MARCH AND APRIL 2007

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

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Review was granted in the following case during the months of March and April:

Secretary of Labor, MSHA v. Asarco, LLC., Docket No. WEST 2006-556-M. (Judge Zielinski, unpublished Settlement decision issued February 5, 2007)

Secretary of Labor, MSHA v. Rogers Group, Inc., Docket No. KENT 2007-47-M. (Chief Judge Lesnick, unpublished Default decision issued April 2, 2007)

Secretary of Labor, MSHA v. The American Coal Company, Docket Nos. LAKE 2005-129 and LAKE 2006-28. (Judge Feldman, March 14, 2007)

No cases were filed in which Review was denied during the months of March and April

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

March 19, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2004-212
v.	:	
SAN JUAN COAL COMPANY	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DECISION

BY: Jordan and Young, Commissioners

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), raises the issue of whether Administrative Law Judge T. Todd Hodgdon correctly concluded that a violation of 30 C.F.R. § 75.400[1] by San Juan Coal Company ("San Juan") did not result from its unwarrantable failure to comply with that standard.[2] 28 FMSHRC 35 (Jan. 2006) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's conclusion. For the

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[1] Section 75.400, entitled "Accumulation of combustible materials," provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

30 C.F.R. § 75.400.

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

reasons that follow, we vacate the judge's determination and remand for further analysis.

I.

Factual and Procedural Background

San Juan engages in longwall mining at its San Juan South Mine, an underground coal mine in Waterflow, New Mexico. 28 FMSHRC at 35. The mine liberates more than one million cubic feet of methane per day and is subject to a "spot inspection . . . every five working days at irregular intervals" under section 103(i) of the Mine Act, 30 U.S.C. § 813(i). *Id.* at 36 n.1.

The mine operates 24 hours a day, seven days a week, in three overlapping shifts. *Id.* at 35. The day shift operates from 7:00 a.m. to 5:00 p.m. *Id.* The afternoon, or "swing," shift operates from 4:00 p.m. to 2:00 a.m. *Id.* The "graveyard," or maintenance, shift operates from 10:00 p.m. to 8:00 a.m. *Id.* The day and afternoon shifts are considered production shifts, while maintenance is generally performed on the graveyard shift. *Id.*

At the 102 longwall panel, San Juan uses a double cutting drum shear, which cuts coal as it moves back and forth across the face on a conveyor system. *Id.* The coal falls onto a pan line below the shear and is transported out of the mine. *Id.* at 35-36. The roof is supported by 176 shields across the face. *Id.* at 36. As the shear cuts the coal, the shields automatically advance toward the face, providing support for the newly exposed roof. *Id.* at 36. Propmen clean accumulations from the shields either by using high pressure water from hoses installed every ten shields or by shoveling. Tr. 33-34.

On March 22, 2004, Donald Gibson, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), visited the mine to conduct a spot inspection. 28 FMSHRC at 36. At approximately 7:30 a.m., after reviewing the mine records and meeting with the operator's management, Inspector Gibson traveled underground with Monty Owens, San Juan's safety representative, and Steve Felkins, the miners' representative, to inspect the 102 longwall panel. *Id.*; Tr. 91.

When Inspector Gibson arrived at the face, he observed miners "pouring seals."[3] Tr. 94. In inspecting the longwall, Inspector Gibson observed that shields 130 through 176, a distance of approximately 230 feet, had accumulations of loose coal and coal dust on the jack legs, the toes of the shields, on the base of the shields and on the leminscates.[4] 28 FMSHRC at 36; Tr. 97. The depth of the accumulations measured between 1/8 inch and 10 inches. 28 FMSHRC at 36.

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[3] When pouring seals, miners empty bags of "mix" into a hopper, which in turn sends the mix through a hose and into a pre-built form. Tr. 283. The resulting structure is a permanent-type stopping which miners referred to as an "isolation stopping seal." *Id.*

[4] A labeled representation of a typical shield (depicted in Jt. Ex. 1) follows this decision.

Owens informed Inspector Gibson that mining had ceased at the end of the afternoon shift, or at approximately 2:00 a.m. on March 22. Tr. 104-05. Since that time, the graveyard shift (10:00 p.m. to 8:00 a.m.), and later, the day shift (7:00 a.m. to 5:00 p.m.), had come on duty, and the coal accumulations had remained uncorrected for approximately six hours over two shifts. 28 FMSHRC at 38; Gov't Exs. 12, 13. Based on his observations, Inspector Gibson issued Citation No. 4768527, pursuant to section 104(d)(1) of the Act, alleging a significant and substantial ("S&S") violation of section 75.400 that was the result of San Juan's unwarrantable failure to comply with the standard.[5] 28 FMSHRC at 36-37.

San Juan challenged the citation, and the matter proceeded to hearing.

The judge affirmed the allegations in Citation No. 4768527 that San Juan violated section 75.400 and that the violation was S&S, but concluded that the violation was not unwarrantable. *Id.* at 37-42. The judge found that the cited loose coal and coal dust accumulations were extensive and obvious and that no attempts had been made to clean them for approximately six hours. *Id.* at 41. He concluded, however, that San Juan had not been placed on notice that it needed to take greater efforts to control accumulations on the shields because it had not previously been cited for a significant number of violations of section 75.400, particularly given evidence that section 75.400 was the most frequently cited standard industry-wide. *Id.* The judge further determined that the prior citations were even less relevant since none of the prior citations had involved accumulations on the shields. *Id.* In addition, he found that prior discussions between San Juan and MSHA did not provide sufficient notice because those discussions were general in nature and did not amount to "admonishments" that greater efforts at compliance were necessary. *Id.* at 41-42. The judge held that while the operator was "highly negligent," its negligence did not rise to the level of unwarrantable failure. *Id.* at 42. Accordingly, he modified Citation No. 4768527 from a section 104(d)(1) citation to a section 104(a) citation.[6] *Id.* at 46.

The Secretary filed a petition for discretionary review challenging the judge's unwarrantable failure determination. The Commission granted the Secretary's petition.

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[5] The inspector also issued a citation alleging a rock dusting violation and Order No. 4768528, alleging a violation of section 75.400. 28 FMSHRC at 36-37. That citation and the merits of that order are not the subject of this appeal.

[6] The judge also modified Order No. 4768528 from a section 104(d)(1) order to a section 104(d)(1) citation because the subject citation, Citation No. 4768527, was the predicate citation for that order. 28 FMSHRC at 45.

II.

Disposition

The Secretary argues that the judge's holding that San Juan's violation of section 75.400 was not unwarrantable is legally and factually erroneous. PDR at 9-15.[7] First, the Secretary maintains that the judge erred by discounting the operator's history of previous violations on the basis that section 75.400 was the most frequently cited regulation industry-wide. *Id.* at 11. Second, the Secretary asserts that the judge ignored Commission precedent by discounting the previous violations on the ground that none of the violations had involved accumulations on the shields. *Id.* Third, the Secretary contends that, contrary to the judge's discounting of prior violations, the operator had been cited on February 18, 2004 – approximately one month before the subject citation – for a violation of section 75.400 in the same area as the citation in question and that Inspector Gibson had previously informed the operator that it needed to watch clean-up in the shield area. *Id.* at 12-13. Fourth, the Secretary submits that the judge erred because he discounted the inspectors' previous discussions with the operator regarding accumulations because they were not admonishments that greater efforts at compliance were necessary. *Id.* at 13-14. Finally, the Secretary argues that the judge failed to give any weight to the degree of danger posed by the violative condition. *Id.* at 13. Accordingly, the Secretary requests that the Commission vacate the judge's unwarrantable failure determination and remand it for application of the correct legal test and consideration of all evidence. *Id.* at 15-16.

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

The Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure. *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001) ("*Consol*"). These include the extent of the violative condition, the length of time that it has existed, the operator's efforts at abating the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's knowledge of the existence of the violation, whether the violation is obvious, and whether the violation poses a high degree of danger. *Id.*

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[7] Pursuant to Commission Procedural Rule 75(a), 29 C.F.R. § 2700.75(a), the Secretary designated her petition for discretionary review as her opening brief.

These unwarrantable failure factors must be examined in the context of all relevant facts and circumstances of each case to determine if an operator's conduct is aggravated, or whether an operator's negligence should be mitigated. *Id.* In considering the factors in this context, some may be relevant, while others may not be. *Id.* Nonetheless, the Commission has made clear that it is necessary for a judge to consider all relevant factors, rather than relying on one to the exclusion of others. *See, e.g., Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999).

We conclude that, contrary to Commission precedent, the judge erred both in the manner in which he considered the unwarrantable failure factors as a whole, and the manner in which he considered certain factors individually. Thus, we vacate the judge's unwarrantable failure determination and remand for further analysis and findings.

A. Whether the Judge's analysis of the unwarrantable failure factors is consistent with Commission precedent

In accordance with Commission precedent, the judge was required to consider all of the unwarrantable failure factors and make a determination regarding which were relevant, analyze relevant factors in the context of the facts and circumstances of this case, and weigh those factors, setting forth his findings. *Consol*, 23 FMSHRC at 593. Moreover, the judge may not rely on one relevant factor to the exclusion of others. *See Windsor*, 21 FMSHRC at 1001. Nevertheless, the judge's unwarrantable failure analysis relied almost entirely on whether the operator had been placed on notice that greater efforts were necessary for compliance, omitting entirely such other presumably relevant factors as the danger posed by the violation, the operator's knowledge of the existence of the violation, and the operator's efforts at abating the violative condition.

We reject the operator's argument that the Commission may consider only those factors that the Secretary explicitly argued in her post-hearing brief.[8] S.J. Br. at 17. As discussed more fully below, the parties adduced evidence at the hearing on each of the factors. To conclude that the judge was bound to consider only the factors that the Secretary explicitly discussed in her brief, even where the evidence clearly demonstrates the relevance of other factors, would impermissibly constrain the judge's responsibility to apply Commission precedent to the legal issue raised on the facts developed in the record. *See* 29 C.F.R. § 2700.69(a) ("The [judge's] decision . . . shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record. . . ."). In addition, Commission precedent clearly requires the judge's consideration of all relevant factors. *Consol*, 23 FMSHRC at 593.

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[8] While the Secretary's brief listed a number of factors identified by the Commission as relevant in determining whether a violation is unwarrantable, it did not specifically include whether the violation posed a high degree of danger or the operator's knowledge of the existence of the violation. *See* S. Post Hr'g Br. at 18-19, 24-29. San Juan, however, listed each of the factors identified by the Commission. S.J. Post Hr'g Br. at 28.

Thus, the identification and consideration of all relevant factors recognized by Commission caselaw as bearing upon unwarrantable failure is appropriate on review. Section 113(d)(2)(A)(iii) of the Mine Act provides in part that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii). The Commission has recognized that a matter urged on review may have been raised implicitly below or is so intertwined with an element tried before the judge that it may properly be considered on appeal. *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1320-21 (Aug. 1992); *see also BHP Copper, Inc.*, 21 FMSHRC 758, 762 (July 1999) ("While the points raised by the Secretary before the Commission are not identical to those raised before the judge, they are 'sufficiently related' . . . that the Commission can consider them.") (citation omitted). Here, those unwarrantable failure factors not specifically argued by the Secretary or analyzed by the judge were so intertwined with evidence relating to factors specifically addressed that they may be considered on appeal.[9] Indeed, citing the relevant Commission cases, the judge explicitly set forth all but one of the factors articulated in these precedents, noting that they were "determinative of whether a violation is unwarrantable." 28 FMSHRC at 40. Therefore, the judge had an opportunity to pass on these matters, and we may appropriately review them.

In any event, even if we were to review only those factors explicitly considered by the judge, the decision below simply does not allow us to trace the path that the judge followed to reach his conclusion that the operator's conduct did not constitute an unwarrantable failure. *See Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994) ("A judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision."). The judge erred by failing to explain how two factors that he found would support an unwarrantable failure finding – obviousness and extensiveness of the violative condition – weighed against the single factor of notice to the operator that greater compliance efforts were necessary. The decision does not explain why the factor involving notice to the operator should be accorded controlling weight in the analysis. The judge's failure to explain how he weighed the factors that he did consider is especially troublesome in this case, where the judge found that the operator's conduct was "highly negligent" (28 FMSHRC at 42) but did not explain why that conduct did not rise to the level of aggravated conduct, which includes "a serious lack of reasonable care" (*see Emery*, 9 FMSHRC at 2003 (citations omitted)). In summary, the judge erred by failing to explain how he weighed as a whole those factors that he did consider.

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[9] The judge failed to list "the operator's knowledge of the existence of the violation" as a factor relevant to an unwarrantable failure analysis (*see* 28 FMSHRC at 40), and the Secretary did not raise the error. Nonetheless, the operator's knowledge is essential to determining whether its conduct constitutes an unwarrantable failure because of its bearing on the degree of care exercised by the operator under all of the circumstances. In fact, a finding of unwarrantable failure may hinge on whether an operator was ignorant of, or indifferent to, a violative condition. Therefore, the issue was so intertwined with other unwarrantable failure factors tried and argued before the judge that we may reach the question on review. *Beech Fork*, 14 FMSHRC at 1321.

Finally, in addition to errors in the overall analytical approach, we conclude that the judge erred in how he considered some of the individual factors. We discuss certain factors below and explain in more detail how they were not properly weighed.

B. Whether the operator had been placed on notice that greater efforts were necessary for compliance

Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997); *see also Consol*, 23 FMSHRC at 595 ("a high number of past violations of section 75.400 serve to put an operator on notice that it has a recurring safety problem in need of correction.") (citations omitted). The purpose of evaluating the number of past violations is to determine the degree to which those violations have "engendered in the operator a heightened awareness of a serious accumulation problem." *Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1232 (June 1994); *see also Consol*, 23 FMSHRC at 595. The Commission has also recognized that "past discussions with MSHA about an accumulation problem serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard." *Consol*, 23 FMSHRC at 595 (citations omitted).

Here, the judge erred in finding that the significance of the 47 citations that San Juan received from January 2001 to March 2004 was lessened in light of evidence that section 75.400 was the most frequently cited section of the regulations, industry-wide, in 2004. 28 FMSHRC at 41. Evidence that a standard is frequently cited within the industry as a whole is irrelevant to the determination of whether a particular operator has been placed on notice that there is a recurring safety problem at its particular mine.

The judge also erred in finding that San Juan's 47 past violations of section 75.400 "t[ook] on even less importance inasmuch as none of them were for accumulations on the shields." *Id.* The Commission has rejected the argument that only past violations involving the same regulation and occurring in the same area within a continuing time frame may properly be considered when determining whether a violation is unwarrantable. *Peabody Coal Co.*, 14 FMSHRC 1258, 1263 (Aug. 1992); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (Jan. 1997). Indeed, the Commission has expressly stated that it has never limited consideration of past violations in such a manner. *Peabody*, 14 FMSHRC at 1263. Receiving a citation in the same area as that previously cited may make an operator aware of an accumulation problem that should be considered for unwarrantable failure purposes. However, even if a different area was cited, past violations may, nonetheless, provide an operator with sufficient awareness of an accumulation problem.[10]

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[10] The record does not support the Secretary's assertion that in February 2004, the operator received a citation alleging a violation of section 75.400 that "dealt with the same area" as the subject citation. PDR at 12. As San Juan noted, the longwall was not cited in February

In addition, the record appears to show that the notice factor may be more of a neutral factor than a mitigating factor in this unwarrantable failure analysis. For instance, the parties stipulated that "San Juan management acknowledges several previous discussions with Inspector Gibson concerning the need to clean the shields of coal dust accumulations." 28 FMSHRC at 41; Tr. 59. In fact, Inspector Gibson testified that from February 2003 through March 2004, he had spoken with mine management about coal accumulations and the cleaning responsibilities under the Mine Act from ten to two dozen times. Tr. 108.

In any event, the judge further erred by failing to explain how his finding that San Juan had not been placed on notice that greater compliance efforts were necessary outweighed aggravating factors that appeared to support a finding of unwarrantable failure. Even if such discussions between MSHA and San Juan did not notify San Juan that it was required to increase its cleanup efforts, as the judge found, the judge did not explain how such evidence would constitute a mitigating factor and outweigh all other relevant aggravating factors. In other words, even if the operator had not been placed on notice that greater compliance efforts were necessary, evidence regarding other aggravating factors could nonetheless support an unwarrantable failure determination. On remand, we direct the judge to weigh the factor of the operator's notice that greater compliance efforts were necessary against other relevant factors and to set forth his findings and rationale.

C. Whether the violation poses a high degree of danger

The judge explicitly recognized that whether a violative condition "poses a high degree of danger" is one of the factors that is "determinative of whether a violation is unwarrantable." 28 FMSHRC at 40. Nonetheless, although the judge considered dangerousness in considering whether San Juan violated section 75.400 and whether that violation was S&S, the judge failed to relate any of those findings to his unwarrantable failure analysis.

In concluding that San Juan violated section 75.400, the judge explained that permitting the accumulations to exist was contrary to the standard's underlying purpose of reducing a fire or explosion hazard. *Id.* at 38. He reasoned that such accumulations could be the originating source of a fire or explosion or they could feed fires or explosions that originated elsewhere in the mine. *Id.* The judge further noted that "this danger exists as long as the accumulations exist," and that "the danger does not cease to exist when a production shift is followed by a maintenance shift or when the day shift is putting in an isolation stopping." *Id.*

In concluding that the violation was S&S, the judge found that the accumulations were extensive, covering an area of 230 feet in depths up to 10 inches, and that Inspector Gibson had testified that they were the "worst that [he had] seen" in his many inspections of the longwall and

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2004. S.J. Br. at 17. Rather, the February 2004 citation pertained to accumulations in the Nos. 2 and 3 return entries, which are areas that are the subject of Order No. 4768528, which is not at issue on review. Tr. 81-82; Gov't Ex. 11.

mine. *Id.* at 39; *see also* Tr. 104 (setting forth Inspector Gibson's testimony that "it was the worst that I'd seen, and I'd been at the mine many times and on the longwall many times"). It is undisputed that the accumulations were also comprised of float coal dust (Tr. 98, 132, 287), which Inspector Gibson testified can act as a secondary fuel in the propagation of an explosion. Tr. 107, 118. The inspector stated, "the coal dust again, it's not how much, it's how little is really needed to cause a dust explosion." Tr. 109. The judge further found that the accumulations were dry[11] and that the mine produced more than one million cubic feet of methane per day. 28 FMSHRC at 39. In addition, he stated that there were ignition sources for a fire or explosion at the face, such as the electrical equipment present, and sparks caused when the bits on the shear's drums struck rock or metal. *Id.* In fact, Inspector Gibson testified that he observed that the front metal plates on the shields, or "sprags," had marks indicating that the shear had contacted the shields, so that there could have been metal-on-metal contact in an area in which there were accumulations. Tr. 105-06. The judge rejected San Juan's argument that the Secretary had not established a reasonable likelihood of ignition since no coal was produced on the graveyard shift, finding that electrical equipment was activated during the graveyard shift in order to perform maintenance and such equipment could have been a source of ignition. 28 FMSHRC at 40.

Absent from the judge's decision is any rationale regarding the manner in which these findings related to his conclusion that the operator's accumulation violation was not unwarrantable. The judge erred by failing to make necessary findings and conclusions as to whether evidence of the danger posed by the violation demonstrated that San Juan's conduct was aggravated, and how this factor weighed against other factors in his analysis. On remand, we direct the judge to make findings and set forth his rationale regarding whether the danger posed by San Juan's violation supports an unwarrantable failure finding. *See, e.g., Kellys Creek Res., Inc.*, 19 FMSHRC 457, 463 (Mar. 1997) (holding that the judge erred by failing to take into account the high degree of danger posed by a violation in an unwarrantable failure analysis); *see also Windsor*, 21 FMSHRC at 1007 (remanding in part for examination of whether the violation posed a high degree of danger).

D. The operator's knowledge of the existence of the violation

The judge further erred by failing to consider and make findings regarding the operator's knowledge of the existence of the violation. The parties do not dispute the judge's findings that the cited accumulations were extensive and obvious. 28 FMSHRC at 41. Yet the operator appeared to ignore the condition. For example, the record reveals that information about the

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[11] In arguing that its violative conduct was not unwarrantable, the operator states that the accumulations occurred during the mining of a compressed zone which resulted in a dry and brittle roof, and that more coal and debris than usual fell on the shields. S.J. Br. at 6, 11. We disagree that such conditions would mitigate the operator's conduct, particularly given the judge's finding that the dryness of the coal contributed to the danger posed by the violation. 28 FMSHRC at 39.

accumulations could have been relayed to an oncoming shift by a preshift report[12] or by oral communication. Tr. 308, 316. Preshift examinations were performed prior to the arrival of the oncoming graveyard shift on March 21 and during the day shift on March 22. Gov't Ex. 12, 15; Tr. 258-61. In fact, during the preshift examination of the face on March 22, the miner conducting the examination walked past shields 130 through 176 between 7:18 a.m. and 8:24 a.m. Tr. 284-85, 299-301. However, the accumulations were not noted in the preshift report for the graveyard shift of March 21/22 or for the day shift of March 22. Gov't Exs. 12, 15. In addition, information about the accumulations was not relayed orally by the outgoing graveyard shift longwall face boss or the miner who performed the preshift examination to the day shift's longwall face boss. Tr. 301, 308. The judge failed to examine this evidence and make findings regarding whether the operator had or reasonably should have had knowledge of the violative condition. *See Emery*, 9 FMSHRC at 2002-04; *Drummond Co., Inc.*, 13 FMSHRC 1362, 1368 (Sept. 1991), *quoting Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991) ("*Emery* makes clear that unwarrantable failure may stem from what an operator 'had reason to know' or 'should have known.'").[13] Such findings are critical to the evaluation of the operator's subsequent efforts, or lack thereof, in abating the violative condition. We remand for the judge's determination of whether the operator had knowledge of the violative condition and whether that determination supports an unwarrantable failure determination.

E. The operator's efforts at abating the violative condition

As the judge recognized, an "operator's efforts in abating the violative condition" is one of the factors established by the Commission as "determinative of whether a violation is unwarrantable." 28 FMSHRC at 40. Where an operator has been placed on notice of an accumulation problem, the level of priority that the operator places on the abatement of the problem is relevant. *Enlow Fork*, 19 FMSHRC at 17. The focus on the operator's abatement efforts is on those efforts made prior to the issuance of a citation or order. *Id.* Thus, an operator's efforts in cleaning up accumulations before and during an inspection may support a finding that a violation of section 75.400 was not caused by unwarrantable failure. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1934 (Oct. 1989). On the other hand, an operator's failure to clean up accumulations at the time of inspection, or its subordination of cleanup efforts to other

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[12] The onshift examination reports from the afternoon shift of March 21/22 and graveyard shift of March 22 did not indicate the presence of hazardous conditions. Gov't Exs. 13 & 14. However, the afternoon shift's longwall face boss testified that if there are accumulations that need to be cleaned, they would not always be noted as a hazardous condition in an on-shift examination report. Tr. 253.

