

## **FEBRUARY 2005**

### **THERE WERE NO COMMISSION DECISIONS**

### **ADMINISTRATIVE LAW JUDGE DECISIONS**

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**FEBRUARY 2005**

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

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



**ADMINISTRATIVE LAW JUDGE DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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February 4, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2004-256-M
Petitioner	:	A.C. No. 04-00224-21700
	:	
v.	:	
	:	Chile Bar Slate Mine
PLACERVILLE INDUSTRIES, INC.,	:	
Respondent	:	

**DECISION**

Appearances: John D. Perez, Conference and Litigation Representative, Mine Safety and Health Administration, Vacaville, California, for Petitioner;\*  
David W. Donnell, Esq., Robert D. Peterson Law Corporation, Rocklin, California, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Placerville Industries, Inc. ("Placerville"), 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"). An evidentiary hearing was held in Sacramento, California.

**I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Placerville operates a slate mine near Placerville in El Dorado County, California. Most of the slate is ground up into a fine powder which is added to seal coatings for roadways. (Tr. 77). Placerville also sells rocks of slate that are used in landscaping. (Tr. 74). On January 28, 2004, Gerald Bockman, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an inspection of the mine. During his inspection, Inspector Bockman issued the three citations that are at issue in this case. At the hearing, the parties announced that they reached a settlement for Citation No. 6356894, which I approved. A hearing was held with respect to the other two citations.

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\* Christopher Wilkinson, Esq., of the Department of Labor's Office of the Solicitor in San Francisco, also appeared for Petitioner.

**A. Citation No. 6356895**

Inspector Bockman issued Citation No. 6356895 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14100(b). The body of the citation states:

The hoist trolley over the vertical impact crusher has no travel stops to prevent it from coming off the travel rail. The trolley is used to hang the hoist for removal of the upper ring on the impact crusher, when changing the anvil. Used 2 - 3 times per year. A lack of travel stops can result in the trolley or hoist coming off the rail and injuring a miner. It is required that any safety defect be repaired in a timely manner.

The inspector determined that it was unlikely that anyone would be injured as a result of this condition and, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was not of a significant and substantial nature ("S&S") and that Placerville's negligence was moderate. The citation was subsequently modified to reduce the negligence to "low." The cited safety standard provides that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Bockman testified that the trolley is used about once or twice a year to remove the upper ring on what he called the vertical impact crusher (the "crusher") when maintenance is performed on the crusher. (Tr. 11, 20-21). The hoist trolley consists of an I-beam rail attached to the beams at the top of the room with a four-wheel trolley that rolls along the beam. (Tr. 11-12; Exs. G-4 and G-5). The beam is about 16 feet long. The trolley is not motorized and it is a freewheeling unit. There is a hole on the bottom of this trolley where Placerville's employees suspend the ring for the crusher when the trolley is in use. At one end of the I-beam rail there is nothing to stop the trolley from rolling off the end. There is no such danger at the end of the rail adjacent to the door of the building because that end of the rail abuts against a perpendicular I-beam.

Inspector Bockman testified that the cited condition violated the cited safety standard even though the trolley has never rolled off the end of the rail. There has never been a stop on the end of the rail. The trolley was not being used on the date of the inspection. (Tr. 33). Bockman considered the trolley to be a piece of equipment. The inspector believed that the lack of a trolley stop affects safety because if a load were suspended from the trolley and someone were to push it toward the open side of the rail, it could come off. (Tr. 15). He believed that someone on that end of the deck or on a walkway below that area could be injured if the trolley were to come off the rail. Such an injury would be reasonably serious. The inspector believed that it was unlikely that the trolley would roll off the open end of the rail because the trolley is not normally used near that end. The trolley is usually positioned on the protected end of the rail near the door. When the ring is removed from the crusher, the crusher's lid would prevent the

trolley from traveling to the open end of the rail because the lid would be in the way of the load suspended from the trolley.

Marc Lemieux is the general manager at the mine. He took a photograph of the crusher, which he called the vertical shaft impactor, which shows the trolley rail above it. (Tr. 62; Ex. R-1). When the lid on the crusher needs to be opened, the chute that enters the crusher on top of the lid is moved off to the side. (Tr. 64; Ex. R-1). Next the clamps holding the lid on the crusher are removed. The hydraulic arm attached to the lid pulls the lid straight up off the top of the crusher. Finally, this arm with the lid attached is swung over the motor, which is shown in the foreground of the photograph. (Tr. 66; Ex. R-1). Once the lid is over the motor, a come-along is attached to the hole in the trolley, which is used to lift the ring out of the crusher. (Tr. 68-69).

The ring attached to the trolley with the come-along is manually pushed toward the door of the building. (Tr. 70). The ring is lowered to the ground using the come-along and a forklift moves the ring out of the building through the door. (Tr. 71). The end of the trolley rail cited by the inspector is at the opposite end of the rail from the door. A load attached to the trolley cannot be pushed toward the open end of the rail because the lid for the crusher would block it. In addition, there would be no place to lower the load attached to the come-along near that open end.

The Secretary argues that she established that there was a defect on equipment that affected safety. The violation did not create a serious safety hazard, but there is a possibility that the trolley rail could be used for a purpose that required the trolley to be near the open end of the rail. Someone could inadvertently roll the trolley off the end of the rail and injure someone. The operator's negligence was low.

Placerville argues that there was no safety defect because the condition did not affect the safety of employees. In order to establish a violation under the cited safety standard, the Secretary must establish that the cited defect affected safety. In this instance, because of the configuration of the crusher and the lid for the crusher, the lack of a stop at the opposite end of the rail did not affect safety. The end of the trolley rail cited by the inspector does not pose any danger when maintenance is performed on the crusher. The rail near the open end is unlikely to ever be used for any other purpose. Placerville does not argue that it would be impossible to use the trolley in a manner which placed it near the open end of the rail, but it contends that such an event is highly unlikely. (Tr. 109).

I find that the Secretary established a violation. The lack of a stop on one end of the rail for the trolley was a defect that could affect safety. I agree that the likelihood that the defect would result in an injury is quite low in this case. The configuration of the crusher, including the top of the crusher, make it impossible for the trolley to be accidentally pushed off the unguarded end of the rail when maintenance is being performed on the crusher. Nevertheless, an employee may use the trolley to lift and move some other load near the open end of the rail and not realize that there is no guard to stop the trolley on that end. The safety standard is designed to prevent

such accidents. An overly narrow or restrictive reading of the scope of this safety standard cannot be reconciled with the purpose of the Secretary's safety standards or with the protective ends of the Mine Act. A safety standard "must be interpreted so as to harmonize with and further . . . the objectives of" the Mine Act. *Emery Mining Co. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10<sup>th</sup> Cir. 1984). Human behavior can be erratic and unpredictable with the result that it is conceivable that someone might try to use the trolley at the unguarded end of the rail. I find that the violation is not serious and that Placerville's negligence is low.

**B. Citation No. 6356896**

Inspector Bockman issued Citation No. 6356896 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.20003. The body of the citation states:

Material build up in the grizzly feeder area is approximately 2 feet deep on the entry side. Material is loose slate, approximately 2 - 4 inches in irregular shapes, creating a slip or twist hazard. It appears the skirting on the feed hopper may be allowing material to spill. Reportedly, this area was cleaned a week ago. It is required to maintain all workplace, service room floors in a clean condition for the safety of the miner. This area is cleaned by shoveling material onto the belt when build up occurs. It is reasonable to expect a miner to twist an ankle or suffer more serious injuries in this condition.

The inspector determined that it was reasonably likely that someone would be injured as a result of this condition and that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was S&S and that Placerville's negligence was moderate. The cited safety standard provides, in pertinent part, that "[t]he floor of every workplace shall be maintained in a clean and, so far as possible, dry condition." The Secretary proposes a penalty of \$91.00 for this citation.

There is an apron feeder and tail pulley in a small basement room under the grizzly feeder. (Tr. 21). The room is about 12 by 6 feet and about 6 feet high. (Tr. 24). Inspector Bockman testified that material had built up to a depth of about 2 feet in the area below the fixed metal ladder used to enter the room. He was not able to measure the depth of the accumulations. The inspector testified that this room is a workplace because the apron feeder is located in this room. The room must be entered on a periodic basis to clean up spilled material so that the material does not get so deep that it damages the conveyor system. The inspector believes that material regularly rolls off the conveyor or apron feeder and that someone enters the room to clean up the material two or three times a week. (Tr. 23).

Inspector Bockman testified that the accumulations in the room were obvious and created a slipping and tripping hazard. The accumulated material tends to shift under your feet if you

walk on it. (Tr. 26; Ex. G-8). The inspector determined that an accident was reasonably likely to occur because of the unstable footing created by this material. (Tr. 27). In addition, because the ceiling was only about six feet high, a miner would have to be stooped over as he began cleaning up the accumulations with a shovel. A miner could twist his ankle, twist his knee, or injure his back while shoveling the material onto the belt. (Tr. 27). If the accumulations were not so extensive, a miner would be able to shovel with solid footing.

Lemieux testified that an employee is assigned to clean the room at the end of every shift. (Tr. 73). The only other time that anyone would be in the room would be to perform maintenance on the hopper or tail pulley. The material that accumulates in the room is a product that is sold for use in gardens and walkways. (Tr. 74). Lemieux built a greenhouse at his home and he used this material for the floor of the greenhouse. Material can accumulate rather quickly if production is high.

Jim Trembley is a shift supervisor at the mine. He testified that material is screened and crushed before it is dumped into a hopper above the grizzly. (Tr. 93). There is an apron feeder under the grizzly in the cited room. A conveyor belt carries the material up above ground to the next step in the processing. (Tr. 94). While the room is being cleaned, the system is locked out. The area is also accessed to check the equipment and to grease the bearings. In January 2004, he would enter the room about two or three times a week. (Tr. 96). Another employee also cleaned the room during this period. The amount of material that will accumulate each shift may vary between one and two feet. (Tr. 96-97). When he shovels the room, there is usually an area where he can position himself that is clear of accumulations. He shovels the material while he is on his knees because it is more comfortable. (Tr. 97-98). The ceiling is too low to comfortably stand and shovel. Trembley testified that if he performs any maintenance on the equipment when there are accumulations present, he cleans away enough of the accumulations to work safely. (Tr. 100). He testified that he has been shoveling out the accumulations in the room for four years and he has not suffered any injuries. The other Placerville employee who cleans up the accumulations gets on his knees to shovel as well.

The Secretary argues that the room under the grizzly is a working place that is required to be maintained. The equipment must be maintained and greased and the accumulations must be removed to protect the apron feeder and conveyor from being damaged. The pile of accumulations was sloped at an angle so that someone could slip and twist an ankle while trying to get to the apron feeder. The operator normally tried to keep the area clean, but in this instance "it just got away from them." (Tr. 106).

Placerville argues that the safety standard must be interpreted to provide the mine operator with the "opportunity to do that which the regulation requires it to do." (Tr. 110). Since Placerville is required to keep the room under the grizzly in a clean condition, it must be given the opportunity to do that. The room is naturally going to contain accumulations when an employee is sent down there to clean up the accumulations. The safety standard does not require an operator to clean the room every hour or so before many rocks have accumulated. Indeed, in

order to abate the citation, Trembley had to enter the room and clean it the way he normally does. Placerville points out that the room is a destination, not a travelway. Although the inspector testified that the accumulations had been in the room for a week, he had no proof to support that testimony. Trembley credibly testified that such an accumulation can occur in a single shift. Finally, Inspector Bockman had no knowledge about how this area is kept clean. As a consequence, his statement that someone could twist an ankle is not supported by the evidence.

