70.208, recognizing that designated occupational samples are taken on a mechanized mining unit while designated area samples are taken in outby locations, and that operators have separate obligations for those two types of samples. 45 Fed. Reg. at 23991.

It is also clear from the regulatory history that while the Secretary may not have known which job title to name as the designated occupation on the longwall at the time of the promulgation of section 70.207,<sup>10</sup> she intended that the position be filled by an actual miner working in an assigned occupation and not by a hypothetical miner. The preamble provides, "The rule allows designated occupation samples to be taken by having the miner in the designated occupation wear the sampling device or by placing the sampling device at specified locations near the miner's normal work position." *Id.* Nowhere is there a suggestion that the Secretary would impose through the designated occupation sampling regime the 060 code with the attendant obligation to transfer the dust pump 40 times in an eight-hour shift among a succession of miners (including an MSHA inspector) in numerous occupations. *See* Sh. Ex. 6.

## B. Rulemaking

We also conclude that the imposition of the 060 code amounts to a "substantive rule," and not an interpretive rule as the Secretary claims. S. Br. at 30-33. Section 553 of the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1994) ("APA"), requires agencies to provide notice of proposed rulemaking and an opportunity for public comment prior to a rule's promulgation, modification, amendment, or repeal. 5 U.S.C. § 553. Under the APA, a "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . ." 5 U.S.C. § 551(4). Substantive rules are subject to the APA's notice and comment requirements, while interpretive

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<sup>10</sup> Shoshone states that section 70.207(e)(7) does not specify a job position because at the time of the rule's promulgation, job titles on longwalls were not well established and the Secretary needed flexibility to select the appropriate job title as the designated occupation. Sh. Reply Br. at 6. The record does not reflect any change in technology or circumstances at Shoshone's mine that justified the change in designated occupation from the tailgate-side longwall operator to the 060. Oral Arg. Tr. at 21.

rules are not. 5 U.S.C. § 553(b)(3)(A).

A substantive rule is distinguishable from an interpretive rule in that it carries “the force and effect of law.” *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 587-88 (D.C. Cir. 1997), quoting *AMC v. MSHA*, 995 F.2d 1106, 1109-10 (D.C. Cir. 1993). An “agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation.” *Appalachian Power v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (citations omitted). Thus, we “look to whether the interpretation itself carries the force and effect of law.” *Id.* (citations omitted). A purported interpretive rule has “legal effect” if, in the absence of the rule, there would not be an adequate legislative basis for the enforcement action taken, or if the rule effectively amends a prior legislative rule. *AMC v. MSHA*, 995 F.2d at 1112. “When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.” *Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999). Thus, although the Secretary may be seeking to achieve the laudable goal of reducing miners’ exposure to respirable dust by imposing the 060 code, she must do so through proper means. See *Michigan v. EPA*, 268 F.3d 1075, 1084 (D.C. Cir. 2001) (stating that agency does not have “a roving commission to achieve . . . [any] laudable goal” without complying with authorized procedure).

We conclude that the Secretary was required to engage in notice and comment rulemaking before imposing the 060 code.<sup>11</sup> Tr. 107. First, the imposition of the 060 code has legal effect in that, in the absence of the code, there would not be an adequate legislative basis for the Secretary’s issuance of the subject citations. *AMC v. MSHA*, 995 F.2d at 1112 (stating that purported interpretative rule has legislative effect if, in the absence of the rule, there was not an adequate legislative basis for enforcement action). The parties do not dispute that the “position” of “Longwall Return-Side Face Worker” does not exist on the longwall face. Tr. 67-68; Oral Arg. Tr. 6, 23, 37. Because the 060 code does not represent an actual miner – an “individual,” to use the statutory definition of miner – it has no significance in and of itself. 30 U.S.C. § 802(g). In fact, the 060 code is meaningless without reference to MSHA’s list of position codes, which

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<sup>11</sup> We note that the Secretary has treated the 060 code as being a generally applicable requirement. It is undisputed that at the time of the hearing, approximately 85% of the nation’s longwalls were required to sample the 060 code as their designated occupation. Tr. 107. The seriatim imposition of the 060 code at a vast majority of mines throughout the country implicates the Commission’s holding in *Carbon County Coal Co.*, that the Secretary commits an abuse of discretion by imposing a plan provision “as a general rule applicable to all mines” without consideration of particular circumstances at a mine outside the mandatory standard promulgation process. 7 FMSHRC 1367, 1375 (Sept. 1985); see also *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 407 (D.C. Cir. 1976) (reasoning that plans are not “to be used to impose general requirements of a variety well-suited to all or nearly all coal mines, but rather to assure that there is a comprehensive scheme for realization of the statutory goals in the particular instance of each mine”).

describes the code as the “Longwall Return-Side Face Worker.”<sup>12</sup> See Stip. Ex. A. In order to obtain further understanding of the 060 code, one must refer to yet another document, either the Spicer memorandum or the letter sent by District Manager Kuzar to Shoshone in April 1999. Gov’t Ex. C. to S. Mot. for Summ. Dec., at 3-4; Gov’t Ex. 12, at 1-2. Instead of a description of duties for the “occupation,” the Spicer memorandum imposes a procedure requiring the sampling pump to be transferred from miner to miner to ensure that the pump remains at all times with the miner working nearest the return air side of the longwall face. Gov’t Ex. C. to S. Mot. for Summ. Dec., at 4. Failure to adhere to this *procedure* is the basis of the citations issued in this case.

Second, the imposition of the 060 code has legal effect in that it effectively amends sections 70.207(e) and 70.2(f) and reveals a departure from the Secretary’s previous interpretations. *AMC v. MSHA*, 995 F.2d at 1112 (stating that a purported interpretive rule has legal effect if it effectively amends a prior legislative rule); see also *Paralyzed Veterans*, 117 F.3d at 586 (stating that allowing an agency to fundamentally change an interpretation of a substantive regulation without notice and comment would undermine those APA requirements). Prior to the imposition of the 060 code, MSHA had applied section 70.207(e)(7) to require bimonthly sampling of the miner assigned to the occupation that was exposed to the highest concentration of respirable dust. Tr. 51-52, 79-80. From 1983 to 1999, MSHA required Shoshone to sample the tailgate-side longwall operator (044) as its designated occupation. 23 FMSHRC at 409. Based upon dust surveys that revealed that the jacksetter was exposed to higher dust concentrations than the tailgate-side longwall operator, the Secretary changed the designated occupation to the 060.<sup>13</sup> Gov’t Ex. 12. By imposing the 060 code, the Secretary stopped requiring the sampling of a designated occupation, as the rule requires, and began sampling miners based upon their location alone. By so doing, the Secretary effectively redefined “designated occupation” from a selected occupation to a selected location. Thus, even

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<sup>12</sup> We note that the list of position codes relied upon by the Secretary includes an “occupation” code (061), which does not represent a miner at all, but is a bracket in a fixed location. Tr. 97-98, 338. In our view, this is not helpful to the Secretary’s argument that these codes represent valid “occupations” as that term is commonly used.

<sup>13</sup> Our dissenting colleague states that we have implied that the jacksetter occupation would be a preferable designated occupation, and that keeping the sampling device with the “appropriate jacksetter under that interpretation” could result in more swapping of the device than with the 060 code. Slip op. at 20. However, our colleague relies upon a purely hypothetical scenario which assumes, for the sake of argument, that the pump would be repeatedly swapped between the five jacksetters on the longwall. Tr. 393-94. It is not clear from the record whether and to what extent swapping among the five jacksetters would be required if the designated occupation were changed to the jacksetter code. See, e.g., Tr. 99, 116, 167-68, 237, 244, 383, 393. Moreover, the number of swaps by the jacksetter occupation referred to in the dissent is based on a ten-hour shift, while the sampling shift is only eight hours. Tr. 414. In any event, we do not intimate which job position is most suitable as the designated occupation.

assuming that the Secretary could have initially interpreted section 70.207(e)(7) to support imposition of the 060 code, this change in her interpretation requires notice and comment. *See Alaska Prof'l Hunters Ass'n*, 177 F.3d at 1034.

The Secretary's effective redefinition of designated occupation is further exposed by a careful comparison of MSHA's Program Policy Manual ("PPM") to the procedure mandated by the Spicer memorandum. In the PPM, the Secretary interpreted section 70.207(e) as requiring the sampling device to remain on or at the designated occupation if "the operator's mining procedures result in the *changing of miners from one occupation to another* during a production shift." V MSHA, U.S. Dep't of Labor, Program Policy Manual, Part 70, at 8 (1988) (emphasis added). As the PPM further notes, this section was designed to address the practice of an operator's relieving a miner in the designated occupation by alternating the duties of the occupation with another miner. *Id.* To avoid removing the sampling device from the designated occupation for a portion of the shift, the PPM requires that the sampling device stay with the miner performing the duties associated with the designated occupation. *Id.* The 060 code, in contrast to the procedure addressed in the PPM, mandates the transfer of the dust pump among numerous miners, without regard to occupation, resulting in the sort of artificial reading that the PPM guidance was designed to prevent.

In addition, the Secretary's imposition of the 060 code effectively amends the procedure for sampling a designated occupation set forth in section 70.207(e). Default locations for sampling the designated occupation on a working face are specified in the subparagraphs of section 70.207(e). Nonetheless, by the language of section 70.207(e), the District Manager has discretion to direct placement of the sampling device at locations tied to a designated occupation other than those so specified.<sup>14</sup> 30 C.F.R. § 70.207(e). The imposition of the 060 code subverts the active role contemplated for the District Manager in reviewing respirable dust samples and ventilation plans. Instead of selecting and validating or redirecting a designated occupation, the Secretary has required the sampling of an area that is not tied to an occupation, and which has not been shown to have been exposed to the highest dust concentration.

Finally, we consider the imposition of the 060 code especially appropriate for the APA's notice and comment procedures because the issues implicated would benefit from a "full ventilation" demonstrating that MSHA considered relevant factors and alternatives and that the "choice it made based on that consideration was a reasonable one." *AMC v. Marshall*, 671 F.2d at 1255. In a rulemaking proceeding, interested persons would have had the opportunity to address such issues as whether the repeated passing of the sampling device among a progression of miners during a shift would adversely affect the accuracy of the sample or could act as a

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<sup>14</sup> Our dissenting colleague suggests that the beginning language of section 70.207(e) ("Unless otherwise directed by the District Manager . . .") grants MSHA unfettered discretion in determining where to conduct dust sampling. Slip op. at 17 & n.5. However, the Secretary does not rely on this language of the regulation as the basis for the imposition of the 060 code in this case. S. Br. at 11; *see also* Oral Arg. Tr. 26.

distraction that has a negative impact on miner safety. The operator in this case also has raised questions pertaining to the accuracy of the 060 code as a predictor of miner exposure to respirable dust. Sh. Br. at 27-29. In addition, one could conclude that the 060 code effects a change in the statutory respirable dust limit because the averaging of peak respirable dust exposures would, on average, produce a sample showing a higher level of dust exposure than the averaging of a single occupation over a shift.<sup>15</sup>

The failure of the Secretary to submit the revised sampling procedure to the public for review and comment has circumvented the thorough evaluation of the 060 code and the rationale for departing from the sampling program promulgated in 1981.<sup>16</sup> This is a critical distinction between the instant case and *AMC v. Marshall*. In that case, the petitioner challenged the designated area sampling regulations, arguing in part that the regime would effectively lower the statutory dust limit, and that the sampling scheme was not reasonably calculated to prevent miners' exposure to respirable dust. 671 F.2d at 1255-56. The court upheld the regulations, reasoning in part that area sampling allows for the identification and control of dust generation sources. *Id.* at 1257. However, the court was reviewing a substantive rule promulgated after notice and comment during which there was a full ventilation of the issues. *Id.* at 1255.

*AMC v. Marshall* therefore does not relieve the Secretary from the requirement to engage in notice and comment rulemaking before adopting the 060 code. The Secretary's arguments to the contrary disregard both the administrative posture of that case, in which the area sampling program had proceeded through notice and comment rulemaking, and the distinct purposes and design of the designated area and occupational sampling regulations. The same concerns raised in *AMC v. Marshall* are thus implicated by the imposition of the 060 code without either the safeguards provided by rulemaking or the clear foundation grounded on the fundamental bases of the area sampling regulations at issue there. Accordingly, the judge's decision is reversed.

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<sup>15</sup> The 060 code aggregates peak exposures, effectively eliminating from the sample the lower exposures experienced by miners. Tr. 157. Thus, although every miner on an MMU may be exposed to less than 2.0 mg/m<sup>3</sup> of dust, the mine could nonetheless still be found in violation. Sh. Ex. 12.

<sup>16</sup> We also are troubled by the fact that the failure to impose the 060 code and its attendant requirements through rulemaking creates an untenable situation in which a mandatory, generally applicable procedure, having been created by administrative fiat, may be similarly removed or simply ignored unilaterally by the agency without public notice and comment.

III.

Conclusion

For the foregoing reasons, we reverse the judge's decision and vacate Citation Nos. 9895049 and 4073211.



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Michael F. Duffy, Chairman



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Stanley C. Saboleski, Commissioner



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Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

I would affirm the judge and uphold the citations under review based on the plain meaning of 30 C.F.R. § 70.207(e)(7). The enforcement policy at issue here is the Secretary's requirement that RAG Shoshone Coal Corporation ("Shoshone") measure the respirable dust on its longwall mining section by passing the dust sampler to whichever miner happens to be working nearest the return air side of the longwall face. The Secretary's enforcement approach is completely congruent with the requirement contained in section 70.207(e)(7), which provides that on longwall mining sections respirable dust should be measured by placing the sampling device "[o]n the miner who works nearest the return air side of the longwall working face. . . ." 30 C.F.R. § 70.207(e)(7). Here, the Secretary's enforcement action stems not so much from her interpretation of section 70.207(e)(7) as it does from an application of that standard in accordance with its literal terms. Such an enforcement approach based on the regulation's plain meaning should be upheld unless it leads to an absurd result or one at odds with the purpose of the underlying statute. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Central Sand and Gravel Co.*, 23 FMSHRC 250, 253-54 (Mar. 2001).