[13] The application of a constructive knowledge standard does not reduce to ordinary negligence the standard of care required to sustain a finding of unwarrantable failure. We simply acknowledge the facts that should have been available to the operator during review of the operator's actions. It is certainly appropriate to hold the operator in this case responsible for knowledge of conditions the judge found to be "extensive" and "obvious." 28 FMSHRC at 41.

work, may support an unwarrantable failure finding. *New Warwick Mining Co.*, 18 FMSHRC 1568, 1574 (Sept. 1996); *Enlow Fork*, 19 FMSHRC at 17; *Consol*, 23 FMSHRC at 596-97.

The record reveals that the accumulations were not removed between the conclusion of the afternoon shift and the time that they were cited at approximately 7:30 a.m. on March 22. The parties do not dispute the judge's finding that the accumulations existed for approximately six hours. 28 FMSHRC at 41. David Zabriskie, the longwall face boss for the afternoon shift on March 21/22, stated that miners on the afternoon shift shut down the longwall on the headgate side at approximately 1:10 a.m. on March 22, and that it was possible that they left the remaining cleanup of the accumulations for the next shift. Tr. 190, 209-10. Zabriskie stated that his crew then helped the graveyard shift work on pouring a seal in the headgate area. Tr. 228-29. It appears that when the day shift arrived, miners continued to pour seals, rather than to remove the accumulations. Tr. 94. J.P. LaBossiere, the longwall face boss for the day shift on March 22, testified that the day shift miners had to pour the headgate seal before they could start mining. Tr. 280, 282, 283.

In the violation portion of his decision, the judge noted San Juan's argument that it was normal for a production shift to pick up cleaning where the prior production shift left off, concluding that the argument might have had "merit if the subsequent production shift began when the previous production shift left off, but that is not the case here." 28 FMSHRC at 37-38. He found that the operator "made no attempt to clean the accumulations up within a reasonable time." *Id.* at 38. The judge explained that the graveyard shift had apparently made no attempt to clean up the accumulations, nor had the day shift by the time the inspector discovered them, even though the day shift began at 7:00 a.m. *Id.*

The operator submits that the delay in cleaning up the accumulations is explained by the fact that the shift between the afternoon shift and day shift – the graveyard shift – is generally concerned with other, non-production-related duties. S.J. Br. at 8-9 n.7. It states that the day shift on March 22 was the subsequent production shift, and thereby expected to continue cleaning the shields where the previous production shift, the afternoon shift, left off.[14] *Id.* at 12-13.

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[14] The dissent's reliance on the operator's clean-up plan is misplaced. Slip op. at 19. First, San Juan has not argued that the terms of its plan allowed it to wait until the next production shift to remove the accumulations. *See* S.J. Br. at 10; S.J. Post-Hr'g Br. at 7, 30 (noting that the clean-up plan requires that "[a]ll face equipment shall be kept reasonably clean of extraneous materials"). Furthermore, even if we were to consider its plan, the terms of the plan fail to establish that San Juan's conduct was not aggravated. Finally, San Juan has not alleged that it believed that waiting to clean up the accumulations based on its cleanup plan was the safest method of compliance with section 75.400. The Commission has held that "when an operator believed in good faith that the cited conduct was the *safest method* of compliance with applicable regulations, even if they are in error, such conduct does not amount to aggravated conduct exceeding ordinary negligence." *Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 972 (May 1990) (emphasis added and omitted). However, such a belief by the operator

It is not clear whether the judge concluded that the graveyard shift should have cleaned the accumulations that had been left by the outgoing afternoon shift. Nor is the matter entirely clarified in reviewing the record. For instance, when questioned whether the day shift, rather than the graveyard shift, would be responsible for cleaning shields that had been left by the afternoon shift, the afternoon shift longwall face boss testified, "yeah, depending on what the maintenance [graveyard] shift had to do that night which I don't have any recollection of what they were doing that night. Depending on their duties that night." Tr. 209-10. Such testimony, although cited by the operator, would not appear to support its assertion that only production shifts were responsible for cleaning accumulations.

Although the judge found that the operator had not cleaned up the accumulations within a reasonable time, the judge failed to relate that finding to his unwarrantable failure analysis. The judge failed to make findings regarding which shift should have cleaned up the accumulations and whether the operator demonstrated aggravated conduct by giving priority to pouring seals rather than removing the accumulations. On remand, we direct the judge to make findings and set forth his rationale regarding whether the operator's actions in abating the violative condition supports an unwarrantable failure finding.

F. Negligence finding

Finally, as noted above (slip op. at 3, 6), the judge found that the operator's conduct, although "highly negligent," did not rise to the level of aggravated conduct. 28 FMSHRC at 42. The Commission has previously recognized that a finding of high negligence suggests an unwarrantable failure. *Eagle Energy Inc.*, 23 FMSHRC 829, 839 (Aug. 2001). The judge failed to adequately set forth his rationale for the reasons that San Juan's conduct could be characterized as highly negligent, but not unwarrantable. Accordingly, on remand, we direct the judge to provide an explanation for any negligence finding seemingly at odds with his unwarrantable failure determination.

G. Summary

We vacate the judge's determination that the violation of section 75.400 set forth in Citation No. 4768527 did not result from San Juan's unwarrantable failure to comply with the standard. We instruct the judge on remand to reconsider the evidence regarding whether the operator had been placed on notice that greater efforts at compliance were necessary, and to make findings regarding whether San Juan's violation of section 75.400 was unwarrantable based on, among other things, the danger posed by the violative condition, the operator's knowledge of the

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must be reasonable. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (Aug. 1994). Here, a belief by San Juan that waiting to clean up the accumulations was the safest method of compliance would not be reasonable. As the judge expressly found, the operator made no attempt to clean up the accumulations in a reasonable time, particularly since the dangers posed by the accumulations continued during non-production shifts. 28 FMSHRC at 38.

existence of the violation, and the operator's efforts at abating the violative condition. The judge is instructed to set forth his findings evaluating the individual factors and weighing the factors as a whole.

III.

Conclusion

For the reasons discussed above, we hereby vacate the judge's determination that San Juan's violation of section 75.400 was not caused by unwarrantable failure and remand for further analysis consistent with this decision. If the judge concludes that San Juan's violation of section 75.400 was caused by unwarrantable failure, he should reassess the penalty and modify Citation No. 4768527 from a section 104(a) citation to a section 104(d)(1) citation and modify Order No. 4768528 from a section 104(d)(1) citation to a section 104(d)(1) order.

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Chairman Duffy dissenting:

I do not join my colleagues in remanding this matter to the judge for further analysis because I do not find that the Secretary has proven that San Juan Coal Company ("San Juan") unwarrantably failed to comply with 30 C.F.R. §75.400. While I find some shortcomings in that portion of the judge's decision addressing the unwarrantable failure issue, I concur with him in result.

When determining whether a violation is caused by an operator's unwarrantable failure to comply with the Mine Act or a mandatory safety or health standard, the Commission's principal task is not to analyze the nature of the violation itself, but, rather, to weigh the operator's conduct in relation to that violation. Under longstanding Commission policy, we determine an unwarrantable failure to comply by whether an operator's conduct is so aggravated as to exhibit "reckless disregard," "intentional misconduct," "indifference" or "a serious lack of reasonable care." *Buck Creek Coal Co., Inc.*, 17 FMSHRC 8, 15 (Jan. 1995) (citations omitted).

To be sure, the Commission has identified a number of factors relating to the violation itself that are, as my colleagues note, "relevant" in determining whether an operator has unwarrantably failed to comply with a mandatory safety and health standard (slip op. at 4), and I will discuss those factors more fully below. Nevertheless, the gravamen of the unwarrantable failure charge is the relative degree of operator culpability in allowing the violation to arise and to persist. As the Commission stated in *Helen Mining Co.*, "in resolving unwarrantable failure questions, the operator's total conduct 'in relation to a violation of the Act' must be examined. This examination includes the operator's conduct in causing the violation, remedying it, or both, depending upon the circumstances of the case." 10 FMSHRC 1672, 1676 n.4 (Dec. 1988) (citations omitted).

The seminal case, of course, for the Commission's jurisprudence regarding unwarrantable failure as that term applies to the degree of operator culpability is *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987). Although that decision has come to be cited routinely over the two decades during which it has held sway, like other leading precedents, it warrants an occasional and careful revisiting to make sure that its potency hasn't been diluted by rote invocation.

In *Emery* the Commission sought to determine where the term "unwarrantable failure" falls within the spectrum between negligent conduct, which is a consideration in the determination of civil penalties generally, and knowing or willful misconduct, which can result in severe civil or even criminal sanctions under the Act. *Id.* at 2000-04. The Commission began by noting that section 104(d) of the Act, which authorizes the use of the unwarrantable failure sanction, "is an integral part of the Act's enforcement scheme, a scheme which, as an incentive for operator compliance, provides for 'increasingly severe sanctions for increasingly serious violations or operator behavior.'" *Id.* at 2000 (citing *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 828 (Apr. 1981)). The Commission went on to cite the D.C. Circuit Court of Appeals' characterization of the unwarrantable failure sanction as "among the Secretary's most

powerful instruments for enforcing mine safety." *Id.* (quoting *UMWA v. FMSHRC*, 768 F.2d 1477, 1479 (D.C. Cir. 1985)).

Having established the Act's enforcement scheme as its context, the Commission went on to parse the plain meanings of "unwarrantable" and "failure," finding that the terms encompass the "neglect of an assigned, expected, or appropriate action" that is "not justifiable" or "inexcusable," and further finding that "[c]onduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention." 9 FMSHRC at 2001. On that basis the Commission reasoned that "the ordinary meaning of the phrase 'unwarrantable failure' suggests more than ordinary negligence," and then concluded that "construing 'unwarrantable failure' to mean aggravated conduct constituting more than ordinary negligence produces a result in harmony with the Mine Act's statutory enforcement scheme of providing increasingly severe sanctions for increasingly serious mine operator behavior." *Id.*[1]

Taking into consideration the Commission's well-established rationale for ascribing unwarrantable failure to conduct evincing a relatively high level of operator fault coupled with the requirement that we evaluate the operator's "total conduct" when determining whether the Secretary has properly applied section 104(d) of the Act, I must conclude that the judge was correct in finding that the violation of section 75.400 was not caused by San Juan's unwarrantable failure to comply with the standard. While I believe that the judge's decision might have been more expansive in some respects, I nevertheless find that he decided the case presented to him, not the case that could have or should have been presented to him, and to that extent, I agree with him in result. Moreover, I believe that appropriate and necessary consideration of certain mitigating evidence further argues against a finding of unwarrantable failure in the circumstances presented in this case.

As my colleagues correctly note, the Commission has identified a number of factors that are "relevant" in determining whether an operator has unwarrantably failed to comply with a mandatory safety or health standard, i.e., the extent of the violation, the length of time it has existed, the operator's efforts at abating the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's knowledge of the existence of the violation, and whether the violation poses a high degree of danger. Slip op. at 4 (citing *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001)).

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[1] My colleagues fault the judge for not determining whether San Juan "had or reasonably should have had knowledge of the violative condition," citing *Emery* and *Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991), but indicate clearly that they are not suggesting that *Emery* contemplates that determining unwarrantable failure can be reduced to an ordinary negligence test. Slip op. at 10 & n.13. Nevertheless, while the Commission was correct in stating the obvious in *Eastern* that unwarrantable failure "may *stem* from what an operator 'had reason to know' or 'should have known,'" 13 FMSHRC at 187 (emphasis added), more is required to *establish* unwarrantable failure. Something more must rest atop that "stem" of actual or imputed knowledge, and that something is aggravated conduct.

In his decision, the judge correctly set forth these factors and went on to state that "some of [them] are present in this case." 28 FMSHRC at 41. That the judge did not address each and every one of the factors, however, is not reversible error, as my colleagues would seem to have it; rather, it is owing to the Secretary's failure to fully develop the case before the judge.

As we have stated before, "Commission precedent has established that the Secretary bears the burden of proving that an operator's conduct, as it relates to a violation, is unwarrantable." *Peabody Coal Co.*, 18 FMSHRC 494, 499 (Apr. 1996). Moreover, we have held that "a matter must have been presented below in such a manner as to obtain a ruling in order to be considered on review." *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1320 (Aug. 1992).

In his post-hearing brief to the judge, counsel for the Secretary set forth only three bases for finding that San Juan's violation of §75.400 was owing to its unwarrantable failure to comply: (1) the extensiveness and duration of the accumulations; (2) the notice of a need for greater compliance; and (3) the open and obvious nature of the accumulations. S.'s Post-Hearing Br. at 24-29.[2]

The judge addressed all three bases in his decision and ultimately determined that the Secretary had not made the case for finding unwarrantable failure. My colleagues fault the judge for not addressing arguments not made by the Secretary below. Slip op. at 7- 13. It is not the judge's role to make the Secretary's case for her, and it is certainly not the Commission's role to make her case on review.

In that connection, I take strong exception to my colleagues' contention that the judge should have considered all of the unwarrantable failure factors enunciated in *Consol*, *supra*, and then determined which ones were relevant. He need only have considered those factors proffered by the Secretary and then determined their relevance in the context of the facts and circumstances of the case *presented*, not the case the Secretary could have or should have presented.

Moreover, while it is true that a "judge may not rely on one relevant factor to the exclusion of others," slip op. at 5, that is not the case here. The judge considered those specific factors pressed by the Secretary as bases for finding that San Juan unwarrantably failed to comply with section 75.400, but "taking everything into consideration" he correctly found them to be insufficient to support such a finding. 28 FMSHRC at 41. The judge did conclude that the accumulations were "extensive and obvious" and that they had existed unabated for six hours prior to the arrival of Inspector Gibson. *Id.* Thus, he did address two of the grounds of the Secretary's case, set forth above, and found in the Secretary's favor. As for the third ground on

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[2] The brief summarizes the Secretary's argument as follows: "Based upon the foregoing facts clearly establishing the extensiveness and duration of the violative conditions, that Respondent had been placed on notice that greater efforts were necessary for compliance and that the violative conditions were obvious, a determination of unwarrantable failure is appropriate." *Id.* at 29.

which the Secretary staked her case, that San Juan had been placed on notice that greater efforts at compliance were needed, the judge, correctly, in my view, found the evidence wanting.[3]

First, he found that the San Juan Mine's compliance history did not exhibit a significant number of section 75.400 violations. 28 FMSHRC at 41. Over more than a three-year period from January 2001 to March 2004, records showed that the company had been cited 47 times for violations of section 75.400. That translates to a bit more than one citation per month at a large continuously operating mine where inspectors are present almost every day and which is subject to at least one inspection every five working days due to its methane liberation.[4] Tr. 65-66, 78, 90-91. While I do not believe that the Commission should engage in a mechanistic numbers game when evaluating an operator's conduct vis a` vis unwarrantable failure, an examination of past cases cited by my colleagues would seem to indicate that a much poorer compliance history with section 75.400 has been necessary to support an unwarrantable finding.[5]

With respect to the issue of whether Inspector Gibson's discussions with San Juan representatives about the need to keep the shields clean constituted notice to the operator that greater compliance efforts were necessary, I find that the judge was eminently correct in finding that those discussions were general admonishments, not specific warnings that the mine was not meeting the requirements of section 75.400. 28 FMSHRC at 41-42. The lack of citations for accumulations on the shields bears that out. Inspector Gibson testified that from January of 2003

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[3] It is important to note that counsel for the Secretary in his opening statement indicated that the substance of the charge that San Juan had unwarrantably failed to comply with section 75.400 was "based primarily on the mine's management's notice of the requirements of the Act and a greater need for compliance with the Act." Tr. 8. It is hard to fault the judge for devoting more time to this issue when the Secretary's case hinges on it.

[4] I disagree with my colleagues' assertion that the frequency with which section 75.400 is cited industry-wide is irrelevant in the context of this case. Slip op. at 7. In assessing an operator's total conduct for purposes of evaluating its level of culpability, an industry-wide context may be highly relevant.

[5] A comparison between San Juan's compliance history with section 75.400 and that of other operators in cases cited by the majority is instructive: *Consol*, 23 FMSHRC at 595 ("MSHA warned Consol that its cleanup and rock dusting efforts at the mine were 'borderline to substandard' and needed to be improved. During the previous two years, the operator received 88 citations alleging violations of section 75.400."); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 16 Jan. 1997) ("Enlow's violation history reveals approximately 60 citations for accumulations from December 8, 1991 through December 7, 1993."); *New Warwick Mining Co.*, 18 FMSHRC 1568, 1574 (Sept. 1996) ("The record indicates that, during the previous inspection period (April 1 to June 30, 1993), MSHA had found 16 violations of section 75.400 at Warwick. Moreover, twice during the two days preceding issuance of the instant order, Inspector Santee informed New Warwick that similar accumulations were not permitted.").

to March of 2004, the time of the citation, he had inspected the face of the San Juan mine two to three dozen times and had never issued a citation for accumulations on the shields. Tr. 134-35. Nor was he aware that any other inspector had done so during that period. Tr. 135.[6] Finally, the judge noted that San Juan had assigned two "propmen" to each longwall evincing the operator's heightened awareness of the need to keep the shields clean. 28 FMSHRC at 42. In sum, I believe the judge's analysis is sufficient to support his conclusion that the violation was not caused by San Juan's unwarrantable failure to comply with section 75.400.

Beyond the judge's findings, however, I find that there are additional mitigating factors that lead me to agree in result with the judge's decision on this issue. In *Windsor, supra,* the Commission stated, "in addressing the question of compliance efforts, we ask simply whether the operator's efforts to comply with safety standards and to correct conditions that could lead to violations were taken with sufficient care under the circumstances, even if ultimately unsuccessful in completely preventing a violative condition." 21 FMSHRC at 1005 n.9. With that in mind, I believe an evaluation of San Juan's "total conduct" in this case indicates that the operator was not indifferent to its compliance responsibilities under section 75.400. As the judge found, San Juan assigned two longwall workers to clean accumulations throughout each production shift. 28 FMSHRC at 42. One of the miners assigned, Tony Heaps, testified that cleanup of the shields occupied 75% of his time during a typical shift. Tr. 268. The condition of the roof at the time of the citation was unusual in that the coal was dry and brittle and tended to spill continually onto the shields — even apparently when the longwall was not necessarily in production. Tr. 288-89. On the morning of the inspection, 75% of the shields had been cleaned by the previous production shift. 28 FMSHRC at 41 n.5; Tr. 129.

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[6] Inspector Gibson testified that he had discussed keeping the shields clean beginning with his first visit to the mine. 28 FMSHRC at 42. Since he had no personal experience to rely on at that time, his discussion with mine representatives at that point can hardly be considered a warning that San Juan was being placed on "heightened scrutiny that it must increase its efforts to comply with the standard." *Consol,* 23 FMSHRC at 595. Likewise, Inspector Gibson's testimony that the conditions he witnessed on March 22, 2004, were "the worst" he had seen during his many inspections of the longwall (Tr. 104) is perfectly understandable since he had never before cited San Juan for accumulations on the longwall. Tr. 134-35.

In addition, San Juan's protocol for addressing accumulations on the shields must be considered when assessing the operator's total conduct. San Juan's clean-up plan, which I must assume was known to MSHA, states in part:

> *When in use*, all face equipment, including electrical equipment, will be cleaned off *during each production shift*. De-energized equipment should be sprayed off with water and cleaned with the necessary tools to prevent oil and coal dust build up.

S.J. Ex. A at 2 (emphases added).

On this issue I part company with the judge (28 FMSHRC at 41) and conclude that the clean-up plan did not call for the removal of accumulations during the graveyard shift. That was the day shift's responsibility and that shift had only come on duty 30 minutes before Inspector Gibson arrived. Furthermore, abatement had not commenced within the first half-hour of the day shift because those miners had been deployed to finish the graveyard shift's task of constructing a seal, a priority assignment necessary to ensure the integrity of a ventilation system in a mine liberating more than one million cubic feet of methane per day. 28 FMSHRC at 39.[7] These factors mitigate against a finding of aggravated conduct, particularly since there is no reason to believe that San Juan would not have begun cleanup of the shields during the day shift pursuant to its cleanup plan.

Moreover, while my colleagues correctly assert that an operator's inadequate abatement efforts may support an unwarrantable failure finding (slip op. at 10-12), their reliance upon *Enlow Fork* for that proposition is problematic. In *Enlow Fork* the Commission declared that "the level of priority that the operator places on the abatement of the problem is a factor properly considered in the unwarrantable failure analysis," and cited *U.S. Steel Corp.*, 6 FMSHRC 1423, 1437 (June 1984), as authority with the following gloss: "unwarrantable failure may be proved by a showing that the violative condition was not corrected or remedied prior to issuance of a citation or order." 19 FMSHRC at 17. That, however, is not exactly what is stated in *U.S. Steel*. The Commission's actual holding is that "an unwarrantable failure to comply may be proved by a showing that the violative condition or practice was not corrected or remedied, prior to issuance of a citation or order, *because of indifference, willful intent, or a serious lack of reasonable care*." 6 FMSHRC at 1437 (emphasis added). In other words, the failure to abate factor is directly tied back to an operator's careless attitude toward compliance.[8]

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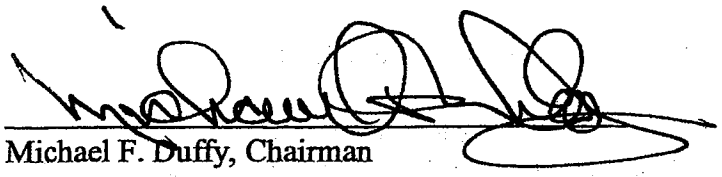
[7] The 'construction" of the seal in this case, which intrinsically served a safety and health purpose, is clearly distinguishable from "construction" associated with mine development and expansion. *See Consol*, 23 FMSHRC at 596-97.

[8] It would also seem axiomatic that if San Juan had cleaned up the accumulation in question prior to the arrival of Inspector Gibson, we would not even be considering a violation of section 75.400, let alone one alleging an unwarrantable failure to comply.

In sum, while the judge could have been more expansive in his analysis, I believe that an examination of the circumstances surrounding the violation in their totality supports his negative finding on the unwarrantable issue. San Juan's efforts to address accumulations on the shields do not bespeak aggravated conduct amounting to reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care. Accordingly, I would affirm the judge in result.