The evidence conflicts with respect to how recently the room had been cleaned. Inspector Bockman testified that he was told by Lemieux that the room had not been cleaned for about a week, but that it was usually cleaned two or three times a week. Lemieux testified that an employee is assigned to clean the room at the end of every shift. Trembley testified that one to two feet of material can accumulate after a single shift. The photograph that Inspector Bockman took shows a rather extensive accumulation of rock. (Ex. G-8). I find that the Secretary established a violation of section 56.14100. I credit Inspector Bockman's testimony that he was told by Lemieux that the area had not been cleaned for about a week. There has been no showing that the plant was not operating during that period. The cited room was a workplace. A miner enters the area via the fixed ladder for the sole purpose of cleaning up spilled rock and performing maintenance on the apron feeder and other equipment. The accumulations in this instance were too deep and extensive to comply with the safety standard. There was a risk that an employee cleaning the room would be injured while accessing the area.

The Federal Mine Safety and Health Review Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10<sup>th</sup> Cir. 1989). “[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty.” *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

*Allied Products, Inc.*, 666 F.2d 890, 892-93 (5<sup>th</sup> Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i). Thus, a violation is found and a penalty is assessed even if the chance of an injury is not very great.

I recognize that accumulations will always be present on the floor of this room when a miner enters it. The presence of such accumulations does not violate the safety standard unless the accumulations are so deep or unstable that they create a hazard to a miner entering the area. A miner should be able to safely traverse the accumulations to shovel the rock onto the belt.

Cleaning the room after every shift should ordinarily be sufficient to comply with the standard because the floor need not be free of all accumulations.

A violation is classified as S&S “if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming “continued normal mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete 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 in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

I find that the Secretary did not establish that the violation was S&S. There was not a reasonable likelihood that the hazard contributed to by the violation will result in an injury. I base my finding in large part on the fact that the cited underground room is not a travelway or passageway. Miners do not enter the room for any purpose other than to clean it up, grease fittings, and maintain equipment. I also credit the testimony of Trembley that miners are usually on their knees when they shovel the accumulations onto the belt. I also find that if anyone were injured while entering the room, the injury would not be of a reasonably serious nature.

## II. APPROPRIATE CIVIL PENALTIES

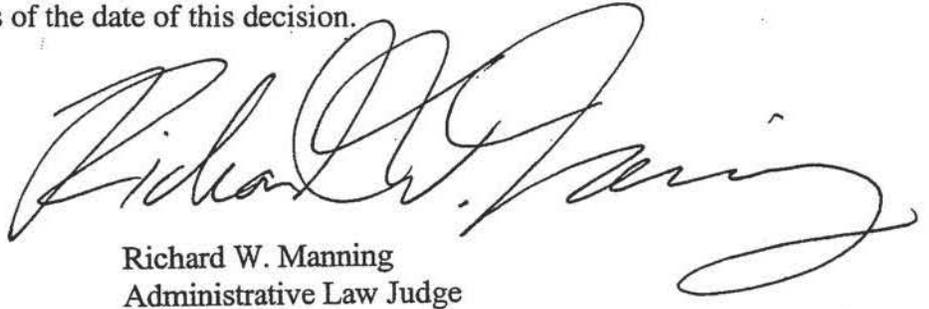
Section 110(i) of the Mine Act sets out six criteria to be considered in determining an appropriate civil penalty for a violation. The Chile Bar Slate Mine is a medium-sized mine that worked 14,908 man-hours in 2003. MSHA has issued about 14 citations at the Chile Bar Slate Mine in 2003. The violations were abated in good faith. The total penalty assessed in this decision will not have an adverse effect on Placerville’s ability to continue in business. My findings on gravity and negligence are discussed above.

### III. 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>
6356894	56.14100(b)	\$60.00
6356895	56.14100(b)	60.00
6356896	56.20003(b)	60.00
	<b>TOTAL PENALTY</b>	<b>\$180.00</b>

Accordingly, the citations contested in this case are **AFFIRMED** or **MODIFIED** as set forth above and Placerville Industries, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$180.00 within 30 days of the date of this decision.



Richard W. Manning  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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February 7, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2004-220-M
Petitioner	:	A.C. No. 04-03007-19403
	:	
v.	:	
	:	Ralston Quarry
ASPHALT PAVING COMPANY,	:	
Respondent	:	

**DECISION**

Appearances: Lydia Tzagoloff, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;  
David Z. Gerganoff, Safety Coordinator, Asphalt Paving Company, Golden, Colorado, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Asphalt Paving Company ("Asphalt Paving"), 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"). An evidentiary hearing was held in the Commission's courtroom in Denver, Colorado.

**I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Asphalt Paving operates a quarry in Jefferson County, Colorado. The quarry is on about 6 acres of land and it has 62 conveyors, 4 crushers, and 7 screens. (Tr. 41-42). On September 9, 2003, MSHA Inspector Laurence Dunlap inspected the Ralston Quarry. During his inspection, Inspector Dunlap investigated an accident that occurred at the quarry on May 29, 2003. The inspector issued Citation No. 6298212 in conjunction with the accident investigation. At the hearing, the parties announced that they reached a settlement for Citation No. 6298211, the other citation at issue in this case, which I approved.

Inspector Dunlap issued Citation No. 6298212 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14107(a). The body of the citation states:

The return roller that is 2 feet 6 inches from ground level, located in the secondary tunnel, is not guarded. Spillage occurs on a regular basis in the tunnel and is cleaned weekly. On May 29, 2003, a worker shoveling material from under the moving belt caught his arm between the return roller and the conveyor belt. The worker received a serious injury that resulted in restricted duty.

The inspector determined that it was reasonably likely that someone would be injured as a result of this condition and, if an injury were to occur, it could result in permanently disabling injuries. He determined that the violation was of a significant and substantial nature ("S&S") and that Asphalt Paving's negligence was low. The cited safety standard provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, . . . and similar moving parts that can cause injury." The Secretary proposes a penalty of \$154.00 for this citation.

Inspector Dunlap testified that Marc Crowe, an Asphalt Paving employee, was shoveling accumulations in a tunnel under the surge pile when he got his arm stuck between the return roller and the conveyor belt. (Tr. 12-13). He received second degree burns on his arm as a result of this accident. The accident occurred when the shovel got caught in the pinch point, which pulled his arm between the roller and belt. Crowe gained access to the tunnel by squeezing through an opening adjacent to the conveyor on the west side of the tunnel. (Ex. 4, p. 2). Crowe told Inspector Dunlap that he had been entering tunnel through that opening for about four years. (Tr. 14). He also told the inspector that the accumulations are cleaned out about once a week. The inspector was able to enter the tunnel through this opening, which he estimated to be about 16-18 inches wide. (Tr. 21-22). Material builds up under the conveyor belt and must be shoveled onto the belt. (Tr. 16; Ex. 4, pp. 3-4). The pinch point for the conveyor was two feet six inches from the floor of the tunnel. (Tr. 16).

Inspector Dunlap testified that Asphalt Paving has a lock-out procedure that employees are supposed to follow when shoveling up accumulations around the belt. (Tr. 18). As a consequence, before a miner works in the tunnel, he is required to shut down and lock out the conveyor. Inspector Dunlap testified that the pinch point on the return roller where Crowe got his arm caught is the type of moving machine part that is covered by the safety standard. (Tr. 21). He stated that Crowe's injuries could have been much worse. (Tr. 23-24). Crowe told him that, when he got his arm caught between the roller and the belt, he knew that the metal splice for the belt would be coming around so he pushed his feet against a solid surface and pulled his arm out before the splice arrived. Inspector Dunlap determined that Asphalt Paving's negligence was low because Crowe told him that the quarry superintendent was not aware that he was shoveling accumulations in the tunnel while the conveyor was operating. (Tr. 29-30). Nevertheless,

Inspector Dunlap believes that management should have been aware that Crowe was shoveling accumulations in this manner because Crowe told him that he had been doing it this way every week for four years. (Tr. 31).

Ray Wright, superintendent at the quarry, is in charge of production, safety, and environmental compliance. Wright testified that Crowe had worked at the quarry for 17 years prior to the accident. (Tr. 41). Wright also testified that Crowe was aware that the company's safety rules prohibited miners from entering the tunnel while the belt was operating. Wright testified that he did not know that Crowe was entering the tunnel by squeezing through an opening on the west side of the tunnel and shoveling accumulations while the belt was running. He admitted, however, that during his employment in the mining industry he has seen miners taking shortcuts. (Tr. 51).

Wright testified that the proper procedure for cleaning up accumulations is to lock out and tag out the conveyor system before entering the tunnel. (Tr. 43). He does not want anyone entering the tunnel when the belt is running. Because the east gate to the tunnel was kept locked and employees were prohibited from entering the tunnel until the belt was locked out, Wright does not believe that the tunnel should be considered to be a work area. (Tr. 49). The opening on the west end of the tunnel that Crowe used is 12 inches wide. (Tr. 45; Ex. A). Most people could not fit through the opening and it was not the normal entrance to the tunnel. Most employees entered the tunnel through the gate on the east end of the tunnel. (Tr. 45-46; Ex. B). The surge pile is quite large and the tunnel goes beneath it. (Ex. G). Accumulations in the tunnel are not shoveled out on a fixed schedule but on an as-needed basis. Crowe returned to work after he was treated by a physician. Crowe was suspended three days without pay for failing to follow company safety rules. (Tr. 48; Ex. F).

The condition was abated by placing a guard around the roller. (Tr. 52). Asphalt Paving also bolted wire mesh across the opening at the west end of the tunnel so that employees could no longer enter the tunnel at that location.

The Secretary argues that she established an S&S violation of the safety standard. (Tr. 55). Inspector Dunlap took into consideration the fact that management did not know that Crowe was shoveling accumulations in the tunnel while the belt was running by designating Asphalt Paving's negligence as low. Asphalt Paving argues that the citation should be vacated because management was not aware that Crowe was violating the company's safety rules by shoveling accumulations in the tunnel while the belt was running. (Tr. 56). Crowe's actions were intentional and Asphalt Paving should not be held liable for intentional safety violations committed by its employees. It maintains that an employer cannot guard against the intentional misconduct of employees. (Tr. 57-58).

I find that the Secretary established a violation of section 56.14107(a). The cited pinch point was required to be guarded under the requirements of that safety standard. Section 14107(b) of the safety standard provides that guards are not required "when the exposed moving

parts are at least seven feet away from walking or working surfaces.” I find that the tunnel was a walking or working surface because at least one employee regularly worked in the tunnel while the conveyor system was operating. The pinch point was only two and a half feet from the floor of the tunnel. Although Asphalt Paving thought that the unguarded pinch point was in an inaccessible area, at least one miner was working in the tunnel on a regular basis to shovel accumulations onto the belt while the belt was moving. Although Wright testified that he did not expect miners to slip through the one-foot wide opening on the west side of the tunnel, he acknowledged that miners will take often shortcuts.

Asphalt Paving argues that because the alleged violation was the direct result of an intentional safety violation committed by Crowe, the citation should be vacated. I reject this argument. It is well established that operators are liable without regard to fault for violations of the Mine Act. *See e.g., Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982); *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893-94 (5th Cir. 1982); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988), *aff'd on other grounds*, 870 F.2d 711 (D.C. Cir. 1989); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (November 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989). The Commission and the courts have also consistently held that a miner's misconduct in causing a violation is not a defense to liability. For example, in *Allied Products*, the court held that the operator is liable for violations even where "significant employee misconduct" caused the violations. 666 F.2d at 893-94. The court concluded: "If the act or its regulations are violated, it is irrelevant whose act [precipitated] the violation . . . ; the operator is liable." *Id.* at 894. Similarly, in *Ideal Cement Co.*, 13 FMSHRC 1346, 1351 (September 1991), the Commission observed that, "[u]nder the liability scheme of the Mine Act, an operator is liable for the violative conduct of its employees, regardless of whether the operator itself was without fault and notwithstanding the existence of significant employee misconduct." Indeed, the Commission has held that an operator is liable for a violation of the safety standard requiring adequate service brakes on mobile equipment where the brakes were defective because disgruntled employees intentionally tampered with the slack adjusters for the brakes. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1115 (July 1995).