Far from leading to an absurd result, the dust sampling procedure at issue in this case directly promotes the protective goal stated in Title II of the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (1994) (the "Mine Act"), which is to "permit each miner the opportunity to work underground during the period of his entire adult working life without incurring any disability from pneumoconiosis or any other occupation-related disease during or at the end of such period." 30 U.S.C. § 841(b).<sup>1</sup> To accomplish this goal, the statute requires that the average concentration of respirable dust in the mine atmosphere not exceed 2 milligrams per cubic meter of air. 30 U.S.C. § 842(b)(2).

To monitor compliance with the 2 milligram standard, Congress has directed operators to sample the amount of respirable dust in the mine atmosphere "by any device approved by the Secretary. . . and in accordance with such methods, at such locations, at such intervals, *and in such manner as the Secretar[y] shall prescribe.*" 30 U.S.C. § 842(a) (emphasis added).

The Secretary has implemented regulations regarding the placement and submission of dust sampling devices. The regulation pertaining specifically to longwall sections is located at 30 C.F.R. § 70.207(e)(7) and requires the dust sampler to be placed as follows:

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<sup>1</sup> This language in the Mine Act was originally articulated in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C §§ 801, 841 (1976). S. Rep. No. 95-181, at 78, 126-29 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 666, 714-17 (1978). Its current significance was emphasized in testimony at trial stating that in 1996 the National Institute of Occupational Safety and Health reported that there were still approximately 300 cases of coal workers' pneumoconiosis annually. Tr. 227.

*Longwall section.* On the miner who works nearest the return air side of the longwall working face or along the working face on the return side within 48 inches of the corner.

The return air side of the longwall is the most downwind location on that mining section. Tr. 35, 230-31. As the majority notes, the return air side is subject to the cumulative effect of several dust sources and is undisputably the area on a longwall section that has the greatest concentration of respirable dust. Slip op. at 7-8; Tr. 35, 95, 122, 230-1. The Secretary has determined that sampling the dustiest work area on the longwall section is the most reliable way of protecting all the miners on that section from impermissibly high dust levels. Tr. 48-51, 70. By requiring the work area that is downwind and affected by several dust sources to be in compliance with the statutory limit, the Secretary believes the operator will effectively protect the miners working upwind from overexposure to respirable dust. S. Br. at 17-18; Tr. 51, 70. As discussed below, the Tenth Circuit upheld this enforcement approach when considering the regulations which required operators to measure respirable dust at known dust generating sources that were away from (“outby”) the working face, calling the program one that was “reasonably calculated to achieve the statutory objective.” *AMC v. Marshall*, 671 F.2d 1251, 1257 (10th Cir. 1982).

The citations under review are the result of the Secretary enforcing section 70.207(e)(7) according to its explicit terms. She requires the sampling device to be transferred from miner to miner so that it will always be on the miner who is positioned “nearest the return air side of the longwall working face” at any particular time. S. Br. at 10. The aspect of the Secretary’s approach that has given rise to this challenge is her insistence that the sampling device be transferred from miner to miner, without regard to a miner’s job title. Shoshone contends that the Secretary can only require the dust sampling device to be passed among miners who hold the same “designated occupation.” Sh. Br. at 11, 15-16. Shoshone’s argument, which my colleagues have accepted, is that the Secretary is constrained by the reference to “designated occupation” in the prefatory language of section 70.207(a) (“Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit. . . .”) and the reference to that phrase in the introductory language of section 70.207(e) (“Unless otherwise directed by the District Manager, the designated occupation samples shall be taken by placing the sampling device as follows. . . .”). 30 C.F.R. §§ 70.207(a) and (e).

The relevant standard, however, is located at section 70.207(e)(7). This regulation, which contains a very specific directive regarding the placement of the dust sampling device on a longwall section, is devoid of any reference to a miner’s occupation. Indeed, the sole focus of this regulation is the miner’s proximity to the return air side of the longwall. Ignoring the regulation’s plain meaning, however, and citing the need to “harmonize” the dust sampling regulations, my colleagues conclude that the Secretary must construe section 70.207(e)(7) as though it too required

placement of the dust sampler on the basis of a miner's job title, rather than the miner's proximity to the return air side of the longwall. Slip op. at 6. Remarkably, although the underlying issue in this case concerns the location of the dust sampling device on a longwall section, the majority has determined that the Secretary cannot rely on the regulation she drafted to address that very issue. By giving precedence to the general introductory language contained in sections 70.207(a) and (e) over the explicit directive pertaining to longwall mining contained in subsection (e)(7), my colleagues ignore the oft-cited canon of construction that specific provisions govern more general ones, not the other way around. See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992) (citation omitted); *Lyons v. Ohio Adult Parole Auth.*, 105 F.3d 1063, 1070 (6th Cir. 1997), cert. denied, 520 U.S. 1224 (1997).

My colleagues conclude that the Secretary can require sampling to be carried out on longwall sections only in the same manner that she requires it to be done on other mining sections. Slip op. at 5-6. Specifically, they insist the Secretary must select a single job title to be the "designated occupation" and require operator sampling only from employees in that job category.<sup>2</sup> *Id.* What my colleagues fail to discuss, however, is that in each of the other mining methods specified in section 70.207(e)(1)-(10), the operator is specifically directed to place the respirable dust sampler on the individual holding a particular job title (i.e., "loading machine operator," "continuous mining machine operator"). Only with respect to longwall mining is there the much more general reference to "miner," and the identification of the miner who is to wear the sampling device is based not on the miner's occupation but on the miner's proximity to a designated area — "the return air side of the longwall face." When certain language is used in one part of a statute and different language in another part, it is assumed that different meanings were intended. 2A N. Singer, *Statutes and Statutory Construction* § 46.06 (6th ed. 2000); see also *U.S. v. Maria*, 186 F.3d 65, 71 (2d Cir. 1999) (use of different words in same context strongly suggests different meanings were intended) (citations omitted).<sup>3</sup>

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<sup>2</sup> The majority emphasizes the use of the singular form "miner" in section 70.207(e)(7) in voicing its objection to the Secretary requiring dust sampling from "a progression of miners." Slip op. at 5 (emphasis omitted). The use of the singular form of miner is consistent with and indeed is the grammatically correct way to express the method of sampling the Secretary is requiring Shoshone to implement since only one miner can be working "nearest the return air side of the longwall face" at a time.

Moreover, the record reflects that pump swapping between miners was often required, even when the sampling was carried out by miners within one occupation. For example, if the operator assigns one miner to work in the shearer operator portion for the first half of the shift, the pump would be switched from the first miner to the second miner so as to have the pump remain with the shearer operator. Tr. 115-16, 290, 292, 351-52.

<sup>3</sup> The preamble to the regulations provides further support for the Secretary's contention that subsection (7) was intentionally drafted without specifying an occupation. It describes section 70.207(e) as "set[ting] forth the job position in *most* mining systems on which designated

The reference to “designated occupation” in section 70.207(e) does not preclude the Secretary from applying subsection (e)(7) according to that standard’s express terms. Section 70.207(e) is an introductory paragraph that directs the reader to consult the appropriate subsection to determine the placement of the respirable dust sampling device, depending on the mining method used. The phrase “designated occupation samples” is logically viewed as applying only to those subsections in which an occupation is specifically referenced. The phrase does not limit the Secretary’s ability to require sampling on a longwall to be carried out in accordance with the requirements of subsection (e)(7), the subsection which specifically addresses longwall mining. Moreover, in light of the express reservation of Secretarial discretion contained in section 70.207(e)’s introductory language, it seems all the more illogical to consider this provision as imposing a limitation on the Secretary’s ability to construe subsection (e)(7) according to its plain meaning.<sup>4</sup>

Section 70.207(a), upon which the majority also relies, concerns the frequency and timing of an operator’s submission of respirable dust samples. It does not discuss how the sampling should occur and therefore the reference to “designated occupation” contained in that regulation should not trump the language in section 70.207(e)(7), which specifies a method of sampling on longwall sections without regard to a miner’s occupation.<sup>5</sup>

My colleagues have put forth several reasons why they feel sampling according to occupation is preferable to passing a dust pump among a progression of miners who have different job titles. Even if the majority’s concerns were valid, they would not provide a basis for preventing the Secretary from requiring that sampling be conducted according to the method she has chosen. “The Secretary is not required to impose an arguably superior sampling method as long as the one [s]he imposes is reasonably calculated to prevent excessive exposure to respirable dust.” *AMC v. Marshall*, 671 F.2d at 1256; *see also Sierra Club v. EPA*, 167 F.3d 658, 662 (D.C. Cir. 1999) (stating that courts will “generally defer to an agency’s decision to proceed on the basis of imperfect scientific information, rather than to ‘invest the resources to conduct the perfect study’”) (citation omitted).

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occupation samples are required to be taken, unless otherwise directed by the District Manager.” 45 Fed. Reg. 23990, 23991 (Apr. 8, 1980) (emphasis added).

<sup>4</sup> Section 70.207(e) provides that “*Unless otherwise directed by the District Manager, the designated occupation samples shall be taken by placing the sampling device as follows . . . .*” 30 C.F.R. § 70.207(e) (emphasis added).

<sup>5</sup> Even if one accepted my colleagues’ approach as a plausible reading of the regulations, the Commission must nevertheless defer to the Secretary’s interpretation “‘unless it is plainly erroneous or inconsistent with the regulation.’” *Sec’y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003) (citations omitted).

In point of fact, the record reflects that the procedure the Secretary is requiring Shoshone to implement is a superior method of assuring that miners on longwall sections are protected from overexposure to respirable dust. Under most mining methods, there is a particular occupation that equates to the dustiest environment on the section. See 30 C.F.R. §§ 70.207(e)(1)-(10) discussed supra. As longwall mining technology improved, however, the occupation that was exposed to the most dust changed. Tr. 79-82, 231-37. When longwalls used a single drum method, the Secretary determined that the headgate drum operator was consistently exposed to the highest concentration of respirable dust. Tr. 81- 82, 231. Operators were required to submit samples from this occupation and, for computer tracking purposes, these samples were identified with the 064 code. Tr. 81-82, 231. As longwall mining progressed to double drum shearers, the tailgate shearer operator became the position generally exposed to the greatest dust concentrations. Tr. 82, 232. The Secretary thereupon required operators to submit samples based on the exposure of this occupation and the samples were identified with an 044 code. Tr. 82, 232-33. Further developments, such as wider panel faces and alternative shield advancement, meant that miners were frequently in different locations during the shift, and were oftentimes further downwind than the shearer operator. Tr. 234-37.

The Secretary concluded that because no single job was consistently performed nearest the return air side of the longwall working face at Shoshone's mine, measuring the exposure of only one occupation would not provide adequate protection. S. Br. at 13; Tr. 234-44, 247. Requiring the sampler to be passed from miner to miner, so that it always remained with the miner nearest the return air side of the longwall face, without regard to the miner's occupation, was considered the best way of assuring that all miners on the longwall would be protected from excessive levels of respirable dust. Tr. 70-71, 95-96, 112-13, 121-22, 127. Samples collected in this manner are identified with an 060 code.<sup>6</sup> Tr. 95-96, 112-13, 122, 127.

Although the 060 code is referred to by the Secretary as a designated occupation code, it does not correlate to an actual job, as did the 064 code and the 044 code. It represents instead a hypothetical occupation. It hypothesizes that there is an occupation that requires a miner to be consistently stationed nearest the return air side of the longwall. The fact that there is, in actuality,

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<sup>6</sup> Another advantage of the 060 code is that it deters operators from manipulating the job duties of individual miners. The Secretary submitted testimony that when a particular occupation such as jacksetter was the designated occupation, some operators engaged in "artificial work practices" so that the jacksetter would not be required to work downwind of the shearer during the cutting of coal. Tr. 167-68, 237.

Starting approximately 15 years ago, the Secretary has implemented the 060 code on a mine-by-mine basis, after reviewing the conditions and sampling results at each mine. Tr. 103-04, 122-24, 166. At the time this case was argued on appeal, sampling in accordance with the 060 code had been implemented at every longwall mine with the exception of one, where the Secretary determined that, based on particular conditions at that mine, the 060 sampling code would not be appropriate. Oral Arg. Tr. 44.

no such occupation is viewed by my colleagues in the majority as fatal to the Secretary's position. Slip op. at 6-8. They object that this method of measuring dust abrogates the distinction between designated occupational samples and designated area samples. *Id.* at 7. Moreover, they view the method as inherently unfair because the sampling will measure only the peak exposure site and not the peaks and valleys of exposure to respirable dust that any individual miner would actually encounter as he or she went about his or her job. *Id.*

Concerns identical to those expressed by my colleagues were considered and rejected by the U.S. Court of Appeals for the Tenth Circuit. In *AMC v. Marshall*, mine operators challenged dust sampling requirements that sought to measure dust in areas outby the working faces. 671 F.2d at 1254. Studies showed that it was not just working faces which posed a hazard to miners in terms of exposure to respirable dust, and the rules required operators to place dust sampling devices near known outby dust generation sources. *Id.* The court noted that the overall approach of this program was "analogous to" the program designed to measure the dust at the working faces, the operating principle of both programs being "if the atmosphere in the area of a known dust generation source is in compliance with the statutory standard, then it can be safely presumed that all miners are protected from overexposure." *Id.*

The Court then considered the argument that the designated area samples were invalid because they did not measure the concentration of dust within an individual's breathing zone. Like the samples collected in the instant case under the 060 code, the samples challenged in the *AMC* case measured the dust breathed by a "hypothetical miner" who was assumed to remain in the dustiest part of the area being measured for the entire shift. *Id.* at 1256 n.9. Similarly, like the petitioner in this case, the operators in the Tenth Circuit proceeding objected to the fact that under the challenged method "an operator might conceivably be cited for a violation of the 2 mg./m<sup>3</sup> standard on the basis of area samples even though no individual miner was exposed to more than 2mg./m<sup>3</sup> of respirable dust during a shift." *Id.* at 1256. Unlike the majority in this case, however, the Tenth Circuit found neither argument a reason to invalidate the sampling procedure under review.