Michael F. Duffy, Chairman

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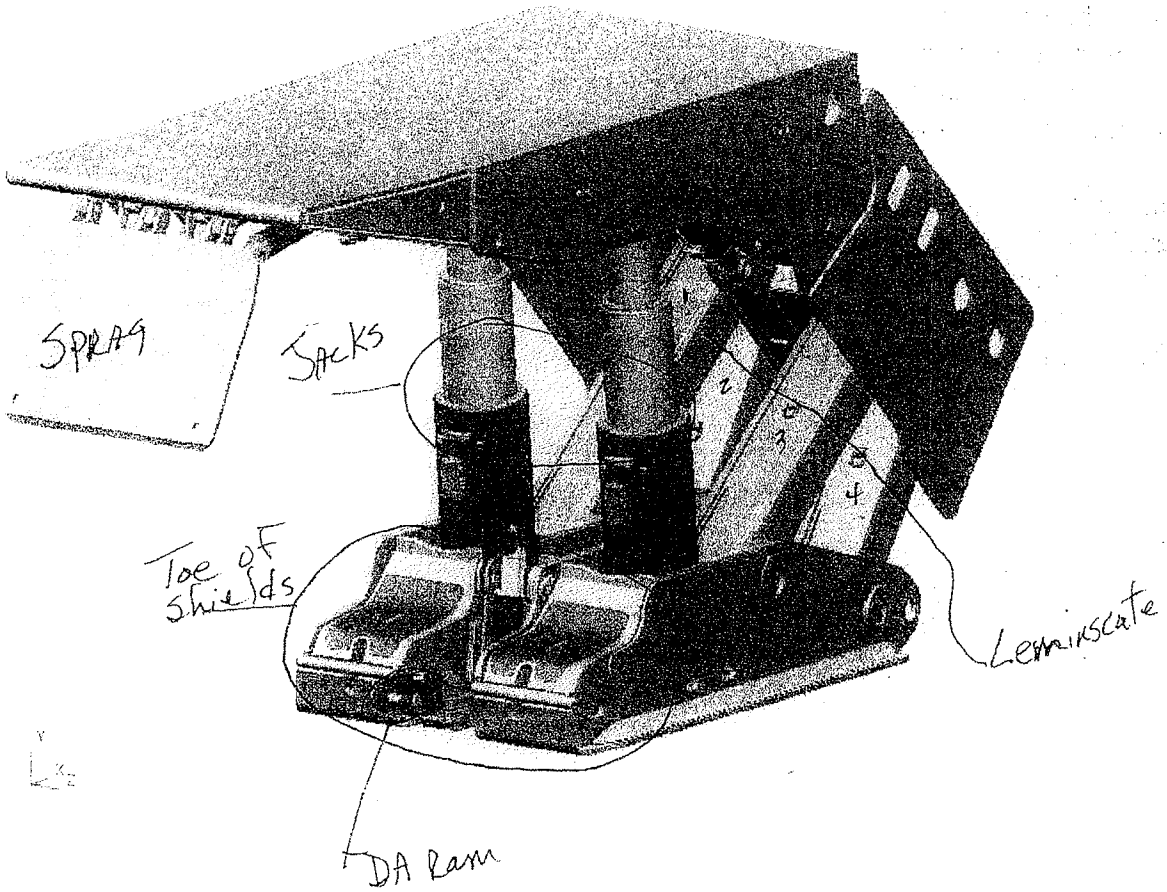
GENERAL SHIELD DRAWING



Joint EXHIBIT
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

March 23, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. CENT 2007-120-M A.C. No. 41-04614-99988
v.	:	
SMITHVILLE SAND & GRAVEL	:	Docket No. CENT 2007-121-M A.C. No. 41-04614-102470

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").[1] On February 6, 2007, the Commission received from Smithville Sand & Gravel ("Smithville") requests from its general manager seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

During August 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued citations and an order to Smithville. On October 5 and November 2, MSHA issued proposed assessments to which Smithville did not respond. On January 4 and February 1, 2007, MSHA's Civil Penalty Compliance Office sent Smithville delinquency notices regarding the penalties that had become final orders. In its requests, Smithville states that it is a "new company," was "ignorant of the rules," and was "misdirected." In her response, the Secretary

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2007-120-M and CENT 2007-121-M, both captioned *Smithville Sand & Gravel* and both involving similar issues. 29 C.F.R. § 2700.12.

requests that Smithville provide a detailed explanation as to why it believes that reopening is warranted and that the Secretary will respond further as to whether such relief is warranted.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Smithville's requests, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Smithville's failure to timely contest the penalty proposals and whether relief from the final orders should be granted. Before the judge, Smithville should provide a more detailed explanation of whether it is entitled to a reopening of the penalty assessments under the principles noted above. If it is determined that such relief is appropriate, these cases shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 23, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. CENT 2007-126-M
	:	A.C. No. 16-00509-99958
v.	:	
CARGILL DEICING TECHNOLOGY	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On February 16, 2007, the Commission received from Cargill Deicing Technology ("Cargill") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On July 26 and August 3, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued two citations and two orders to Cargill. On August 23, Cargill timely filed notices of contest of the citations and orders, and those cases are presently pending before an administrative law judge. On October 17, Cargill received the proposed assessments from MSHA. Cargill states that its operations coordinator, who was new to the position, checked the boxes next to the citations and orders that he wanted to contest and passed the assessment to payroll personnel, who he assumed would pay the remaining fines and mail the form. Cargill further states that payroll personnel assumed that the operations coordinator would mail the form, but it was never mailed. Cargill learned of the error when it received a delinquency notice from MSHA on January 8, 2007. The Secretary states that she does not oppose Cargill's request to reopen the penalty assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Cargill's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Cargill's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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March 23, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. LAKE 2007-65-M
	:	A.C. No. 20-01012-102786
v.	:	
EMPIRE IRON MINING PARTNERSHIP	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On February 20, 2007, the Commission received from Empire Iron Mining Partnership ("Empire") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On February 21, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to Empire. Empire timely filed a notice of contest of the citation, and that case went to trial before an Administrative Law Judge. However, Empire states that, when it received the proposed assessment for the penalty from MSHA, it inadvertently paid the penalty. According to Empire, it had intended to contest the assessment, as indicated by its contest of the underlying citation. Empire further states that the penalty was paid because of a change in personnel who normally handled such matters at Empire. The Secretary states that she does not oppose Empire's request to reopen the penalty assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Empire's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Empire's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

March 23, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. SE 2007-154-M A.C. No. 22-00313-101052
v.	:	
HOLCIM (US) INCORPORATED	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On February 8, 2007, the Commission received from Holcim (US) Incorporated ("Holcim") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On March 9, 2007, Holcim filed an amended motion to reopen.

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

On May 2, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation and order to Holcim. On May 17, Holcim timely filed notices of contest of the citation and order, and the assigned judge stayed those cases pending the docketing and assignment of the related civil penalty case. Holcim states that, following the contest of the citation and order, it was never served the "civil penalty proposal," or that, if it was, it was unaware of the civil penalty proposal and has no record of ever having received it. Holcim learned of the penalty when it received a delinquency notice from MSHA's Civil Penalty Compliance Office.

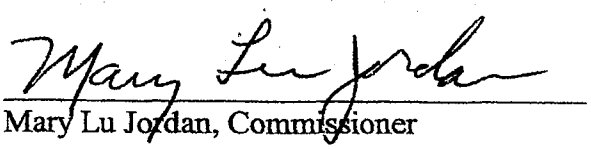
On February 23, 2007, the Secretary filed her Response to the Motion to Request to Reopen. In her response, she states that her records indicate that proposed assessments were sent to Holcim on October 18, 2006, but that they were never contested. The Secretary continues that, if Holcim failed to timely contest the assessments, then it should explain why it is entitled to relief.[1]

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

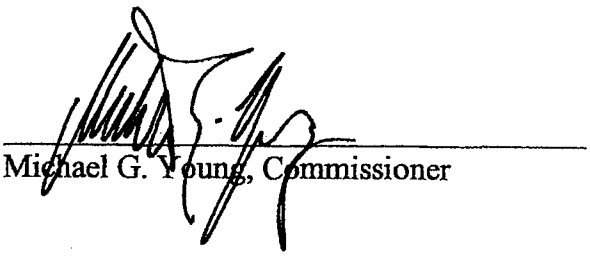
[1] The Secretary also requests that the Commission direct Holcim to specify whether it filed timely contests to the "penalty assessments," rather than the "penalty petition," which was referred to in Holcim's initial motion to reopen. However, in its amended motion to reopen, Holcim has clarified that its reference to "penalty petition" in the original motion should have been to "penalty proposal."

Having reviewed Holcim's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Holcim's failure to timely contest the proposed penalty assessments and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

March 23, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2007-284
	:	A.C. No. 46-08862-102285 A
v.	:	
	:	
JERRY ALLEN, JR., employed by MARTIN MARIETTA MATERIALS, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On March 1, 2007, the Commission received from Jerry Allen, Jr. ("Allen") a motion by counsel seeking to reopen a penalty assessment against Allen under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On November 1, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") mailed a proposed penalty assessment to Allen, alleging that he was personally liable under section 110(c) of the Mine Act for an order, No. 6035585, issued to his employer, Martin Marietta Materials, Inc. MSHA mailed the proposed penalty assessment to

Allen at an address that was incorrect.[1] Accordingly, Allen states that he never received the proposed assessment form and that it was returned to MSHA with the notations, "return to sender" and "unable to forward," stamped on the envelope. The certified return receipt card was unsigned. On February 19, 2007, Allen received a delinquency notice from MSHA stating that the proposed penalty assessment had become a final order of the Commission. On February 20, Allen's counsel was able to obtain a copy of the proposed assessment.

Allen, through counsel, states that, because service was not complete, he was unable to contest the penalty previously. He further maintains that service of the assessment was not complete until February 20, when his counsel received the penalty assessment. The Secretary states that she does not oppose Allen's request to reopen the penalty assessment.

Here, the proposed penalty assessment was mailed to the wrong address, and Allen never received it. Under these circumstances, we conclude that Allen was not notified of the penalty assessment, within the meaning of the Commission's Procedural Rules, until February 20, 2007. In his motion to reopen this matter, filed with the Commission on March 1, Allen clearly states his intent to contest the proposed penalty assessment against him. We conclude from this that Allen timely notified the Secretary that he contests the proposed penalty. *See Stech, employed by Eighty-Four Mining Co.*, 27 FMSHRC 891, 892 (Dec. 2005).

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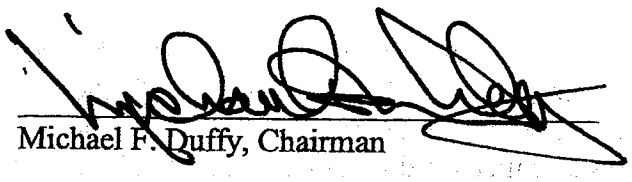
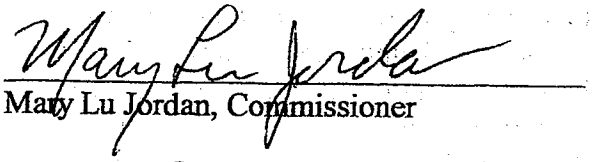
[1] MSHA mailed the assessment to a post-office box number that was similar, but not identical, to that of Allen's employer. MSHA apparently did not attempt to mail the proposed penalty assessment to Allen at his home address.

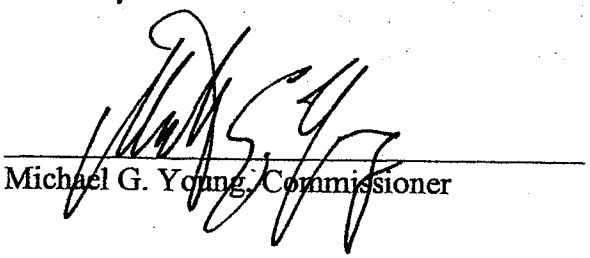
Accordingly, the proposed penalty assessment is not a final order of the Commission. We remand this matter to the Chief Administrative Law Judge for assignment to a judge. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

April 3, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of LAWRENCE L. PENDLEY	:	
v.	:	Docket No. KENT 2006-506-D
HIGHLAND MINING CO., LLC	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On September 25, 2006, the Commission received a complaint of discrimination filed by the Secretary of Labor on behalf of Lawrence L. Pendley against Highland Mining Company, LLC ("Highland") pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). Among other relief requested, the complaint sought three days backpay with interest for Pendley. Compl. at 3. On December 21, 2006, the Secretary and Highland filed a Joint Motion to Approve Settlement. However, they stated in that motion that Pendley had indicated that "he will not agree to this settlement." Jt. Mot. at 3. On January 18, 2007, Commission Administrative Law Judge David F. Barbour issued a Decision Approving Settlement and Dismissal of Proceeding. This decision adopted the major terms of the settlement described in the motion and dismissed the proceeding. Dec. at 1-2.

On February 15, 2007, the Commission received a letter from Pendley objecting to the judge's settlement of his discrimination complaint and requesting relief from the decision. In his letter, Pendley stated that the amount of the settlement he received does not reflect the amount of time lost, and alleged that he did not agree to the settlement, nor was it discussed with him. Letter at 1.

We deemed Pendley's correspondence to be a timely-filed petition for discretionary review. *See, e.g.*, *Wake Stone Corp.*, 27 FMSHRC 289, 290 (Mar. 2005). On February 26, 2007, we granted the petition and stayed briefing pending further order of the Commission.

On February 23, 2007 – prior to the Commission's granting of Pendley's petition – the Secretary filed a motion to reopen these proceedings, in which she stated that "Pendley, as a party to this case, should have been, but was not, given an opportunity to be heard prior to the proffered settlement being approved by the judge." S. Mot. at 3. The Secretary maintained that, because one of the parties did not participate in the settlement agreement, there was no "meeting of the minds" and therefore no genuine agreement between the parties. *Id.* Accordingly, the Secretary requested that the Commission set aside the judge's decision approving settlement and remand the case to the judge for further proceedings. *Id.* at 4-5.[1]

On March 7, 2007, Highland filed a response to the Secretary's motion to reopen, urging the Commission to deny the motion and permit the Decision Approving Settlement to stand. Highland argued that there was a "meeting of the minds" between the representatives of the parties, Resp. at 3, and that the Secretary had stated in the settlement motion that the settlement achieved for Pendley all relief requested in the discrimination complaint. *Id.* at 1-2.

The Commission has made clear that "[s]ettlement of contested issues is an integral part of dispute resolution under the Mine Act." *Tarmann v. Int'l Salt Co.*, 12 FMSHRC 1, 2 (Jan. 1990) (quoting *Pontiki Coal Corp.*, 8 FMSHRC 668, 674 (May 1986)). In this respect, the Commission has observed that "the record must reflect and the Commission must be assured that a motion for settlement [approval], in fact, represents a genuine agreement between the parties, a true meeting of the minds as to its provisions." *Tarmann*, 12 FMSHRC at 2 (quoting *Peabody Coal Co.*, 8 FMSHRC 1265, 1266 (Sept. 1986)). *See also Wake Stone*, 27 FMSHRC at 290 (decision approving settlement vacated where it was "unclear whether the parties achieved a true meeting of the minds"). Moreover, according to the Commission's procedural rules, in a proceeding under section 105(c)(2) of the Mine Act, a "complainant on whose behalf the Secretary has filed the complaint is a party." Commission Procedural Rule 4(a), 29 C.F.R. § 2700.4(a).

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[1] The Secretary relies on Rule 60(b)(4) of the Federal Rules of Civil Procedure, which permits a judicial body to relieve a party from a final judgment, order, or proceeding because the judgment is void. S. Mot. at 3-4. In the alternative, the Secretary requests that, if the Commission chooses to treat Pendley's letter as a timely-filed petition for discretionary review, it grant the same relief requested in her motion to reopen. *Id.* at 2 n.1. We have decided to adopt the latter approach and therefore need not reach the Secretary's Rule 60(b)(4) argument. Accordingly, the Secretary's motion is denied as moot.

Here, the record demonstrates that the motion was prematurely filed, as all of the parties had not come to an agreed disposition of this matter. *See Montana Resources, Inc.*, 15 FMSHRC 1527 (Aug. 1993). Accordingly, the judge's dismissal order is vacated, this case is reopened, and the matter is remanded to the judge for appropriate proceedings.[2] The Secretary's motion to reopen is denied as moot.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

[2] Neither the settlement agreement nor the judge's decision makes clear whether the amount to be awarded Pendley represents a net amount to be paid to him or whether deductions are to be taken out of that amount. J. Mot. at 2, Dec. at 1. This matter should be clarified on remand. *See Sec'y of Labor on behalf of Hopkins v. ASARCO, Inc.*, 18 FMSHRC 2081, 2082-83 (Dec. 1996). In addition, because interest is added to backpay awards in discrimination cases brought under the Mine Act, *see Ross and Gilbert v. Shamrock Coal Co., Inc.*, 15 FMSHRC 972, 976 (June 1993), and *Loc. U. 2274, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493, 1504-05 (Nov. 1988), the judge on remand should indicate the amount of interest, if any, included in any settlement.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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April 5, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2007-283-M A.C. No. 02-03016-91269
v.	:	
FANN CONTRACTING, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On March 14, 2007, the Commission received from Fann Contracting, Inc. ("Fann") a letter by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

Fann states that it received a proposed penalty assessment on June 26, 2006. It asserts that on July 24, 2006, it timely sent its contest of the proposed penalty assessment to the Department of Labor's Mine Safety and Health Administration ("MSHA"). Fann contends that, although MSHA received its contest on July 26, the operator was not granted a hearing on the contested proposed penalties. The Secretary of Labor states that she does not oppose Fann's request to reopen the penalty assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to

reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Fann's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Fann timely contested the penalty proposal and, if not, whether good cause exists for granting relief from the final order. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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April 5, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2007-186
v.	:	A.C. No. 15-18370-103059
PREMIER ELKHORN COAL COMPANY	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On March 1, 2007, the Commission received from Premier Elkhorn Coal Company ("Premier Elkhorn") a motion to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On November 9, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment, A.C. No. 000103059, to Premier Elkhorn for several citations including Citation Nos. 7436363, 7436366, and 7436368. Premier had previously contested the three citations, which are currently the subject of Docket Nos. KENT 2007-3-R, 2007-5-R, and 2007-6-R. Premier Elkhorn states that it inadvertently sent its contest of the penalty assessment to the MSHA office in Pittsburgh, Pennsylvania, instead of the MSHA office located in Arlington, Virginia. The Secretary states that she does not oppose Premier Elkhorn's request to reopen the penalty assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Premier Elkhorn's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Premier Elkhorn's failure to timely contest the penalty proposals and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

April 5, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2007-187
v.	:	A.C. No. 15-17826-103115
PREMIER ELKHORN COAL COMPANY	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On March 7, 2007, the Commission received from Premier Elkhorn Coal Company ("Premier Elkhorn") a motion to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On November 9, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment, A.C. No. 000103115, to Premier Elkhorn for several citations, including Citation No. 7435474.[1] Premier Elkhorn explains that it inadvertently sent its contest of the penalty assessment to the MSHA office in

[1] Premier Elkhorn states that Citation No. 7435474 is related to a civil penalty proceeding, Docket No. KENT 2006-490, which has been stayed before Administrative Law Judge Avram Weisberger pending the contest proceeding.

Pittsburgh, Pennsylvania, instead of the MSHA office in Arlington, Virginia. The Secretary states that she does not oppose Premier Elkhorn's request to reopen the penalty assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Premier Elkhorn's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Premier Elkhorn's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

April 5, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 2007-164
	:	A.C. No. 36-08637-100333
FKZ COAL INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On March 13, 2007, the Commission received from FKZ Coal Inc. ("FKZ Coal") a letter seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor filed a response to FKZ Coal's letter on March 14, 2007.

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

On October 11, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment, A.C. No. 000100333, to FKZ Coal for six citations or orders. In its letter, FKZ Coal states that it is unable to pay the assessments. The company offers no explanation, however, for its failure to timely contest the proposed assessment. In her response, the Secretary states that FKZ Coal "identifies no legally cognizable grounds for requesting reopening" because the company's "stated reason of not having the money to pay does not meet any of the legal requirements of Rule 60(b)" of the Federal Rules of Civil Procedure. S. Resp. at 2.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787.

Because FKZ Coal's request for relief does not explain the company's failure to contest the proposed assessment, and is not based on any of the grounds for relief set forth in Rule 60(b), we hereby deny the request for relief without prejudice. *See Marsh Coal Co.*, 28 FMSHRC 473, 475 (July 2006); *Eastern Assoc. Coal, LLC*, 28 FMSHRC 999, 1000 (Dec. 2006).

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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April 9, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. VA 2007-30
	:	A.C. No. 44-04856-104744
v.	:	
CONSOLIDATION COAL COMPANY	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On March 21, 2007, the Commission received from Consolidation Coal Company ("Consolidation") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On November 17, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 7316749 to Consolidation. MSHA and Consolidation scheduled a conference on the citation for January 3, 2007. Prior to the conference, MSHA issued a proposed penalty assessment to Consolidation for various citations, including Citation No. 7316749. Consolidation states that it intended to contest the proposed penalty for that citation, but inadvertently paid the penalty because it believed that the penalty would not be proposed until after the conference. The Secretary states that she does not oppose Consolidation's request to reopen the proposed penalty assessment.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Consolidation's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Consolidation's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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April 19, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. KENT 2007-47-M
	:	A.C. No. 15-18157-98778
v.	:	
ROGERS GROUP, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On February 2, 2007, Chief Administrative Law Judge Robert Lesnick issued to Rogers Group, Inc. ("Rogers") an Order to Show Cause for failure to answer the Secretary of Labor's petition for assessment of penalty. On April 2, 2007, Chief Judge Lesnick issued an Order of Default dismissing this civil penalty proceeding for failure to respond to the show cause order.

On April 10, 2007, the Commission received from Rogers a letter asserting that it had submitted what it thought was the correct paperwork and had not heard further concerning the case. Rogers also explains that it does not have much experience with Commission proceedings. It states that it now knows what it needs to do to continue its contest and requests that the default be withdrawn. The Secretary has indicated that she does not oppose Rogers' request.