I also find that the Secretary established that the violation was S&S. A violation is classified as S&S "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete 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 in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not

that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

The Secretary established the underlying violation of the safety standard and that a discrete safety hazard was created. There was a reasonable likelihood that the hazard contributed to by the violation would result in an injury. The undisputed evidence establishes that Crowe was entering the tunnel on a regular basis to shovel accumulations onto the belt while the conveyor system was operating. Assuming continued normal mining operations, it was reasonably likely that the unguarded pinch point would injure him. Crowe sustained an injury of a reasonably serious nature and it is clear that his injuries could have been much more serious. The belt could have pulled off his arm or ripped skin and muscles off his arm. The parties do not contest the inspector's negligence finding.

## II. APPROPRIATE CIVIL PENALTIES

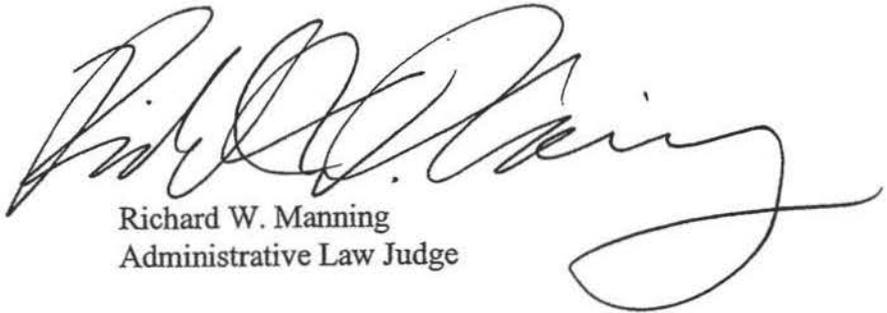
Section 110(i) of the Mine Act sets out six criteria to be considered in determining an appropriate civil penalty for a violation. The Ralston Quarry is a medium-sized mine that worked 31,981 man-hours in 2003. MSHA issued about 21 citations at the Ralston Quarry in the two years preceding September 9, 2003. Both violations were abated in good faith. The total penalty assessed in this decision will not have an adverse effect on Asphalt Paving's ability to continue in business. My findings on gravity and negligence are discussed above.

## III. 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>
6298211	§103(d) of Act	\$60.00
6298212	56.14107(a)	154.00
	TOTAL PENALTY	\$214.00

Accordingly, the citations contested in this case are **AFFIRMED** and Asphalt Paving Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$214.00 within 30 days of the date of this decision.



Richard W. Manning  
Administrative Law Judge

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RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, N.W., SUITE 9500  
WASHINGTON, D.C. 20001-2021

February 24, 2005

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of WILFREDO MORALES,	:	Docket No. SE 2005-71-DM
Petitioner	:	SE-MD 2005-01
	:	
v.	:	
	:	
ARENERO RAFAEL COLON, INC.	:	Arenero Rafael Colon
Respondent	:	Mine ID 54-00150

**ORDER TEMPORARILY REINSTATING  
WILFREDO MORALES**

This matter is before me on an application for temporary reinstatement filed by the Secretary of Labor (Secretary) on behalf of Wilfredo Morales pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act) (30 U.S.C. §815(c)(2)). The Secretary seeks an order requiring the Respondent (Arenero Rafael Colon, Inc. (Arenero)) to reinstate Mr. Morales as an employee pending a decision on the merits of the discrimination complaint Mr. Morales filed with the Secretary's Mine Safety and Health Administration (MSHA) on November 15, 2004. A hearing on the application was conducted in San Juan, Puerto Rico. At the conclusion of the hearing counsels orally summarized their arguments. For the reasons that follow, I grant the application, and I order that Mr. Morales be reinstated on a temporary basis.

**THE EVIDENCE**

**I. The Arenero Facility**

Arenero operates a sand processing facility located in San Lorenzo, Puerto Rico. At the facility sand is extracted, processed, and shipped to purchasers. Once the sand is extracted, it is loaded onto haulage trucks by a front end loader (loader). The trucks are driven to the facility's processing plant. At issue in this matter is the condition of a part of the road connecting the sand extraction site to the plant.

The extraction area is at a higher elevation than the plant. To reach the plant haulage, truck drivers must descend a slope of approximately 15 degrees. Drops exist on both sides of the slope, and where they exist, the road is bermed with sand. There is a small pond at the bottom right-hand side of the slope (as one proceeds down). The area at the top of the slope, including

the extraction and loading area, is level. The area at the bottom of the slope, including the route the road takes to the processing plant, also generally is level (see Resp. Exh. 5).<sup>1</sup>

Haulage trucks first enter the facility below the slope. Therefore, at the start of the workday they must travel up-slope to be loaded. Normally, it takes approximately 20 minutes for a loaded truck to drive from the extraction area to the plant. Once loaded, the trucks weigh between 60,000 pounds and 120,000 pounds, depending on their type.

## **II. Morales and Arenero**

Wilfredo Morales was dismissed by Arenero on July 6, 2004, at which time he had worked for Arenero for approximately four years and seven months as a heavy equipment operator. Morales operated several different types of equipment, including an excavator, a loader, a bulldozer and a haulage truck. At the time of his dismissal, Morales was operating a haulage truck. While others driving haulage trucks at the facility were employees of a contractor, Morales was an employee of Arenero. Although the truck he drove was owned by his son, Morales's wages were paid by the company.

Mr. Morales was supervised by Ruben Roman, who described Morales as a good employee, one who arrived on time, who was available when needed and who followed instructions. However, according to Mr. Colon, there was another side to Mr. Morales as an employee, in that when operating a loader, he was slow to load trucks and, as a result, his productivity was low. Colon testified that he and Roman spoke with Morales "many times" about this aspect of his job performance (Tr.168-169).<sup>2</sup>

## **III. Events of July 1, 2004**

On the night of June 30, the hourly precipitation data of the National Oceanic and Atmospheric Administration (NOAA) shows that between the hours of 11:00 p.m. and 12:00 a.m., .2 inches of rain fell at NOAA's San Lorenzo weather station, which is located in the

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<sup>1</sup> The road and land adjacent to it were best described by Arenero's Treasurer and Plant Manager, German Colon. Mr. Colon, who holds a BA in science and engineering, estimated the angle of the slope at 15 degrees and the length of the road on the slope as 40 to 50 meters. He described the pond as 15 feet wide and 15 to 20 feet long. In addition, Mr. Morales described the width of the road as approximately 12 feet. This was not disputed by Arenero's witnesses.

<sup>2</sup> Mr. Colon could not recall the dates when the discussions took place, and he agreed Arenero never expressed its job performance concerns to Morales in writing (Tr.169).

vicinity of the mine (Resp. Exh. 3 at 19).<sup>3</sup> Between the hours of 12:01 a.m. and 4:00 a.m. an additional .7 inches of rain was recorded (Id. at 22).

Morales arrived at the mine around 7:00 a.m. He was joined by three other haulage truck drivers who were employed by Arenero's haulage contractor. Morales and the other drivers proceeded up the road to the sand extraction area. However, because the road was wet and slippery, the drivers did not want to travel back down the slope with loaded trucks. According to Morales, the drivers did not think it was safe. Morales noted that his truck would be loaded, that he would be descending the slope in first gear and that he would have to brake on the way down. Therefore, he feared that his truck might slip off the road and/or overturn, and that he might be injured or worse.

Morales asserted that for the haulage trucks to use the road safely, either the bulldozer had to scrape the wet material from the sloped part of the road or the drivers had to wait until the sun dried the road (Tr. 23). However, according to Morales, there was a problem on July 1. The bulldozer broke down and could not scrape the wet material from the road.

Meanwhile, Morales's supervisor, Mr. Roman, who was working in the plant area, received a call from the bulldozer operator, who told Roman that the bulldozer could not be operated because the belts on the bulldozer were broken and needed to be replaced. Roman called the company's contract mechanic, Rudolfo Ramos, and advised him of the problem. Ramos testified that he heard from Roman between 7:45 a.m. and 8:00 a.m. Ramos told Roman he would come to the facility. According to Ramos, he arrived at the mine between 9:30 a.m. and 10:00 a.m. It took him about two hours to repair the bulldozer, which was back in operation between 11:45 a.m. and 12:00 p.m.

While Ramos was on his way to the mine, Mr. Roman noticed no trucks were arriving at the plant. He decided to find out why. He traveled up the slope to the flat ground near the excavation area where the trucks were located. Roman testified that when he reached the area, the three contract drivers were together and Morales was some distance away. Roman asked one of the contract drivers, "El Gordo," why the drivers were not hauling sand to the plant (Tr. 115-116).<sup>4</sup> (According to Roman, as he spoke, Morales moved closer to the group.) El Gordo told Roman that the road was slippery and the owner of the contracting firm did not want to put his employees at risk by traveling down the road. Roman, who had worked for 10 to 11 years in the aggregate industry, told El Gordo that since the drivers had traveled to the top of the slope safely,

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<sup>3</sup> Copies of the NOAA records were offered by Arenero to establish, among other things, the amount of rain occurring at the mine on various dates. The copies were offered as true and accurate replications of official NOAA documents, and I accepted them as such. I also accept the information set forth on the copies as accurate and factual.

<sup>4</sup> El Gordo was the driver's nickname. Roman did not know the driver's full name (Tr. 116).

the road was in good enough condition to travel down. Although El Gordo and the other drivers did not respond to what Roman said, Roman believed Morales heard the end of the conversation because Morales had moved even closer to the group. Mr. Roman left the area believing the drivers would start hauling sand to the plant.<sup>5</sup>

German Colon was the next person to visit the drivers. According to Mr. Colon, he was at the plant, and he noticed no trucks were arriving. He wanted to know why, so he traveled to the top of the slope. On his way to the top he found the road was clear. Colon stated when he reached the contract drivers he asked them why they were not hauling sand to the plant, and they responded that the road was “not okay” (Tr. 134). Colon replied in essentially the same way Roman had, telling the drivers the road was in good condition as shown by the fact their vehicles had traveled up the slope without incident.

Colon stated that Morales was parked about 25 meters from the contract drivers. Colon testified he approached Morales and told him to let it be the first and the last time he did something like this, and Morales asked him what he had done (Tr. 135).

According to Colon, he then left the area and a short time later all of the drivers, including Morales, began hauling sand to the plant. (The company’s delivery records show the first contract employee arrived at the plant at 9:30 a.m. (Resp. Exh. 2 at 7).)<sup>6</sup>

Mr. Morales stated that during the course of Colon’s visit, he told Colon he was not hauling sand because the road was muddy, the bulldozer was broken and he could not go down the slope (Tr. 37).<sup>7</sup> Colon did not respond. Morales also stated he told the other drivers what

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<sup>5</sup> Morales’s testimony regarding Roman’s visit to the drivers was less detailed than Roman’s and differed from it in several respects. Morales stated that Roman arrived around 9:00 a.m., that he asked the drivers why they were not working, that all of the drivers stated they did not want to kill themselves and that Roman left without responding (Tr. 30-31). When asked whether he had made a safety complaint to Roman, Morales was adamant that the drivers had done so (Tr. 35).