My colleagues have attempted to distinguish the *AMC* case. They contend the Tenth Circuit's opinion is unpersuasive because it concerns "designated area" sampling of the outby sections of the mine, while the instant case involves "designated occupation" sampling at the working face. This is a distinction without a difference. The very terms of section 70.207(e)(7) already contradict the notion there is a bright line that separates occupational and area sampling, as the regulation provides that the sampling device need not be placed on a miner, but can instead be placed "along the working face on the return side within 48 inches of the corner." 30 C.F.R. § 70.207(e)(7). In fact, each of the 10 subsections of section 70.207(e) covering the different mining systems permit operators to use a similar "location" alternative as part of occupation sampling. 30 C.F.R. § 70.207(e)(1)-(10); Tr. 74. Designated occupation sampling is not carried out for the purpose of determining the exposure of an individual miner, or even the exposure of a particular occupation. Even when the sampling is carried out by a single miner, its purpose is to provide assurance that the mine atmosphere is safe for every miner working at the face. Tr. 70. It

was for this reason that the Tenth Circuit concluded that “[t]he designated occupation sampling program is itself an area sampling program.” *AMC v. Marshall*, 671 F.2d. at 1256. The majority also ignores the fact that the Commission has likewise concluded that “the designated occupation sampling program contained in section 70.207(a) is an area sampling program, not a personal sampling program.” *New Warwick Mining Co.*, 18 FMSHRC 1365, 1368 (Aug. 1996).<sup>7</sup>

The majority opinion argues that the Secretary’s policy is burdensome, requiring the transfer of the dust pump possibly 40 times in an eight-hour shift. Slip op. at 8. It implies that perhaps designating the jacksetter occupation would be preferable, citing dust surveys that revealed that the jacksetter was exposed to higher dust concentrations than the tailgate side longwall operator. *Id.* at 10. Shoshone itself estimates, however, that keeping the device with the appropriate jacksetter under that interpretation of the regulation would result in six transfers of the device among the five MMU-008-0 jacksetters during each hour-long longwall cutting cycle, which would result in approximately 48 to 60 transfers during a normal 10-hour shift. Tr. 393-97, 414-15. Thus, the 060 code would result in fewer transfers per shift than the alternative interpretation of section 70.207(e)(7) adopted by the majority.<sup>8</sup>

Focusing on the Secretary’s decision to label the challenged sampling method for computer tracking, my colleagues contend the Secretary must engage in notice and comment rulemaking before she can impose the 060 code. Slip op. at 8-12. As I have pointed out earlier, the manner in which the Secretary is requiring sampling to be conducted is consistent with a literal application of Section 70.207(e)(7).<sup>9</sup> That standard was promulgated pursuant to notice and comment rulemaking and provides an adequate legislative basis for the Secretary’s issuance of the subject citation.

In fact, the allegation that the Secretary’s interpretation of the regulation has changed at all is simply a red herring. Notwithstanding that contention, the Secretary’s interpretation of section 70.207(e)(7) has remained constant. As I have discussed, *supra* at 18-19, changing technology and varying circumstances at different mines could affect who “the miner who works nearest the return air side of the longwall working face” may be. In such cases, the standard and its legal interpretation are not altered — the only difference is a change in mining conditions affecting

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<sup>7</sup> The preamble that accompanied the publication of the respirable dust rules indicated that the Secretary considered designated occupation sampling to be a “method of area sampling.” 45 Fed. Reg. at 23998.

<sup>8</sup> Notably, Shoshone’s longwall production supervisor stated he did not have a problem with sampling in accordance with the 060 code. Tr. 295. When asked what he would do if he had a choice between sampling 044 (tailgate operator) and 060 he responded “[w]ell actually, I wouldn’t make the choice. I think sampling both locations would be good.” Tr. 299.

<sup>9</sup> This puts the Secretary in the novel position of being ordered to go through notice and comment rulemaking to produce a result that would duplicate the rule already located at section 70.207(e)(7).

which miner meets the description in the regulatory language.

Thus, although Shoshone is now being required to pass the sampling pump among miners of different job titles, the Secretary's approach has not changed. She has always required the personal sampling device to be worn so it would measure the area of greatest concentration of respirable dust on the section, so that if that sample were in compliance, the Secretary could reasonably conclude that the rest of the miners on the section were working in an atmosphere that was within the 2 milligram standard. Tr. 50-51.

For the foregoing reasons, I respectfully dissent.

  
Mary Lu Jordan, Commissioner

Distribution

R. Henry Moore, Esq.  
Buchanan Ingersoll  
One Oxford Centre  
301 Grant St., 20<sup>th</sup> Floor  
Pittsburgh, PA 15219-1410

Jack Powasnik, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
1100 Wilson Blvd., 22<sup>nd</sup> Floor West  
Arlington, VA 22209-2247

Administrative Law Judge August Cetti (retired)  
Federal Mine Safety & Health Review Commission  
Office of Administrative Law Judges  
1244 Speer Blvd., Suite 280  
Denver, CO 80204

ADMINISTRATIVE LAW JUDGE DECISIONS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 4, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2003-59-M
Petitioner	:	A.C. No. 17-00282-05504
	:	
v.	:	
	:	
F.R. CARROLL, INCORPORATED,	:	Limerick Pit & Mill
Respondent	:	

**DECISION**

Appearances: Kathryn A. Joyce, Esq., Office of the Solicitor, U.S. Department of Labor, Boston, Massachusetts, for the Petitioner; Francis R. Carroll, President, F.R. Carroll, Inc., Limerick, Maine, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, F.R. Carroll, Incorporated. Francis R. Carroll (Carroll), the corporate president, appeared on behalf of the respondent. The Secretary proposes a civil penalty of \$250.00 for Citation No. 4569275 for an alleged violation of section 103(a) of the Mine Act, 30 U.S.C. § 813(a). This statutory provision grants Mine Safety and Health Administration (MSHA) inspectors the right of entry to any mine without advance notice of an inspection.

This matter was heard on October 1, 2003, in Portland, Maine. The Secretary filed a post-hearing Memorandum of Law. At the hearing, Carroll waived the right to file a post-hearing brief. (Tr. 145). For the reasons discussed, Citation No. 4569275 shall be affirmed. With respect to the appropriate civil penalty, Commission judges assess penalties *de novo* and are authorized to reduce or increase the penalty proposed by the Secretary as circumstances warrant. *Topper Coal Co.*, 20 FMSHRC 344, 350 n.8 (April 1998); *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (March 1983), *aff'd* 736 F.2d 1147 (7<sup>th</sup> Cir. 1984). As detailed below, a civil penalty of \$500.00 shall be assessed for Citation No. 4569275 because of the seriousness of the gravity of the violation, and because the respondent's conduct was willful, unjustifiable and inexcusable.

## **I. Findings of Fact**

The Limerick Pit and Mill is a sand and gravel facility located in Limerick, Maine. It is operated by Francis Roger Carroll, who, as noted, is the corporate president. Michael P. Carroll, Carroll's son, is the vice-president. (Tr. 8-9). The facility consists of a processing plant where material is crushed and screened, and a quarry and off-site pits that are located approximately five miles from the processing plant. (Tr.81). Operations at the plant include concrete and asphalt production. Carroll's business employs approximately 63 people, 14 of whom work in mining operations. Some employees work both asphalt production and mining tasks. (Tr. 80). Carroll has operated his business since 1952. Carroll testified that MSHA inspectors have inspected his facility once or twice each year since 1970. (Tr. 82).

At the gravel pit equipment is used to remove material from the ground. At the quarry material is extracted by drilling and blasting. In both instances, after the material is removed from the earth, it is loaded and hauled by truck to the processing plant. (Tr. 17, 18, 81). There various products including crushed stone, asphalt, concrete, and sand and gravel are produced. These products are sold to the general public as well as public municipalities for road construction. (Tr. 18).

Donald Fowler has been an MSHA inspector for 27 years. He is assigned to MSHA's Northeastern District Office in Manchester, New Hampshire. To ensure compliance with safety and health standards, section 103(a) of the Mine Act requires MSHA to inspect underground mines at least four times a year, and surface mines at least twice a year. Fowler was scheduled to inspect the Limerick facility for a mandated semi-annual inspection on September 10, 2002. During this quarter, Fowler was responsible for inspecting a total of 80 mines. (Tr. 19).

On September 10, 2002, Fowler arrived at the Limerick pit at approximately 7:35 a.m. Because of his past experience, Fowler went directly to the pit rather than stopping at Carroll's office. Fowler explained that if he went to Carroll's office, he would have to wait for Carroll before he was permitted to start his inspection. In the past, Fowler had to wait for up to 45 minutes before Carroll was available. Fowler opined that delaying an inspection once the arrival of an inspector is known can compromise the effectiveness of an inspection. (Tr. 20-25).

Upon his 7:35 a.m. arrival at the pit, Fowler remained in his vehicle for approximately ten minutes to prepare his inspection paperwork. During this time, Fowler observed an excavator operator loading three trucks with material for removal to the plant. At approximately 7:45 a.m., Fowler approached the excavator operator, identified himself, and asked the operator whether he could communicate with Carroll to notify him of Fowler's presence. The operator replied that he would contact Carroll to inform him Fowler was on site. (Tr. 30).

Shortly before 8:00 a.m., approximately ten minutes after Fowler's conversation with the excavator operator began, Carroll arrived at the pit. (Tr. 31-33). Upon his arrival, Carroll expressed concern that Fowler did not initially stop at Carroll's office before proceeding to the pit. (Tr. 34). Despite MSHA inspections since 1970, Carroll asserted to Fowler that he was not allowed on mine property without a search warrant, and that he was a trespasser. (Tr. 34).

Fowler tried to explain that he was attempting to conduct an inspection as required by statute. Carroll replied that he had a previous appointment, and that he couldn't accompany Fowler on his inspection until 1:00 p.m. that afternoon. (Tr. 34-35). Carroll testified he had a 9:30 a.m. appointment with Ted Jones, a lobbyist for Maine Aggregate. (Tr. 84).

Fowler informed Carroll that he could not wait four hours to begin his inspection. He provided Carroll with a copy of the Mine Act, explaining that he had a right to conduct his inspection without a search warrant. (Tr. 34-36).

Carroll testified that, shortly after arriving at the pit, he radioed his son Michael, instructing him to call the Sheriff's Department to send an officer to the mine site. (Tr. 95). A few minutes after Fowler began his conversation with Carroll, Michael arrived at the pit. Carroll testified that Michael Carroll was too busy to accompany Fowler on his inspection because "he was buried in [paperwork] records" and "we have to get the work out the door." (Tr. 97, 103).

The conversation concerning Fowler's right of entry continued during which time Carroll advised that he had called the York County Sheriff to have Fowler removed from the property. Shortly thereafter, a York County Sheriff arrived at the scene. (Tr.37). It soon became apparent that the Sheriff did not know what to do after Fowler identified himself as a federal official authorized to carry out his duties under federal law. The Sheriff requested back-up assistance. (Tr. 37-38). Carroll testified:

The Sheriff, when he got there, he didn't know what to do with him, and I knew he wouldn't know what to do with him. He said to me, I can't throw him off, I can't.

(Tr. 90). Within minutes, another Sheriff, who appeared to be a senior officer, arrived and took charge of the scene. (Tr. 38).

Carroll and Fowler explained their respective positions to the Sheriffs. (Tr. 39). The lead Sheriff then asked Fowler if he would leave the premises. Fowler replied "no." (Tr. 39-40). Fowler explained to the Sheriffs that he had jurisdiction and that he was not leaving the property at the Sheriff's request. (Tr. 40). Fowler then turned to Carroll and Michael and said, ". . . I'm going to ask you one more time with the county sheriffs as my witnesses . . . to let me continue this inspection . . ." (Tr. 40). Carroll refused. (Tr. 40). Consequently, Fowler verbally issued a citation for denial of entry and left the mine property. The time was 8:35 a.m. (Tr. 70-71).

It is MSHA policy for inspectors to immediately advise superiors of a denial of entry. Thus, after exiting the mine site, Fowler drove into town to telephone Donald Foster of the District Office in Warrendale, Pennsylvania, the office to which the New Hampshire region reported. (Tr. 41). After discussing the morning's events, Foster instructed Fowler to issue a written citation citing section 103(a) of the Mine Act for denial of entry. (Tr. 41-42).

Upon completing the citation, Fowler telephoned Foster to communicate the contents of the citation for Foster's approval. MSHA policy requires that a written citation for a section 103(a) violation must be served on the party denying entry. Fowler contacted the Sheriff's Department to advise that he was returning to the mine site to serve the citation. (Tr.45-46).

Fowler returned to the mine site at approximately 1:00 p.m. and went directly to Carroll's office. Fowler told Carroll that he needed to discuss the citation and he presented Carroll with Citation No. 4569275 citing a violation of section 103(a) of the Mine Act. Carroll invited Fowler into his office whereupon Fowler testified the two had a "real good conversation" about MSHA's role with particular emphasis on the right of entry. (Tr. 46-47). The meeting ended with Carroll inquiring when Fowler could return to perform his inspection. Fowler replied that he could not tell him when the inspection would be. In view of Carroll's representation that he would permit an inspection, Fowler terminated Citation No. 4569275 at 1:33 p.m. and left the mine site. (Gov. Ex. 1; Tr. 48). Fowler subsequently inspected Carroll's facility and did not observe any violations.

Carroll testified that he would like "to be treated like a human being," and that he objected to "Gestapo" tactics. (Tr. 85, 88). He expressed frustration over being over-regulated by numerous state and federal agencies. (Tr. 87-88). Carroll testified, "I can't understand why we are here today" because after five hours, at 1:30 p.m. on September 10, 2002, when Citation No. 4569275 was terminated, he "had agreed to the inspection continuing." (Tr. 92).

## **II. Pertinent Case Law and Statutory Provisions**

As a threshold matter, it is well settled that sand and gravel quarries are governed by the Mine Act because they affect commerce even if they are primarily intrastate in nature. *See, e.g., Jerry Ike Harless Towing, Inc*, 16 FMSHRC 683, 686 (April 1994) *citing Fry v. United States*, 421 U.S. 542, 547 (1975) and *Wickard v. Filburn*, 317 U.S. 111 (1942). Carroll does not assert that his quarry business does not affect interstate commerce, or, that his business activities consisting of the extraction and processing of sand a gravel, are not subject to Mine Act jurisdiction.