The judge's jurisdiction in this matter terminated when his decision was issued on April 2, 2007. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Rogers' correspondence to constitute a timely filed petition for review, which we grant. *See, e.g., Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

On the basis of the present record, we are unable to evaluate the merits of Rogers' position. Having reviewed Rogers' request, in the interest of justice, we remand this matter to the Chief Administrative Law Judge, who shall determine whether relief from default is warranted, and for further proceedings as appropriate.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 2, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2005-386-M
Petitioner	:	A. C. No. 15-16138-62819
v.	:	
	:	Docket No. KENT 2005-424-M
	:	A. C. No. 15-16138-65643
DIX RIVER STONE INC.,	:	
Respondent	:	Dix River Surface

DECISION

Appearances: Brian W. Dougherty, Esq., U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner
Marcus P. McGraw, Esq., Greenebaum Doll & McDonald PLLC, Lexington, Kentucky, on behalf of the Respondent

Before: Judge Barbour

These consolidated cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor ("Secretary") on behalf of her Mine Safety and Health Administration ("MSHA") against Dix River Stone, Inc. ("Dix River"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. §§ 815, 820 ("Mine Act" or "Act"). The Secretary seeks the assessment of civil penalties totaling $1220 for eight alleged violations of mandatory safety standards for surface metal and nonmetal mines. The alleged violations are set forth in citations issued pursuant to sections 104(a) and 104(d)(1) of the Act. 30 U.S.C. §§ 814(a), 814(d)(1). The citations are the result of inspections at the company's Dix River Surface Mine in January and April 2005. In addition to alleging violations, the Secretary charges several of the violations were significant and substantial contributions to mine safety hazards ("S&S") and one was caused by Dix River's unwarrantable failure.

Dix River denied the violations and contested the Secretary's S&S and unwarrantable allegations. The cases were tried in Lexington, Kentucky.[1]

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[1] Clarence Barrett, a company witness, was unavailable to testify at the Lexington hearing due to illness. Subsequently, Mr. Barrett's testimony was taken via the telephone. *See* Tr. II; *see also* Tr. 13-14; 212-213.

STIPULATIONS

The parties stipulated as follows:

> 1. [T]he mine is subject to the Act;
>
> 2. Dix River and the mine affect interstate commerce;
>
> 3. Dix River and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission (Commission) and . . . the administrative law judge has authority to hear and decide the subject cases;
>
> 4. [T]he proposed penalties will not affect the ability of Dix River to continue in business;
>
> 5. [T]he mine is a small-sized, metal/nonmetal mine that operates one production shift per day during five-day weeks, with annual hours worked ranging from 10,000 to 20,000 per year;
>
> 6. Dix River is a small-sized, metal/nonmetal controlling entity with less than 60,000 annual hours worked per year;
>
> 7. [I]n 2005, the mine received seven citations over nine inspection days, in 2004 it received zero citations over 19 inspection days and in 2003 [it] received six citations over four inspection days.

Tr. 11-12; *see also* Joint Ex. 1.

DIX RIVER'S FACILITY THE INSPECTIONS AND THE CITATIONS

Tommy Owens, the owner and operator of the quarry, testified he and a partner acquired the mine in 1997. Before they began operations, the partner died and Owens became solely responsible for the quarry. Tr. 128. Owens stated he ran a very safety-conscious operation. For example, prior to January 31, 2005, Dix River had not received a citation or order charging the company with an unwarrantable failure to comply (*i.e.*, a citation or order issued pursuant to section 104(d) of the Act). Tr. 129-130.

Owens maintained he always got along with MSHA's inspectors, but when James Ellison, the inspector who issued the subject citations came to the mine on January 31, 2005, Ellison "got mad" because he was kept waiting at the office for an hour-and-a-half while the mine's foreman, Gene Smith, made necessary equipment repairs. Tr. 129, 144. Owens implied Ellison then went out of his way to cite Dix River for conditions he might not otherwise have found objectionable. *See* Tr. 129, 1454.

Ellison, who works at MSHA's Lexington, Kentucky, field office, has been an MSHA inspector for approximately three-and-one-half years. [2] Although he inspects both underground and surface mines, surface mines predominate. Tr. 23-24. Prior to joining MSHA, Ellison worked for approximately 31 years at a Colorado cement plant where he started as a laborer and rose to safety director. Tr. 25. Along the way, he held positions ranging from maintenance manager to quarry superintendent and production manager. Tr. 25. Ellison maintained the mining methods employed at the Colorado facility were "very similar" to those employed at Dix River's facility. Tr. 25-26.

On Monday, January 31, 2005, Ellison arrived at the mine at approximately 1:00 p.m. and went to the scale house, a building serving as the mine office. Ellison had been at the mine once before. Tr. 26. Ellison asked the dispatcher to notify Gene Smith, Dix River's supervisor, that he, Ellison, was on the property. Tr. 27. The dispatcher told Ellison that Smith was repairing a conveyor belt. *Id.* Therefore, Ellison began the inspection at the scale house office, where he looked through some of the company's records. He then inspected the employee's break room. Shortly thereafter, Smith arrived, and Ellison began inspecting the rest of the mine accompanied by Smith. Tr. 28. Ellison estimated he waited about an hour before Smith came to the office, but he denied the delay made him angry. Tr. 52.

Citation No.	**Date**	**30 C.F.R. §**
6108357	1/31/05	56.14112(b) [3]

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[2] In addition to his MSHA qualifications, Ellison holds a BA in history from Brigham Young University and an MA in occupational safety and health from Columbia Southern University. Tr. 25, 26.

[3] Section 56.14112(b) states:

> Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard.

Ellison and Smith traveled to the secondary crusher, a two-story structure with electrical components on both floors. Ellison explained that "[e]very mine has a crusher" and that part of his training with MSHA involved courses concerning the inspection of crushers. Tr. 24. On the second floor, the maintenance crew was working on a damaged belt. From the crusher control room, Ellison watched the miners. Soon, Smith left him to join them. Tr. 28.

Clarence Barrett, the control room operator was in the room. Tr. 28-29. Ellison noticed the guard for the roll crusher was not in place. It was around 3:00 p.m. He also noticed the "disconnect [for the crusher] had not been . . . locked out, so the only thing that prevented . . . [the] motor from starting . . . [was that] nobody had gone in and pushed the start button." Tr. 48. In Ellison's view, the guard had been missing for "a lengthy period of time" (Tr. 57), because Barrett told him the guard had been off since the previous Friday when the motor that drives the roll crusher was replaced. Tr. 29, 30.[4] (Barrett testified he did not recall this conversation. Tr. II 28.) Ellison asked Barrett why the guard was off. According to Ellison, Barrett responded he could not put it on himself. Tr. 29. Ellison also maintained Barrett told him the crusher had been operating that morning, and Barrett did not indicate tests or adjustments had been performed on the motor at any time that Monday. Tr. 31.

Ellison explained the motor had a pulley at its end. V-belts ran from the pulley to the crusher. The motor turned the pulley which, in turn, caused the v-belts to turn at a high speed. Tr. 34. A pinch point was created by the pulley and the belts. Tr. 34. In addition, there was another pinch point at the top of the pulley. Tr. 36. Ellison feared if the belts caught a person's clothing, hand, or finger, the person would be pulled into the pinch points. Tr. 36. In such case, the motor "wouldn't even slow down" and the person would suffer amputation, loss of blood and other significant injuries. Tr. 43.[5]

There was a walkway from the control room to the crusher. The walkway was adjacent to the motor. Ellison testified Barrett used the walkway several times during a shift. Tr. 38. Ellison also testified he had seen other Dix River employees use the walkway. Tr. 39. According to Ellison, the walkway made a turn of 90 degrees at the motor, which meant there were places from which a miner could contact the pinch points. Tr. 37. Ellison estimated the distance between the walkway and the nearest pinch point was "[a]pproximately 12 inches." Tr. 38. However, Ellison did not measure the distance. Tr. 55-56.

Ellison recalled Barrett expressing concern he would be injured because the motor was close to the walkway and Barrett had to pass it multiple times during a shift. Tr. 42. Ellison believed Barrett's fears were justified. Ellison had seen spillage on the walkway. Tr. 40.

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[4] The motor is depicted in Gov. Ex. 6

[5] Ellison also explained because the belts moved at, around 1,760 revolutions per minute, contact with their surfaces could produce abrasions. Tr. 43, 66.

Although no rocks were present that Monday, Ellison speculated that as normal mining operations continued, rocks could be caught in the walkway's metal grating. They could cause Barrett or other miners to slip or trip and contact the moving parts. Tr. 40.

Much of Ellison's testimony was contradicted by Owens, who maintained the walkway was not as close to the pinch points as Ellison believed. In fact, it only came within three feet of the pulley wheel and stopped at a dead end before the guarded area. Tr.139-140; *see also* Tr. 150. According to Owens, the only way a miner could reach the moving machine parts was to "climb up on the machinery . . . on crushers and stuff like that." Tr. 151.

Supervisor Smith, on the other hand, was not as certain that the moving parts were out of reach. Smith testified to touch them, "[y]ou would have to reach [or stretch] out." Tr. 180. He stated when the guard was off a person on the walkway could "walk over to . . . [the moving parts] and reach over to them" (Tr. 181), and if a person came in contact with the moving flywheel, "it would probably jerk you through it . . . . [and] kill you." Tr. 189.

As for Barrett's use of the walkway, Owens testified Barrett walked it to inspect the crusher before starting the equipment. However, Owens maintained Barrett always locked out the equipment before starting it and he again locked it out at the end of the work day. Moreover, Smith and Owens agreed because of noise and dust generated by the equipment, Barrett never used the walkway while the crusher was operating. Tr. 140, 189. Rather, he stayed in the operator's booth. Tr. 140-141.[6]

Owens explained why the guard was not in place. He stated the motor driving the belts stopped working on Thursday, January 27. A replacement was installed the same day. Tr. 145-146. Although it was necessary to remove the guard to install the new motor, the guard was reinstalled after the work was completed. Smith agreed with this scenario. Tr. 172-173.

As best Barrett could recall, the new motor was not installed completely until the following day, Friday. During the time the new motor was being installed, the guard was off and was "propped up on the walkway." Tr. II 12. After the motor was in place, Barrett ran it to make sure it was properly installed. In fact, according to Smith, rock was crushed at the mill on Friday, and Owens and Smith agreed when production was resumed on Friday, the guard was in place. Tr. 148, 174. Barrett, too, recalled rock being crushed on Friday and the guard being on. Tr. II 12.

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[6] However, Owens later stated Barrett stayed in the booth "about 95 percent of the time" (Tr. 152) and came out only "on occasion," "once a month" or "once a week." Barrett was less restrictive when describing his use of the walkway; he stated he might use it during the shift if, "I have to go up there and check the screen and see if it's shaking right." Tr. II 17.

In Smith's view, on Friday "everything seemed ... okay," but when he reached the mine the following Monday, Barrett told him there was "trouble." Tr. 175. Barrett testified the "trouble" first was noticed on Friday night after the crusher was shut down. Tr. II 13. A loose pulley had moved toward the newly installed motor. Barrett maintained the guard was in place over the weekend. Barrett reported the problem to Smith on Monday morning. Tr. II 19-20, 26. After reporting the malfunction, Barrett locked out the equipment. Tr. II 14-15. Because of the malfunction, production could not take place. Tr. II 25.

Smith testified the guard was again removed on Monday so the pulley could be returned to its correct position. Tr. 175-176; Tr. II 21, 27. After the problem was corrected, everyone went into the operator's booth and watched as Barrett restarted the equipment. Tr. 179, Tr. II 21, 27. Rock was crushed for about ten minutes in order to make sure the repair was proper and the pulley was secure. Tr. 179; *see also* Tr. II 22. During this test, the guard was off. Tr. II 22.

While this was going on, something else was occurring and complicating the situation. Smith stated a "belt was about to break in two" and had to be replaced. Tr. 176. Barrett agreed. In fact, according to Barrett, the belt was being repaired when Ellison arrived at the crusher. Tr. II 15-16.

Barrett recalled Ellison asking why the guard was off. Barrett stated he told Ellison, "[W]e . . . had to tighten the sheave up. Then we had to leave . . . [the guard off] till [sic] they run it . . . . In the meantime, they were working . . . [on the belt] and we hadn't had time to put . . . [the guard back] on." Tr. II 16. In other words, the guard could not be replaced because the crew was "all up there working on the belt," and Barrett could not put it on himself. Tr. II 27.

Smith agreed he was working on the belt problem when he was told Ellison was at the mine. Tr. 178. Smith went to get Ellison and brought him to the crusher. Smith then went back to help with the belt. Tr. 178. The next thing Smith knew, Barrett yelled that Ellison wanted the guard replaced immediately, and the guard was reinstalled. Tr. 178.

Owens was certain that while the repairs were underway on Monday, no one was endangered and there was no violation. While the equipment was being repaired, Barrett would have locked out the crusher, and when the mill was run to test the repairs, MSHA regulations allowed the guard to be off. Tr. 142-143.

With regard to negligence, Ellison believed Smith knew the guard was taken off on the previous Friday and that Smith had a responsibility to make sure it was put back in place before work resumed on Monday. Ellison testified Smith acknowledged production had been underway on Monday morning until the conveyor belt pulled apart. Tr. 44.[7] In failing to meet his responsibility, Ellison believed Smith, and through Smith the company, was negligent. Tr. 43-44.

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[7] In addition, Ellison noted rock on the conveyor belt, which indicated to Ellison the belt had been in operation prior to the time the belt problem developed. Tr. 49.

Ellison also testified Smith told him the electrician who should have replaced the guard was just too lazy to do it (Tr. 48), but Smith denied the exchange. Tr. 190. According to Smith, Ellison did not let him explain why the guard was off. Ellison simply demanded it be immediately replaced. Tr. 182.

Ellison also felt the failure to replace the guard represented an unwarrantable failure on the company's part. He stated Smith "had not made any effort to check on the completion of the job, [and] make sure it was safe." Tr. 47. Although the mine did not operate on Saturday and Sunday, the fact that Ellison believed the guard was missing from Friday to Monday had an impact on Ellison's unwarrantable failure finding. Tr. 47. [8]

The condition was abated in 30 minutes by replacing the guard. Ellison regarded this as prompt abatement. Tr. 76.

THE VIOLATION

Citation No. 6108357 states in part:

> The guard over the drive pulley and drive belts for the drive motor on the roll crusher was not in place. The guard had been removed to replace the motor . . . . Following the motor swap the end section of the guard was not reinstalled thereby exposing persons to the moving motor sheave and drive belts. A [walkway] is adjacent to the motor platform and drive unit. Persons are in the area on a daily basis.

Gov. Ex. 5.

Section 56.14112(b) is straightforward. It requires guards to be in place while machinery is being operated. The sole exception to the requirement is the guard can be "off" during adjustments or repairs to the machinery that cannot be made with the guard "on."

The first question is whether the guard was in place while the motor and drive belts for the crusher were operating. The inspection took place on a Monday. During the course of the

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[8] Ellison modified the citation from one initially issued pursuant to section 104(a) to one issued pursuant to section 104(d)(1) because of his conclusion regarding the company's unwarrantable failure and because approximately one month after the section 104(a) citation was issued, it was reviewed by his supervisor, who "pointed out the conditions for a [section] 104(d)(1) citation existed." Tr. 60.

inspection Ellison noticed the guard was not in place, and Ellison stated he was told by Barrett that it had been "off" since the previous Friday (Tr. 29-30). Barrett did not recall making the statement (Tr. II 28), and Smith, Owens and Barrett all maintained the guard was replaced after the new motor was put on. Tr. 148,174, Tr. II 12. Thus, the testimony is in conflict as to whether the guard was on or off on Saturday and Sunday, but it is a conflict I need not resolve, because it is clear that whether or not the guard was on or off the equipment, the crusher was not operated over the weekend. In fact, in the context of ongoing operations the quarry never would have been operated because production did not take place on the weekends.

It also is certain the guard was off on Monday, so the next question is whether the crusher motor was operated or was going to be operated on Monday while the guard was off. Although Ellison did not actually observe the crusher operating, Ellison testified Barrett told him the crusher motor had been operating on Monday morning with no guard, Tr. 31, and Barrett confirmed this was so. Tr. II 13, 23.

This leads to the question of whether the motor was operated in order to test the efficacy of the repair; or whether it was operated for other purposes. The testimony is in conflict on this critical issue. According to Ellison, Smith stated production occurred on Monday morning before miners had to repair the conveyor belt. Tr. 44. On the other hand, Smith maintained Monday was the day additional problems involving the motor required the guard to be removed while miners worked on the needed repairs. The equipment was operated with the guard off, but only as part of a test to make sure the repairs were successfully accomplished. Tr. 175-176, 179. Barrett agreed with this scenario. He stated that rock was crushed for about ten minutes to make sure the repairs were effective. Tr. II 21-22, 27; *see also* Tr. 179.

Therefore, under both Ellison's and the company's versions of events, the guard was not in place on Monday while the motor was operating. This would establish a violation unless, as the company contends, it was making adjustments which could not be performed without removal of the guard; in other words, unless the company's actions came within the regulatory exception.

I conclude the record supports finding the exception applied. Ellison did not see the motor operating. He did see rock on the conveyor belt (Tr. 49), but that rock does not support an inference production took place on Monday. Since the crusher did not operate over the weekend, the rock was as likely the result of production from the previous Friday as from Monday, or from when the equipment was operated to test the efficacy of the repairs. Moreover, I am struck by Barrett's testimony Ellison asked why the guard was off and Barrett explained about tightening the sheave and that the guard had to be off and the equipment operated while the repair was tested. Tr. II 16. I believe Barrett accurately related what he told Ellison. Barrett's response was logical, and it offers the most plausible explanation for why the guard was not replaced.[9] Even if,

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[9] Further, in view of Barrett's logical explanation, it is likely Smith's purported statement to Ellison that "production" took place on Monday morning (Tr. 44), if made at all,

as Ellison testified, Barrett told Ellison only that the crusher was operated that morning (Tr. 31), it was incumbent on Ellison, as the representative of the party bearing the burden of proof, to inquire as to the nature of the operation – *e.g.*, Was it for production purposes? Was it for test purposes? – something Ellison did not do.

I also find it logical that the company would have assigned miners to repair the belt before the guard was replaced. Production could not be resumed before the repair was made. It was important to get the work done. The fact that belt repair was going on at or nearly at the same time as the sheave was being tightened does not mean the company should be penalized because the belt repair was not completed. The two repairs were of a unit as far as returning to production was concerned, and it is reasonable to expect the guard would be replaced once the repairs were completed and the company was ready to resume production.

In sum, I conclude the Secretary did not present sufficient evidence to refute Dix River's defense, and I find the Secretary did not establish the alleged violation by a preponderance of the evidence. I will vacate the citation at the close of this decision.

Citation No.	Date	30 C.F.R. §
6108392	4/25/05	56.14107(a) [10]
6108393	4/26/05	56.14101(a)(2) [11]

On April 25 and 26, 2005, Ellison returned to the mine. His activities included the inspection of two trucks, a Euclid R-35 truck and a Euclid R-25. On the R-35 truck, Ellison found the crank shaft pulley and the pulley for the air conditioner compressor were not guarded. Tr. 72-73; *see* Gov. Ex. 8. The pulleys are near the front of the engine on the left side. Tr. 73.

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was a reference to activation of the equipment to test the repairs.

[10] Section 56.14107(a) states:

> Moving 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.

[11] Section 56.14101(a)(2) states:

> If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.

Ellison believed the position of the fender, "allow[ed] a person to step in behind the tire in close proximity to the pulleys and drive belt on the crank shaft and compressor." Tr. 73.

Ellison posited reasons why drivers or other miners might place themselves in close proximity to the unguarded moving parts. First, drivers went behind the fender "quite often" to investigate noises or vibrations emanating from the engine. Tr. 73-74. Second, although he agreed the company's normal procedure was to check the oil while the engine was not running, he noted the oil dip stick was on the same side of the engine as the unguarded pulleys. Tr. 74, 77. Third, drivers not infrequently used the space behind the tire as a pissoir. Tr. 74.

Ellison's fears were disputed by Owens, who maintained, "the truck can't be running to check the oil" (Tr. 155, *see* Tr. 156), and who testified he was not aware of miners relieving themselves behind the fender. It would be "against . . . company rules." Tr. 155. Besides, the company maintained two on-site bathrooms. Tr. 155. Owens also noted the truck was manufactured without a guard. Tr. 156.

With regard to the kind of injury that might result from the lack of a guard, Ellison testified the crank shaft was a foot-and-a-half inside the truck frame and about five feet aboveground. The compressor pulley was even closer to the frame. Tr. 74-75. If a driver or other miner got his or her hand or fingers caught in the shaft or pulley, Ellison believed he or she would suffer cuts and "maybe a broken bone." Tr. 75. However, he also believed such an accident was "unlikely" because there was no reason for a person to visit the area daily. It was "not likely a person would be in . . . [the area] unless something drew him there." Tr. 75.

In Ellison's view, the violation was due to the company's "moderate" negligence. He agreed the truck was manufactured without a guard, and he noted no one reported the condition to mine management. Tr. 76.

The condition was promptly abated by installing a screen over the cited area. Tr. 75-76.

The following day, Ellison inspected the R-25 tuck. The truck was used to transport rock to the mine's primary crusher. The truck was stopped above the top of the ramp near the crusher. Ellison checked the truck's park brake and found that it would not hold the truck. Tr. 77-78. The truck was loaded, and Ellison estimated the grade on which the truck was parked as "somewhere around four percent." Tr. 78.

Ellison testified how he determined the brake was not functioning. He ask the truck driver to set the brake three times, and each time the brake failed to hold the truck. Tr. 78. The truck's engine was running when the tests were conducted. Tr. 78-79. The truck's pneumatic service brakes have a short life if the engine is not running because the air compressor cannot refill the air brake reservoir. Tr. 79, 82-83. The only way to stop the truck when the engine is off is with the park brake. Tr. 79, 82-83. Thus, if the engine failed, the service brakes would not work and, given the non-functioning park brake, there would be no way to stop the truck. It

would descend uncontrolled to the bottom of the pit or roll off of the road, and the driver, or others, would be seriously, even fatally, injured. Tr. 79-80.[12] In Ellison's view, the lack of a working park brake created a "serious and significant situation." Tr. 83.

Owens maintained Ellison did not properly test the brake. To do it right, the air pressure should have been 120 pounds per square inch (p.s.i.). The inspector did not let the truck operator "pump the air to 120," thus invalidating the test. Tr. 158, 161, *see also* Tr. 150. Owens also noted the truck was inspected by MSHA at least ten other times and its brakes never were found inadequate. Tr. 150.

Owens did not share Ellison's concern that an engine failure would lead to a runaway. He testified if the truck's engine cut off, the service brakes would "probably work for at least 10 or 15 minutes." Tr. 157. He maintained, "There [was] enough air [pressure] on reserve to take care of that truck." *Id.*

As for the company's negligence, Ellison believed is was moderate. The truck operator did not report the defective brake to Smith. Rather, the truck operator told Ellison the brake worked the morning of the inspection. Tr. 80, *see also* Tr. 81.

After Ellison issued a citation the truck was moved onto a flat area and the park brake was repaired. Tr. 78, 81.