<sup>6</sup> Morales described Colon’s visit somewhat differently, Morales stated Colon arrived and asked why the trucks were not operating. In Morales’s version, Colon told the drivers they had to “load up” or “go” (Tr. 33; see also Tr. 37-38 ). Colon left, but came back a short time later and said to Morales, “[D]on’t do this again. If you do this again you go to hell together with your truck” (Tr. 34). Later in his testimony, Morales quoted Colon as stating, “Don’t ever do this to me again; otherwise you’ll have to get the hell out of here together with your truck” (Tr. 38).

<sup>7</sup> In the complaint he lodged with MSHA, Morales did not specifically indicate he complained about unsafe conditions either to Roman or Colon. However, he stated in the complaint that Colon “told us angrily that we must load the trucks and it did not matter the

Colon had said to him, and that he asked the other drivers as well as the excavator operator what he had done (Tr. 38).

After Colon was gone, the drivers, including Morales, loaded their trucks and proceeded to drive to the plant. Morales testified they did so because they believed Colon would “kick us out” if they continued their refusal (Tr. 39). By that time the sun had dried the road so that it was safe to travel, and Morales worked the rest of the day.

#### **IV. The Events of July 2 and July 3, 2004**

On Friday, July 2, 2004, and on Saturday, July 3, Morales worked normal work days. However, around 4:00 p.m. on Saturday, Roman told Morales not to bring his truck to work on July 6, that Colon wanted to speak with him. Roman did not say why.

#### **V. The Events of July 6, 2004**

Around 1:00 p.m. on July 6, Mr. Morales went to see Mr. Colon as Roman had directed. Morales and Colon testified about their resulting conversation. According to Morales, Colon told him he would have to leave and make money somewhere else (Tr. 41). Morales asked why, and Colon said because of Morales’s “insubordination” (Id.). Morales did not ask what Morales meant, and Colon did not explain.

Colon testified he told Morales he was being dismissed for insubordination in that he refused to haul sand without reason (Tr. 144). In addition, Colon stated he also told Morales he was being dismissed because his truck did not have an automated load cover and because Morales’s work performance was poor (Tr. 143-144).<sup>8</sup>

After the conversation, Morales left the mine and has not worked since for Arenero.<sup>9</sup>

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condition of the road,” a statement which, if true, inferentially indicates Colon understood the drivers’ refusal to haul was based on their belief the road was unsafe.

<sup>8</sup> Colon explained that Commonwealth environmental regulations require covered loads on haulage trucks and that neither the trucks of the contractor nor the truck Morales drove were equipped with automated load covers. Rather, covers on the contractor’s trucks and on the truck Morales used had to be manually installed, a procedure requiring the drivers to climb on the trucks’ beds. In Colon’s view, this procedure endangered the drivers. Colon also explained that Morales’s poor work performance consisted of his low productivity, something he and Roman had orally warned Morales about prior to July 1 (Tr. 168-169).

<sup>9</sup> The termination of Morales was not the only change in employment at the mine. Colon also contracted with a new haulage company.

## THE LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the 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.)).

As I explained at the hearing, in ruling on an application for temporary reinstatement the issue before the judge is limited to a determination as to whether the miner’s complaint “is frivolously brought” (Sec. on behalf of Price v. Jim Walter Resources, Inc. v. FMSHRC, 920 F.2d 738 (11<sup>th</sup> Cir. 1990)). It is “not the judge’s duty . . . to resolve . . . conflict[s] in testimony” (Sec. on behalf of Albu v. Chicopee Coal Co., Inc., 21 FMSHRC 717, 719 (July 1999)), rather, the question is whether the evidence establishes the complaint is non-frivolous (see Tr. 6-8).

The Courts have equated the “not frivolously brought” standard with a “reasonable cause to believe” standard (Brock v. Roadway Express, Inc., 481 U.S. 252 (1987)). The Courts also have equated it with finding the complaint is “not insubstantial” and “not clearly without merit” (Jim Walter Resources, 920 F.2d at 747). In addition, the legislative history of the Act defines the “not frivolously brought standard” as whether the complaint “appears to have merit” (Legis. Hist. at 624-625).

### I. The “Not Frivolously Brought Standard” and a Prima Facie Case

I conclude that Morales’s complaint was not frivolously brought. It has been held repeatedly that to establish a prima facie case of discrimination, a complainant must show that he or she engaged in protected activity and that the adverse action complained of was motivated in any part by that activity (see Dykhoff v. U.S. Borax, Inc., 22 FMSHRC 1194, 1198 (October, 2000); Driessen v. Nevada Goldfields, Inc., 20 FMSHRC 324, 328 (April, 1998); Sec. on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799 (October, 1980), rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3<sup>rd</sup> Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-818 (April, 1981)). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity (see Robinette, 3 FMSHRC at 818, n. 20). To meet the standard that is at issue in an application for temporary reinstatement, the complainant need only establish a prima facie case, something Morales has done.

### II. Protected Activity

Mr. Morales's assertion that he refused to haul sand on the morning on July 1 because he believed the road was not safe is established by the record and is protected. While there is a dispute as to whether Morales actually complained about the condition of the road either to Roman or Colon, I need not resolve the controversy because there is no dispute that Roman understood the drivers were refusing to haul sand because the road was slippery and because they believed hauling under the existing conditions was dangerous. Roman testified El Gordo told him so.

Roman knew that Morales, although physically some distance from the other drivers during Roman's conversation with El Gordo, was involved in the same work refusal as the other drivers, and it is reasonable to conclude Roman understood Morales was refusing to work for the same reason.

Moreover, I find that Colon too understood Morales was not hauling sand because of the condition of the road. Like Roman, Colon responded to the drivers' complaint the road was "not okay" by assuring them since they had reached the top of the slope without problems, it was safe to proceed down. Once again, Morales physically was some distance from the other drivers, but, like Roman, Mr. Colon understood Morales was involved in the same work refusal, and it is reasonable to conclude Colon understood Mr. Morales was refusing to work for the same reason as the other drivers. (Communication of a perceived hazard "must be evaluated not only in terms of the specific words used, but also in terms of the circumstances within which the words are used" (Hogan and Ventura v. Emerald Mines Corp., 8 FMSHRC 1066, 1074 (July 1986), aff'd mem., 829 F.2d 31 (3<sup>rd</sup> Cir. 1987 (table cite))).

I further find that Morales established his good faith belief the road was hazardous (See Robinette, 3 FMSHRC at 809-812; Sec. on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (June 1983)). A good faith belief "simply means an honest belief that a hazard exists" (Robinette, 3 FMSHRC at 810). There is nothing in the record to indicate Morales's belief in the unsafe condition of the road was other than honest. Almost an inch of rain had fallen the night of June 30-July 1. Obviously, the road was wet. It is true that Arenero offered testimony that on the morning of July 1 and prior to Roman's and Colon's visits, the bulldozer was used to clean the path and that after it broke down, the loader finished the job (see Tr. 83-90 (Testimony of Serafin Martinez)). Morales, on the other hand, stated his belief that the bulldozer was not used and that he did not know whether or not the loader was used. In fact, both the bulldozer and the loader may have been used and the slope may indeed have been safe to travel. However, if so, neither Roman nor Colon responded to the drivers' concerns with this information. Rather, they offered the drivers a non sequitur, telling them since they had made it to the top of the slope without incident, they would make it down the same way. Clearly, Roman's and Colon's opinion did not take account of the fact that on the way down the slope the drivers would face substantially different conditions, in that their trucks would be fully loaded and they would need to brake. Nor was it unreasonable for the drivers, including Morales, to think the sand berms on both sides of the slope would not prevent their fully loaded trucks from over traveling the road.

Once the safety complaint was communicated, Roman and Colon had a duty to address the perceived danger in a manner that reasonably should have resolved the miners' fears (Gilbert v. FMSHRC, 866 F.2d 1433, 1441 (D.C. Cir. 1989); Secretary v. Metric Constructors, Inc., 6 FMSHRC 226, 230 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469 (11<sup>th</sup> Cir. 1985); Sec. on behalf of Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529, 1534 (September 1983)). Roman's and Colon's responses did not meet this requirement. The drivers were not told why the road was safe given the conditions they believed they would face if they used it (See e.g., Hogan and Ventura, 8 FMSHRC at 1074)).

### **III. Motivation of Adverse Action**

Colon testified that at least one of the reasons for Morales's dismissal was his failure to haul sand on the morning of July 1, that is, for his "insubordination." Thus, while Colon testified there were other reasons as well, Morales was dismissed in part at least for his protected activity. Having established he engaged in protected activity and was dismissed at least in part because of that activity, Mr. Morales is entitled to the relief he seeks.

### **Order**

Based on the above, I find that the Secretary has met her burden of establishing that Mr. Morales's complaint was not "insubstantial" or "clearly without merit" in that she has made a sufficient showing of the elements of a prima facie case. This stated, it is not certain that Morales will be able to prevail in the discrimination proceeding. For one thing, the company's assertions it dismissed Morales for reasons that are not protected by the Mine Act will need to be more fully evaluated.

The purpose of temporary reinstatement is to render the complainant financially secure during the pendency of his discrimination case. In enacting the "not frivolously brought" standard, Congress intended that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding" (Jim Walter Resources, Corp., 920 F.2d at 748 n. 11). However, it would be inequitable to require Arenero to reinstate Morales for an indefinite period. At the hearing, counsel for the Secretary stated that the Secretary had completed her investigation of Morales's complaint (Tr. 192-193). Accordingly, I expect the Secretary to proceed expeditiously with her decision regarding the filing of a complaint and, should she decide to go forward, to file it no later than April 1, 2005. Once a complaint is filed, I will promptly schedule a hearing.

In view of the foregoing, Arenero is **ORDERED** to **REINSTATE** Wilfredo Morales to the position he held prior to his discharge on July 6, 2004, and to do so at the same rate of compensation and benefits and with the same work hours, including overtime.



David F. Barbour  
Administrative Law Judge  
(202) 434-9980

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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DENVER, CO 80204-3582  
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February 24, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2004-284
Petitioner	:	A.C. No. 42-02263-22817
	:	Bear Canyon No. 3 Mine
	:	
v.	:	Docket No. WEST 2004-372
	:	A.C. No. 42-02263-28001
	:	Bear Canyon No. 3 Mine
	:	
C. W. MINING COMPANY,	:	Docket No. WEST 2004-385
Respondent	:	A.C. No. 42-01697-28929
	:	Bear Canyon No. 1 Mine

**DECISION**

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;  
Carl F. Kingston, Esq., Salt Lake City, Utah, for Respondent.

Before: Judge Manning

These cases are before me on three petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against C. W. Mining Company ("CW"), 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 six citations issued at the Bear Canyon Nos. 1 and 3 Mines, which are underground coal mines in Emery County, Utah. The Secretary proposes a total penalty of \$7,725.00 in these cases. The parties introduced testimony and documentary evidence at a hearing held in Salt Lake City, Utah.

**I. DOCKET NO. WEST 2004-284**

MSHA's Price, Utah, office received a complaint under section 103(g) of the Mine Act stating that some miners at the Bear Canyon No. 3 Mine had not been properly trained. (Tr. 11). MSHA Inspector Lester Coleman investigated the complaint on November 11, 2003, by looking at the mine's training records and time cards. After his review, Inspector Coleman issued Order No. 7635413 under section 104(g)(1) of the Mine Act alleging a violation of 30 C.F.R. § 48.6(b). The body of the order provides as follows:

The operator acknowledges that the following newly employed experienced miner, Manuel Lopez, did return to work at this underground coal mine on September 9, 2003, after an absence of more than fourteen months. The afore mentioned miner was not provided with any training as required by this part and section. The operator is aware of this training requirement. The operator is hereby ordered to withdraw the miner from the mine until the employee is trained. The Federal Mine Safety and Health Act declares that an untrained miner is a hazard to himself and others.