The U.S. Supreme Court has recognized that section 103(a) of the Mine Act authorizes warrantless inspections by granting MSHA inspectors the right of entry to, upon, or through any mine, *without advance notice*, to determine if there is compliance with mandatory health and safety standards. *Donovan v. Dewey*, 452 U.S. 594, 596 (1981); *see also Unites States Steel Corp.*, 6 FMSHRC 1423, 1430-31 (June 1984). The Court explained:

[It is] clear that a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.

*Dewey*, 452 U.S. at 600.

Consistent with *Dewey*, the Commission has long held that a mine operator's refusal to permit inspections is a violation of section 103(a). *Waukesha Lime & Stone Co., Inc.*, 3 FMSHRC 1702, 1703-04 (July 1981); *United States Steel*, 6 FMSHRC 1423, 1430-31 (June 1984); *Calvin Black Enterprises*, 7 FMSHRC 1151, 1156 (August 1985). However, MSHA's entry is not absolute. In *Dewey*, the Court acknowledged a mine operator's right to demonstrate, in an adjudicative forum, that a specific inspection is outside federal regulatory authority because of "unusual privacy interests" such as the potential disclosure of trade secrets. 452 U.S. at 604-05.

When mine entry is denied, the Secretary may pursue injunctive relief, or, as in the instant case, bring a civil penalty action before the Commission alleging a violation of section 103(a) of the Mine Act. *Waukesha*, 3 FMSHRC at 1703-04. The party denying entry may defend its action in a neutral adjudicative proceeding. If it is determined that there is no justification for the denial of entry, injunctive relief or civil penalties may be imposed.

### **III. Further Findings and Conclusions**

A mine operator denying entry, particularly an operator like Carroll's business that has been inspected by MSHA for over 30 years, does so at its own "legal peril" absent a showing of "unusual privacy interests." *Secy. of Labor v. Tracey & Partners*, 11 FMSHRC 1457, 1462 n.3 (August 1989). It has neither been contended nor shown that Fowler's attempted inspection on the morning of September 10, 2002, was an unwarranted invasion of Carroll's privacy. Rather, the sole basis for Carroll's denial of entry was that *both* he and his son were too busy to accompany Fowler on his inspection.

The importance of unannounced inspections proceeding without delay is self-evident. Such inspections encourage compliance by preventing mine operators from concealing hazardous violations upon learning that mine inspectors have arrived on the premises. Thus, Carroll's insistence on delaying Fowler's inspection five hours until 1:00 p.m. must be viewed as unreasonable. If Carroll and his son were "too busy" to accompany Fowler, then it was incumbent on Carroll to designate someone else to accompany Fowler. If Carroll could not find someone to fulfill this role, Carroll was obliged to permit Fowler to conduct his inspection unaccompanied.

In considering the conduct of Fowler and Carroll, there was nothing in Fowler's behavior on September 10, 2002, that demonstrates overreaching or an abuse of discretion. Upon arriving at the mine site, Fowler promptly requested the excavator operator to notify Carroll of his presence. Fowler explained the mandatory inspection requirements specified in section 103(a) of the Mine Act. Fowler repeatedly asked Carroll to allow him to proceed with his inspection, explaining why Carroll's request that he return at 1:00 p.m. could not be granted. In apparent recognition that the Mine Act prohibits forcible entry, Fowler voluntarily left mine property to avoid further confrontation. 30 U.S.C. § 818. Finally, Fowler did not charge Carroll with any violations of mandatory safety standards during the inspection that followed Carroll's denial of entry reflects that Fowler harbored no ill will towards Carroll.

In contrast, there are no mitigating circumstances to justify Carroll's conduct. After all, Carroll's mine had been inspected by MSHA since 1970. As the Court noted in *Dewey*, a mine operator "cannot help but be aware that his property will be subject to periodic inspections." 452 U.S. at 600. Carroll's concession that he knew the Sheriff "would not know what to do with [Fowler]" demonstrates that Carroll recognized Fowler was a federal official who was acting within the scope of his authority. (Tr. 90). In the final analysis, Carroll created an awkward confrontation between federal and local officials by his insistence that the Sheriff remove Fowler from mine property although Carroll knew, or should have known, his request was unreasonable. This entire incident occurred because Fowler's inspection apparently was an inconvenience. As discussed above, Congress mandated that section 103(a) periodic inspections are to be unannounced. Mine operators must permit such inspections to occur unimpeded and without delay. Accordingly, Citation No. 4569275 **IS AFFIRMED**.

#### **IV. Civil Penalty**

As noted, Commission judges assess civil penalties *de novo*, and they are not bound by the Secretary's proposed assessments. *Topper Coal, supra*; *Sellersburg Stone, supra*. In determining the appropriate civil penalty to be assessed, Commission Rule 30, 29 C.F.R. § 2700.30, requires the judge to consider the statutory criteria set forth in 110(i) of the Mine Act, 30 U.S.C. § 820(i). In determining the appropriate civil penalty, section 110(i) provides, in pertinent part:

the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

**a. Size of Operator and Ability to Remain in Business**

The respondent is a small to moderate mine operator. Carroll does not contend that imposition of a reasonable civil penalty in this matter will adversely affect his business' continued viability.

**b. Negligence**

With respect to negligence, Carroll's conduct was willful, unjustifiable and inexcusable. Given the 30 year history of mine inspections, Carroll's unreasonably created a confrontation between federal and local officials although Carroll knew, or should have known, that Fowler was authorized to conduct an inspection without a search warrant.

**c. Gravity**

The gravity penalty criterion contained in section 110(i) requires an evaluation of the seriousness of the violation. *Hubb Corporation*, 22 FMSHRC 606, 609 (May 2000) citing *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (September 1996); *Sellersburg*, 5 FMSHRC at 294-95. In evaluating the seriousness of a violation, the Commission focuses on "the affect of a hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC at 1550. Here, refusing to allow an inspection creates the potential that hazardous conditions that expose mine personnel to the risk of serious injury will continue to exist. Consequently, the violation is indicative of extremely serious gravity.

**d. History of Previous Violations**

Fowler testified that Carroll's mine facility operates in accordance with safety and health standards. Significantly, Fowler did not observe any violations of mandatory safety standards during the inspection that followed Carroll's denial of entry. Fowler further testified that the mine facility has an excellent record with respect to its history of previous violations.

**e. Good Faith Efforts at Abatement**

As noted, Carroll's conduct cannot be condoned. Carroll's continued refusal to permit Fowler to perform the inspection was unreasonable and in bad faith. Carroll's belated consent to an afternoon inspection is not a mitigating factor.

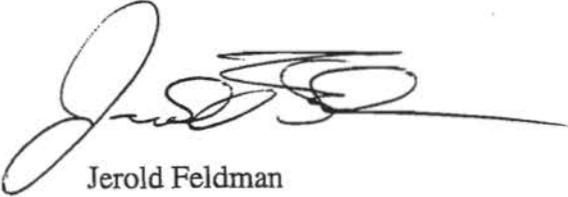
When considering the penalty criteria in their entirety, the undisputed facts in this case warrant a higher penalty than the \$250.00 civil penalty initially proposed. As the Commission has stated, a mine operator denies entry at its own legal peril. *Tracey & Partners*, 11 FMSHRC at 1462 n.3. With the exception of Carroll's excellent safety record, there are no mitigating circumstances. Carroll's disingenuous insistence that the Sheriff escort Fowler off mine property because "he's trespassing" presents a compelling case for increasing the proposed penalty. (Tr. 90). Consequently, a civil penalty of \$500.00 shall be imposed for Citation No. 4569275.

As a final note, I have exercised restraint. Although the assessed \$500.00 civil penalty is double that initially proposed by the Secretary, it only increases the civil penalty by \$250.00, and, there is no evidence that it will cause financial hardship. Hopefully this relatively small increase in penalty is enough of a deterrent to encourage future cooperation and compliance.

### **ORDER**

Accordingly, **IT IS ORDERED** that Citation No. 4569275 **IS AFFIRMED**.

**IT IS FURTHER ORDERED** that F. R. Carroll, Incorporated, shall pay a civil penalty of \$500.00 in satisfaction of Citation No. 4569275. Payment shall be made within 40 days of the date of this decision. Upon timely payment of the \$500.00 civil penalty, Docket No. YORK 2003-59-M **IS DISMISSED**.



Jerold Feldman  
Administrative Law Judge

Distribution: (Certified Mail)

Kathryn A. Joyce, Esq., Office of the Solicitor, U.S. Department of Labor,  
E-375, John F. Kennedy Federal Bldg., Boston, MA 02203

Francis R. Carroll, President, F.R. Carroll, Inc., P.O. Box 9, Limerick, ME 04048

/hs

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

February 18, 2004

LESLIE O. GLEASON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2003-265-D
	:	DENV CD 2003-03
v.	:	
	:	Mine I.D. 05-02962
COLOWYO COAL COMPANY,	:	Colowyo Mine
Respondent	:	

**DECISION**

Appearances: Leslie O. Gleason, Bagdad, Arizona, pro se;  
Laura E. Beverage, Esq., Jackson Kelly, Denver, Colorado,  
for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Leslie O. "Jack" Gleason against Colowyo Coal Company ("Colowyo"), under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). Mr. Gleason alleges that Colowyo terminated him from his employment with the company because of protected activities he engaged in while an employee of Colowyo. An evidentiary hearing was held in Steamboat Springs, Colorado.

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

Colowyo operates the Colowyo Mine, an open pit coal mine, near Meeker, Colorado. Mr. Gleason contends that he was forced to leave Colowyo, by taking long term disability benefits, because he complained about safety conditions at the mine starting in January 2001. After Gleason presented his case in chief at the hearing, I granted Colowyo's motion to dismiss Gleason's discrimination complaint for failure to present a *prima facie* case. My reasons for granting Colowyo's motion are set forth below. Prior to the hearing, the parties entered into detailed stipulations, as follows:

1. Mr. Gleason was employed at the Colowyo site from March 6, 1978, until October 11, 2002.
2. Kennecott Energy acquired the Colowyo site in December 1994.

3. Mr. Gleason was an electrical planner at the time of a reorganization in June 1999 and was offered a buyout, along with other personnel.
4. Mr. Gleason declined the buyout option and instead opted to become an electrician.
5. Mr. Gleason was the lead electrician until approximately August 2000, when Tim Buller was moved into the role of electrical supervisor.
6. Mr. Gleason commenced having knee problems in approximately 1997, which problems were later diagnosed as the result of misaligned kneecaps.
7. Mr. Gleason took Family and Medical Leave to have surgery on his left knee commencing September 29, 2000, through October 25, 2000.
8. Mr. Gleason returned to work with medical restrictions on October 26, 2000, following his knee surgery and remained on restricted duty until December 21, 2000. The restrictions included the following: no climbing; no kneeling; no squatting; and no lifting greater than ten (10) pounds.
9. Mr. Gleason took Family and Medical Leave on January 20, 2001, to undergo urology surgery and remained off work until March 1, 2001. He returned to work on restricted duty until March 12, 2001. The restrictions included the following: no climbing and no lifting greater than ten (10) pounds.
10. Mr. Gleason's knee problems continued to deteriorate after his surgery . . . and he was placed on work restrictions on September 27, 2001. The restrictions included the following: no climbing; no lifting objects greater than 20 pounds; no carrying of objects greater than 20 pounds; no pushing of objects greater than 20 pounds; and no pulling of objects greater than 20 pounds.
11. Mr. Gleason remained on restricted duty for his knee problems until he took Family and Medical Leave on February 14, 2002, for additional surgery on both knees.
12. Mr. Gleason remained off work as a result of this February 14, 2002, knee surgery until May 24, 2002, when he returned to work with restrictions. These restrictions included the following: no carrying of objects greater than 20 pounds; no pushing of objects greater than 20 pounds; no pulling of objects greater than 20 pounds; no crawling, kneeling, or squatting; no climbing of stairs or ladders; and the avoidance of uneven ground.
13. On May 15, 2002, while Mr. Gleason was recovering from his surgery, Colowyo requested an opinion of Mr. Gleason's ability to return to work, based on the physical

demands analysis of the electrician position, from his physician to ascertain his fitness for work.

14. On May 23, 2002, Dr. Sisk issued a release to work with restrictions of carrying less than ten (10) pounds; pushing or pulling less than ten (10) pounds; no crawling, kneeling or squatting, no climbing of stairs or ladders; and a notation that Mr. Gleason should be able to return to full duties within three (3) months.
15. On July 21, 2002, Mr. Gleason underwent eye surgery for a detached retina and remained off work until July 26, 2002, when he returned to work with restrictions. The restrictions included the following: no heavy lifting, jumping or jarring activity; and no lifting greater than 50 pounds.
16. Mr. Gleason remained on restricted duty for his eye and knee problems until October 11, 2002, when he left Colowyo and applied for long term disability.
17. On September 13, 2002, Colowyo requested a functional capacity evaluation from Mr. Gleason's physician, Dr. Sisk, to determine his physical fitness for duty.
18. The functional capacity evaluation limited Mr. Gleason from crouching, kneeling, ladder climbing, crawling, or lifting. The functional capacity evaluation noted the following specific weight limits: from floor to waist a weight limit to 40 pounds throughout the day, 50 pounds occasionally, and no more than 70 pounds infrequently. The evaluation also limited Mr. Gleason lifting from waist level to overhead heights as follows: 30 pounds on a consistent basis, 50 pounds occasionally, and no more than 70 pounds infrequently. [The evaluation also included restrictions on lifting, specific carrying restrictions, and other restrictions.]
19. On September 30, 2002, his physician requested that Mr. Gleason be placed in a position meeting his physical limitations.
20. Mr. Gleason's restrictions identified in Nos. 8-12 and 14-18 of these stipulations precluded him from performing the duties of an electrician at Colowyo.
21. While on restricted duty identified in Nos. 8-12 and 14-18 of these stipulations, Mr. Gleason was assigned tasks other than those of an electrician, including the provision of assistance to the safety department. However, he continued to be paid his hourly rate as an electrician while on restricted duty, and Colowyo did not fill his position as an electrician during his performance of restricted duty.
22. On October 11, 2002, Mr. Gleason worked his last day at the Colowyo site.