THE VIOLATIONS

Citation No. 6108392 states in part:

> The crankshaft pulley, drive belt and compressor pulley for the air compressor on the Euclid R-35 . . . were not guarded to prevent contact on the moving parts by persons. The pulleys and belt are located on the left side of the engine compartment at the front of the truck engine, behind the left tire. This is the same side of the engine as the engine oil dip stick. Persons are in this area at least once each shift that the truck is operating. Normal procedures are to check engine oil while the engine is not running.

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[12] Ellison noted Smith told him the road had grades of up to ten percent. Tr. 78, *see also* Tr. 79. The road also had several turns, including a long sweeping U-turn before it descended to the bottom of the pit. Tr. 79. In addition, there was a powder magazine and a maintenance area along the road where miners worked. Moreover, on the day the alleged violation was cited, an excavator was operating in the area of the long turn. Tr. 80.

Gov. Ex. 7.

Section 56.14107(a) requires moving machine parts to be guarded to protect persons from the parts specified in the standard and from similar parts that can cause injury. There is no question the cited pulleys and drive belt were the kinds of parts coming within the standard. As Ellison persuasively testified, if the pulleys and drive belt were operating and were contacted by miners, they could cause a serious injury. Tr. 75.

Further, everyone agreed the parts were not guarded. Tr. 72-73, 156; Gov. Ex. 8. Indeed, as Owens noted, a guard never was installed. Tr. 156. For these reasons I conclude the violation of section 56.14107(a) existed as charged.

Citation No. 6108393 states in part:

> The park brake on the Euclid R-25 . . . [t]ruck, would hold on the typical slope traveled with the typical load. The truck was tested, loaded with production rock, on the pit haul road near the jaw crusher where the slope is between 4% and 6% grade. The haul road climbs about 125 feet from the loading area near the bottom of the pit to the jaw crusher at the top. The grade ranges between about 10% grade to about 4%. Each truck hauls between 25-35 loads each shift that the crusher operates. The haul road has sever turns, including one sweeping, long U turn near the bottom.

Gov. Ex. 9.

There is no question Ellison found the park brake did not function as required by the standard. Such brakes are required to hold a truck like the R-25 "with its typical load on the maximum grade it travels." 30 C.F.R. § 14101(a)(2). Ellison testified that the truck was loaded and that it was parked on a grade that was "around four percent." Tr. 77-78. Although that grade was less than the maximum grade the truck traveled (Tr. 78-79), if the park brake would not hold on the lesser grade, it would not hold on the maximum grade. Further, it is clear the park brake would not keep the truck from moving. Ellison testified he had the brake tested three times, and each time it failed. Tr. 78. Although Owens challenged the way in which the tests were conducted, he did not refute Ellison's contention that if the engine cut off and the service brakes failed, the lack of a properly functioning park brake meant there was no sure way to stop the truck. Tr. 55, 79, 82-83, 165. From all of this, I conclude the violation existed as charged.

S&S AND GRAVITY

The Secretary did not allege the lack of a guard for the pulleys and drive belt of the air compressor on the R-35 truck (Citation No. 6108392) was an S&S violation, and for good reason. The evidence supports finding a miner could, but rarely would, go behind the wheel to check on an engine malfunction or to answer the call of nature. It also supports finding the engine should be off when the oil is checked. It is true that once behind the tire a miner could slip or trip and contact the moving, unguarded pulleys and belt,[13] but the fact a miner rarely would go behind the tire meant an accident would be equally rare. Indeed, the possibility of an accident was so unlikely as to render the violation less than serious.

In contrast to the violation of section 56.14107(a) (Citation No. 6108392), the Secretary alleged the violation of section 56.14101(a)(2) (Citation No. 6108393) was S&S. An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S, "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (January 1984); *accord Buck Creek Coal Co., Inc.* 52 F. 3rd 133, 135(7th Cir. 1995); *Austin Power Co., Inc. v, Sec'y of Labor*, 81 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985). Further, an S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (August 1985); *U.S. Steel*, 7 FMSHRC at 1130.

Finally, the S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September, 1996).

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[13] The moving parts were within easy reach. Tr. 74-75.

I conclude the violation of section 56.14101(a)(2) (Citation No. 6108393) was both S&S and serious. I have found the park brake on the R-25 truck was non-functioning and in violation of section 56.1410(a)(2). I further find the lack of the park brake contributed to the danger of the truck running away, a condition that would endanger its driver and those working or traveling along the road as the driver descended into the pit. Tr. 79-80. In this regard, Ellison's testimony was convincing. Certainly, in the context of continuing mining operations, it was likely the truck's engine would fail during one of its frequent and repeated descents into the pit and the service brakes would be lost as air pressure faded. The service brakes might or might not lock, but the only thing left to stop or control the truck would be the park brake. (Ellison specifically noted, when the engine was not functioning, the service brakes quickly bled off and the park brake had to be used. Tr. 82-83.) Moreover, the road's grades must be kept in mind. *See* Tr. 79. They meant in the event of engine failure during a descent, without a park brake to slow and stop the truck, it quickly would gather speed and most likely would roll uncontrolled down or off the road or ramp. Tr. 79-80. It was reasonably likely that such an uncontrolled descent would result in very serious injuries or, worse, to the truck driver and/or to those working in the area. Tr. 79-80. These factors made the violation S&S.

I also find the gravity of the reasonably expected injuries resulting from the truck's running away (contusions, broken bones, or even death) made the violation serious.

NEGLIGENCE

The violation of section 56.14107(a) (Citation No. 6108392) was the result of the company's neglect. Negligence is the failure to meet the standard of care required by the circumstances, and I find the Secretary established Dix River failed to meet its required standard of care. Even though the truck was manufactured without a guard and even though the condition was not reported (*see* Tr. 76), the lack of a guard was visually obvious. Moreover, I take note of the fact such trucks are subject to inspection prior to use. Reasonable care required the exposed moving engine parts be guarded.

In the case of the violation of section 56. 14101(a)(2) (Citation No. 6108393), I conclude the Secretary did not establish Dix River was negligent. Although there is scant relevant testimony on the subject, it is clear Ellison accepted what he was told by the truck's operator, that the park brake functioned properly on the morning of the inspection. Tr. 81. The citation was issued at 9:30 a.m., which leads me to conclude the brake was ineffective for only a very brief period. There is no testimony the park brake was or should have been used between its pre-operational inspection, when it presumably functioned properly, and the time it was cited by Ellison, and there is no basis in the record to conclude mine management knew or should have known the brake was defective prior to Ellison finding it so.

Citation No.	Date	30 C.F.R. §
6108394	4/26/05	56.14107(a) [14]

During the course of his April 26 inspection, Ellison saw miners working in the general area of the primary crusher. As a result, Ellison examined the crusher's discharge belt. Tr. 102. (The belt was the No.1 conveyor belt, and it ran from the crusher to the silo where the crushed material was deposited. Tr. 166.) Ellison noticed an idler roller on the belt was not guarded. The belt, which ran over the top of the roller, moved toward the right as Ellison faced the belt. The belt caused the roller to turned clockwise. Tr. 87. *See* Gov. Ex.12. A walkway passed within one foot of the roller. Tr. 88. As Ellison recalled, the roller was approximately four feet above the ground. Tr. 91. The unguarded idler roller was "very obvious." (Tr. 91). Ellison saw no indication it ever had been guarded. Tr. 91, 94.

The tail roller of the discharge belt also was in the area. The tail roller often needed adjustment and cleaning. Material carried back on the belt after it discharged frequently sloughed off in the area of the tail roller, about ten feet behind the idler roller. Tr. 89-90. Ellison believed the area was cleaned by employees using shovels and hoses. Tr. 88-89. In fact, during the inspection, Ellison saw a miner using a hose to clean under the belt. As Ellison recalled, the miner was "a couple of feet" from the belt and the miner passed "within two feet of the roller." Tr. 90. Ellison believed miners could work from both sides of the belt, and a hazard existed regardless of the side used. Tr. 99. However, at the time of the inspection the belt was not operating, and Ellison could not recall if the belt was locked out while the cleaning was taking place. Tr. 94

Ellison testified if a miner stooped under the belt to retrieve a tool, he or she could be exposed to contact with the moving roller. In addition, because mud built up on the idler roller, Ellison believed "people sometimes [were] tempted to take a shovel and clean the mud off." Tr. 91. His main fear was that, in the course of cleaning, miners would travel under the belt and be exposed to the unguarded roller. He observed miners at times took shortcuts. Tr. 104.

Because the belt and the roller turned toward one another, anyone caught between them would be pulled into the pinch point. The speed at which the belt traveled made it unlikely a miner could extricate himself or herself. In fact, in similar situations miners had been suffocated or killed by the belt cutting through their bodies. Tr. 92.

Owens testified that Larry Wilson, the jaw crusher operator, inspected the crusher every morning before production started. Tr. 167. In order to do this, Wilson climbed down a ladder to look at various levels of the crusher. When he conducted a pre-operational inspection "[e]verything was tagged and locked out." Tr. 167. Owens maintained that Wilson never went near the equipment without the power being off. (He stated, "That's the rule, and they all do it."

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[14] The standard is set forth in n.10 *supra*.

Tr. 167). Owens observed Wilson hosed collected fines from beneath the crusher, and it was almost always wet in the area. Tr. 167-168.

Owens speculated the unguarded idler roller was "probably . . . at least 20 feet . . . [from] the . . . crusher." Tr. 167. Owens also stated the roller was "approximately 32 inches off . . . the ground," and Wilson "never [went] under it and . . . never work[ed] under it, [and] never crosse[d] under it, because . . . [he'd] have to get down on . . . [his] hands and knees if he did." Tr. 167. [15]

Wilson maintained he went to the area of the idler roller every day to grease fittings. Tr. 202-203. He applied grease either in the morning before the operation started, or in the evening after everything shut down. He never did so when the belt was moving. Tr. 202-203. The only time other miners went into the area was when something had to be repaired. Then, all the equipment was locked out. Tr. 203-204. Wilson testified no one traveled in the area of the return idler while the equipment was operating. Tr. 202. Wilson observed the idler roller never had been previously cited. Tr. 169.

Ellison found the violation was S&S because he believed the belt was operated "a long time" without the roller being guarded. Tr. 93. He also found Dix River was negligent, but that its negligence was tempered by the fact foreman Gene Smith, who was supposed to examine the area, was incapacitated and could not perform the examination. No one else reported the condition to Smith. Tr. 93.[16]

The condition was abated when Dix River fabricated and installed a guard. Tr. 95. Ellison believed this constituted good faith abatement. Tr. 100.

THE VIOLATION

Citation No. 6108394 states:

> The return idler at the lower end of the # 1 conveyor belt was not guarded to prevent contact with the moving parts. The idler is located at the lower end of the # 1 conveyor about 10 feet from the tail roller.

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[15] Wilson agreed with Owens there was not enough room to travel and work under the belt. Tr. 205.

[16] However, Ellison acknowledged it was the company's duty to assign someone to do a proper workplace examination, and the person conducting an examination was required to report any hazardous condition to mine management, which, in turn, was required to "repair the situation." Tr. 94.

> It is about 4 feet above the concrete pad that the jaw crusher and conveying equipment sits on. Persons are in the area on a daily basis to inspect, lubricate, adjust or clean. The cleaning is accomplished by using a water hose to wash spilled rock from under the conveyor belt. Contact with the unguarded idler could result in loose clothing, hands, or arms becoming entangled with the moving roller.

Gov. Ex. 11.

As previously noted, section 56.14107(a) requires moving machine parts to be guarded to protect persons from specified and similar parts that can cause injury. An idler roller is not one of the specified parts. However, it is a moving machine part that can cause injury. If there is a reasonable possibility the roller can be contacted, it must be guarded. *See Thompson Brothers Coal Co., Inc.*, 6 FMSHRC 2094, 2097 (September 1984).

I conclude Ellison's decision to cite Dix River for a violation of section 56.14107 was proper. The idler roller was in a position (under the belt and belt structure) where it could be accessed and where miners might travel to repair or maintain the belt structure and or belt parts, or to clean around the crusher.

Owens' credible testimony that the belt was too low to travel under [17] and his testimony that miners hosed, not shoveled, fines from under the crusher, removed from the realm of reasonable possibility two of Ellison's fears how a miner would be caught in the pinch point created by the roller while shoveling or traveling under it. Nonetheless, contact remained a reasonable possibility.

The area near the roller was constantly wet from hosing. Further, I accept Wilson's testimony miners at times went into the vicinity of the roller to make repairs. Tr. 203-204. I conclude the wet surface of the floor in the vicinity of the roller combined with the visits of miners sent to hose the area, or to repair or maintain the belt and/or belt structure, as well as the approximately 32-inch height of the roller, created a reasonable possibility a miner would slip and fall and be ensnared in the unguarded pinch point. Moreover, Dix River's witnesses did not dispute Ellison's testimony that on one side of the belt a walkway passed within one foot of one

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[17] Although Ellison testified the roller was approximately four feet above the concrete apron on which the structure rested (Tr. 91), Owens's testimony that it was approximately 32 inches above the apron was more believable. Tr. 167. Owens visited the area shortly before the hearing and presumably had a fresher recollection of the conditions at and around the crusher, and there was no evidence the roller was repositioned between Ellison's inspection and Owens's visit.

end of the roller. Tr. 88. This, too, meant a miner would be close enough to the pinch point where a slip would be dangerous. The idler roller should have been guarded. Tr. 91-92, 104.

This stated, I recognize Owens maintained Wilson always locked out the crusher (Tr. 167), and Ellison stated the pinch point "would not be a hazard" if the belt was locked out (Tr. 96). Wilson, too, maintained when miners made repairs in the vicinity of the roller, the belt always was locked out. Tr. 203-204. However, the history of mining is replete with injuries and fatalities which occurred when preventive practices that "always" were implemented, were not. Therefore, I conclude that in the context of continued mining, despite a generally practiced lock-out procedure at the crusher, the guard should have been in place.

S&S AND GRAVITY

I have found there was a violation of the cited standard. It is clear to me there also was a safety hazard that was contributed to by the violation; namely, the possibility a miner would be caught and pulled into the pinch point. Moreover, I conclude in the context of ongoing mining operations that even if the practice at the mine was to shut down the belt while miners made repairs in the vicinity of the roller or hosed away accumulated material, it was reasonably likely a miner would slip or trip and be caught in the pinch point because best mining practices are not invariably followed, and the fact the area under and around the belt was almost always wet, made an injury-producing slip likely.

Further, I find the Secretary established if contact with the unguarded pinch point occurred, suffocation, laceration and/or death would result. Obviously, these consequences were "reasonably serious," which, given the other findings, means the inspector properly found the violation to be S&S. Moreover, in view of the likely injuries, the violation was serious.

NEGLIGENCE

The lack of a guard was "visually obvious." Tr. 91. Dix River should have known a guard was necessary. Ellison saw no indication one ever was installed, and Dix River presented no evidence to the contrary. Tr. 91, 94. However, Ellison's inspection was not the first time the mine was inspected by MSHA, and the lack of a guard was not previously cited. Tr. 169. While the failure of inspectors previously to cite the missing guard does not provide Dix River with a defense, it lessens the company's negligence. The degree of its negligence was less than had it failed to replace an existing guard. Therefore, I find the company's negligence was low.

Citation No.	Date	30 C.F.R. §
6108395	4/26/05	56.14101(a)(3) [18]

[18] The standard states:

Later that morning, Ellison inspected a water truck Dix River leased for use at the mine. Tr. 106. The truck was parked, but the truck driver told Ellison the truck had been used that morning to wet down the mine's roadways, including those at the pit and stockpile Tr. 106-107. (As previously noted, Ellison testified the maximum grade of the road that ran into the pit was ten percent. Tr. 107). At the time Ellison inspected the truck, it was located on "a flat level area at the tip of the ramp adjacent to the . . . dump area." Tr. 107.

Part of the inspection of the truck involved testing the truck's pneumatic service brakes. The test was conducted at the flat, level area.[19] Ellison asked the driver to start the engine and let it idle until the air pressure reached 95 pounds per square inch (p.s.i.). He then asked the driver to apply the service brakes. When the driver applied the brakes, the air pressure dropped from 95 p.s.i. to 70 p.s.i.. This indicated there was a leak in the brake system air lines. In fact, Ellison heard the air leaking. Tr. 115. Ellison explained if the driver applied the brakes multiple times, the air would leak off and it would be "very, very likely . . . [the driver] would not be able to stop the truck." Tr. 108.

Although Ellison was not a mechanic, he stated he knew "the principal operation of air brakes." Tr. 112. He did not know the minimum air pressure needed to stop the truck; but he believed to be safe, the pressure should be at least 95 p.s.i. Tr. 108.[20] When the truck operator requested Ellison let the p.s.i. get to the "operating p.s.i." before the test was conducted, Ellison waited until the air pressure got as "high as it would go," which, according to Ellison, was 95 p.s.i. Tr. 112, 113. Because the air pressure then dropped to 70 p.s.i. and could not be sustained at 95 p.s.i., Ellison concluded the brake system was not maintained in functional condition and that the lack of properly maintained service brakes was reasonably likely to result in a fatal injury. Tr. 109. Ellison noted the truck was operated on the steep, sloping road into the pit, and that a service brake failure could lead to the truck's uncontrolled descent and to its overturning. According to Ellison, this type of accident "often result[ed] in fatal injuries." Tr. 109. In addition to the driver, other miners were at risk -- those that used the road and those working in an area set aside for equipment maintenance adjacent to the road. Tr. 109-110.

> All braking systems install on . . . [self-propelled mobile] equipment shall be maintained in functional condition.

[19] Ellison did not ask the driver to set the service brakes on a grade because he did not want to put the driver at risk if there were a brake failure. Tr. 114-115.

[20] Ellison stated that 95 p.s.i. was in the green area of the pressure gauge in the truck's cab, whereas 70 p.s.i. was in the red area. He was not sure if the gauge had a margin of error. Tr. 109, 115.

Ellison believed Dix River was negligent in allowing the service brakes to malfunction. However, the company's negligence was mitigated, in Ellison's view, by the fact that he could not establish the condition of the brakes was reported to company officials. The truck driver told Ellison the air line "didn't leak last time . . . [he] ran . . . [the truck]" (Tr. 110), and Ellison could not remember if he asked the driver whether there were problems with the service brakes on prior runs. Tr. 113.

The condition was abated by the installation of new brake system parts. Tr. 111; Gov. Ex.13 at 2-3.

THE VIOLATION

Citation No. 6108395 states:

> The service brake on the . . . water truck . . . was not maintained in a functional condition in that an air leak existed in the area of the break chambers on the rea[r] axle. When tested the air pressure on the truck compressed air system, dropped from 95 p.s.i. to about 70 p.s.i. when the service brake was being applied. When tested at a high engine idle as long as the service brake remained applied the compressor would not recover air pressure. The water truck is used to water roads throughout the mine, including the inclined haul road coming out of the quarry pit.

Gov. Ex. 13.

I conclude the violation existed as charged. Clearly, air was leaking from the system. Ellison heard it, and Dix River did not deny it. Tr. 114-115. It is equally clear the air pressure in the system dropped from 95 p.s.i. to 70 p.s.i. Tr. 114-115. Pneumatic brakes are not maintained in "functional condition" as required by the standard, if there is a leak in the system, and this is true even if the leak does not cause the air pressure to fall to the point where the brakes are wholly inoperable. The condition must be viewed from the standpoint of continuing mining operations, and in this context it is reasonable to assume that the leaking air will continue until the brakes fail.

S&S AND GRAVITY

I have found there was a violation of the cited standard. I also find there was a safety hazard contributed to by the violation, namely, and as Ellison testified, that as the truck was driven and the driver applied the brakes, the air pressure would continue to decline and the

brakes would not be able to stop or, ultimately, even to slow the truck. Tr. 108. This situation not only endangered the truck driver, it also put at risk others who traveled or worked in the vicinity of the truck.

Moreover, in the context of ongoing mining operations, I conclude it was reasonably likely that the brakes would fail and injuries would result. Ellison described the road leading into the pit as steep and long, and he noted on the day the violation was observed an excavator was being repaired in an area along the side of the road. Tr. 109-110. Ellison properly concluded under these circumstances a serious, even fatal, runaway accident was "very, very likely." Tr. 108. Obviously, injuries resulting from such an accident would be either reasonably serious or fatal. Therefore, I agree with the inspector the violation was S&S. Moreover, given the expected consequences, it was serious.

NEGLIGENCE

The company knew the truck would be operated in circumstances where non-functioning brakes would pose a hazard not only to the driver but to those working and/or traveling near the truck. It realized, or should have realized, how important fully functional service brakes were to the safety of its miners. The fact that Ellison found the truck being operated with a audibly leaking brake system means the company did not meet the standard of care required by the circumstances and was negligent. Although Ellison could not establish company officials knew of the condition through a prior report or reports, and although Ellison could not establish the system was leaking the last time the driver used the truck (Tr. 110, 113), it does not excuse the company of negligence, but, rather, means there was no showing of aggravated conduct by the company. The violation was audibly obvious and should have been detected and corrected.

Citation No.	Date	30 C.F.R. §
6108398	4/26/05	56.20003(a) [21]

Citation No. 6108398 states:

> The passageway at the base of the stair to the pug mill feed conveyor was not kept clean and orderly. A spill of material had occurred which buried the approach to the stair and the bottom two stair steps. Persons must use this stair to access the pug mill

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[21] The standard states:

> At all working operations –
> (a) Work places, passageways, store rooms, and service rooms shall be kept clean and orderly [.]

> control platform. The pug mill is seldom used because of low demand.

Gov. Ex. 15.

During the course of the April 26 inspection, Ellison noticed a pile of spilled material at the bottom of a "ladder stairway" leading to the pug mill. The material had fallen off the mill conveyor (Tr. 116-117; Gov. Ex. 16). The material, was of various sizes. It covered the approach to the stairway so that the bottom two stairs or treads of the ladder were covered. Tr. 116-117, 123.

Although Ellison identified a photograph depicting the spilled material (Tr. 116; Gov. Ex.16), Smith maintained the photograph was misleading. According to Smith, the angle at which the photograph was taken made it appear the material was snug against the steps, when in fact it was not. Tr. 197. Rather, there was a narrow walkway between the spilled material and the steps. The walkway was not shown on the photograph. According to Smith, the walkway consisted of material that had "flattened out." Tr. 196. Smith insisted miners coming down the ladder would step onto the flattened area. Tr. 196. The bottom step was snug to the ground, and although the second step from the ground had loose material on it, the material was level, and there were no mounds of material up against the steps. Tr. 196, 199; *see* Co. Exs. 9 and 10. Smith also emphasized the pug mill, "hadn't been used in some time." Tr. 196.

Ellison believed the area at the bottom of the stairway was a workplace as well as a passageway. Tr. 118. He noted a miner "ha[d] to go up the ladder to get to the control to the pug mill to operate it." Tr. 118; *see also* Tr. 119. He also believed a miner had to travel across the material to reach and use the stairway. Tr. 117-118, 123-124.