The inspector determined that an injury was unlikely, that the violation was not of a significant and substantial nature ("S&S"), and that the negligence was high. The safety regulation provides, in part, that "[e]xperienced miners must complete the training prescribed in this section before beginning work duties." Subsection 46.6(a)(4) states that the training requirements in section 46.6 apply to miners returning after an absence of 12 months or more. The Secretary proposes a penalty of \$500.00 for this order.

Inspector Coleman testified that the time cards showed that Mr. Lopez had worked at the mine for about eight to ten days in September 2003 but there was no record that he had received any experienced miner training. He worked on the surface as a mechanic at that time. (Tr. 23). The inspector testified that he based this conclusion on Lopez's time cards. (Tr. 17; Ex. G-4). He had previously worked at the mine from April through July 2002 and had received new miner training, task training, and annual refresher training during that employment period. (Tr. 15, 18-20; Ex. G-5). Lopez worked underground in 2002. (Tr. 45). Inspector Coleman determined that the violation was a result of CW's high negligence because Ken Defa, the mine superintendent, acknowledged that Lopez had never received experienced miner training. In addition, the inspector believed that Lopez had only worked at the mine for a few months in 1992. Coleman immediately terminated the order on November 11, 2003, because Lopez was not working at the mine. Lopez was apparently out on strike. (Tr. 13, 22).

Robert Brown, maintenance superintendent, testified that Lopez worked in the surface shop in August and September 2003. (Tr. 31). He did not work underground. Lopez performed light repair and body work at the surface shop. Brown testified that Lopez was a safe worker. Brown believed that Lopez had received all required training because the checklist that he saw had the training box checked off.

Ken Defa testified that when a person is hired, CW checks to see if he has completed the requisite training. Training is often obtained through the College of Eastern Utah. In the case of Mr. Lopez, a clerical employee at CW mistakenly checked the box on an internal checklist that indicated that Lopez was fully trained. (Tr. 39-40). Training is offered in both English and Spanish at the college.

CW argues that the section 104(g)(1) order is invalid because Mr. Lopez was not employed at the mine on November 11, 2003, so that an order withdrawing him from the mine served no purpose. In *Twentymile Coal Co.*, 26 FMSHRC 666, 673 (Aug. 2004), the Commission held that “a section 104(g) order is an order aimed at a specific individual (one deemed a hazard to himself and others), and it is to be issued on the spot in real time.” The miner must be immediately withdrawn from the mine. In the face of this argument, counsel for the Secretary replied that she has no objection to modifying the order to a section 104(a) citation with the same proposed penalty. (Tr. 48). CW does not dispute that Lopez did not receive experienced miner training when he was re-employed at the mine and that, as a consequence, it violated section 48.6. (Ex. G-2). The purpose of section 104(g) is to remove the miner from the work environment until he has been fully trained. I modify this order to a section 104(a) citation under my authority in section 105(d) of the Mine Act. See *Twentymile*, 26 FMSHRC at 672.

CW also argues that the Secretary failed to establish that the violation was the result of its high negligence. I agree. The inspector based his high negligence determination on the fact that CW was aware of the requirements of section 48.6 and was aware that Lopez’s prior mining experience was quite minimal. I credit the evidence presented by CW that, as a result of a clerical error in Lopez’s processing, mine management believed that he had completed all required training. (Tr. 39-40). As a consequence, I find that CW’s negligence was moderate. A penalty of \$200.00 is appropriate for this violation.

## II. DOCKET NO. WEST 2004-372

On November 30, 2003, MSHA Inspector Donald Durrant issued Citation No. 7613156 at the Bear Canyon No. 3 Mine under section 104(d)(1) of the Mine Act alleging a violation of 30 C.F.R. § 75.360(a)(1). The body of the citation provides as follows:

The required preshift examination along the Main North, Main East, Main South, and South East Mains had not been conducted within the mine operator’s predetermined time frame on Saturday, November 29, 2003, and Sunday, November 30, 2003, for the day shift crews. The mine operator’s examination schedule for this area of the mine for the day shift starts at 4:30 a.m. and must be concluded no later than 7:30 a.m. The mine examiner, who was also the section foreman in the South East Mains section, stated that he was told by management personnel that the preshift examination just needed to be completed by 9:00 a.m. and was not aware of the revolving preshift schedule and thus had conducted the examinations on these two days between 8:30 a.m. and 8:40 a.m. Observation of the date, time, and initials along these travelways verified the examiner’s statements . . . for the day shift on November 30, 2003 . . . .

The inspector determined that an injury was reasonably likely, that the violation was S&S, that the negligence was high, and that the violation was the result of CW's unwarrantable failure to comply with the safety standard. The safety standard provides, in part, that "a certified person designated by the operator must make a preshift examination within three hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. . . . The operator must establish 8-hour intervals of time subject to the required preshift examinations." The Secretary proposes a penalty of \$1,100.00 for this order.

At the hearing, the Secretary moved to modify the citation to strike the S&S designation and to modify it to a section 104(a) citation with a high negligence designation. (Tr. 51). The motion to modify is granted. CW admitted that it violated the safety standard and that preshift examinations are scheduled to be conducted at the mine between 4:30 a.m. and 7:30 a.m.. (Ex. G-6, p. 3). It also admitted that the examinations on the dates cited were actually conducted between 8:30 a.m. and 8:40 a.m. *Id.*

Inspector Durrant discovered the violation as he was talking to Lynn Stoddard, the examiner and section foreman, while examining the preshift books. (Tr. 52). Durrant discovered that CW divided the mine into segments with slightly different shift schedules. Stoddard told the inspector that he thought the preshift examinations had to be completed by 9:00 a.m. (Tr. 54). Inspector Durrant determined that the violation was a result of high negligence because Stoddard was CW's agent and should have known when preshift examinations were required. (Tr. 55).

Mr Stoddard testified that he worked as a weekend foreman during the fourth quarter of 2003. (Tr. 99). He lived in the Salt Lake City area and traveled to the mine to work Friday, Saturday, and Sunday. His shift started at 9:00 a.m. on Friday, 6:30 a.m. on Saturday, and 6:00 a.m. on Sunday. He testified that he thought that he had until 9:00 a.m. to complete the preshift examinations, in part because of his schedule on Friday. (Tr. 100). Stoddard testified that Defa had previously told him that the preshift examinations were required to be completed by 7:30 a.m., but that he was confused about the schedules.

Defa testified that he did not advise Stoddard that the preshift examinations did not have to be completed until 9:00 a.m. (Tr. 126). He also testified that this citation is the first citation issued at this mine for improperly completing a preshift examination.

The only issue with respect to this citation is whether the violation was a result of CW's high negligence. Stoddard was CW's agent because he was a member of management. In addition, a miner is considered to be the agent of a mine operator when he is conducting required examinations. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-96 (Feb. 1991). As a consequence, Stoddard's negligence is imputed to CW. Inspector Coleman testified that the violation was caused by CW's high negligence because Stoddard "knew or had reason to know of the preshift intervals . . . [and] Mr. Defa . . . obviously had made no effort to explain the preshift times, revolving intervals, to Mr. Stoddard because he wasn't aware of them." (Tr. 55-56). The inspector admitted that, given the different shift schedules at the mine, it was

“somewhat confusing” to determine when the preshifts were required to be completed. (Tr. 56). The schedules were posted on a mine bulletin board.

I find that the violation was caused by CW’s moderate negligence. The inspector’s testimony that Stoddard “knew or should have known” when the preshift exams were required to be completed correlates to a moderate negligence finding. Stoddard credibly testified that he was simply confused. Since this mine operates during multiple shifts, Stoddard’s examination occurred more than 8 hours after the previous exam. I find that the violation was serious but I reject the Secretary’s high negligence arguments. Given the modification of the citation made by the Secretary at the hearing and my finding of moderate negligence, I find that a penalty of \$400.00 is appropriate.

Inspector Durrant also issued Order No. 7613157 on November 30. This order was issued under section 104(d)(1) of the Mine Act alleging a violation of 30 C.F.R. § 75.360(b)(9). The body of the citation provides as follows:

No preshift examination had been conducted at the South East Mains section electrical installation, at or about X-Cut 4, between the hours of 6:00 a.m. and 9:00 a.m. for the day shift crew. When questioned, the section foreman/mine examiner stated that he had just forgotten to do the examination. Slip, trip, and fall hazards were found to exist along both sides of the electrical installation.

The inspector determined that an injury was reasonably likely, that the violation was S&S, that the negligence was high, and that the violation was the result of CW’s unwarrantable failure to comply with the safety standard. The safety standard provides, in part, that the “person conducting the preshift examination shall examine for hazardous conditions . . . at . . . underground electrical installations. . . .” The Secretary proposes a penalty of \$875.00.

At the hearing, the Secretary moved to modify this order to a section 104(d)(1) citation because of the modification made to Citation No. 7613156, above. The motion to modify is granted.

Inspector Durrant testified that when he inspected the mine he discovered the current date, time, and initials of a preshift examiner had not been posted at the electrical installation at the crosscut. (Tr. 58). He stated that this power center was required to be examined under the cited safety standard. Durrant testified that self-contained self-rescuers (SCSRs), tools, and other equipment were kept in and around the electrical installation. (Tr. 61). He determined that no examination had been conducted in this area. Durrant testified that when he questioned Stoddard about it, he told him that he forgot to examine the area. (Tr. 62; Ex. G-8, p. 2). Durrant testified that Stoddard did not tell him that he conducted the examination but he forgot to record it. (Tr. 63, 86). Inspector Durrant believed that the violation was S&S because it was reasonably likely that a serious injury would occur. Durrant found tripping and stumbling hazards in the area.

Jacks, surveying equipment, and other supplies were lying around the area which presented a tripping hazard. There was also loose coal in the area which presented the same hazard. (Tr. 64-65). There was an informal lunch room in the same area so miners frequently walk by the electrical installation. About seven miners were exposed to the hazard. Durrant testified that it was reasonably likely that miners would suffer arm, shoulder, or head injuries if they stumbled over the loose coal or equipment. (Tr. 66).

Inspector Durrant determined that the violation was the result of an unwarrantable failure because CW's agent forgot to examine the area. He believes that CW has a history of these types of violations. (Tr. 67). "Stoddard knew or had reason to know that this examination was required and he just did not do it . . . and when he did do it, the exam . . . was poor at best because he missed a hazardous condition." *Id.*

Stoddard testified that he examined the cited electrical installation and the SCSRs on November 30. (Tr. 102). He stated that, although he examined the area, he must have forgotten to record the date, time, and his initials at the electrical installation. He testified that he did record his examination of the SCSRs, which are within ten feet of the electrical installation. (Tr. 104). Stoddard testified that when Inspector Durrant asked him why his name, date and time were not recorded at the electrical installation, he replied "I must have forgotten that one." *Id.* In making that statement, Stoddard testified that he meant that he forgot to record his preshift examination, not that he forgot to do the required examination. (Tr. 104-05). Stoddard testified that when he performs preshift examinations he looks for roof hazards and tripping hazards. At electrical installations he checks for coal accumulations in the area and makes sure that the electrical equipment is clean. Stoddard passed through that area several times before Durrant inspected the area. Stoddard testified that although there was equipment in the area, there were no significant tripping hazards and there were no major accumulations of coal. (Tr. 107, 110). Stoddard stated that he had to do a minimal amount of cleaning and he moved some jacks against the ribs to abate the citation. He admitted that his name was not on CW's list of certified people who are qualified to perform preshift examinations, but he was qualified and a certified person. (Tr. 110-12).