23. For a six (6) month period beginning on October 12, 2002 and ending on April 11, 2003, Kennecott Energy paid Mr. Gleason salary continuation benefits at his full pay rate of \$23.63 per hour.
24. On October 29, 2002, Colowyo requested that Mr. Gleason be evaluated for Long Term Disability benefits which he qualified for and which were initiated in April 2003 after his salary continuation benefits expired. This request was not motivated by any protected activity under the Mine Act.
25. Mr. Gleason's Long Term Disability benefit was one half of his hourly rate as an electrician.
26. Mr. Gleason commenced work as an electrician at Phelps Dodge Corporation's Bagdad Mine in Arizona on July 28, 2003. That position does not require that he work on a dragline and in that position he can access equipment that is equipped with hydraulic lifts, rather than stairs and ladders. His pay rate in this position is \$18.30 an hour.

(See Tr. 114).

In his complaint of discrimination and at the hearing, Mr. Gleason presented facts to show that he engaged in protected activity. His evidence can be summarized as follows:

On or about January 23, 2001, Colowyo posted a position opening for a maintenance supervisor. (Tr. 74; Ex. G-1B). Gleason raised objections about this posting to Gene Bryant, the director of the human resources department. Gleason did not apply for the position but raised questions about the wording in the job description. He believed that, because the position supervised electrical repairs, only people with an electrical qualification card would be able to apply for the position. He believed that this requirement was too restrictive and that employees who were not certified electricians should be able to qualify. (Tr. 76). Bryant and Joe Vaccari, the manager of operations and maintenance, believed that the language in the job posting was acceptable and that the position was open to anyone, not just qualified electricians. Paradoxically, although Gleason testified that he thought that the position should be open to non-electricians, he was also concerned about non-electricians supervising electricians. (Tr. 77). The position was filled with a non-electrician.

On March 14, 2001, Tim Buller, the electrical supervisor at the time, assigned Gleason the responsibility to conduct a thorough electrical inspection of the mine. Gleason was chosen to perform this work, in part, because of his extensive knowledge of 30 C.F.R. Part 77 and the National Electrical Code ("NEC"). Part of Gleason's responsibility was to look for violations of MSHA's electrical standards in Part 77. Gleason tagged a number of items in the water filtration plant that he believed violated the NEC. During the course of this inspection, Gleason became concerned about electric panels in the filtration plant. He observed standing water on the deck of this plant and he knew that water was used to wash down the walls of the plant. (Tr. 78-80). The

electric distribution panels in the plant were panels that are typically used in dry environments. The panels showed some signs of corrosion from the moisture or the chlorine. He believed that because the plant was a “wet/damp” environment a different type of electric distribution panels should be installed. Gleason wrote a “red tag” for the condition, but he did not hang it. (Tr. 79). Instead, Gleason went to the mine office and got Tim Buller out of a cost meeting to discuss the situation with him. Buller and Kimberly Wolf, an environmental engineer, went to the filtration plant with Gleason to observe the conditions. *Id.*

The filtration plant had been in this condition for about ten years. (Tr. 36). After looking at the electrical system in the plant, they realized that they could not cut the power to the plant because the mine-wide radio system obtains its power from the same distribution panel. Gleason suggested that notice be given to electricians through a notation in the electrical inspection book. (Tr. 80; G-1C). The notation, written by Buller, states as follows:

Filtration plant. Many of the electrical enclosures are only classified as dry location equipment. This area is washed down occasionally so it will need to be wired for wet location. I have spoken to engineering about replacing this plant later this year. I don't believe that there are any safety hazards, but it should be fixed.

(Ex. G-1C). Employees working in the filtration plant were also warned. (Tr. 123). Colowyo had ongoing plans to replace the filtration plant, but as of January 2004, it appears that the existing plant was still being used with the same electric distribution panels.

Gleason testified that about two weeks later, Buller told him that Bryant and Vaccari wanted to meet with him. Gleason met with the two managers in the human resources department office. The managers asked him if there had been any problems when he moved from an electrical planner to an electrician. As set forth in the stipulations, during a company reorganization in June 1999, Gleason was demoted from the position of electrical planner to an electrician position. Vaccari complained that Gleason did not know how to “take care of the boss.” (Tr. 82). Both managers told him that he was too aggressive and confrontational. *Id.* Gleason believed that management was asking him to “work more cooperatively with my supervisors.” (Tr. 106). Gleason testified that Bryant asked him whether he raised the issues about the filtration plant to get back at the company for demoting him from electrical planner to electrician. (Tr. 82, 148-49). They also discussed Gleason’s objections to the language in the January 2001 job posting. According to Gleason, Bryant told him not to get so emotional and aggressive about minor things. Gleason testified that he was also advised that just because he believes something is unsafe does not mean that it actually is unsafe. (Tr. 83). Gleason believed that Bryant was telling him that he did not have the final say on whether a condition violates 30 C.F.R. § 77.502. That provision provides, in part, that electric equipment shall be frequently examined and, when a potentially dangerous condition is found, such equipment shall be removed from service. Gleason apparently took that statement personally as an insult to his

professional judgment. (Tr. 85). Bryant also indicated that, by taking Buller out of a meeting to look at the conditions at the filtration plant, Gleason had blown the matter out of proportion. *Id.*

Colowyo posts job announcements from other Kennecott Energy properties on the bulletin board at the mine. Two announcements were of interest to Gleason: an opening for an electrical planner at the Cordero Rojo mine and a similar opening at the Spring Creek mine. Gleason testified that he applied for these positions by giving his application to Mr. Bryant, the human resources manager at Colowyo. (Tr. 86). Gleason believes that either his application was not forwarded to these mines or he was not given serious consideration for the positions as a result of his protected activities. (Tr. 87-88).

On June 25, 2001, Gleason was conducting a monthly electrical inspection at the tank farm at the mine. He understood that the building at the tank farm was considered to be non-classified, meaning that hazardous or flammable materials would not be stored there. (Tr. 90). During this inspection, Gleason found barrels of kerosene as well as a pump for the kerosene. Gleason went to the safety department to discuss the matter. In addition, he reviewed the NEC. (Tr. 91; Ex G-6). Gleason testified that kerosene was listed as a Class I Group 2A substance. He discussed the issue with the safety director.

On July 11, 2001, Buller assigned Gleason to be a walkaround representative during a regular MSHA inspection. Gleason believes that Vaccari told the inspectors that Gleason was a "disgruntled employee." (Tr. 89). Gleason was a walkaround representative during the entire inspection except for one day, when he was told not to accompany the inspectors.

On August 7, 2001, Rick Scherer, an electrical engineer with Kennecott Energy, was at Colowyo. Gleason showed him the conditions at the filtration plant and the tank farm. (Tr. 93). At the filtration plant, Scherer and Gleason found other conditions that violated the NEC. (Tr. 94). Scherer and Gleason discussed the conditions they found with Steve Hinkemeyer, the engineering manager. Hinkemeyer told them that the filtration plant was scheduled to be replaced within a year. *Id.* Scherer told him that the conditions needed to be corrected in any event. Hinkemeyer then asked if it would be satisfactory if Colowyo took precautions to make sure that water was not sprayed on the walls, that the electric panels did not get wet, and that water would not be allowed to remain on the floor. Scherer and Gleason agreed that his suggestion was a reasonable approach to the problem. (Tr. 95, 124). It was agreed that the other electrical problems at the filtration plant would be fixed and that flammable material would be removed from the building at the tank farm. *Id.* The flammable material was removed about a month later, but the pump remains. (Tr. 95, 120-21).

In January 2002, Gleason accompanied Jim Andrews, the mine's safety director, on a safety inspection of the mobile equipment shop. Gleason noted that an air hose reel was located directly under the 480-volt control panel in violation of the NEC. Gleason does not know if this condition was corrected.

On June 6, 2002, Buller announced that he was leaving Colowyo to take a position at another mine. Gleason applied for this job soon after it was posted on June 21, 2002. (Ex. R-1).<sup>1</sup> On August 16, 2002, Gleason saw an e-mail from Kennecott Energy which stated that MSHA inspectors are now considering diesel fuel to be a flammable liquid. (Tr. 99; Ex. G-1D). As a consequence, Gleason filed a written section 103(g) complaint with the MSHA office in Craig, Colorado, asking MSHA to come out to the mine to discuss this and the other issues he had previously raised, including the filtration plant and the tank farm. (Tr. 99). Two MSHA inspectors visited the mine on August 27, 2002. Although the inspectors issued some citations, they did not issue any citations related to the items that Gleason mentioned in his complaint. (Tr. 108). The inspectors were satisfied that if water was not sprayed on the electric panels in the filtration plant, the panels did not have to be replaced with panels suitable for a damp/wet environment. The inspectors also apparently did not believe that the conditions at the tank farm violated the safety standards since the kerosene had been removed. Although it appears that the MSHA inspectors told Colowyo management that the complaint had been phoned in, Gleason believes that management knew he had filed a written section 103(g) complaint.

On August 30, 2002, James Petty, the new maintenance coordinator, asked Gleason to meet with him. Petty advised Gleason that he would not be considered for the Electric Supervisor-Planner position. (Tr. 99). Gleason testified that Petty said that management had "their own ideas about the personality they wished to see in the job and that I wouldn't fit." (Tr. 100). Although Colowyo interviewed David Bird, an electrician at Colowyo, the position was filled by someone from outside Colowyo.

On September 3, 2002, Colowyo posted two open positions for Maintenance Supervisor. (Ex. R-2). Gleason applied for these positions. (Tr. 100).

On October 4, 2002, a meeting was held to discuss Gleason's ability to perform his job as an electrician. As stated in the stipulations, Gleason had completed a functional capacity evaluation and his physician asked that Gleason be placed in a position meeting his physical limitations. (Stips. ¶¶ 18 & 19). Colowyo management told Gleason at the meeting that an employee can only work on restricted duty for a short time. (Tr. 54). Gleason was no longer physically able to perform his duties as an electrician at Colowyo. Gleason does not dispute that fact. (Stips. ¶ 20; Tr. 109, 129). Management stated that, because it had kept him in his position while he was on medical leave and on restricted duty, the company was short one electrician. Colowyo wanted to fill his slot with someone else. Management suggested that Gleason bid on a maintenance assistant position because it was not as strenuous. (Tr. 131). Gleason declined this offer because the pay was somewhat lower, he would be required to walk up and down stairs, and he would be required to do more typing than he had in the past. (Tr. 132-33). Gleason also raised the issue of who is qualified to supervise electricians.

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<sup>1</sup> Exhibits R-1 and R-2 were introduced by Gleason, not Colowyo. Gleason agreed to use Colowyo's copies of these premarked exhibits because they were in better condition than his own.

When Gleason declined to consider the maintenance assistant position, Bryant told him that the company would try to get him long term disability. When Gleason asked if this meant that he was fired, Bryant replied that he was being terminated because he could no longer do the job of an electrician. Gleason's last day at work was October 11, 2002.

As set forth in the stipulations, Gleason was on salary continuation benefits through April 11, 2003, at \$23.63 per hour. After that date, he started receiving disability benefits at one-half of his hourly rate. In July 2003, Gleason decided to see if he could work again on an experimental basis. (Tr. 153). He obtained a job as an electrician at a copper/molybdenum mine in Arizona that does not require as much physical exertion. (Tr. 154).

Gleason filed a complaint of discrimination with the Department of Labor on November 8, 2002. By letter dated April 9, 2003, MSHA notified Gleason that it determined that the facts disclosed during its investigation of his complaint did not constitute a violation of section 105(c) of the Mine Act. On May 5, 2003, Gleason filed the complaint in this proceeding.

## **II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW**

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

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

## **A. Protected Activity**

I find that Gleason engaged in protected activity while employed at Colowyo. Specifically, he raised questions about the conditions in the filtration plant and at the tank farm. He raised other issues concerning electrical safety. He also filed a written complaint with MSHA under section 103(g) of the Mine Act.

## **B. Adverse Action**

Gleason suffered an adverse action in that he was separated from his employment. The issue is whether Gleason was terminated from his job as a result of his protected activities. In determining whether a mine operator's adverse action is motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant.

It is clear that Colowyo management had knowledge of Gleason's protected activities. It is not entirely clear that management knew that Gleason filed the 103(g) complaint, but given the subject matter contained in the complaint, management likely had a good idea that Gleason filed it. (Tr. 108). Most of his protected activities occurred in 2001 long before he was terminated. His 103(g) complaint, however, was filed only a few months before his termination. There has not been a strong showing of animus or hostility towards Gleason's protected activities. Management appears to have been dissatisfied with the manner in which he raised electrical safety issues, but management addressed most of the issues although not as quickly as Gleason would have liked. Management's request that he be more cooperative demonstrated some degree of hostility. Nevertheless, he was supported in his efforts by some individuals in management, such as Buller and Scherer. Gleason's work performance appraisal given by Buller after he had raised the electrical safety issues in the filtration plant was quite positive. With respect to safety performance and philosophy, the appraisal states that "Jack has not only complied with all [safety requirements], he has been instrumental in setting the standards we follow." (Ex. G-1E). With respect to productivity performance, the appraisal states, "Jack's strict interpretation of standards has been a source of some conflict, but I truly believe that Jack's intentions are genuine and his ultimate desire is to do what is best for the company." *Id.* The appraisal also cites the fact that one of Gleason's productivity improvements will likely save the company hundreds of thousands of dollars. Gleason also had a clean disciplinary record. (Tr. 160).

Gleason was forthright in presenting his case in this matter. He admitted that he could not perform the job duties of an electrician due to his health problems. At Colowyo, an electrician is required to climb onto heavy equipment, such as draglines, to perform electrical work. An electrician must also perform other tasks that Gleason was not capable of performing in October 2002. Gleason testified that he “wasn’t ready to leave Colowyo” and he wanted to be considered for the Electrical Supervisor-Planner position or the Maintenance Supervisor positions. (Tr. 135-36, 159). He admitted, however, that his limitations would interfere with his ability to perform all the functions of those jobs as well. (Tr. 137-39, 145-46). He testified that he would have to “designate somebody to go be my legs. . . .” if he were in either of those positions. (Tr. 156). He testified that Colowyo has made accommodations for other employees in the past. Although Gleason touched on the disparate treatment issue, there is no credible evidence in the record to find that he was treated differently from other similarly situated employees because of his safety activities.