In Ellison's opinion, the material presented a slip-and-fall hazard. If a miner fell accessing or using the stairway, he or she could suffer an ankle, knee or wrist injury. Tr. 118; *see also* Tr. 120-121. But, such an accident was not likely. Ellison explained the material, which had been wet originally, hardened over time so that a miner was not "near as likely to fall as if it was a fresh spill." Tr. 221. Moreover, access to the mill was limited. Tr. 221. Nonetheless, because the spilled material prevented the area in which it existed from being kept "clean and orderly," Ellison believed Dix River violated section 56.2003(a).

Ellison was told the pug mill was not in operation for "several months" (Tr. 121) and that "the pug mill is seldom used." Tr. 124. Although the material was visually obvious, Ellison considered Dix River's negligence to be no more than "moderate." In making this determination, he noted the infrequent use of the mill. Tr. 122.

The company abated the condition by cleaning up the material with a front end loader. Tr. 122-123.

THE VIOLATION

I conclude the testimony establishes the bottom two steps and the approach to the stair leading to the pug mill were not kept "clean and orderly" as required by section 56.20003(a). I accept as a fact – as Ellison testified and as Gov. Ex.16 shows – that the approach was strewn with piles of material of various sizes. While I also accept Smith's testimony the tramped down material created a "little walkway" at the foot of the stairs (Tr. 196), the "walkway" was obviously narrow and a misstep still could have placed a miner's foot outside the confines of the walkway and onto the piled material. The area into which miners could step as well as the ladder treads were parts of the "passageway" covered by the citation. The presence of the material in the area approaching the ladder meant the passageway was not kept "clean and orderly." In addition, even though, as Smith testified, the material on the bottom two steps was level, it was, as he admitted, loose. Tr. 196. The presence of the loose material also meant the passageway to the from the pug mill was not kept "clean and orderly" as required by the standard.

GRAVITY

The inspector properly believed the violation was not serious. Even when the mill was operating, access to it was limited (Tr. 121), and, as Ellison and Smith further observed, the mill had not operated recently. Tr. 121, 124, 196. Moreover, if a miner were to access the stairway and surrounding area, it was not likely an injury-causing accident would occur. The steps not kept clean and orderly were the lowest two, meaning a stumble was more likely than a fall. Further, the presence of the "little walkway" reduced the chance a miner who stumbled approaching the ladder would be injured, and Ellison's uncontradicted testimony, that the originally wet material had dried, limited the chance of a stumble and injury even more. Tr. 121.

NEGLIGENCE

The piles of material and the covered treads were visually obvious. The condition should have been detected and corrected by Dix River. In failing to do so, Dix River was negligent, but the degree of its negligent was low. The lack of use of the area meant that it was not subject to frequent inspection by Dix River personnel. Moreover, the diminished hazard created by the violation justified a lower level of watchfulness on the company's part.

CIVIL PENALTY CRITERIA APPLICABLE TO ALL VIOLATIONS

ABILITY TO CONTINUE IN BUSINESS

The parties stipulated the proposed penalties would not affect the ability of Dix River to continue in business. Stip. 4.

SIZE

The parties stipulated the mine is a small metal, nonmetal mine that operates one production shift per day during five-day-weeks, with annual hours worked ranging from 10,000 to 20,000, and that the mine's controlling entity, Dix River, is a small operator with less than 60,000 annual hours worked per year. Stips. 5, 6.

GOOD FAITH ABATEMENT

As the witnesses testified, the conditions resulting in each violation were abated promptly and in good faith by Dix River.

HISTORY OF PREVIOUS VIOLATIONS

The parties stipulated in 2005 the mine received seven citations over nine inspection days, in 2004 it received no citations over 19 inspection days, and in 2003 it received six citations over four inspection days. Stip. 7; *see* Gov. Ex. 2. This is a small history.

CIVIL PENALTY ASSESSMENTS

DOCKET NO. KENT 05-424-M

Citation No.	Date	30 C.F.R. §	Proposed Assessment
6108357	1/31/05	56.14112(b)	$500

I have found the Secretary did not prove the alleged violation. Therefore, there is no basis to assess a penalty.

DOCKET NO. KENT 05-386-M

Citation No.	Date	30 C.F.R. §	Proposed Assessment
6108392	4/25/05	56.14107(a)	$60.00

I have found the violation was not serious and was due to Dix River's negligence. The violation was abated in good faith and the penalty will not affect the company's ability to continue in business. Given these criteria, and in view of Dix River's small size and small history of previous violations, I conclude an assessment of $50.00 is appropriate.

Citation No.	Date	30 C.F.R. §	Proposed Assessment
6108393	4/26/05	56.14101(a)(2)	$135.00

I have found the violation was serious and was not due to Dix River's negligence. The violation was abated in good faith and the penalty will not affect the company's ability to continue in business. Given these criteria, and in view of Dix River's small size and small history of previous violations, I conclude an assessment of $100.00 is appropriate.

Citation No.	Date	30 C.F.R. §	Proposed Assessment
6108394	4/26/05	56.14107(a)	$135.00

I have found the violation was serious and was due to Dix River's negligence. The violation was abated in good faith and the penalty will not affect the company's ability to continue in business. Given these criteria, and in view of Dix River's small size and small history of previous violations, I conclude an assessment of $120.00 is appropriate.

Citation No.	Date	30 C.F.R. §	Proposed Assessment
6108395	4/26/05	56.14101(a)(3)	$135.00

I have found the violation was serious and was due to Dix River's negligence. The violation was abated in good faith and the penalty will not affect the company's ability to continue in business. Given these criteria, and in view of Dix River's small size and small history of previous violations, I conclude an assessment of $150.00 is appropriate.

Citation No.	Date	30 C.F.R. §	Proposed Assessment
6108398	4/26/05	56.20003(a)	$60.00

I have found the violation was not serious and was due to Dix River's low negligence. The violation was abated in good faith and the penalty will not affect the company's ability to continue in business. Given these criteria, and in view of Dix River's small size and small history of previous violations, I conclude an assessment of $40 is appropriate.

Citation No.	Date	30 C.F.R. §	Proposed Assessment
6108397	4/26/05	56.12025	$135.00

At the hearing, Dix River stated it wished to withdraw its request for a hearing on the validity of the citation. Tr. 13. Accordingly, I conclude the violation existed as charged and an assessment of $135 is appropriate.

Citation No.	Date	30 C.F.R. §	Proposed Assessment
6108396	4/26/05	56.12025	$60.00

At the hearing, Dix River stated it wished to withdraw its request for a hearing on the validity of the citation. Tr. 70. Accordingly, I conclude the violation existed as charged and an assessment of $60 is appropriate.

ORDER

Citation No. 6108357 **IS VACATED.** Within 30 days of the date of this decision, Dix River **SHALL PAY** to the Secretary civil penalties totaling $655 for the violations found above. In addition, within the same 30 days, the Secretary **SHALL MODIFY** Citation No. 6108357 from a citation issued pursuant to section 104(d)(1) of the Act (30 U.S.C. § 814(d)(1)) to a citation issued pursuant to section 104(a). 30 U.S.C. § 814(a). Upon payment of the penalties and modification of the citation, these proceedings **ARE DISMISSED.**

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

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/ej

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 7, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 2006-12 A. C. No. 01-01247-66219
v.	:	
JIM WALTER RESOURCES, INC., Respondent	:	No. 4 Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Guy W. Hensley, Esq., Jim Walter Resources, Inc., Brookwood, Alabama, on behalf of Jim Walter Resources, Inc.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalties filed by the Secretary of Labor ("Secretary"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 ("Act"). The petition alleges that Jim Walter Resources, Inc., ("Jim Walter") is liable for four violations of the Secretary's regulations applicable to underground coal mines, and proposes the imposition of civil penalties in the amount of $18,714.00. A hearing was held in Birmingham, Alabama, and the parties filed briefs after receipt of the transcript.[1] The parties agreed to settle one of the alleged violations during the course of the hearing, and made an oral motion to approve the settlement. That motion will be granted. For the reasons set forth below, I find that Jim Walter committed two of the three remaining alleged violations, and impose civil penalties in the amount of $9,300.00 for those

[1] Respondent's reply brief included references to portions of a deposition transcript that were not in evidence. The Secretary moved to strike that text and a footnote alluding to the absence of charges under section 110(c) of the Act. The paragraph beginning on the bottom of page seven of Respondent's reply brief and carrying over onto page eight is hereby stricken. The motion as to the footnote is denied. The Secretary had requested leave to supplement the record with portions of Woods' deposition, but did not timely do so. The Secretary's motion for an extension of time, and Respondent's motion to supplement the record with portions of Church's deposition, were denied by Order dated December 4, 2006.

violations.

Findings of Fact - Conclusions of Law

Jim Walter operates an underground coal mine, the No. 4 Mine, near Tuscaloosa, Alabama. Like most mines in the area, it is "gassy," liberating over seven million cubic feet of methane per day. As a result, it is subject to 5-day spot inspections by the Secretary's Mine Safety and Health Administration ("MSHA"), pursuant to section 103(i) of the Act. 30 U.S.C. § 813(i). On June 8, 2005, John M. Church, an MSHA inspector, conducted a spot inspection at the No. 4 Mine. He was accompanied by Steven E. Womack, an inspector-in-training.

After meeting with management officials and reviewing pertinent documents, including preshift reports, Church and Womack entered the mine. They were accompanied by Arnold G. Loggins, a miners' representative, and Jimmy E. Brackner, Jim Walter's associate safety supervisor. Church knew from prior experience that the No. 8 section, or mechanized mining unit, was being mined with an experimental piece of equipment, and that the mining method created difficulties in maintaining proper ventilation. He determined to inspect the No. 8 section, and proceeded to that location.

The "experimental" miner was a Voest-Alpine combination continuous miner and roof bolter. Jim Walter was trying the machine out in the hope that it would be more efficient in developing longwall mining sections. It was a "full face" miner, which made turning corners while mining more difficult, and required that working faces be ventilated with an auxiliary fan and tubing, rather than line curtain. Because of the properties of the Alpine miner, a modified mining procedure was used on the No. 8 section. Only three entries were driven, instead of the usual four, and entries were driven 240 feet deep before connecting crosscuts were mined. Appended to this decision is a copy of exhibit G-8, a sketch depicting the layout of the section as it existed at the time of the inspection. The far right entry, #3, was first driven inby 240 feet from the last open crosscut. While mining in the #3 entry, the auxiliary fan was located on the right side of the section, and 20-inch diameter ventilation tubing was maintained within 10 feet of the face. After that entry was mined, line curtain was installed to maintain face ventilation, and the auxiliary fan was moved to the #1 entry. Ventilation tubing was placed in the #1 and #2 entries. The #1 entry was driven, and the next crosscut, referred to as the #1R entry, was partially driven.[2] The Alpine miner was then moved into the #2 entry and line curtain was installed in the #1 and #1R entries. As noted below, the line curtain in the #2 entry, as depicted on the exhibit, was not installed until after the Alpine miner had broken down and it was apparent that the auxiliary fan would be turned off.

Primary ventilation was supplied by multiple main mine fans, which forced nearly 70,000 cubic-feet-per-minute ("CFM") of air through the section. Intake air flowed in the #2 and #3

[2] The #1R entry, the beginning of the next crosscut, was also referred to as the No. 1 to 2 entry.

entries. A check curtain was placed in the #2 entry, outby the last open crosscut, to force the intake air into the #3 entry. At the time of the inspection, line curtain had been installed in the #3 entry to direct the intake air to the face. It then flowed outby on the left side of the #3 entry into the last open crosscut. Because the auxiliary fan had been turned off, check and line curtains had been installed to channel the air inby to the face in the #2 entry, then to the #1 entry and over to the #1R face and the #1 face. It then flowed outby on the left side of the #1 entry to the last open crosscut and out the #1 return entry.

Jim Walter followed a work schedule called "hot seating" on the No. 8 section. The midnight, or owl, shift started at 11:00 p.m. Rather than leave the work area at 6:00 or 6:15 a.m., the miners would continue working until the day shift personnel arrived and took over operation of the equipment. The day shift started at 7:00 a.m., and the owl shift did not normally get out of the mine until about 8:00 a.m. However, this schedule was not followed on June 8, 2005. The Alpine miner broke down around 3:30 a.m., and attempts to repair it were unsuccessful. The manufacturer's representative was contacted and was scheduled to arrive later that morning. Since no mining could be done, Tommy L. Spencer, the section coordinator, directed the owl shift to leave after a regular eight-hour shift, rather than stay over for the arrival of the day shift. Tr. 252, 309.

Because the owl shift would be leaving the section before the day shift arrived, for more than one hour no miners were scheduled to be on the section. Applicable regulations require that when no one is present, auxiliary fans and other mechanized equipment must be deenergized, and line brattice (curtain) or other face ventilation control devices must be used to maintain ventilation to affected faces. 30 C.F.R. § 75.331. Jim Walter's approved ventilation plan required that air flow of at least 3,000 CFM be maintained at each idle face. Tr. 53-54; ex. G-3.

James E. Woods, the owl shift foreman, testified that he conducted a preshift examination of the No. 8 section between 4:37 and 5:22 a.m. Tr. 301-08; ex. G-7. At that time, the auxiliary fan was operating, required ventilation was being maintained at the faces, and no unusual or hazardous conditions were found. Thereafter, he talked to Spencer, and was advised that the owl shift would be leaving before the next shift arrived. Tr. 309. He instructed the miners under his supervision, a total of 12 men, to install line curtain in the #2 entry, and to tie down the check curtains in the #2 entry and the last open crosscut.[3] Tr. 311-12. He then instructed the electrician to deenergize the auxiliary fan. Tr. 318. At 6:10 a.m., he called the control room and reported the results of his earlier preshift examination, which were recorded in the fire boss book. Tr. 302. Woods testified that, as the men were finishing their assigned tasks and preparing to leave, he again traveled to the faces, found no hazardous conditions, and believed that required air flow was being maintained. Tr. 318-19. He left the section at 6:15 - 6:20 a.m. and, after exiting the mine, signed the book entry of the results of his preshift examination. Tr. 303, 315, 334, 343;

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[3] The first portion of the line curtain running up an entry, the part that spanned the last open crosscut, was referred to as check curtain. Tr. 312.

Ex. G-7.

Church and the rest of the inspection party reached the section about 8:00 a.m., shortly after the day shift personnel arrived. The day shift foreman was Ed Hosmer, and his crew consisted only of a laborer and an electrician, a reduced "idle" crew, because mining could not be done.[4] Hosmer followed Jim Walter's established practice of having his crew wait outside the section, while he traveled to the faces to check for hazardous conditions and planned the work for the shift.[5] He discovered poor ventilation flow at the faces, and high levels of methane in the #2 and #1 and #1R faces, which he reported to the crew upon his return. He instructed the electrician to deenergize the power center and instructed the men to work on ventilation controls, i.e., to instal and tighten up check and line curtains, in order to increase ventilation to the faces and alleviate the hazardous conditions. Tr. 369-70, 375. Church and Womack had inspected a battery charger, and were in the vicinity of the power center when Hosmer returned. However, neither of them heard Hosmer relate that he had found high levels of methane.

The inspectors proceeded across the section to the belt tailpiece in the #3 entry, and traveled inby toward the #3 face. When they got to the face, it was apparent that there was virtually no air flow. Church attempted to take an airflow reading with an anemometer, but there was not enough velocity to turn the blades of the meter. Tr. 50. He determined that the 3,000 CFM of ventilation required by the approved ventilation plan was not being maintained, and issued Citation No. 7682300 for that violation.[6] Ex. G-13. The line curtain in the #3 entry was poorly hung, with gaps at the top and bottom and at seams. Tr. 59. This allowed air to "short circuit" from the intake side to the return side without going to the face. Brackner began to assist on the curtain work. Loggins had gone to the #2 entry to work on curtains. Tr. 384-85. Church remained in the #3 entry, in the hope that ventilation could quickly be restored and he could terminate the citation. After about 20 minutes, he decided to move on to the #2 entry, in part, because he suspected that there were other ventilation problems. When he arrived he saw that new line curtain had been hung across the last open crosscut up to the #2 face, and two miners were leaving the face. Tr. 68. They told him that they had just hung new curtain in the #2 entry.[7] Air flow at the #2 face was adequate, and there were no hazardous atmospheric conditions.

Church and Womack proceeded into the #1 entry and traveled inby, turning into the

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[4] Hosmer passed away prior to the hearing.

[5] The crew waited at the "kitchen," a lunch table that was set up outby the second-to-last open crosscut. Tr. 369.

[6] Jim Walter did not contest that citation or the civil penalty that was assessed for it. It is not at issue in this proceeding.

[7] The new curtain had been hung over some older, ineffective curtain that had been placed there by the owl shift. Tr. 374, 385.

incomplete crosscut, the #1R entry. They noticed poorly hung line curtain, similar to that they had seen in the #3 entry. They both carried "Solaris" meters that continuously monitored the concentrations of five substances in the atmosphere. Their meters were set to provide visual and audible warnings when the concentration of methane reached 1% and/or when the concentration of oxygen dropped below 19.5%. About half way to the #1R face, Church's and Womack's meters alarmed, and showed methane at or above 5% and oxygen content of 15.9-16.0%, both extremely hazardous conditions.[8] Church attempted to take an air flow measurement, detected no flow, and immediately departed the area. Spencer arrived on the section about 9:45 a.m., with the Alpine representative, and immediately began to assist on the curtain work. Church and Womack encountered Spencer as they reached the #1 entry, where Church issued an imminent danger withdrawal order pursuant to section 107(a) of the Act.[9] They then returned to the #1R entry and took bottle samples of the atmosphere. The power center had been deenergized, and the crew continued to work on the line and check curtains in an effort to remedy the ventilation problems. Ventilation was restored in the #3 entry, and that citation was terminated at 10:05 a.m. Ex. G-13. The required flow of 3,000 CFM could not be achieved in the #1R entry. Tr. 183, 392. However, the flow was sufficient to clear the methane. The power center and auxiliary fan were then reenergized, which supplied 5,700 CFM to the #1R face. Ex. G-11 p. 14. The citations and imminent danger order were terminated at 10:43 a.m. Ex. G-2, G-4, G-5.

Church issued citations based upon the conditions in the #1 and #1R entries, alleging that Jim Walter failed to follow its approved ventilation plan and failed to maintain the required level of oxygen in places where persons work or travel. He also issued a citation alleging that Jim Walter failed to conduct a proper preshift examination, because he felt that the conditions should have been discovered and corrected by Woods before he left the section. The fourth citation, which the parties have settled, pertained to a defective main mine fan door, and is not related to the other violations. The citations are discussed below in the order that they were presented at the hearing.

Citation No. 7682297

Citation No. 7682297 alleges a violation of 30 C.F.R. § 75.370(a)(1), which requires that mine operators "develop and follow a ventilation plan approved by the [MSHA] district manager." Church described the violation in the "Condition or Practice" section of the citation as follows:

> The ventilation plan was not being followed on the Number 8 Section at this mine in that adequately installed controls were not in place so as to dilute, render harmless and carry away methane gas. The line brattice installed in the Number 1 and Number 1 to 2 [# 1R] working places did not reach the mine floor, gapped

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[8] The maximum concentration of methane reportable by the meters was 5%.

[9] Jim Walter did not contest the imminent danger order.

open along the top, had tears, and was open at the corner of the last open crosscut thus not allowing at least 3,000 cubic feet per minute of air to reach the working faces to remove a concentration of methane gas measured to be in excess of five (5) percent. When air readings were attempted in these places the vanes of the anemometer would not turn.

Ex. G-2.

Church determined that it was highly likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that four employees were affected, and that the operator's negligence was high. A civil penalty in the amount of $8,300.00 has been proposed for this violation.

The Violation

At the time of the inspection, ventilation controls in the #1 and #1R entries were in such poor condition that there was virtually no air flow at the faces, which resulted in the build-up of high levels of methane. Hosmer had told his day-shift crew that he found high concentrations of methane in those areas, and in the #2 entry, when he conducted his inspection at the beginning of the shift. Tr. 369. He told Brackner and Loggins the same thing when he met them in the #2 entry at the time Church and Womack arrived. Tr. 382, 406. The newly hung line curtain in the #2 entry had remedied the condition in that entry before Church arrived, but the condition continued to exist when Church inspected the #1 and #1R entries. Tr. 73, 81-87. Brackner confirmed that his detector also alarmed at those locations, and showed high levels of methane and low oxygen content. Tr. 409. A bottle sample taken by Church in the #1R entry contained 24.29% methane, well above the explosive range of 5-15%, and 15.81% oxygen, well below the required 19.5%. Tr. 81-85; ex. G-12. Air flow was woefully inadequate, and did not approach the 3,000 CFM required by the ventilation plan. Jim Walter does not dispute the fact that ventilation was inadequate in the #1 and #1R entries. The regulation was clearly violated.

Significant and Substantial

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

The Commission has explained that:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must

> prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

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

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

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

Jim Walter's failure to comply with its approved ventilation plan directly resulted in extremely hazardous conditions, concentrations of methane that had reached the explosive range, and serious oxygen deficiencies in locations where persons were scheduled to travel and work.[10] Any injury that might result from an ignition of methane or exposure to oxygen deficient air would be serious, and potentially fatal. Consequently, it is the third *Mathies* criteria that is determinative of whether the violation was S&S, i.e., whether it was reasonably likely that the hazard would result in an injury.

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[10] The methane most likely originated near the #1R face, in a very high concentration. Because of the virtually non-existent air flow, it remained heavily concentrated. However, as it migrated out the entry, it mixed with the existing atmosphere, at some point passing through the explosive range of 5-15%. Tr. 86.

Jim Walter's primary argument that the violation was not S&S is that it was not shown that an ignition of the methane was likely because there is no evidence of an ignition source in the section or in proximity to the methane concentration. Respondent also argues that it discovered the deficiencies in the normal course of mining operations, and that appropriate corrective action had been initiated before Church arrived. Consequently, the hazardous condition existed for a limited period of time, and would have been corrected in the normal course of operations without significant risk of injury, whether or not MSHA had appeared on the scene.[11] The Secretary counters that the conditions were extremely hazardous and posed grave risk of serious or fatal injuries to miners and other persons in the vicinity, including the inspectors, who were not informed of the conditions and entered the affected area.

Jim Walter's S&S argument is focused on the methane hazard, most likely because Church based part of his assessment of gravity on the possibility of an ignition. Tr. 165-67. However, as Church made clear, the hazard contributed to by the violation was a dual one, explosive levels of methane and low levels of oxygen, both of which he considered to be very serious conditions. Tr. 79-80, 101.