Defa testified that, when he observed the electrical installation with the inspector, he did not observe "any real hazards or problems with the area." (Tr. 125). There was some coal present, but it did not create a trip or fall hazard. Electrical cables are always present in this area, but they were flat on the ground. Defa believes that he heard Stoddard tell the inspector that he performed the preshift examination. (Tr. 134).

The Secretary has the burden to prove a violation of a safety standard. Inspector Durrant based his citation on two factors. First, he believes that Stoddard admitted that he did not perform a preshift examination at the cited area. Second, he found conditions in the area that led him to believe that the examination had not been performed. CW contends that Stoddard performed the examination but that he forgot to record it with the date, time, and his initials. I find that the Secretary established a violation. I credit Inspector Durrant's testimony that

conditions in the area indicated that a competent examination had not been completed. Stoddard and Defa testified that the conditions did not create any real hazards. I find that, given the heavy foot traffic in the area, a competent preshift examination would have revealed these hazards. In addition, Durrant was quite certain that Stoddard did not tell him that he performed a preshift examination at the electrical installation. (Tr. 62-63, 68, 86; Ex. G-8, p. 2). I credit the inspector's testimony in this regard.

I also find that the violation was S&S. A violation is classified as S&S "if based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete 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 in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

There was a discrete safety hazard presented by the violation. It was reasonably likely that, assuming continued mining operations, the hazard contributed to by the violation would result in an injury. Preshift examinations play a crucial role in ensuring that miners work in a safe environment. I credit the testimony of Durrant that conditions were present in the area that presented a tripping, slipping, and falling hazard to miners. Durrant testified that "there was a pretty good rip roller . . . where coal had come off the rib . . . for an area of five feet . . . there were some simplex jacks . . . some surveying equipment . . . just numerous things that were around the area that one would have to step over . . ." (Tr. 64-65). I credit his testimony. Miners ate lunch in there so there was heavy foot traffic through the area. I also find that there was a reasonable likelihood that an injury would be of a reasonably serious nature. It was reasonably likely that a miner would suffer strains, pulled muscles, or more serious injuries if he tripped while walking through the area.

I find that the Secretary did not establish that the violation was the result of CW's unwarrantable failure to comply with the safety standard. Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94. I find that CW's conduct does not reach that level of negligence. As stated above, Inspector Durrant testified that "Stoddard knew or had reason to know that this examination was required and he just did not do

it.” (Tr. 67). Although this is a close issue, I find that the preponderance of the evidence establishes that Stoddard’s failure to conduct the examination was a result of moderate negligence. He passed through the area several times, but he did not conduct the required examination. He believed that the conditions that Durrant subsequently observed were not serious enough to require correction. He exercised poor judgment but his conduct did not rise to the level of “reckless disregard,” “intentional misconduct,” or “indifference.” I also find that his failure to more thoroughly examine the area did not constitute a serious lack of reasonable care.

In light of the above, the citation is modified to a section 104(a) citation with moderate negligence. The violation was S&S and serious. A penalty of \$400.00 is appropriate.

Inspector Durrant issued Order No. 7613170 on December 9, 2003. This order was issued under section 104(d)(1) of the Mine Act alleging a violation of 30 C.F.R. § 75.1914(f). The body of the citation provides as follows:

The Bobcat skid loader, company #2, being operated in the South East Mains section, MMU 001-0, had not been examined by a qualified person, as required by Sec. 75.1915, since May 2003. When questioned, the mine operator stated that the machine had been mistakenly put on the section permissibility check list, and that it was being checked weekly, but the individual making the weekly examination has not been qualified as per Sec. 75.1915. The approved book was also used to verify this condition as no entry was present after May 12, 2003.

The inspector determined that an injury was reasonably likely, that the violation was S&S, that the negligence was high, and that the violation was the result of CW’s unwarrantable failure to comply with the safety standard. The safety standard provides, in part, that the “[a]ll diesel-powered equipment shall be examined and tested weekly by a person qualified under § 75.1915.” The Secretary proposes a penalty of \$1,500.00.

Inspector Durrant testified that he inspected the cited diesel skid loader and found “some deficiencies.” (Tr. 68). When the inspector examined the record books he discovered that it had not been examined by a qualified person in more than six months. The last entry in the book for the skid loader was on May 12, 2003. (Tr. 70). Inspector Durrant testified that Robby Brown, the surface and mobile maintenance equipment superintendent, told him that the skid loader had been incorrectly placed on the section checklist. Brown told Durrant that Warren Pratt was assigned to examine the equipment and that Pratt was doing the exams. (Tr. 71). The inspector does not dispute that Pratt examined the skid loader. (Tr. 87). Inspector Durrant had talked to Mr. Pratt previously who told him that he was not a qualified diesel mechanic. (Tr. 72; Ex. G-9, p. 3). Brown did not dispute this fact. (Tr. 72).

The inspector testified that diesel equipment is required to be examined and tested weekly by a qualified person to make sure that the equipment is being maintained in a safe operating condition. The skid loader was not being used at the time of his inspection, but the inspector believes that it was used earlier in the shift. Inspector Durrant believes that the violation was S&S because it was reasonably likely that a serious injury would occur. He issued two non-S&S citations on the skid loader. Durrant testified that there are a number of tests that must be conducted during the weekly examinations, including carbon monoxide readings. He believes that miners could receive permanently disabling injuries such as burns, smoke inhalation, as well as other injuries. Warren Pratt had not been trained to look for the types of hazards found on diesel equipment that create a danger to miners. (Tr. 77).

Inspector Durrant believes that the violation was caused by CW's unwarrantable failure because the skid loader was being examined for about six months by a person who was not qualified. Someone in the mine's maintenance department should have noticed that the skid loader was being examined by the section crew rather than by a trained mechanic.

Brown testified that, at the time of Durrant's inspection, the skid loader was examined by the underground section crew rather than by the maintenance crew. (Tr. 113). Brown testified that the skid loader was regularly examined by Mr. Pratt. He was not qualified to inspect diesel equipment at that time, but he performed competent examinations. (Tr. 114). Brown performed the exhaust tests on the skid loader on December 9 to abate the citation and it passed. (Tr. 115). He stated that the equipment operator will usually know if there is a problem with the skid loader that needs attention by a mechanic. In addition, the foreman carries a gas meter. Brown does not believe that this violation created a hazard. (Tr. 117-18).

Defa testified that CW requires equipment operators to perform a pre-operational check on all diesel equipment. (Tr. 127). All equipment operators are task trained and are given a check list to use when examining their equipment for defects. Defa does not believe that the skid loader was out of compliance during this period. Although Brown was certified to examine diesel equipment, Pratt did not have this certification. (Tr. 128-29). Brown is responsible to make sure that the skid loader is properly being inspected by a qualified person. (Tr. 130). Defa and Brown knew that Pratt was not qualified to perform these inspections.

CW admits that it violated the safety standard by not having a qualified person examine and test the skid loader on a weekly basis. It also admits that this violation had existed since May 12, 2003. CW contends that the violation was not S&S because the skid loader was examined weekly by a responsible person. CW also contends that the violation was not caused by its unwarrantable failure to comply with the safety standard.

I find that the Secretary established that the violation was S&S. In analyzing whether a violation is S&S, the judge must assume continued normal mining operations. *U. S. Steel* at 6 FMSHRC 1574. If not for Inspector Durrant's inspection, the skid loader would have continued to be operated without the required weekly examination by a person qualified under § 75.1915.

That section requires persons who perform “maintenance, repairs, examinations and tests on diesel-powered equipment” to successfully complete a “training and qualification program” that meets the detailed requirements set forth in the section. Mr. Pratt had not been trained under such a program. It is reasonably likely that diesel equipment operated in an underground coal mine will eventually develop problems that will create health or safety hazards. Neither Pratt nor equipment operators have been trained to recognize these problems. Some of the tests require special equipment, such as carbon monoxide monitors. Carbon monoxide is both colorless and odorless so relying on the equipment operator to observe that the exhaust on the skid loader is smoky or that his eyes are burning is not sufficient. (Tr. 115). The test is performed by holding a gas meter in the undiluted exhaust stream while the skid loader is operating in a loaded condition. (Tr. 75, 121). The equipment operators and Mr. Pratt did not test for gas. Without the weekly examinations, the skid loader could be emitting carbon monoxide into the mine atmosphere without anyone knowing about it.

Inspector Durrant was also concerned about other types of mechanical problems that could create a risk of fire. (Tr. 75-76). The skid loader was operating on the intake primary escape route. I find that the Secretary established that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury of a reasonably serious nature.

I also find that the violation was the result of CW’s unwarrantable failure to comply with the safety standard. A number of factors are relevant in determining whether a violation is the result of an operator’s unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator’s efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999). In this instance, the violation had been in existence for about six months without anyone in management recognizing that the examination and tests were not being performed. This failure represents a serious lack of reasonable care beyond ordinary negligence. The Secretary’s proposed penalty of \$1,500.00 is appropriate for this violation. Because I vacated the unwarrantable failure determination in Citation No. 7613157, above, Order No. 7613170 is modified to a section 104(d)(1) citation.

Inspector Durrant issued Order No. 7613173 on December 11, 2003. This order was issued under section 104(d)(1) of the Mine Act alleging a violation of 30 C.F.R. § 75.1914(h)(1). The body of the citation, as amended, provides as follows:

The carbon monoxide gas readings for the Arnold road grader had not been recorded in the secure book nor electronically for over 10 months. Records were examined back through including February of 2003 and no readings were recorded. Mine management participates in these tests and maintenance, including record keeping, thus exhibiting a serious lack of reasonable care. [This machine is] considered to be heavy-duty nonpermissible diesel

powered equipment, as [it] is used to move coal or rock. The mine operator states that the tests were conducted, but no readings were recorded.

The inspector determined that an injury or illness was unlikely, that the violation was not S&S, that the negligence was high, and that the violation was the result of CW's unwarrantable failure to comply with the safety standard. The safety standard provides, in part, that "records required to be kept by paragraphs (f)(2) and (g)(5) shall be recorded in a secure book that is not susceptible to alteration, or recorded electronically in a computer system that is secure and not susceptible to alteration." Paragraph (f)(2) requires that persons who perform weekly examinations and tests of diesel-powered equipment "make a record when the equipment is not in approved or safe condition." Paragraph (g) provides that the mine operator shall develop and implement standard operating procedures for testing and evaluating exhaust emissions of diesel-powered equipment "that specify . . . (5) the maintenance of records necessary to track engine performance." The Secretary proposes a penalty of \$750.00 for this violation.

CW admitted that it violated the safety standard by not recording the carbon monoxide readings for the road grader. (Ex. G-6, p. 6). It contends, however, that the readings were taken and that the grader would have been shut down if the readings were high. *Id.* Inspector Durrant testified that the carbon monoxide readings had not been recorded in the record book for at least nine months. Brown told him that they had been taken, but they were not recorded. (Tr. 80, 88). Durrant determined that the violation was the result of CW's unwarrantable failure because management knew what the standard required and the violation was obvious. Durrant believed that Mr. Brown should have been reviewing the secure records to make sure that all of the required tests and readings were being recorded for diesel-powered equipment. (Tr. 82). Inspector Durrant testified that there were some entries in the book noting that the grader was "OS," out of service, but most weeks there was nothing listed. (Tr. 135). Mine operators are required to list the defects or hazardous conditions found, but are not required to list all of the tests conducted. (Tr. 137).

Brown testified that the road grader was inspected weekly. (Tr. 116). The results of the inspections were not properly reported. This grader is infrequently used and was out of service during a part of the time. Brown does not know when it was out of service or whether it was inspected during this time. (Tr. 122-23). Brown examined the grader to abate the citation and he found no problems. (Tr. 117). Brown does not believe that this violation created a hazard. (Tr. 117-18). Brown believes that he did some of the tests during this period, but he must not have recorded them. (Tr. 119).