As stated above, at the conclusion of Gleason’s case in chief, Colowyo moved that the case be dismissed because he had not established a *prima facie* case. Colowyo argued that Gleason’s evidence shows that he was not terminated from his employment, but that he was placed on long term disability because he could no longer perform his job. Gleason admits that he was not capable of performing the work of an electrician in October of 2002. Although Gleason wanted to be considered for two supervisory positions, Colowyo would have been required to modify the scope of those jobs in order to accommodate Gleason’s limitations. Colowyo argues that the relief requested by Gleason is not within the scope of section 105(c).

I agree with Colowyo’s argument in this regard. As shown in the stipulations, Gleason did little electrical work after September 2000. During most of that period he was on medical leave or restricted duty that precluded him from doing the type of work that other electricians were performing. Colowyo did not bump him from his position, but gave him other assignments so that he could continue to receive his pay as an electrician. (Tr. 129). Many of his assignments involved inspecting the mine for safety violations. Colowyo continued giving him safety-related work despite the fact that he discovered many conditions that he believed did not meet MSHA and NEC standards. (Tr. 117-18, 126). Colowyo asked him to thoroughly inspect electrical installations at the mine to help reduce the number of citations it receives from MSHA.

In September 2002, Gleason’s physician requested that Gleason be placed in a position meeting his physical limitations. (Stips. ¶ 19). Because of these limitations, Colowyo management concluded that Gleason would not be able to perform the work of an electrician for the foreseeable future. Colowyo offered him a position that would fit his limitations. Although Gleason argues that they did not offer him the maintenance assistant position, but only offered to let him bid on the job, it is not disputed that he declined to discuss or consider the offer.

The Mine Act protects miners who make safety complaints or who refuse to work in the face of hazardous conditions. The Mine Act does not require a mine operator to continue to employ a miner in a position that he is no longer able to perform because of his own physical limitations. *See Collette v. Boart Longyear Co.*, 17 FMSHRC 1121, 1125-26 (July 1995) (ALJ).

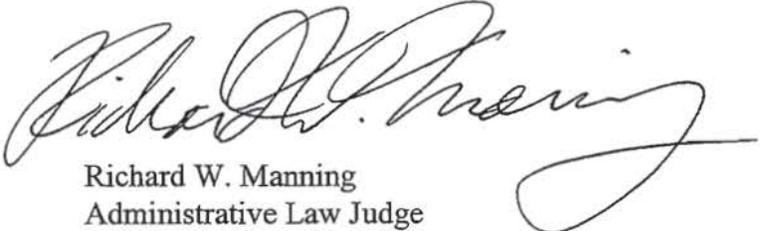
There has been no credible evidence that Colowyo forced Gleason to go on long term disability as a pretext or subterfuge to hide its discriminatory motive. Colowyo offered Gleason another position at the mine or at the least encouraged him to bid on that position. This fact belies any discriminatory motive. It is true that Colowyo did not offer him one of the two supervisory positions that he applied for, but those positions were inconsistent with the limitations Gleason was under in October 2002.

Gleason is proud that he is a "carded electrician." Gleason also took his responsibilities under section 77.502 with appropriate seriousness. Gleason believes that when Colowyo supervisors began questioning his concerns about electrical safety, they were questioning his judgment. He believes that management thought that he "couldn't be trusted to determine if something was a danger or not." (Tr. 160). Although the Mine Act protects miners who raise safety complaints, it does not prohibit a mine operator from questioning or probing the issues raised. It is clear from the evidence that Colowyo respected Gleason's demonstrated expertise in electrical safety and the NEC. The fact that Colowyo's supervisors did not immediately change or correct every alleged deficiency that Gleason tagged and the fact that these supervisors questioned Gleason about some of these items does not establish that Gleason was not a trusted employee or that he was discriminated against in violation of section 105(c).

For the reasons set forth above, I find that Mr. Gleason did not establish that his protected activities played a part in Colowyo's decision to place him on long term disability. Colowyo placed Gleason on long term disability because of his physical limitations only after he declined to bid on or discuss the maintenance assistant position.

### III. ORDER

For the reasons set forth above, the discrimination complaint filed by Leslie O. Gleason against Colowyo Coal Company under section 105(c) of the Mine Act is **DISMISSED**.

  
Richard W. Manning  
Administrative Law Judge

Distribution:

Leslie O. Gleason, 805 Exmoor Road, Craig, CO 81625-3828 (Certified Mail)

Leslie O. Gleason, P.O. Box 125, Bagdad, AZ 86321 (Certified Mail)

Laura E. Beverage, Esq., Jackson Kelly PLLC, 1099 18<sup>th</sup> Street, Suite 2150, Denver, CO 80202-1958 (Certified Mail)

RWM

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 25, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2003-306-M
Petitioner	:	A.C. No. 23-00759-05521
	:	
v.	:	
	:	
SOUTHWEST QUARRY & MATERIALS,	:	
INCORPORATED,	:	
Respondent	:	Southwest Quarry & Materials

## DEFAULT DECISION

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Southwest Quarry & Materials, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges nine violations of the Secretary's mandatory health and safety standards and seeks a penalty of \$1,096.00. For the reasons set forth below, I affirm the citations and assess the penalty proposed.

On December 18, 2003, counsel for the Secretary filed a Motion to Deem Admissions Admitted and Motion for Summary Decision. However, because the operator, who is not represented by counsel, failed to respond to the Secretary's motion or to file a required prehearing statement, an Order to Show Cause was issued instead.<sup>1</sup>

The Secretary's motion stated that discovery requests, including requests for admissions to each citation, were served on the Respondent on October 27, 2003. When the Respondent did not object or respond to the requests, counsel for the Secretary sent the company a letter on November 28, 2003, pointing out the failure to respond and advising that failure to respond "could result in the matter being deemed admitted." The Operator had not responded to the discovery requests as of the date the Secretary filed the motion. As noted above, the company also did not respond to the Secretary's motion.

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<sup>1</sup> The case was scheduled for hearing on January 13, 2004. The Order to Show Cause continued the hearing.

In addition, the Notice of Hearing in this case required the parties to file a preliminary statement concerning the matters to be considered at the hearing with the judge so that it was "**RECEIVED** not later than **5:00 p.m. ET on January 2, 2004.**" No statement was received from the Respondent.

Commission Rule 66(a), 29 C.F.R. § 2700.66(a), provides that: "When a party fails to comply with an order of a Judge or these rules . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal." Additionally, Commission Rule 66(c), 29 C.F.R. § 2700.66(c), states that: "When the Judge finds a party in default in a civil penalty proceeding, the Judge shall also enter an order assessing appropriate penalties and directing that such penalties be paid."

Accordingly, on January 7, 2004, Southwest Quarry and Materials, Inc., was ordered to show cause, within 21 days of the date of the order, why it should not be held in default, the nine citations at issue in this case affirmed and ordered to pay a civil penalty of \$1,096.00. The order directed that the Respondent could comply by filing, within the 21 days provided, a proper response to the Secretary's discovery requests, with a copy of the response filed with the judge, or it could furnish any other reasons it deemed appropriate as to why it should not be held in default.

On January 26, 2004, an undated letter was received from the Respondent. It was signed by Chester McDowell, Vice-President, and stated:

I am sending you a copy of a letter that I sent to Lydia A. Tzagoloff. She said that I haven't done anything about this matter. I have called her and sent two faxes to her. I am sending the next letter to her registered. Also I am sending you a copy of pictures of my backhole [*sic*] with the guard that has always been on it.

The questions in my letter to Tzagoloff sured [*sic*] be answered.

After you read my letter, you will see that MSHA has no ground to stand on. This case should be dropped.

The enclosed letter was also undated. It contained questions about the inspectors' qualifications and statements about the citations.

Since the Respondent apparently did not respond to the discovery requests and only marginally addressed why it should not be defaulted, I had my Legal Assistant instruct counsel for the Secretary to set-up a telephone conference call with Mr. McDowell. After several days of unsuccessfully attempting to contact Mr. McDowell, counsel called my Legal Assistant to give an update. At that time, my Legal Assistant called the Respondent and left a message that it was

very important that Mr. McDowell contact the judge and counsel for the Secretary. As of the date of this decision, the Respondent has not been heard from.

It is apparent that the operator is intent on not participating in this proceeding. The company has failed to respond in a meaningful way to any orders or to the Secretary's discovery requests. Accordingly, I find that the Respondent is in default in this matter.

**Order**

In view of the above, Citation Nos. 6217087, 6217088, 6217089, 6217090, 6217091, 6217092, 6217093, 6217094 and 6217095 are **AFFIRMED** and Southwest Quarry & Materials, Inc., is **ORDERED TO PAY** a civil penalty of **\$1,096.00** within 30 days of the date of this decision.



T. Todd Hodgson  
Administrative Law Judge  
(202) 434-9973

Distribution: (Certified Mail)

Lydia Tzagoloff, Esq., Office of the Solicitor, U. S. Department of Labor,  
P.O. Box 46550, 1999 Broadway, Suite 1600, Denver, CO 80201

Chester McDowell, Vice President, Southwest Quarry & Materials, Inc.,  
13073 State Rt. CF, Rolla, MO 65401

/hs

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

February 26, 2004

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. CENT 2003-214-M  
Petitioner : A.C. No. 41-00070-05529  
 :  
v. :  
 :  
COLD SPRING GRANITE CO., :  
Respondent : Sunset Quarries

**DECISION**

Appearances: Lindsay A. McCleskey, Esq., and Danielle L. Jaberg, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;  
Steven R. McCown, Esq., Littler Mendelson, Dallas, Texas, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Cold Spring Granite Company, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges a violation of the Secretary’s mandatory health and safety standards and seeks a penalty of \$242.00. A hearing was held in Austin, Texas. For the reasons set forth below, I affirm the citation and assess the penalty proposed.

**Background**

Cold Spring Granite Company operates an open-pit granite quarry, known as Sunset Quarries, near Marble Falls, Texas. Granite is mined by blasting large pieces of granite called “loaves” from the natural granite bed. A “loaf” weighs between 200 and 600 tons, is between 8 and 25 feet tall and is 12 to 15 feet in length. The loaves are then broken into smaller pieces, called “blocks,” by use of drills and wedges, and the blocks are moved to another location to be further broken up. A block normally weighs 20 to 22 tons, is between 5 and 5 1/2 half feet high and is no longer than 11 feet. A block is broken up into milling size by drilling holes in it and then driving wedges into the holes so that the granite splits along the line of holes. Finally, the milling-sized pieces are machine milled to various customers’ requirements.

On February 5, 2003, MSHA Inspector James R. Fitch, Jr., was conducting an inspection of Sunset Quarries when he observed a miner operating a drill while standing on top of a five foot high block of granite. The miner was standing within a foot of the edge of the block and was not wearing any type of fall protection. Believing this to be a violation of the Secretary’s mandatory safety standards, the inspector issued a citation to the company.

The citation, No. 6226687, alleges a violation of section 56.15005, 30 C.F.R. § 56.15005, because:

A miner was observed standing within 1 foot of the edge (to the side and behind the miner) of a 5 foot high granite block. The miner was not wearing any form of fall protection while drilling. The miner could miss-step [*sic*] and fall from the block to the ground below. The surface of the block appeared to be dry and relatively free of tripping hazards. The fall could result in spinal injuries to the miner. It is common practice at this mine for miners to stand on blocks without fall protection.

(Govt. Ex. 2.) Section 56.15005 provides, in pertinent part, that: "Safety belts and lines shall be worn when persons work where there is danger of falling . . . ."

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

The company does not dispute that the block of granite was five feet high or that the miner was standing near its edge without fall protection. It argues, however, that the regulation was not violated because: (a) in a previous citation, MSHA had approved Cold Springs fall protection policy and the miner in this case was in compliance with that policy; (b) regulations of the Occupational Safety and Health Administration (OSHA) for the construction industry do not require the use of fall protection unless the height is six feet; (c) it is not industry practice to use fall protection on a five foot block and MSHA had observed company employees working on such blocks for years and had not cited them; and (d) there are no reported cases requiring fall protection for a height of five feet. None of these arguments is persuasive.

In construing 30 C.F.R. § 57.15-5, a regulation worded almost exactly the same as the instant regulation, the Commission noted that it was the kind of regulation "made simple and brief in order to be broadly adaptable to myriad circumstances."<sup>1</sup> *Kerr-McGee Corporation*, 3 FMSHRC 2496, 2497 (November 1981). The Commission has further held, with regard to this language, that the applicability of the standard to a specific situation is whether a reasonably prudent person familiar with the mining industry and the protective purpose of the standard "would recognize a danger of falling warranting the wearing of safety belts and lines." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). The company's arguments do not address this standard.

With regard to the previous citation, on February 23, 2001, the operator was cited for a violation of section 56.15005 at its Bear Mountain Quarry because an employee was standing on a "boulder" operating a drill without fall protection. (Govt. Ex. 9.) The citation was modified at

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<sup>1</sup> The only difference in the two regulations is the word "men" where "persons" is in section 56.15005.

an informal conference with Ralph Rodriguez, the San Antonio Field Office Supervisor, by deleting the “significant and substantial” designation and reducing the level of negligence from “moderate” to “low.” The reason given for the modification was that: “The company has [a] policy on tying off and will evaluate each driller.” (Govt Ex. 9 at 3.) Based on this language, the company argues that “MSHA specifically incorporated and approved Respondent’s shoulder height fall policy.”<sup>2</sup> (Resp. Br. at 5.)