Church was, understandably, very concerned about explosive levels of methane on an active mining section, and was aware of previous methane ignition disasters at Jim Walter mines. Tr. 93-94; ex G-10 at 15. In analyzing the hazard presented by methane, the critical question is whether there was any likelihood of explosive concentrations of methane coming into contact with an ignition source. *See Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). The Secretary points to several potential ignition sources, including the auxiliary fan, the battery charger, mobile equipment and a power center. Tr. 93-94. However, the fan, and presumably the continuous miner, were permissible pieces of equipment, and power to the fan and the miner had been cut prior to the owl shift's departure. The power center was deenergized immediately after Hosmer found the hazardous conditions. Moreover, both the battery charger and the power center were located outby the section in the intake air courses. The Secretary offered no explanation of how the methane accumulation, which would eventually be swept out the #1 return entry, could possibly come into contact with those pieces of equipment. In addition, the auxiliary fan was located outby the last open crosscut in the #1 entry. The stoppings separating the #1 entry from the #2 entry assured that, regardless of the condition of the ventilation curtains, nearly 70,000 CFM of air would be flowing in the last open crosscut between the #1 and #2 entries and out the #1 entry past the fan. Even if power somehow might have been restored to the fan, it is highly likely that the apparently limited amount of methane in the #1R entry would have been diluted well below any hazardous level as soon as it reached the last open crosscut. Whether the violation was S&S due solely to the methane hazard would be a close call. However, the violation contributed to a second hazardous condition, low oxygen levels.

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[11] The hazardous condition most likely arose shortly after the auxiliary fan was turned off, i.e., about 7:00 a.m. It appears that Hosmer, the day-shift crew, and other personnel acted appropriately in discovering and responding to the hazard, and that it was abated by 10:43 a.m., with the assistance of Loggins, Brakner and Spencer. Ex. G-2, G-5.

Respondent argues, with respect to the S&S designation on Citation No. 7682298, which cited low oxygen levels, that no one was exposed to the hazard until the inspectors found it. It further asserts that "there is no proof that [Hosmer traveled there] or, if he did, that he would have done so in an unsafe manner." Resp. Br. at 27. However, pursuant to Respondent's claimed policy, Hosmer traveled to the faces to check for hazards and plan work for the shift. He found excessive methane (and presumably low oxygen levels) in the #1 and #2 entries. In its arguments on negligence and S&S, Respondent makes much of its policy and the fact that it found and was addressing the hazards. Hosmer was clearly exposed to the hazard, as were Church and Womack. Those persons were experienced and well-trained, and were equipped with monitoring devices that were able to detect the hazardous conditions. However, that does not eliminate the possibility of injury. It is also possible, although less likely, that other miners who were not equipped with monitoring devices might have been exposed. The ventilation flow, although extremely limited, would cause the dangerous atmosphere to migrate out the #1 entry where miners were working on the line curtains. Tr. 104-06.

The low oxygen levels posed an insidious hazard, to which at least three persons were actually exposed. Church was particularly concerned about the low oxygen levels, because at concentrations below 17% persons can become confused, and if they stay in such conditions fatalities can result. Tr. 101-02. He also was concerned that continued accumulation of methane might further reduce the level of oxygen, and make the condition extremely hazardous.[12]

Considering the nature of the hazards, the high level of danger posed by each, the fact that virtually everyone on the section was exposed to injury from the hazardous methane condition, and the actual exposure of three persons and the potential exposure of others to the oxygen deficiency, it was reasonably likely that a reasonably serious injury would occur. I find that the violation was S&S.

Negligence

Woods testified that he made another inspection of the section after the auxiliary fan had been turned off, and his crew had installed line curtain to the #2 face and made adjustments to other line and check curtains. All of the curtains were properly hung and weighted, were straight up and down, and were channeling the ventilation air as they were intended to do. Tr. 313-15.

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[12] Respondent argues that a printout of readings from Church's Solaris meter showed that he did not regard the conditions as serious, because he remained in the substandard atmosphere for five minutes. Resp. Br. at 27; ex G-9. However, both Church and Womack testified that they left the area immediately upon encountering the conditions. Tr. 87, 141-45, 219. Womack's field notes also indicate that they promptly left the area, but returned to take bottle samples. Ex. G-11 at 8. The printout relied upon by Respondent does not establish that they remained in the area, but shows that they were in substandard atmospheric conditions at three times, the latter two being less than two minutes apart. The printout is consistent with Church's and Womack's testimony.

He found no hazardous conditions. Tr. 318-19. However, there is no doubt that at the time the day-shift foreman arrived on the section, about ninety minutes after Woods left, the ventilation controls, notably the line curtain in all of the entries and the check curtains in the #1 and #2 entries, were woefully inadequate to maintain required ventilation, and that hazardous levels of methane had accumulated as a result.

Woods testified that after he departed "any number of things" could have happened to impair the efficacy of the ventilation controls. Tr. 316-18. He cited as examples, a rib roll that could have torn down up to 70 feet of curtain, or curtain tearing from supporting structures. Tr. 316-18, 352. However, Brackner testified that he had no recollection of seeing evidence of a rib roll that would have knocked line curtain down, and there is no other evidence of such an occurrence. Tr. 412. Spencer explained that pressure generated by the main mine fans can tear curtains loose. However, he also agreed that curtains should be installed properly such that they would not be damaged by normal ventilation pressure, and he had no explanation as to how the ventilation became inadequate after Woods claimed to have verified proper ventilation after the auxiliary fan had been turned off. Tr. 274-76. There is no evidence of pressure surges, or other unusual pressures that might have produced significant damage to ventilation controls. Moreover, several witnesses described numerous defects that were clearly the result of improper installation. There were gaps of two feet or more where the curtain did not extend to the footwall in the #1 and #3 entries. Tr. 59, 70-71, 390, 411. The check curtain at the #1 entry was partially missing and the remainder was not weighted or attached to the footwall, rendering it virtually useless. Tr. 61, 215-16. There was no evidence that timbers or weights were present, from which curtains might have torn.

Woods could not have inspected the entries and found properly installed curtains, as he claimed. It is also virtually impossible that Woods could have made an inspection of the faces after the auxiliary fan had been deenergized and found adequate air flow. I find that he did not do so. He knew, from his preshift inspection, that there were deficiencies in the curtains. He should have known that the effect of those deficiencies would be exacerbated when the auxiliary fan was turned off, particularly in the #1 and #1R entries, where the curtains would then become the only means of providing ventilation. As noted below, ventilation at the #3 face must have been marginal when he conducted the preshift inspection, which should have been a signal that it would be difficult to achieve the required ventilation flow with the condition that the curtains were in.[13]

Upon consideration of the above, and the fact that, as a section foreman, Woods' negligence is attributable to Respondent, I agree with Church's assessment and find that Respondent's negligence was high.

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[13] I accept the fact that Woods has a history of working in safety-related positions, and was well aware of the hazards posed by poor ventilation in gassy mines, having lost friends in previous methane explosions. Tr. 287-90. Nevertheless, the evidence that he did not conduct the second inspection that he claimed to have done is nearly overwhelming.

Citation No. 7682298

Citation No. 7682298 alleges a violation of 30 C.F.R. § 75.321(a)(1), which requires that "air in areas where persons work or travel . . . contain at least 19.5 percent oxygen." Church described the violation in the "Condition or Practice" section of the citation as follows:

> On the Number 8 Section in the Number 1 to 2 working place and working face an oxygen concentration of at least 19.5 percent is not being maintained. When measured with an approved detector, it was determined that only 15.9 percent of oxygen was present.

Ex. G-5.

Church determined that it was reasonably likely that the violation would result in an injury involving lost work days or restricted duty, that the violation was significant and substantial, that one employee was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $1,500.00 has been proposed for this violation.

The Violation - S&S

As is evident from the discussion of the violation alleged in Citation No. 7682297, there is no dispute that oxygen concentrations in the range of 16% existed in the #1 and #1R entries, places where persons normally worked or traveled. The regulation, which specifies that air in such places be composed of at least 19.5% oxygen, was violated. Jim Walter argues that the low oxygen levels occurred because the oxygen was displaced by methane. It challenges the fact of violation, citing cases that recognize that an operator typically has no control over the release of methane and that the mere presence of methane does not establish that mandatory health and safety standards have been violated.[14] Accepting the premise that the low oxygen concentration was the result of displacement by methane, Jim Walter's argument is unavailing because it was responsible for the ventilation controls on the section, and its negligence in maintaining those controls lead directly to the accumulation of methane and the low oxygen levels.

Respondent also argues that this citation is duplicative of the ventilation plan citation, because the requirement for 3,000 CFM of ventilation was designed to ensure adequate oxygen levels and that the same actions abated both conditions. This argument too, must be rejected.

Citations and orders alleging violations of different standards arising out of the same, or related, conduct are not duplicative, as long as the standards involved impose separate and distinct legal duties on an operator. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-05 (June 1997) (citing *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993); *Southern Ohio*

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[14] *Drummond Co.*, 25 FMSHRC 767, 770 (Dec. 2003)(ALJ) citing *Mid-Continent Coal and Coke Co.*, 8 IBMA 204 (1977).

Coal Co., 4 FMSHRC 1459, 1462-63 (Aug. 1982); and *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (Jan. 1981)). In *Western Fuels-Utah*, the Commission held that a charge of violating a specific standard was duplicative of a charge of violating a more general standard. However, the Commission made clear that its decision was not based solely upon the premise that every violation of the more specific standard would also be a violation of the more general one. Rather, it looked to whether the operator had been cited for more than one specific act or omission. Had there been evidence of additional deficiencies that violated the general regulation, such that that allegation would not have been based upon the identical evidence used to support the violation of the more specific standard, the charges would not have been found duplicative. 19 FMSHRC at 1004 n.12.

Here, the respective provisions impose entirely separate duties, one to maintain a specific volume of air flow at the faces, the second to assure adequate oxygen content of air wherever persons are scheduled to work or travel. The evidence supporting each violation is separate and distinct, and a violation of one standard would not necessarily entail a violation of the other. The virtually non-existent air flow in the #3 entry did not result in hazardous atmospheric conditions. Conversely, as Respondent points out in its methane displacement argument, high methane concentrations, resulting in low oxygen concentrations, can occur despite air flow of 3,000 CFM or even 60,000 CFM. Tr. 111-12, 283-84, 322. Citation No. 7682298 is not duplicative of Citation No. 7682297.

I also find that the violation was S&S. As noted above, the insidious nature of oxygen deficient air, coupled with the actual exposure of at least three persons, and possible exposure of others, made it reasonably likely that the hazard contributed to by the violation would result in a reasonably serious injury. I also find that the operator's negligence was high, rather than moderate. I see no reasonable distinction between the degree of negligence attributable to Citation No. 7682297 and this one. I also find, as indicated above, that more than one person was exposed to the hazard. However, despite the rejection of Respondent's duplication argument, it is clear that the violations overlap to some extent. The oxygen deficient air was one of the hazards contributed to by the ventilation plan violation, and was instrumental in sustaining the S&S determination with respect to that citation. The proposed penalty will be reduced to reflect the fact that the hazard contributed to by this violation was substantially factored into the gravity findings with respect to the ventilation plan violation.

Citation No. 7682299

Citation No. 7682299 alleges a violation of 30 C.F.R. § 75.360(b), which requires that preshift examinations be conducted in areas where miners are scheduled to work or travel, and that the certified person conducting the examination "shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction." Church described the violation in the "Condition or Practice" section of the citation as follows:

An adequate pre-shift examination was not conducted for the Number 8 Section for the day shift of 06/06/2005. The conditions called outside and recorded in the examination booklet do not reflect the actual condition of the section ventilation. Upon the day shift maintenance crew arriving on the section no changes were made to the section ventilation controls, as stated by the day shift foreman, prior to arrival on the section by MSHA to conduct a 5-day spot ventilation inspection (E02). The following conditions were found.

(1) No airflow in the Number 3 working face due to poorly installed line brattice which took a considerable amount of time to correct. Approximately 260 feet of line curtain is in place and needed to deliver sufficient airflow into the Number 1 working face.

(2) Poorly installed line brattice in the Number 1 and Number 1 to 2 working places allowed an accumulation of methane gas in excess of five (5) percent to be present and an oxygen content of only 15.9 percent. The Number 1 face is approximately 248 feet inby the last open crosscut and the Number 1-2 crosscut is mined to a depth of 115 feet off the Number 1 entry.

The line curtain mentioned was hung in such a manner that it did not touch the mine floor, had large gaps at the top and where sections of the curtain ended and another started, was open at the corner of the last open crosscut, and was torn in many locations. An adequate examination would have shown these conditions which are obvious to a casual observer much less a trained and certified pre-shift examiner. The section auxiliary fan when turned off as was the case in hand presents considerable changes to the section ventilation which must be addressed by use of line curtain. Pre-shift examinations are conducted and report[ed] so as to alert management and on-coming workers that either no hazards exist or that areas are not safe to enter which requires corrective action to be taken. This mine liberates in excess of seven (7) million cubic feet of methane gas every 24 hours. Therefore, an adequate pre-shift examination showing accurate conditions of the ventilation controls and atmosphere is essential to the health and safety of miners entering these areas.

These conditions are contributing factors to the issuance of imminent danger order No. 7682296 being issued on 06/08/2005. Therefore no abatement time was set.

Ex. G-6.

Church determined that it was highly likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that four employees were affected, and that the operator's negligence was high. A civil penalty in the amount of $8,300.00 has been proposed for this violation.

The Violation

The Secretary's "final legal position" on this violation is that Woods conducted an inadequate preshift examination because he "failed to identify and to correct the hazards set forth in the body of the citation, most importantly the poor condition of the line curtains, which failed to provide sufficient ventilation to the Number 3 and Number 1 right working faces." Sec'y Reply Br. at 5-6. Respondent contends that Woods' preshift examination was timely and accurately reflected that no hazardous conditions existed at the time the examination was made.

Woods conducted a preshift examination of the section between 4:37 a.m. and 5:22 a.m., which was timely under the regulation.[15] He found positive air flow, no hazardous conditions, and the highest concentration of methane detected was 0.3%. Ex. G-7. He called the results of his inspection out at 6:10 a.m., they were recorded in the fire boss book, and he signed the book entry after exiting the mine. There is no evidence that any of Woods' observations were inaccurate or erroneously recorded. Church did not feel that the report of the examination had been fabricated. Tr. 119. The examination was performed while the auxiliary fan was operating, which assured that substantial volumes of air were supplied to the #2, #1 and #1R entries and faces. Tr. 319-20. Ventilation at the #3 face, which should not have been affected significantly by the auxiliary fan, was most likely marginal.[16] However, there was no methane accumulation in the #3 entry at the time of Church's inspection, and there is no evidence that hazardous conditions existed in the #3 entry when Woods inspected it at about 5:05 a.m. Ex. G-7. Church acknowledged that it was possible that ventilation was adequate when Woods left the section, i.e., even when the auxiliary fan had been turned off. Tr. 117.

At the time Woods conducted the preshift examination, the line curtains in the #3 entry and in the #1 and #1R entries were most likely in poor condition, essentially as Church found them several hours later. Woods himself stated that they "weren't perfect, but [they were] doing the job [they were] supposed to do." Tr. 312. Indeed, the check and line curtains could have supplied adequate ventilation, even if they were in relatively poor condition, because only 3,000 CFM of air, less than 5% of the air flow supplied by the main mine fans, was required at the faces. While Woods should have, and apparently did, observe the obvious defects in the line curtains, those defects were not, in themselves, hazardous conditions, and had not produced hazardous conditions at the time of his inspection. Church testified that defects in ventilation control devices, like line curtains, need not be included in the report of a preshift examination, as long as the required ventilation is being supplied. Tr. 122-23.

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[15] The regulation requires that the preshift examination be conducted "within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground." 30 C.F.R. § 75.360(a)(1).

[16] Church and Spencer testified that the auxiliary fan would not have had much impact on ventilation in the #3 entry. Tr. 174, 259.

The hazardous conditions most likely developed, as Church believed, shortly after the auxiliary fan had been deenergized. Tr. 116-17. He noted in the citation that the shutting off of the auxiliary fan would result in "considerable" changes to the section ventilation. It was his position that, in order to accurately reflect the conditions on-coming workers would confront, a preshift examination should have been conducted after the fan had been turned off, even if an earlier preshift examination had been conducted. Tr. 121; ex. G-6.

The logic of Church's "second examination" theory, which the Secretary embraced in her original brief,[17] cannot be disputed. However, the failure to conduct a second preshift examination to assess conditions that may have changed after a proper preshift examination has been completed, is not a violation of the regulation. As noted by Judge Hodgdon in *Independence Coal Co.*, 26 FMSHRC 520 (June 2004) (ALJ), a preshift examination, which must be conducted within three hours of the scheduled start of the succeeding shift, typically will be completed well before the next shift arrives. Thus, the regulation contemplates that mining will continue in the interim and any number of conditions might change. However, "there is no requirement in section 75.360 that a preshift examiner revisit areas that he has already examined."[18] 26 FMSHRC at 534.

As noted above, I have found that Woods did not conduct a second examination of the faces after the auxiliary fan had been deenergized. His failure to address the obvious problems with the check and line curtains resulted in violations of Respondent's ventilation plan and other regulatory provisions. However, it did not violate the regulation pertaining to preshift examinations, as alleged by the Secretary. The hazardous conditions noted in the citation did not exist at the time the preshift examination was done.

The Appropriate Civil Penalties

Jim Walter is a large operator, as is its controlling entity. Jim Walter does not contend that payment of the penalties would impair its ability to continue in business. All of the violations were promptly abated in good faith.

Respondent's history of violations is set forth in exhibit G-1. Respondent objected to the admission of the exhibit on grounds that it improperly included violations issued at Jim Walter mines other than No. 4. Tr. 98-100. The exhibit was admitted over objection, and the parties were advised that they would be required to specifically address the history of violation penalty criteria in posthearing briefs. A Supplemental Briefing Order, issued on December 26, 2006, directed the parties to address the following:

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[17] Sec'y Br. at 31 n.6, 36.

[18] While that decision is not binding, I agree with Judge Hodgdon's rationale.

3. With respect to penalty factors, precisely identify the violation history deemed relevant, and the reasons therefor. Also indicate what effect the particular violation history relied upon, or relied upon by the opposing party, should have on the amount of any civil penalty, i.e., increase it, lower it, or none. If the pertinent consideration is the number of cited violations that have become final per inspection day, identify the particular evidence that you contend establishes the correct factor to be applied.

Despite this directive, the parties' posthearing briefs were less than helpful in shaping the issue, or in addressing the proper factors to be considered with respect to the history of violations penalty criteria. The Secretary reiterated her position that the Act requires that the violation history of the "operator" be considered, not that of a particular mine. Sec'y Br. at 37. She then presented the number of previously cited violations of the specific regulations at issue, characterized them as "excessive," "moderate" and "negligible," and argued that any penalty for a violation of the ventilation plan or the preshift regulation should be enhanced.[19] While the Act requires that the violation history of the "operator" be taken into account in assessing a civil penalty, the remainder of the Secretary's argument misses the mark. It is the general history of previous violations, not the specific nature of prior violations, that is relevant to the penalty criteria. *Peabody Coal Co.*, 14 FMSHRC 1258, 1264 (Aug. 1992).

Respondent cited in its brief, 43 Fed. Reg. 23514-15, a May 30, 1978, publication of a final rule on the proposed assessment of civil penalties, and argued that it is the history of the particular mine involved that is the proper focus of the penalty criteria. However, as noted above, the Act requires that the violation history of the "operator" be taken into account. 30 U.S.C. § 820(i). Moreover, the Secretary's current rules for proposed assessments, which were published in 1982, refer to the violation history of the operator. 30 C.F.R. § 100.3. Respondent did not identify the particular evidence it relies upon for a proper evaluation of its history of violations. Nor did it explain how that factor should affect any penalty assessment.

The information provided in exhibit G-1 is of very limited value. It indicates that during the 24 month period preceding the violations at issue, a total of 2,387 violations had been cited at five separate mines operated by Respondent. Of those violations, 661 had been issued at the No. 4 Mine. The report apparently includes violations that are currently being contested, and citations that have been vacated. It contains no information as to the number of inspection days, but indicates that there has been no excessive history of violations.

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[19] No explanation was provided for the characterizations of "excessive" or "moderate," other than a reference to the raw numbers of cited violations, which include violations which have been contested by Respondent. References to raw numbers of violations, in the absence of some qualitative information upon which to evaluate the numbers, do not provide a proper basis for evaluating the history of violations penalty factor. *Cantera Green*, 22 FMSHRC 616, 623-24 (May 2000). *Hubb Corp.*, 22 FMSHRC 606, 613 n. 9. (May 2000).

Qualitative information was provided in the Proposed Assessment, filed as an exhibit to the Petition. It discloses that, for violations cited on June 8, 2005, there had been 608 violations issued over the course of 677 inspection days within the pertinent two-year period.[20] On the basis of the ratio of 0.9 violations per inspection day, eight out of a possible 20 penalty points were assigned, essentially a moderate violation history, which was taken into account by the Secretary in proposing penalties for the violations at issue. It is unlikely that that evaluation would change if it were based upon the total number of violations issued to Respondent.

On the basis of that information, it appears that Respondent has a moderate history of violations, and I so find. It also appears that that factor was appropriately taken into account in the Secretary's proposed penalties. Consequently, in considering the amount of the civil penalty to be imposed for the violations that were sustained, it will be considered a neutral factor for any penalties similar to those proposed.

Citation No. 7682297 is affirmed as an S&S violation. The gravity of this violation was serious, and the operator's negligence was high. A civil penalty of $8,300.00 was proposed by the Secretary. In light of that consideration and the factors enumerated in section 110(i) of the Act, I impose a penalty in the amount of $8,300.00.

Citation No. 7682298 is affirmed as an S&S violation. The gravity of this violation was serious, the operator's negligence was high, and at least three persons were exposed to the hazard. However, there was considerable overlap among Citation Nos. 7682297, 7682298 and 7682300. Essentially the same activity, restoration of the efficacy of the line and check curtains on the section, abated all three violations, and the hazardous condition contributed to by the violation charged in Citation No. 7682298 was a significant factor enhancing the gravity of the violation charged in Citation No. 7682297. A civil penalty of $1,500.00 was proposed by the Secretary. I find that the mitigating factor outweighs the enhancement factors, and in light of that consideration and the factors enumerated in section 110(i) of the Act,
I impose a penalty in the amount of $1,000.00.