Defa testified that the road grader was used to maintain the main roadway going into the underground mine. (Tr. 129). At most it is used once a month. Defa testified that he is the employee who usually operates the grader and he always performs a pre-operational check. This violation did not present a hazard because the grader was only used once a month.

CW admitted the violation. Inspector Durrant determined that an injury or illness was unlikely as a result of this violation. The issue, then, is whether the violation was the result of CW's unwarrantable failure to comply with the standard. I find that the Secretary established an unwarrantable failure violation and that the evidence presented by CW to rebut the Secretary's case was not persuasive. The secure book did not include the carbon monoxide readings for a substantial period of time. CW admitted that these readings were required to be kept in the record book. It contends that the readings were taken whenever the equipment was operated, which was infrequently. CW was cited, however, for a record-keeping violation. The Secretary contends that CW should have been reviewing these records on a periodic basis to make sure that the required records were being kept. (Tr. 82). The violation was obvious. Although there were some entries in the book indicating that the road grader was out of service part of the time, the evidence establishes that many readings required to be kept in the secure record book were not recorded. This violation existed for a substantial period of time and CW's actions demonstrated a serious lack of reasonable care beyond ordinary negligence. Given that the violation was not serious, I find that a reduced penalty of \$500.00 is appropriate.

### **III. DOCKET NO. WEST 2004-385**

On May 12, 2003, MSHA Inspector Dave Markosek inspected the Bear Canyon No. 1 Mine. This mine is now closed and sealed. He was at the mine on the graveyard shift. (Tr. 143). He traveled about 3,000 feet into the mine into the Blind Canyon Seam which was on retreat mining. As he looked into the working section, he saw Chris Peterson, the section foreman, standing by the crosscut. Inspector Markosek walked up the No. 1 entry and saw two miners standing by the continuous mining machine. Markosek testified that when Peterson saw him, he yelled something to the miners in Spanish. When the inspector arrived at the last open crosscut, he "could immediately tell there was no air coming through that crosscut from where the bolters were [in the No. 2 entry]." (Tr. 147). When the inspector walked over toward the roof bolting machine, he saw a miner starting to put up a curtain from the corner of the crosscut toward the No. 2 face. (Tr. 148, Ex. G-13). After that curtain was installed, Inspector Markosek walked to the face and he "could tell there was no air." (Tr. 149). He did not think he could get any reading from an anemometer, so he opened a smoke tube. The smoke did not move in any direction. This fact indicated to the inspector that there was insufficient ventilation at the working place.

After he discussed his concerns with Peterson, miners proceeded to hang additional curtains into the intersection. (Tr. 152; Ex. G-13). When the curtains did not appear to improve the ventilation, the inspector walked down entry No. 2 a short distance and opened another smoke tube. He could not detect any air movement at that location. When the inspector pointed this out to Peterson, Peterson again yelled something out in Spanish. Inspector Markosek testified that within five minutes he could feel air moving up the No. 2 entry. (Tr. 153). The inspector testified that, because a roof bolting machine was operating on the section, CW was required to have 3,000 cfm of air. (Tr. 153; Ex. G-11A).

As a result of these events, Inspector Markosek issued Citation No. 7612750 under section 104(d)(1) of the Mine Act alleging a violation of 30 C.F.R. § 75.370(a)(1). The body of the citation provides as follows:

The approved ventilation plan was not being complied with in the #2 entry of the Blind Canyon Seam section, MMU-004-0. There was no movement of air at the end of the line brattice when checked with a smoke tube. The roof bolter was running, installing the last row of bolts. The foreman was in the immediate area and should have been aware of this condition.

The inspector determined that an injury was reasonably likely, that the violation was S&S, that the negligence was high, and that the violation was the result of CW's unwarrantable failure to comply with the safety standard. The citation notes that a citation was issued on April 10, 2003, for no air movement in an idle face in this section and management was warned about this type of condition. The safety standard provides, in part, that the "operator shall develop and follow a ventilation plan approved by the district manager." The Secretary proposes a penalty of \$3,000.00.

Markosek testified that anyone who has worked in a mine should be able to tell when there is no air movement. You can feel the air on your face, so that when the air is dead, it is noticeable. (Tr. 156). He believes that the lack of air movement on the section was obvious. The inspector determined that the violation was S&S. Although roof bolting machines have water sprays, the water sprays are generally not used for the first inch or so of drilling because the bolters do not want to get wet. (Tr. 157). The bolting crew would have drilled between 30 and 34 holes on a 40-foot cut. This drilling would have created dust that could be inhaled, including quartz dust. (Tr. 159-61; Ex. G-15). Inspector estimated that the violation lasted about one and one-half hours. Respirators were not being worn. The inspector was concerned about the development of lung disease. He did not raise any concerns about the buildup of methane.

Inspector Markosek issued other citations alleging violations of section 75.370(a)(1) in the months preceding May 2003. He issued a citation in the same section of the mine in April 2003 because a ventilation curtain was not within 20 feet of the bolted, idle face. (Tr. 164; Ex. G-14). He issued another citation in April 2003 for not supplying enough air to another idle face. *Id.* The inspector discussed these citations with Mr. Defa at the time they were issued.

Inspector Markosek designated Citation No. 7612750 as being the result of CW's unwarrantable failure to comply with the standard because the foreman should have known that air was not being properly maintained at the face. The inspector also relied on the fact that he had previously discussed the importance of maintaining air at faces with mine management in recent months. Markosek believed that the violation was obvious.

Chris Peterson testified that he was attempting to reestablish ventilation when Inspector Markosek first arrived on the section. (Tr. 176). He stated that the continuous mining machine was not operating because the section had lost its ventilation when the machine tore down the curtain at the No. 1 face. (Tr. 177, 201). The problems started at about 2:05 a.m. (Tr. 201; Ex. R-2). Peterson testified that he was aware that there was no air movement in the section when the inspector arrived and that the crew was in the process of rehangng brattice. (Tr. 177). Peterson stated that his "buggy drivers" also told him at about 2:30 a.m. that another brattice fell down inby the face due to a roof or rib fall. (Tr. 177, 203; Ex. R-2). When there is insufficient ventilation during pillar recovery, all you can do is stop mining and try to reestablish the air. (Tr. 177, 202-03). Peterson testified that he had experienced problems maintaining air movement over the previous few days due to caves and sloughing ribs. (Tr. 178). On April 29, the crew was trained on how to reestablish and maintain ventilation during retreat mining.

Peterson believes that this citation should be vacated because his crew was working to reestablish ventilation by rehangng brattice in areas outby the face. (Tr. 180-84; Ex. R-1). He also believes that the inspector's smoke tube tests were not indicative of the conditions in the section. One side of an entry may show that there was no air movement when the air is moving up the other side. (Tr. 184). Peterson testified that he told Inspector Markosek that he was in the process of reestablishing ventilation in the section. (Tr. 185). He stated that the top was between 9 and 12 feet above the floor and it was difficult to hang curtains. He thinks the top was. Peterson also testified that the roof was coal, not rock as the inspector believed. (Tr. 186). Peterson testified that he checked the air before mining commenced and before the roof bolter went in and started bolting. There was adequate air movement at that time. He did not take any additional readings after that. (Tr. 204-05). Peterson believed that there was adequate ventilation in the section when the inspector arrived and used the smoke tube. (Tr. 187-88). The inspector should have blown the smoke across the entire intake entry to test for air movement because it is such a wide and high area. (Tr. 188). Peterson did not take any air readings after the inspector arrived. (Tr. 192).

Peterson further testified that CW had been mining at the face for about an hour and one-half before the inspector arrived and that the continuous mining machine had been down about 15 minutes before the inspector arrived. (Tr. 190). He testified that after the inspector arrived, he instructed the crew to check on the inby curtains on the section. (Tr. 191-92; Ex. R-1). He further testified that he might not immediately notice if the air ventilating the section stopped, especially if you are near the roof bolter because he does not believe that you can feel 3,000 cfm of air. (Tr. 196-97).

Mr. Defa testified that the mine has not had any significant problem with quartz dust. (Tr. 206-07). The top and bottom of the entries in the Blind Canyon Seam are coal, not rock. (Tr. 207). During 2003, CW took at least 30 dust samples and only one was out of compliance. (Tr. 208-09). MSHA took about 20 dust samples during this same period. None of these samples was out of compliance. (Tr. 210). Defa testified that CW did not contest the ventilation

citations issued in April 2003, even though the company disagreed with them, because they were designated as non-S&S citations.

On rebuttal, Inspector Markosek testified that Peterson did not tell him during the inspection that he was in the process of reestablishing ventilation in the section. (Tr. 217-18). He also testified that the curtain that was knocked down in the No. 1 face by the continuous mining machine would not have had any effect on the ventilation at the roof bolting machine at the No. 2 face. (Tr. 218-19).

I find that the Secretary established a violation. I credit Inspector Markosek's testimony that there was no air movement in the cited area. I also credit his testimony that he could immediately tell that there was no air movement when he entered the section because he could not feel air against his face. I reject Mr. Peterson's testimony that the absence of ventilation would not be immediately noticeable to an experienced miner. Finally, I credit the inspector's method of using the smoke tube to test for air movement. If there had been any ventilation coming up the No. 2 entry or at the No. 2 face, Inspector Markosek would have felt it and the smoke would have stirred. He credibly testified that the smoke that he released in the middle of the entry did not move at all. He also testified that the smoke did not move at the curtain for the No. 2 face near the roof bolting machine. There is no dispute that the crew was using this roof bolter to install the last row of bolts at the time the inspector arrived on the section. (Ex. G-11, p. 3). The ventilation plan requires the operator to maintain 3,000 cfm of air at the roof bolting face. (Ex. G-11A). I find that the Secretary established there was no air movement at that location.

I also find that the Secretary established that the violation was the result of CW's unwarrantable failure to comply with the standard. CW had been placed on notice that it needed to do more to ensure that faces were adequately ventilated during retreat mining. Although it appears that CW provided some training to its employees, the problem persisted. Based on the evidence presented at the hearing, I conclude that the ventilation was restored to the cited No. 2 face only after Inspector Markosek pointed out that there was no air movement. Had he not arrived on the section at that time, the ventilation would not have been immediately restored. I do not credit Peterson's testimony that he was in the process of restoring the ventilation when the inspector arrived. As stated by the inspector, the ventilation curtain that was knocked down in the No. 1 face would have little or no effect on the ventilation in the No. 2 face. Ventilation was fully restored only after changes were made further outby and these changes were made in response to Inspector Markosek's inspection. The violation was obvious. CW demonstrated aggravated conduct constituting more than ordinary negligence. The negligence was high.

Whether the violation was S&S is a closer question. I find that the Secretary established the first two elements of the *Mathies* test. The hazard contributed to by the violation is that miners were exposed to respirable dust. Without ventilation, miners would breathe any dust generated by the roof bolting machine. I credit the inspector's testimony that the water sprays on

the bolting machine are generally not used when drilling is started for each hole. I find that the roof was mostly coal at that location.

The duration of the violation is not clear. The inspector assumed that the crew had been bolting without sufficient ventilation for an hour or more. He based this testimony on his estimate of the time required to install a row of roof bolts. There is no direct evidence that there was no ventilation for that length of time, however. I credit the testimony of Peterson that ventilation is unstable in retreat mining with the result that ventilation is often lost and must be reestablished. Given that the ventilation was not corrected until after the inspector arrived, I find that at least a significant portion of the last row of roof bolts was installed without ventilation in the section. I do not credit CW's evidence that there was adequate ventilation until the curtain at the No. 1 face was knocked down by the continuous mining machine at 2:05 a.m.