The language in the modification of the citation does not indicate that MSHA “incorporated and approved” the company’s fall protection policy. In the first place, the granite block in question in the Bear Mountain citation was six feet high. (Tr. 80.) Thus, drilling on it without fall protection violated the company’s fall protection requirements as well as MSHA’s. Secondly, the fact that the company had a fall protection policy was cited in the citation to justify reducing the gravity and negligence of the violation. It certainly was not intended to incorporate it into the regulation. Furthermore, the Respondent’s interpretation ignores the rest of the language in the modification, that the company would “evaluate each driller.” As Rodriguez testified, “[t]he company agreed to monitor each situation that came up on drilling these big granite boulders, because they’re not all the same conditions.” (Tr. 93.)

Moreover, Inspector Rodriguez, in agreeing to the modification of the Bear Mountain citation, obviously did not have the authority to waive the regulation’s requirements and bind the Secretary to what would be an amendment of the regulatory language. In this connection, the 10th Circuit Court of Appeals has said:

Whatever their positions within the agency, the MSHA officials who approved Emery’s plan clearly had no authority to waive the Act’s requirements and bind the government to what amounts to an amendment of the statutory language. Particularly where mandatory safety standards are concerned, a mine operator must be charged with knowledge of the Act’s provisions and has a duty to comply with those provisions. To the extent Emery relied on an interpretation by MSHA officials of the Act’s implementing regulations, Emery assumed the risk that that interpretation was in error.

*Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984) (citations omitted). Similarly, to the extent that Cold Springs relied on what it believed to be Rodriguez’ acceptance of its fall protection policy, it assumed the risk that that interpretation was in error.

Finally, it is not at all clear that the company’s policy was not violated in this case. Inspector Fitch testified that the miner on the block was “5’ 4”, 5’ 6”” tall. (Tr. 71.) Michael J.

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<sup>2</sup> Cold Spring’s fall policy provides that persons operating rock drills will use fall protection on “any block above the operator’s shoulder height.” (Govt. Ex. 5 at 2.)

Clark, the company's safety manager, testified that he was "five six, five seven." (Tr. 122.) The inspector further testified that "I'd estimate a normal head to be six to eight inches long. That would put his shoulder below the level of five foot." (Tr. 71.) If anything, the inspector's estimate of the length of a head and neck is on the conservative side. Therefore, it appears that the miner was not wearing fall protection in violation of the company's own policy.<sup>3</sup>

The operator's second argument implies that since OSHA construction regulations do not require fall protection unless the work area is six feet or more above the ground, MSHA should adopt a similar standard. While correctly arguing that OSHA standards are not applicable to this case, the Secretary points out that OSHA's General Industry standard for Walking-Working Surfaces requires fall protection to be worn at heights of four feet or greater. (Sec. Br. at 7.) It is not necessary, however, to determine which OSHA standard might be appropriate, since OSHA standards are clearly not applicable to mines.

Turning to the company's third argument, there is no support in the record for its claim that it is not industry practice to require fall protection on a standard sized block of granite and that MSHA has observed such operations for years and not issued citations. Clark did testify that he was not aware of any quarry company that required its employees to use fall protection on five foot blocks. (Tr. 127.) However, no independent evidence was offered to support this assertion. Further, it was contradicted by Inspector Rodriguez who testified that he had inspected other quarries and observed miners wearing fall protection at "[a]nywhere from four, six to ten feet, eight feet" anytime "they were in danger of falling." (Tr. 95-96.) The assertion is also at odds with the company's own fall protection policy which, depending on the height of the miner, could require the use of fall protection at less than five feet.

Furthermore, the Secretary cannot be estopped from citing a violation simply because that same condition was not cited during a previous inspection, or was not cited at another quarry. Collateral estoppel cannot be asserted to prevent the Secretary from carrying out her statutory enforcement responsibilities. *King Knob Coal Co., Inc.*, 3 FMSHRC 1417, 1421-22 (June 1981). Consequently, it makes no difference that, with the exception of the Bear Mountain Quarry, the Respondent had never been cited for this violation.

The Respondent's final argument is partially correct. There do not appear to be any Commission cases holding that a work place five feet off of the ground required fall protection under the standard. On the other hand, there is only one case that concludes that being five feet off of the ground does not require fall protection and it is distinguishable from this case. In *USX Corp., Minnesota Ore Operations*, 15 FMSHRC 2333 (November 1993), Judge Barbour found that an employee climbing a five to six foot ladder on the outside of the cab of an electric mining shovel did not have to have fall protection. He held that: "The *record does not support* finding

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<sup>3</sup> No evidence was offered of the miner's actual height. In addition, if the company's policy were part of the regulation, each violation would turn on a measurement of the alleged violator's shoulder height and not on whether there was a danger of falling.

that falling from the 5 to 6-foot ladder would have produced an injury. Moreover . . . it was *utterly impractical* to expect the person to tie off while climbing the ladder.” *Id.* at 2340 (emphasis added).

In this case, the record supports finding that falling from the five foot block of granite would result in an injury and that it is possible to tie-off while operating a drill on the block. The operator’s attempt to argue that tying-off is impractical is undercut by its own requirement that fall protection be used on blocks above shoulder height.<sup>4</sup>

Based on the evidence, I find that a reasonably prudent person would have recognized that the miner was in danger of falling and that use of a safety line was warranted. As Inspector Fitch testified, whether fall protection is required on a five foot block of granite,

depends upon the circumstance that is found. In this case the miner was standing right next to the edge. He was operating a drill, which meant he was thinking about other things more than likely, such as running the drill. During situations like that it’s possible to lose concentration.

(Tr. 30.) Or, as the Commission stated in *Great Western Electric*: “Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions, which could result in a fall.” 5 FMSHRC at 842.

Indeed, the company did recognize that fall protection was appropriate in this instance. Its requirement that fall protection was to be used on blocks over shoulder height basically would require protection at a few inches above or below five feet. Such a minimal distinction would make no difference as far as the fall is concerned. Accordingly, I conclude that the company violated section 56.15005, as alleged.

#### *Significant and Substantial*

The Inspector found this violation to be “significant and substantial.” A “significant and substantial” (S&S) violation is described in Section 104(d)(1) of the Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard

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<sup>4</sup> The Respondent also argues that the fact that miners performing the wedging operation do not have to use fall protection shows that drillers should not have to tie-off. This argument is without merit. As Inspector Fitch pointed out, the reason wedgers do not use fall protection is that the nature of the wedging function would place them at a greater danger if they used fall protection than if they did not. (Tr. 66-67.)

contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

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

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

In this case, whether the violation is S&S depends on the third and fourth *Mathies* elements. I have already found the violation of a safety standard and that the failure to use fall protection created the danger of a fall. With regard to whether the fall would result in an injury and whether injury would be reasonably serious, Inspector Fitch testified that it was reasonably likely that the miner would step off of the edge and fall to the ground suffering anything from bruises, to a permanently disabling spinal injury, to a fatal accident. (Tr. 44-45.) Inspector Rodriguez testified that there was a danger of falling off of the block or into the gap between the block the miner was on and the block next to it, that he believed the violation to be S&S and that they types of injuries that could result from a fall of five feet included broken bones, broken pelvises, back injuries and head and neck injuries, with the most common being broken bones. (Tr. 99-100.)

Based on the above, I find that the violation was "significant and substantial."

### **Civil Penalty Assessment**

The Secretary has proposed a penalty of \$224.00 for this violation. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, I find that Sunset Quarries is a small to medium operation and that Cold Spring Granite Company is a small company. I find that the company

has a good history of previous violations. (Govt. Ex. 8.) The operator has made no claim that the proposed penalty will adversely affect its ability to remain in business. Therefore, based on that, and the small penalty, I find that payment of the penalty will not adversely affect it. I further find that the record supports a finding that the company demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

In addition, I find that the gravity of this violation was not very serious. Finally, I find that the company was moderately negligent in that, even though the operator may have believed that MSHA had approved its shoulder height requirement and even though it may have been misled by previous non-enforcement, it was put on notice that MSHA was starting to enforce the fall protection requirement by the Bear Mountain citation.

Taking all of these factors into consideration, I conclude that the \$224.00 penalty proposed by the Secretary is appropriate.

**Order**

In view of the above, Citation No. 6226687 is **AFFIRMED** and Cold Spring Granite Company is **ORDERED TO PAY** a civil penalty of **\$224.00** within 30 days of the date of this decision.

  
T. Todd Hodgdon  
Administrative Law Judge

Distribution: (Certified Mail)

Lindsay McClesky, Esq., Office of the Solicitor, U. S. Department of Labor, 525 South Griffin St., Suite 501, Dallas, TX 75202

Steven R. McCown, Esq., Littler Mendelson, 2001 Ross Avenue, Suite 2600, Dallas, TX 75201

/hs

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

February 26, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2003-289-M
Petitioner	:	A.C. No. 41-03932-05515
	:	
v.	:	Docket No. CENT 2003-290-M
	:	A.C. No. 41-03932-05516
GRANITE MOUNTAIN CRUSHING, LLC,	:	
Respondent	:	Granite Mountain Crushing

**DECISION**

Appearances: Michael D. Schoen, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Secretary of Labor;  
David M. Williams, Esq., San Saba, Texas, for Granite Mountain Crushing, LLC.

Before: Judge Manning

These cases are before me on two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Granite Mountain Crushing, LLC (“Granite Mountain”), 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”). The cases involve 23 citations issued by the Secretary under section 104(a) of the Mine Act. The Secretary seeks a total penalty of \$11,578 for the alleged violations. An evidentiary hearing was held in Austin, Texas. The parties introduced testimony and documentary evidence and, at the close of the hearing, presented oral argument.

**I. BACKGROUND**

Cold Spring Granite Company, USA, (“Cold Spring”) operates a granite quarry near Marble Falls, Texas. Granite Mountain was organized in May 1996 to reduce the spoil piles at the granite quarry. (Tr. 10; Ex. R-1). Granite Mountain entered into an agreement with Cold Spring to crush material from its spoil pile, mostly mill block fragments, to produce Class A road stone, cover stone, ballast, rip rap, and other specially crushed engineering stone. (Tr. 16; Ex. R-1). The original participants in the venture were Cold Spring and Texas Architectural Aggregates, Inc., (“TAA”). Contributions to the venture included quarry and mill site premise leases from Cold Spring, an operations agreement from TAA, and the guarantees from both

corporations on a note to purchase necessary mining and milling equipment through Cargill Leasing Corporation.

As a result of operations problems, Cold Spring withdrew from the venture after about three years but continued its leases and supply agreements. (Tr. 11; Ex. R-1). Granite Mountain continued with the operation and obtained additional financing through Orix Financial, the CIT Group, and equipment suppliers, which maintained security interests in the mill, heavy machinery, and parts which they supplied. (Tr. 12; Ex. R-1).

Because of high operations expenses, Granite Mountain made the decision in the spring of 2003 to cease operations on the Cold Spring property and to salvage as much of the company's investment in the venture as possible. The project "never did prove feasible." (Tr. 11). Granite Mountain auctioned off its salvageable equipment and machinery through Ritchie Brothers Auctioneers in Fort Worth in September 2003. The crushing plant, which had a cost basis of about \$1.5 million sold for less than \$225,000. (Ex. R-1). The net proceeds from the sale of the equipment and machinery at auction was \$244,592 which was paid directly to Orix Financial and the CIT Group. (Tr. 13, 22; Ex. R-1). Granite Mountain represents that, excluding MSHA's proposed penalties, it owes its creditors about \$115,000. (Tr. 15, 28). Granite Mountain further represents that, although it had a large supply inventory when it liquidated its assets, that material is in the possession of Cold Spring and Granite Mountain has no rights to it. (Tr. 13-14, 41-42). Granite Mountain states that its only assets are additional equipment that were not suitable for auction with a net fair market value of about \$11,000 and accounts receivable of about \$5,800. (Tr. 14, 36-38; Ex. R-1). Accounts receivable includes accounts that are unlikely to be collected.

Granite Mountain has not filed for bankruptcy, but does not have any income at this time. (Tr. 15). The manager of Granite Mountain has been paying off some of the company's debt with his own funds, but he had no legal obligation to do so. (Tr. 30). He has not been making these payments with funds from other companies in which he has an interest. (Tr. 31). Granite Mountain states that it is possible "with a different crushing system, new granite lease arrangements, and improved market trends, that Granite Mountain could return to the business of mining and crushing granite." (Ex. R-1 p. 2; Tr. 39-40).

The 23 citations contested in these cases were issued during an MSHA inspection on March 6 - 7, 2003. Prior to the hearing in these cases, the parties entered into joint stipulations in which the parties agreed that (1) Granite Mountain is an operator within the meaning of the Mine Act that is subject to the jurisdiction of the Mine Act; (2) the products of Granite Mountain enter commerce or affect commerce within the meaning of section 4 of the Mine Act; (3) the Commission has jurisdiction over these cases; and (4) Granite Mountain abated or terminated all citations within the time frame initially set by the MSHA inspector.

The parties also stipulated that all of the citations "were properly served by the duly authorized representative of the Secretary upon an agent of Granite Mountain on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its

issuance and for the truthfulness or relevance of any statements asserted therein.” The parties further stipulated that “Granite Mountain admits that it committed the violations alleged in the citations [attached to] the Secretary’s Petitions for Assessment of Civil Penalty.” Finally, the parties stipulated that Granite Mountain contends “that the proposed assessed penalties in the total amount of \$11,578.00 are not appropriate and requests that the Court make a determination of the proper amounts, if any, to be assessed against Respondent in light of Respondent’s affirmative assertion that it is no longer in business and is presently unable to pay the penalties as assessed.”

## II. SUMMARY OF THE PARTIES’ ARGUMENTS

The Secretary maintains that Granite Mountain has not met its burden of establishing that the proposed penalties will have an “effect on the operator’s ability to continue in business.” 30 U.S.C. § 620(I). (Tr. 44-46, 50-52). The fact that Granite Mountain ceased operations does not demonstrate that the proposed penalties of \$11,578 would affect its ability to resume operations if it chooses to do so. The Secretary objected to the introduction of Exhibit R-1 on the basis that it is hearsay and it was not accompanied by supporting documents. (Tr. 7-8). The Secretary believes that, if Granite Mountain’s statement that it is carrying a debt load of \$115,000 is accepted, then that fact helps to establish its current financial condition but it does not show that it is unable to pay the proposed penalty. In addition, there may be other potential “cash revenues” from accounts receivable. *Id.* The Secretary relies, in part, on the decision in *Energy Trucking*, 19 FMSHRC 1685, 1691 (Oct. 1997) (ALJ). In that case, the administrative law judge held that “net operating losses are not proof of an inability to continue in business.” *Id.* Because Granite Mountain did not meet its burden of showing that the penalties will negatively affect its ability to continue in business, the proposed penalties should be affirmed.

Granite Mountain contends that “it is essentially penniless.” (Tr. 48). It is in debt and is trying to stay out of bankruptcy. Granite Mountain maintains that the proposed penalties will affect its ability to continue in business. (Tr. 49). Finally, it argues that it is not only in debt but it also has no significant assets.

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

It is well settled that the Commission assesses civil penalties de novo and is not bound by the Secretary’s proposed penalties. *Topper Coal Co.*, 20 FMSHRC 344, 350 n.8 (April 1998); *Sellersburg Stone Co.*, 5 FMSHRC 287, 291, (March 1983), *aff’d* 736 F.2d 1147 (7th Cir. 1984). In determining the appropriate civil penalty to be assessed, Commission Rule 29 C.F.R. § 2700.30, requires the judge to consider the statutory criteria set forth in 110(i) of the Mine Act, 30 U.S.C. § 820(i). Section 110(i) provides, in pertinent part, that in assessing civil penalties the Commission shall consider the operator’s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator’s ability to continue in business, the gravity of the violation,

and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. Although the parties focused on the ability to continue in business criterion, I am required to evaluate all of the criteria based on the evidence presented at the hearing.

**A. Size of the Mine Operator**

Granite Mountain is a small operator, as set forth in the record.

**B. The Mine Operator's History of Previous Violations**

The record establishes that Granite Mountain was issued 23 citations during the 24 months prior to March 2003. This is a relatively high number of citations for a small operator. The Secretary's proposed penalties were heavily influenced by this history. Indeed, the Secretary assigned the maximum number of penalty points for this criteria under 30 C.F.R. § 100.3(c). In addition, the Secretary added 20 extra penalty points for "excessive history" to the total points for most of the citations. All but 5 of the 23 citations at issue in these cases were designated as not being of a significant and substantial nature ("S&S"). Because of this "excessive history," the Secretary proposed penalties for these non-S&S citations that were significantly greater than her typical single penalty proposals under 30 C.F.R. § 100.4. The proposed penalties for the non-S&S citations ranged between \$259 and \$1,428 each. But for the "excessive history" determination, the penalties for these non-S&S citations would have been \$60 each. I find that, although the penalties should take into account Granite Mountain's relatively high history of previous violations, the Secretary's proposed penalties are too high when taking this criterion into consideration, especially with respect to the non-S&S violations.

**C. Negligence of the Operator**

As set forth in the citations, Granite Mountain's negligence was moderate with respect to each violation except with respect to the violation alleged in Citation No. 6226697 where its negligence was high.

**D. Gravity of the Violations**

The gravity of the violations are as set forth in the citations. The most serious violations are as set forth in Citation Nos. 6226697, 6226701, 6226704, 6226705, and 6226714, which are S&S.

**E. Demonstrated Good Faith in Achieving Rapid Abatement of the Violations**

Granite Mountain demonstrated good faith in quickly abating the violations.

**G. Effect on the Operator's Ability to Continue in Business**

I find that the Secretary's proposed penalties will have a negative effect on Granite Mountain's ability to continue in business. Granite Mountain has virtually no assets and it has substantial debts. The proposed penalties will affect its ability to resume operations. I credit the testimony of Granite Mountain's corporate secretary as to the financial condition of the company. The Secretary's reliance on *Energy Trucking* is misplaced. In that case, the judge determined that the operator was "essentially a 'pass through' business whereby almost all of its income passes through the company to one or more 'lessor-operators.'" 19 FMSHRC at 1691. He concluded that a company with such a structure "would effectively have an exemption from civil penalties under the Act if its reported net losses were accepted as proof of an inability to pay substantial penalties and continue in business." *Id.* The present case presents a different situation. Granite Mountain is not operating at a loss; rather it is not generating any income at all and it is in debt.

In reaching this conclusion, I note that there is no evidence that Granite Mountain's decision to liquidate its assets was motivated in any part by the Secretary's proposed penalties. There is also no evidence that Granite Mountain was operated as a shell corporation or that it was deliberately under-capitalized in order to avoid responsibility for paying its debts.

In conclusion, I have reduced the penalties proposed by the Secretary for two reasons. First, I find that the Secretary increased her proposed penalties for "excessive history" by more than is justified under the circumstances presented in these cases. With respect to the non-S&S citations, the proposed penalties are four to nine times higher than they would have been without the excessive history designation. I have also reduced the penalties under the ability to continue in business criterion, as discussed above.

#### IV. ORDER

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

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
CENT 2003-289-M		
6226697	56.6130(b)	\$1,000.00
6226698	56.4101	120.00
6226699	56.16005	120.00
6226700	56.6132(a)(10)	200.00
6226701	56.6101(a)	500.00
6226702	56.6131(a)(1)	200.00
6226703	56.6130(d)	120.00
6226704	56.14100(b)	250.00
6226705	56.4101	250.00

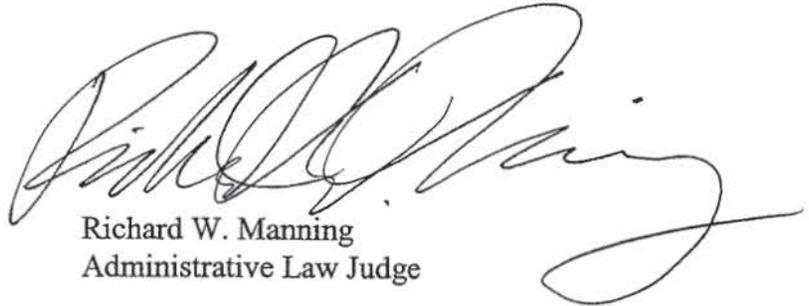
6226706	56.20013	120.00
6226707	56.12006	120.00
6226708	56.12008	120.00
6226709	56.12008	120.00
6226710	56.14107(a)	120.00
6226712	56.14107(a)	120.00
6226713	56.14107(a)	120.00
6226714	56.11012	500.00
6226716	56.14107(a)	120.00
6226717	56.14107(a)	120.00

CENT 2003-290-M

6226718	56.9300(a)	120.00
6226719	56.15001	120.00
6226720	56.12004	120.00
6226721	56.18002(a)	120.00

TOTAL PENALTY \$4,820.00

For the reasons set forth above, the citations at issue in these cases are **AFFIRMED**. Granite Mountain Crushing LLC is **ORDERED TO PAY** the Secretary of Labor the sum of \$4,820.00 within 40 days of the date of this decision.



Richard W. Manning  
Administrative Law Judge

Distribution:

Michael D. Schoen, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202-5036 (Certified Mail)

David M. Williams, Esq., P.O. Box 242, San Saba, TX 76877-0242 (Certified Mail)

RWM



**ADMINISTRATIVE LAW JUDGE ORDERS**



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 2, 2004

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. SE 2003-97-R
	:	Order No. 7670621; 03/03/03
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE 2003-98-R
ADMINISTRATION (MSHA),	:	Order No. 7670622; 03/03/03
Respondent	:	
	:	No. 7 Mine
	:	Mine ID No. 01-01401

**ORDER ADMITTING EVIDENCE**

At initial hearings in these cases on September 9, 2003, the Secretary of Labor offered into evidence 26 charging documents alleging violations over the three-month period preceding the violations at issue, of the same mandatory standard that is at issue in these cases, *i.e.*, 30 C.F.R. § 75.400. The Secretary asserted at the time that these charging documents were evidence of similar repeated violations supporting her theories of high negligence and “unwarrantable failure” in the cases at bar. See *Peabody Coal Co.*, 14 FMSHRC 1258, at 1263-64 (August 1992) and *Deshetty, employed by Island Creek Coal Co.*, 16 FMSHRC 1046, 1051 (May 1994). At the time of hearing however, only one of those 26 charging documents had become final. Accordingly 25 of the 26 charging documents were found inadmissible and the Contestant’s objections to the evidence were sustained.

At continued hearings on December 15, 2003, the Secretary offered 23 of the original 26 charging documents into evidence but under a new theory. The Secretary argued that the documents were admissible not as evidence of violations *per se* (acknowledging that the charging documents had not yet become final) but that the charging documents were evidence of notice to the operator that it was MSHA’s position that the cited conditions were violative and that the issuance alone of those charging documents provided notice of MSHA’s concerns about accumulation problems and that the operator needed to increase its efforts to comply with the standard. A ruling on the admissibility of the proffered charging documents was deferred subject to Contestants filing a posthearing legal memorandum.

In its memorandum filed January 9, 2004, Contestant objects to the admission into evidence of the 23 charging documents proffered by the Secretary at the December 15, 2003, trial. The Contestant objects on the grounds, (1) that they are not relevant, (2) that all of the charging documents are under contest and therefore not final and would become relevant only if and when they become final, (3) that five of the proffered charging documents were not

designated as “significant and substantial” and, for this additional reason, were not relevant, (4) six of the charging documents proffered by the Secretary relate primarily to trash, other materials and equipment and therefore are not relevant to whether Contestant knew or should have known of dust accumulation problems at the No. 7 Mine, (5) of the 23 prior charging documents only three of them relate to dust accumulations on the beltlines and that the rest of them relate to areas of the mine other than beltlines, (6) none of the prior charging documents relate to dust accumulations in the north main belt area - - the area to which the present citations relate, (7) five of the charging documents are “without merit” because the areas in question are supplied by intake air - - Contestant argues that such areas were essentially free of float coal dust therefore maintains that those citations should not be at all relevant to Contestant’s notice of accumulation problems prior to Order No. 7670621, (8) the allegations in Order No. 7678683 are “meritless” because Contestant had several employees working in the area at the time of the alleged violation and therefore, that order should not be considered as evidence of notice.

I find the 23 proffered charging documents to be relevant to the issues of negligence and “unwarrantable failure” and that such evidence should not be barred by lack of finality under the Secretary’s theory that such documents are evidence of prior notice by the Secretary to Contestant of her concerns with various accumulations of combustible materials in the subject mine in close time proximity to the issuance of the orders at bar. Such evidence is even more persuasive than that of oral notification by inspectors to mine operators about potentially unsafe conditions in a mine. The Commission has acknowledged that such evidence may be used to show that the operator has been placed on notice that it must increase its efforts to comply with the standard. See *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (January 1997). Such notice has therefore been considered by the Commission in determining negligence and unwarrantability. The utilization of prior charging documents in this manner does not therefore require that those charging documents be final. It is not the violation within the charging documents that is critical but only the notice provided by the issuance of those charging documents.

Contestant’s remaining arguments (numbered 3 through 7 herein) go primarily to the weight to be given the evidence and not to its admissibility. Under the circumstances the proffered 23 charging documents are admitted collectively as Government Exhibit No. 6.



Gary Melick  
Administration Law Judge  
(202) 434-9977

Distribution: (Facsimile and First Class Mail)

Ann G. Paschall, Esq., Office of the Solicitor, U.S. Dept. of Labor, 61 Forsyth Street, S.W.,  
Room 7T10, Atlanta, GA 30303

Warren B. Lightfoot, Jr., Esq., Maynard, Cooper & Gale, P.C., 1901 Sixth Avenue North, 2400  
AmSouth/Harbert Plaza, Birmingham, AL 35203

Guy Hensley, Esq., Jim Walter Resources, Inc., P.O. Box 133, Brookwood, AL 35444

/mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 23, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2003-332
Petitioner	:	A.C. No. 15-02132-03851
	:	
v.	:	Docket No. KENT 2003-333
	:	A.C. No. 15-02132-03852
WEBSTER COUNTY COAL, LLC,	:	
Respondent	:	Dotiki Mine

**ORDER**

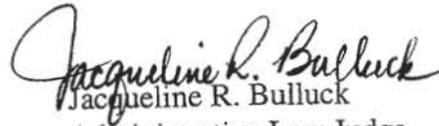
Respondent filed a Motion to Compel on February 6, 2004, seeking production by the Secretary of three categories of documents pertaining to the above-captioned cases. The Secretary has asserted that the documents are protected by the deliberative process privilege. Subsequent to the Secretary’s refusal to produce the documents, but prior to the filing of this Motion, the Secretary changed her representative.

A teleconference with the parties was held on February 18, 2004. Two of the three categories of disputed documents were resolved. The sole issue remaining is whether Respondent is entitled to the Health and Safety Conference Worksheets respecting the citations in these dockets. The Secretary, through her new representative, argued that the documents are protected by the work product privilege, rather than the deliberative process privilege. I denied her request to advance an alternative legal theory.

The deliberative process privilege protects communications between subordinates and supervisors within the government that are “antecedent to the adoption of an agency policy.” *Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 992 (June 1992) (citation omitted). The deliberative process privilege “covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D. C. Cir. 1980). Documents that are protected by the privilege “are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position.” *Id.* Nevertheless, “even if the document is pre-decisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.” *Id.*

I find that the Worksheets are relevant to the characterizations of the cited violations. To the extent that the contents are fact-based, i.e., summaries of the parties' respective representations and negotiations in the meetings, they are not protected by the deliberative process privilege and Respondent is entitled to them. Respondent is not entitled, however, to the personal opinions and deliberations of the authors. The Secretary shall redact any portions of the Worksheets that reflect the personal analyses, opinions and recommendations of the MSHA personnel who prepared them.

**WHEREFORE**, Respondent's Motion to Compel is **GRANTED**, and it is **ORDERED** that the Secretary provide Respondent with a copy of the Health and Safety Conference Worksheets, redacted as directed, as soon as is practicable.

  
Jacqueline R. Bulluck  
Administrative Law Judge  
(202) 434-9987

Distribution: (Certified Mail)

Anne T. Knauff, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215

Thomas C. Means, Esq., Crowell & Moring, LLP, 1001 Pennsylvania Avenue, NW, Washington, DC 20004-2595

ej