I find that the Secretary established that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury. I rely on the phrase "hazard contributed to" in this element of the *Mathies* test in reaching this conclusion. 6 FMSHRC at 3. A single exposure to respirable dust will not generally result in an illness, but an exposure to respirable dust is a hazard that contributes to the development of an illness. *See Consolidation Coal Co.*, 8 FMSHRC 890, 894-99 (June 1986). By the same measure, installing roof bolts in an environment where there is no ventilation is unlikely to produce an illness, but it is a discrete hazard that contributes to the development of an illness. Any illness would be of a reasonably serious nature. As a consequence, the Secretary established that the violation was S&S. The Secretary's proposed penalty of \$3,000.00 is appropriate for this violation.

### **III. APPROPRIATE CIVIL PENALTIES**

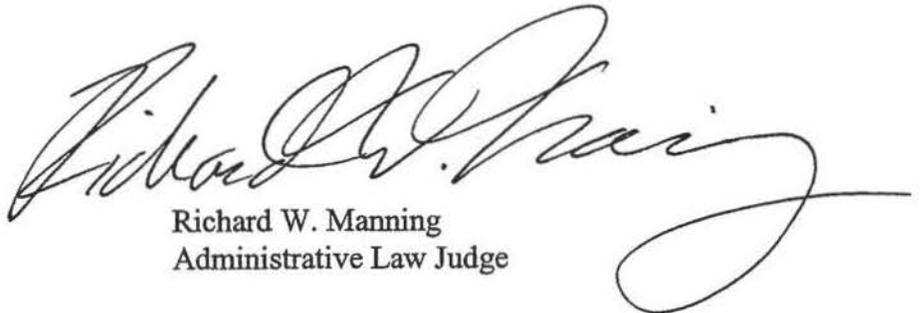
Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The record shows that the Bear Canyon No. 1 Mine had a history of about 248 paid violations in the two years prior to May 12, 2003, and that the Bear Canyon No. 3 Mine had a history of 3 paid violations in the two years prior to November 5, 2003. Bear Canyon No. 1 Mine produced about 412,387 tons of coal in 2003 and Bear Canyon No. 3 produced about 316,433 tons of coal in 2003. All of the citations were abated in good faith. The gravity and negligence findings are discussed above. The penalties assessed in this decision will not have an adverse effect on CW's ability to continue in business. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

#### 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/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
WEST 2004-284		
7635413	48.6(b)	\$200.00
WEST 2004-372		
7613156	75.360(a)(1)	400.00
7613157	75.360(b)(9)	400.00
7613170	75.1914(f)	1,500.00
7613173	75.1914(h)(1)	500.00
WEST 2004-385		
7612750	75.370(a)(1)	3,000.00
	<b>TOTAL PENALTY</b>	<b>\$6,000.00</b>

For the reasons set forth above, the citations and orders are **AFFIRMED** or **MODIFIED** as set forth above and C.W. Mining Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$6,000.00 within 30 days of the date of this decision.



Richard W. Manning  
Administrative Law Judge

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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, DC 20001

February 7, 2005

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

**ORDER GRANTING CONTESTANT'S MOTION  
FOR CERTIFICATION OF INTERLOCUTORY RULING**

This contest matter concerns Citation No. 6361036 that was issued for an alleged violation of the Secretary of Labor's ("the Secretary's") mandatory safety standard in 30 C.F.R. § 56.9300(a) that requires the construction of berms or guardrails on the banks of roadways where significant drop-offs exist. The citation involves a private roadway that is appurtenant to National Cement Company of California, Inc.'s ("National Cement's") Lebec Plant. National Cement seeks interlocutory review of a summary decision that determined this private, paved 4.3 mile long two-lane road, beginning at State Route 138 in northern Los Angeles County, and ending at the entrance to the Lebec Plant, is subject to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (the "Mine Act"). 27 FMSHRC \_\_\_ (January 2005) (ALJ). National Cement's certification request is supported by Tejon Ranch Corporation, an intervenor in this matter.

Commission Rule 76(a)(1)(i) provides that, upon motion of a party, a judge shall certify his interlocutory ruling if it involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F. R § 2700.76(a)(1)(i). The Secretary opposes National Cement's motion for certification of the jurisdictional issue.

The question National Cement seeks to certify is whether this private road, that serves as the sole vehicular access to its cement plant, is a "mine" as defined by section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1). Section 3(h)(1) defines a "coal or other mine," in pertinent part, as "an area of land from which minerals are extracted . . . [and] *private ways and roads appurtenant to such area . . .*" (Emphasis added).

The summary decision held that the operative terms "private ways and roads appurtenant to" a mine in the Section 3(h)(1) statutory definition of a mine are not ambiguous. Nevertheless, the summary decision addressed National Cement's assertion that the subject road is not within the purview of Section 3(h)(1) because National Cement has neither exclusive use of the private road, nor control over individuals who travel over the road in vehicles that are used for non-mine related purposes. With respect to the exclusive use issue, the summary decision held, *inter alia*, that "National Cement's frequent and disproportionate use of the road justifies Mine Act oversight." 27 FMSHRC \_\_\_, slip op. at 18.

In support of its motion for certification, National Cement contends that this Commission has not addressed directly whether "a multi-use [private] road [appurtenant to a mine] that is used not just by the mine, but also for non-mine-related purposes by others whom the mine operator has no legal right to control" is subject to Mine Act jurisdiction. *Nat'l Cement mot.* at 3. Thus, it argues that the facts in this case present a novel controlling question of law.

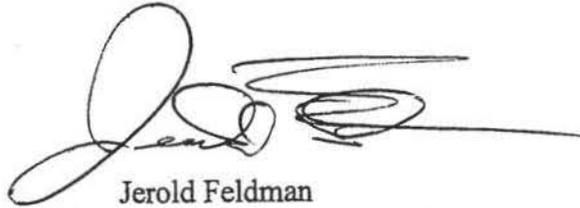
The Secretary opposes the certification request because National Cement's request involves "factual issues or issues involving mixed questions of law and fact which are inappropriate for interlocutory review." *Sec'y's opp.* at 7. Moreover, although the pertinent civil penalty matter has yet to be docketed and assigned, the Secretary argues that granting certification would unduly delay the ultimate disposition of the civil penalty proceeding.

There are no outstanding factual disputes as the parties have filed joint stipulations that serve as the basis for the summary decision. I am unaware of a Commission decision that is directly on point on the exclusive use issue. Consequently, although I have concluded that the statutory terms "private ways" and "appurtenant to" are unambiguous, I will give National Cement the benefit of the doubt that the lack of exclusivity presents a controlling question of law concerning application of the statutory definition.

With respect to the remaining criteria for certification in Rule 76, immediate review will not delay disposition of this matter because the civil penalty case has yet to be assigned. Moreover, interlocutory review will materially advance the final disposition of this proceeding if National Cement prevails because such an outcome would obviate the need for further proceedings on the merits of the contested citation.

**ORDER**

In view of the above, National Cement's Motion for Certification under Commission Rule 76 **IS GRANTED**. Accordingly, **IT IS ORDERED** that this jurisdictional issue **IS CERTIFIED** to the Commission for its determination on whether to grant interlocutory review.<sup>1</sup>



Jerold Feldman  
Administrative Law Judge

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/hs

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<sup>1</sup> The Secretary suggests that “[the judge] cannot find . . . that ‘immediate review will materially advance the final disposition of the proceeding’ unless [the judge] concludes that [his] prior decision was incorrect and will be reversed by the Commission . . . .” *Sec’y’s opp.* at 8. The grant of the motion to certify is based on a recognition of National Cement’s colorable claim of a novel issue of law rather than a self-dissenting rejection of the prior decision on jurisdiction.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, N.W., SUITE 9500  
WASHINGTON, D.C. 20001-2021

February 11, 2005

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of WILFREDO MORALES,	:	Docket No. SE 2005-71-DM
Petitioner	:	SE-MD 2005-01
	:	
v.	:	
	:	
ARENERO RAFAEL COLON, INC.,	:	Arenero Rafael Colon
Respondent	:	Mine ID 54-00150

**ORDER DENYING MOTION TO DISMISS**

This matter arises under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the “Act,” and Commission Rule 45, 29 C.F.R. § 2700.45, upon the application of the Secretary of Labor to reinstate Wilfredo Morales to his former position with Arenero Rafael Colon, Inc. (Colon, Inc.), a sand extraction and processing concern located in San Lorenzo, Puerto Rico. The Secretary alleges in her application that Sr. Morales was discharged from his job as a heavy equipment operator on July 6, 2004, because he in effect complained about the unsafe condition of a haulage road.

The Secretary requests that an Order of Temporary Reinstatement be issued directing Colon, Inc. to reinstate Sr. Morales to his position at his same rate of pay and benefits and with the same, or equivalent, duties. Colon, Inc. denies the Secretary’s allegations of discrimination and requests a hearing on the application for temporary reinstatement.

The alleged discriminatory act occurred on July 6, 2004. Wilfredo Morales filed his complaint with the Secretary November 15, 2004. Section 105(c) of the Act sets a time limitation applicable to filing a complaint under the Mine Act by requiring a miner “who believes that he [or she] has been discharged, interfered with, or otherwise discriminated against in violation of this subsection” to file a complaint alleging such discrimination “within 60 days after such violation occurs.” Clearly, Sr. Morales did not comply with this provision in that his complaint was due to be filed on or before September 6, 2004. Because the complaint was late-filed, Colon, Inc. moves in effect for dismissal of the application for temporary reinstatement which is based on the untimely complaint. The Secretary opposes the motion. She argues that the 60-day time limit is not jurisdictional and that a miner’s failure to comply with it may be excused for good cause.

The Secretary is right in this regard. The Commission repeatedly has held that the 60-day time limit in Section 105(c) is not jurisdictional and that justifiable circumstances may excuse compliance (See e.g., Hollis v. Consolidation Coal Co., 6 FMSHRC 21 (January 1984); Hermann v. INCO Services, 4 FMSHRC 2135 (December 1986)).

Moreover, the Commission and its judges have recognized a miner's ignorance of his or her Section 105(c) rights to be "good cause" justifying a late filing when the miner has filed promptly upon becoming aware of his or her rights and when the delay is not exceptional (See e.g., Daniel C. Howell v. Capital Cement Corp., 23 FMSHRC 901 (August 2001) (ALJ Bulluck)). When, as here, the Respondent does not allege it has been prejudiced by the delay, excusing the late filing is made more likely, especially if the delay is as short as that at issue here (See Secretary on behalf of Bernard Smith v. Jim Walter Resources, 21 FMSHRC 359 (March 1999) (ALJ Melick); Secretary on behalf of Franco v. W. A. Morris Sand & Gravel, Inc., 18 FMSHRC 278 February 15, 1996 (ALJ Manning)).

The affidavit Applicant's counsel submits to support his opposition to the motion states the Applicant was "not aware that there was any requirement to file a complaint with MSHA within 60 days" and that "[a]s soon as ... [he] became aware that MSHA had protections against terminating miners for the exercise of protected activity, he filed his complaint with MSHA, on November 15, 2004."

I accept counsel's affidavit as true, and I therefore find the Applicant was in fact unaware of the 60-day time limit and the Applicant filed his complaint as soon as he became aware of his section 105(c) rights. Based on these facts, and because the complaint was only 72 days late and the Respondent does not assert it was prejudiced by the delay, I conclude the Respondent's motion to dismiss should be, and hereby is, **DENIED**.

  
David F. Barbour  
Administrative Law Judge  
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