The Settlement

In the course of the hearing, the parties announced that they had negotiated a resolution of the violation alleged in Citation No. 7684427 and, by motion, sought approval of the settlement agreement. The Secretary agreed to modify the citation to specify that it was not significant and substantial. It was proposed that the penalty for that violation be reduced from $614.00 to $60.00. Respondent withdrew its notice of contest as to the citation, as amended. I have considered the representations and evidence submitted, and conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

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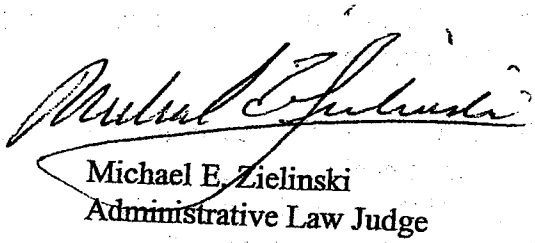
[20] Curiously, the history of violations factor in the Proposed Assessment appears to be based only upon violations at the No. 4 mine, contrary to the Secretary's argument.

ORDER

Citation No. 7682297 is **AFFIRMED** and Citation No. 7682298 is **AFFIRMED**, as modified. Respondent is directed to pay civil penalties totaling $9,300.00 for those violations. Payment shall be made within 45 days.

Citation No. 7682299 is hereby **VACATED**.

As to Citation No. 7684427, the motion to approve settlement is **GRANTED**, and Respondent is directed to pay a civil penalty of $60.00 within 45 days.



Michael E. Zielinski
Administrative Law Judge

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March 7, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2006-441-M A.C. No. 10-01777-87696
v.	:	Docket No. WEST 2006-493-M A.C. No. 10-01777-90504
CLAYTON'S CALCIUM, INC., Respondent	:	Docket No. WEST 2006-525-M A.C. No. 10-01777-92960 Mill

DECISION

Appearances: John D. Pereza, Conference & Litigation Representative, Mine Safety and Health Administration, Vacaville, California for Petitioner; Todd Clayton, President, Clayton's Calcium, Inc., Meridian, Idaho, 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 Clayton's Calcium, Inc., ("Clayton's Calcium"), 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 18 citations issued by MSHA under section 104(a) of the Mine Act at the Mill operated by Clayton's Calcium. The parties presented testimony and documentary evidence at the hearing held in Boise, Idaho.

At all pertinent times, Clayton's Calcium operated a mill in Ada County, Idaho. The mill produces calcium carbonate products for livestock, industry, and medical uses. Clayton's Calcium is a family-run business. Until a few years ago, Glen Clayton was the president and chief operating officer . His son, Todd, was the plant operator. Todd Clayton took over as president in 2002 but Glen is still involved in the corporation. The company received only three citations between 2003 and 2005. Most of the citations at issue in these cases were issued by MSHA Inspector Larry Stevenson. Ron Jacobsen, the supervisor of MSHA's Boise office, accompanied Inspector Stevenson during the inspection. Inspector Stevenson retired from the Department of Labor and did not testify at the hearing. Supervisory Inspector Jacobsen offered testimony with respect to each citation.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 6360913

On January 18, 2006, Inspector Stevenson issued Citation No. 6360913 under section 104(a) of the Mine Act alleging a violation of section 56.14107(a) as follows, in part:

> The bottom portion of the V-belt drive for the screen in the mill building was not guarded to prevent persons from accidentally contacting the moving parts. The open area measured 12 inches wide and 6 feet long. The moving parts measured 4 feet and 6 feet above the walkway.

Inspector Stevenson determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. He determined that the violation was not of a significant and substantial nature ("S&S") and that the negligence was low. The 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, . . . shafts, . . . and similar moving parts that can cause injury." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Jacobsen testified that the V-belt drive was located along a walkway for the shaker screen. (Tr. 25; Ex. P-7). Miners could become entangled in the pulley. The inspectors determined that the negligence was low because the operator advised him that the condition had existed for 15 years. (Tr. 27).

Glen Clayton, an owner of Clayton's Calcium, testified that when Inspector Stevenson took the photo, the camera must have been about six inches above the walkway. (Tr. 114; Ex. P-7). The walkway is used only occasionally and never when the mill is running. (Tr. 115). If a belt broke, it is highly unlikely that anyone would be struck by the belt.

Mr. Heriberto "Eddie" Sarabia is the plant operator. (Tr. 125). He testified that a miner would have to get on his knees and reach up to come in contact with the cited belts. (Tr. 130). The bottom of the existing guard comes within three feet of the deck. The guards are made of belting material. (Tr. 134).

Todd Clayton, the president of Clayton's Calcium, testified that MSHA has never required guards on the bottom of belts. (Tr. 139). Nobody could come in contact with the belts or pulleys unless he got down on his hands and knees and crawled under the existing guard.

The Commission interprets safety standards to take into consideration "ordinary human carelessness." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). In that case, the Commission held that a guarding standard must be interpreted to consider whether there is a

"reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Id.* Human behavior can be erratic and unpredictable. For example, someone might attempt to perform minor maintenance or cleaning near an unguarded tail pulley without first shutting it down. In such an instance, the employee's clothing could become entangled in the moving parts and a serious injury could result. Guards are designed to prevent just such an accident. There is a history of such injuries at plants throughout the United States. "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions. . . ." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). As a consequence, citations issued under this standard must be "resolved on a case-by-[case] basis." *Thompson Bros.*, 6 FMSHRC at 2097.

The evidence establishes that a guard was present that protected miners from any reasonable possibility of contact and injury. The guard hung down to within three feet of the decking, well below the level of the belts and pulleys. (Ex. P-7). Clayton's Calcium has guarded this belt assembly in this manner for many years. The possibility that anyone would accidently come into contact with any pinch points or other moving parts as a result of stumbling and falling was extremely unlikely. Other Commission administrative law judges have vacated citations where the Secretary did not establish a reasonable possibility of contact with the moving machine parts. *See Hamilton Pipeline, Inc.*, 24 FMSHRC 915, 922-23 (Oct. 2002) (ALJ); *Chrisman Ready-Mix, Inc.*, 22 FMSHRC 1256, 1259-61 (Oct. 2000) (ALJ). Consequently, this citation is hereby vacated.

B. Citation No. 6360915

On January 18, 2006, Inspector Stevenson issued Citation No. 6360915 under section 104(a) of the Mine Act alleging a violation of section 56.14107(a) as follows, in part:

> The guarding on the feeder conveyor tail pulley did not extend a sufficient distance to prevent persons from accidently contacting the moving parts. The tail pulley [was] three feet above the floor. The opening measured 14 inches long and 12 inches wide. The chain drive guard had an opening through which a person could accidently contact the moving parts. There was an exposed keyed shaft that measured 1 inch in diameter and protruded out 2 inches. These moving parts all traveled at a slow rate of speed and were mostly protected by the existing guards.

Inspector Stevenson determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Jacobsen testified that there were three moving parts that were exposed, a tail pulley, a chain drive, and the keyed shaft. (Tr. 29; Exs. P- 11, P-12 & P-13). Contact with any of these moving machine parts could create permanently disabling injuries. Such contact was not likely because partial guards were in place.

Glen Clayton testified that the hole in the chain guard is there so that a grease gun can be inserted. This guard has been present since the mid 1980s. (Tr. 110-11). The guard was installed after a citation was issued by an MSHA inspector. The chain moves very slowly. Glen Clayton testified that a person would have to purposefully put his fingers in the hole to get caught in any moving parts.

Glen Clayton further testified that the exposed keyed shaft is down at the bottom of the dump hopper. The area is accessed only once every three months and the speed of the shaft is about 12 RPM. (Tr. 111-12). He admitted that the guarding on the feeder conveyor tail pulley was insufficient. Todd Clayton agreed that the guarding on the feeder conveyor tail pulley was not sufficient. (Tr. 141; Ex. P-11). He testified that the chain guard had been present for many years and had never been cited. He did not believe that it presented a safety hazard.

I find that the Secretary established a violation. All witnesses agreed that the guarding on the feed conveyor tail pulley was insufficient to protect miners. (Ex. P–11). The question whether the chain drive guard met the requirements of the standard is more problematic. (Ex. P-12). The small opening is present so that miners can oil the chain. The chain moves very slowly. More importantly, this guard has been present for many years and has been inspected during previous MSHA inspections. I credit the testimony of Glen Clayton that the guard was installed after MSHA issued a citation during a previous inspection and that the hole has been present since that time. Thus, MSHA has, up until this inspection, accepted the chain guard as being in compliance with the safety standard.

In some situations a citation should be vacated if the cited condition has been previously inspected by MSHA without any enforcement action being taken. Prior inconsistent enforcement of a safety standard at a mine is a factor that the Commission considers when evaluating whether a mine operator has received fair notice of the Secretary's interpretation of an ambiguous safety standard. *Good Construction*, 23 FMSHRC 995, 1006 (Sept. 2001).

With respect to the chain guard, Clayton's Calcium believes that it was led astray by MSHA's prior inconsistent enforcement actions. I agree. I vacate that part of the citation that concerns the chain guard. Clayton's Calcium must understand, however, that it is now on notice that, in order to comply with the safety standard, it cannot have a hole in the chain guard.

The third part of this citation concerns the lack of a guard over the exposed keyed shaft that measured 1 inch in diameter and protruded out 2 inches. The evidence establishes that the area is accessed only once every few months and the speed of the shaft is about 12 RPM. I find that the Secretary established a violation because there is a risk, even if it is very slight, that

someone's fingers or clothing could become entangled in the moving shaft. The safety standard specifically provides that shafts must be guarded.

I find that this violation was not serious and that the company's negligence was moderate. The lack of complete guarding for the feeder conveyor tail pulley was obvious. A penalty of $60.00 is appropriate for this violation.

C. Citation No. 6360918

On January 18, 2006, Inspector Stevenson issued Citation No. 6360918 under section 104(a) of the Mine Act alleging a violation of section 56.14107(a) as follows, in part:

> The motor/pump coupling on the 100 H.P. greaser was not guarded to prevent persons from accidentally contacting the moving parts. The coupling [was] 10 inches above the floor. The coupling rotated slowly. Maintenance was done while the unit was de-energized. Persons were not in the area on a routine basis.

Inspector Stevenson determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. He determined that the violation was not S&S and that the negligence was low. The Secretary proposes a penalty of $60.00 for this citation.

The coupler was exposed at the time of the inspection. (Tr. 31; Ex. P-15). The coupler moved very slowly so the likelihood of an injury was not great. (Tr. 32). The inspectors believed that people walked in the area and, if they slipped and fell, they could get their hand caught in the coupler.

Glen Clayton testified that this coupling rotated at about 34 RPMs. (Tr. 112). He does not believe that anyone could get caught in the cited area because it is "sitting down between the housing and the gear pump assembly." (Tr. 113). He believes that it is highly unlikely that a person would be injured by the condition if he fell in the area. Todd Clayton testified that he specifically asked another MSHA inspector whether the cited area needed to be guarded. The inspector told him "no" because of the speed and "there's no way to catch onto it." (Tr. 141).

I credit Todd Clayton's testimony that another inspector observed the condition and advised the company that a guard was not required. In addition, the mill has been subject to MSHA inspection for many years. The citation itself notes that the coupling was at floor level, it rotated slowly, any maintenance was performed while the unit was shut down, and persons were not in the area on a regular basis. Clayton's Calcium did not receive fair notice that the Secretary interpreted the safety standard to require that the coupling be guarded. It was led to believe by the actions of MSHA inspectors that no guard was required. Clayton's Calcium is now on

notice, through the issuance of this citation, that it now must guard the cited coupler in order to comply with the safety standard. The citation is hereby vacated.

D. Citation No. 6360919

On January 18, 2006, Inspector Stevenson issued Citation No. 6360919 under section 104(a) of the Mine Act alleging a violation of section 56.14107(a) as follows, in part:

> The guarding on the secondary rolls crusher was not sufficient in preventing persons from contacting the moving parts. The moving parts measured 4 feet above the floor and had an opening that measured 12" X 15." There was smooth shaft on the end bell side of the drive motor that was not guarded to prevent persons from accidently contacting the moving shaft. It measured 52 inches above the floor and measured 4 inches in diameter and protruded 5 inches. Clean-up and maintenance was done while the unit was de-energized.

Inspector Stevenson determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. He determined that the violation was not S&S and that the negligence was low. The Secretary proposes a penalty of $60.00 for this citation.

The inspectors believed that two areas needed additional guarding. (Tr. 33-34; Exs. P-17 & P-18). Because the area was partially guarded and the area was not generally used as a walkway or working place, Inspector Jacobsen testified that an injury was unlikely.

Glen Clayton testified that the guard was sufficient because it extended to the bottom of the axle of the tire that was part of the assembly and the tire rotated away from the walkway. (Tr. 117; Ex. P-17). He also testified that the exposed shaft was smooth. (Tr. 117; Ex. P-18). There is nothing on the rotating shaft that could catch clothing or fingers in a pinch point. Todd Clayton testified the secondary roll crusher was shut down at the time of the inspection. When it is operating, there is a "bulk can" in front of the area that the inspector cited. (Tr. 142). As a consequence, the moving machine parts are not accessible. In addition, the guarding that was present had been there since 1984. No inspector has ever cited the area for insufficient guarding. In addition, the cited shaft was smooth, so no guarding was required.

A guard was present at the crusher but it did not cover the entire area. (Ex. P-17). In addition, when the secondary crusher is operating, there is a large bin present that makes the area largely inaccessible. It is not at all clear from the record that anyone could come in contact with the moving parts. I find that the Secretary failed to carry her burden of proving that additional guarding was necessary to comply with the safety standard. With respect to the shaft, I find that the Secretary established a violation. Shafts are specifically covered by the safety standard. The

inspector recognized that an injury was unlikely. I find that this violation was not serious and that the company's negligence was low because the condition had never been cited by MSHA. A penalty of $50.00 is appropriate for this violation.

E. Citation No. 6360910

On January 18, 2006, MSHA Inspector Stevenson issued Citation No. 6360910 under section 104(a) of the Mine Act alleging a violation of section 56.9300(a) as follows, in part:

> A berm or guardrail was not provided at the parking area on the south side of the canal that runs through the site and the guardrail on the east side of the bridge over the canal was not being maintained. At this area, a drop-off existed that could cause a vehicle to overturn and endanger persons that park and truck drivers that use the roadway two to three times per day.

Inspector Stevenson determined that an injury was unlikely but that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons or equipment." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Jacobsen testified that mine vehicles travel along the cited area and that over-the-road trucks also sometimes travel through the area. (Tr. 14). A log had been placed along the side of the bridge to act as a berm, but it had fallen down. (Ex. P-3). As a consequence, a vehicle could over-travel and go into the ditch, which was about four feet deep. (Tr. 15). The inspector testified that such an accident was unlikely because the roadway was quite wide and the road was straight through the area. He testified that the operator advised him that the area in question had only just been reopened to vehicle traffic. Inspector Stevenson took a photograph of the bridge but not the parking lot. Inspector Jacobsen had little memory of the conditions at the parking lot.

Glen Clayton testified that the cited bridge carries little or no traffic. (Tr. 105). He stated that the cited bridge is used primarily to park a loader. Todd Clayton testified that MSHA inspectors have given him conflicting advice as to how to eliminate any hazard. One inspector wanted him to put up bicycle flags along the edge of the bridge. (Tr. 138). The next inspector told him to take the flags down and improve the berm. He complains that MSHA's requirements have changed over time.

I find that the Secretary established that the guardrail on the east side of the bridge over the canal was not being maintained. A vehicle could overturn if it went over the edge. (Ex. P-3).

The evidence establishes that a log had been used as a guard, but had fallen or rolled down so that it was no longer axle height. Thus, the Secretary established a violation. A reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized that the safety standard required a berm or guardrail over the bridge. The Secretary introduced insufficient evidence to establish that a guardrail or a berm were required on the parking lot. As a consequence, I do not affirm that part of the citation. I find that this violation was not serious and that the company's negligence was moderate because the condition was obvious. A penalty of $60.00 is appropriate for this violation.

F. Citation No. 6360912

On January 18, 2006, Inspector Stevenson issued Citation No. 6360912 under section 104(a) of the Mine Act alleging a violation of section 56.11001 as follows, in part:

> Safe access was not provided along the bridge work over the plant feed bin located at the drive-over ramp. The area was being used as a walkway on a regular basis. A person could fall through an opening in the middle of the structure that measured 28 inches wide and depth of 8 feet into the bin.

Inspector Stevenson determined that an injury was reasonably likely and that any injury could reasonably be expected to be permanently disabling. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that "[s]afe means of access shall be provided and maintained to all working places." The Secretary proposes a penalty of $114.00 for this citation.

Inspector Jacobsen observed a miner on the cited structure using a shovel or bar to knock loose rock into the bins below. (Tr. 17). A miner could fall through the opening in the structure while performing this task. (Ex. P-5). Because bottom-dumping trucks travel over the structure to dump rock from their trailers through the opening, the area needed to be cleaned on a regular basis. As a consequence, the inspector determined that the violation was serious and S&S.

Glen Clayton agreed that truck drivers position their vehicles over the bridge structure and dump rock out of the bottom of the trailers into the crusher bin below. (Tr. 108). The only reason miners walk over the structure is to clean up rock from the bridge structure. He further testified that the cited structure was constructed in the early 1960s and it has not been changed since that time. (Tr. 106). In addition, the company has not changed the way it uses the structure. He testified that he has escorted MSHA inspectors through the cited area on several occasions. These inspectors discussed the purpose of the structure with him but, in every instance, the inspector was satisfied that it did not violate any safety standards. (Tr. 107). Mr. Sarabia testified that he escorted an MSHA inspector around the plant about four years earlier and they walked over the cited structure at the inspector's direction. (Tr. 126, 129). The

inspector did not indicate that walking through the area was a safety hazard and he did not issue any citations. Miners do not normally walk across the structure. (Tr. 127).

Todd Clayton testified that the structure has been in place since before MSHA started inspecting the mill. At least a dozen inspectors have observed the condition and have not written a citation. (Tr. 138). He said that the company is in the process of building a new bridge structure in the area.

Clayton Calcium does not dispute that there is a large opening in the middle of this bridge structure. It argues that several MSHA inspectors have observed the opening while walking across the bridge. Nevertheless, there is no evidence that any inspectors observed miners out on the bridge using a shovel or bar to push loose rock down the hole. It is not clear the MSHA inspectors were aware that miners routinely perform this work in close proximity to the opening. The photo shows that there are numerous tripping and stumbling hazards on the bridge structure. (Ex. P-5). As a consequence, the company's argument that MSHA's enforcement has been inconsistent is not convincing. I find that Clayton's Calcium did not provide and maintain a safe means of access to this working place. I reduce the negligence from medium to low, however, because the company genuinely believed that it was complying with MSHA regulations.

A violation is classified as S&S "if based upon the 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 established that the violation was serious and S&S. A discrete safety hazard was created by the violation. It was reasonably likely, assuming continued mining operations, that a miner working in the area would be injured. He could trip and fall into the opening, for example. He could also twist his ankle on the bridgework. It is reasonably likely that any injuries would be serious. As a consequence, I find that it was reasonably likely that the hazard contributed to by the violation would result in an injury of a reasonably serious nature. A penalty of $100.00 is appropriate.

G. <u>Citation No. 6360914</u>

On January 18, 2006, Inspector Stevenson issued Citation No. 6360914 under section 104(a) of the Mine Act alleging a violation of section 56.20003(a) as follows, in part:

> The walkway on the east side of the screen in the mill building had accumulations of spilled material. The material accumulation measured 14 inches high. The walkway measured 3 feet wide for a visual distance of eight feet. A handrail and toeboard were in place. The area was accessed periodically for maintenance duties. Visible footprints were observed on the spilled material.

Inspector Stevenson determined that an injury was unlikely but that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that "[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Jacobsen testified that the walkway could be used to check or change the screens of the shaker to the left of the walkway. (Tr. 46; Ex. P-9). It appeared to the inspectors that the material had accumulated over a significant period of time and that the material was unconsolidated. (Tr. 48, 59). Because the walkway was used infrequently, the likelihood of an accident was low. The accumulations presented a tripping hazard.

Todd Clayton testified that the accumulations form a ramp over the I-beam that crosses the walkway, which eliminates any tripping hazard. (Tr. 140). The accumulation was firm and tight. Nobody enters the area except to change screens.

I find that the Secretary established a violation. The accumulations were significant in size and the fact that they were firm and tight helps establish that they had accumulated over time. I reject the company's argument that the accumulations improved safety by providing a ramp for employees to use when crossing the I-beam. The violation was not serious and the negligence was low. Miners were in the area only when screens needed to be changed. A penalty of $50.00 is appropriate.

H. Citation No. 6360923

On January 18, 2006, Inspector Stevenson issued Citation No. 6360923 under section 104(a) of the Mine Act alleging a violation of section 56.15002 as follows:

> Suitable hard hats were not being worn at the plant where falling objects may create a hazard to persons. A vibrating screen, conveyor, and objects on overhead walkways were present that could cause head injuries to persons in the area. The walkways had

toeboards. Large fallen objects were not visible on the floor areas. 1" diameter rocks were observed on the screen walkway.

Inspector Stevenson determined that an injury was unlikely but that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was low. The safety standard provides that "[a]ll persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard." The Secretary proposes a penalty of $60.00 for this citation.

The inspectors observed that Clayton's Calcium employees were not wearing hard hats in the mill building. (Tr. 49). Loose rock was observed on the elevated walkways. In addition, hand tools may be placed on the walkways when maintenance is being performed. They also observed a loose guard in a elevated position that could have fallen, but Inspector Jacobsen could not state that this guard presented a falling hazard to employees. (Tr. 50, 64-65; Ex. P-20). Inspector Jacobsen also believes that he observed a bucket of bolts on an elevated walkway. He testified that each MSHA inspector determines whether a hazard is present and that there is no written list of hazards that inspectors rely on. (Tr. 63). The fact that the walkways were equipped with toeboards reduced the likelihood of an injury but they did not eliminate the hazard.

Glen Clayton testified that, during a previous inspection, an MSHA inspector told him that miners did not need to wear hard hats inside the mill building. (Tr. 119). The inspector told him that hard hats were not required because there was no danger that anything would fall. No employees have ever been injured by objects falling in the mill building.

Mr. Sarabia testified that he discussed hard hats with an MSHA inspector about nine years ago. (Tr. 130). The inspector told him that hard hats were not required in the mill because it is not a dangerous place. Todd Clayton testified that he has worked in the mill since he was a teenager and more than one MSHA inspector told company management that hard hats are not required in the mill building. (Tr. 143). During an early MSHA inspection, an inspector issued a citation for the lack of hard hats. (Tr. 146). All employees wore company-issued hard hats after that inspection. Then another MSHA inspector came to the mill and asked "why are you wearing those silly things." *Id.* Employees stopped wearing hard hats after this inspection.

The evidence establishes that there was a danger that objects could fall and hit miners on the head while working in the mill. I credit the testimony of Inspector Jacobsen that, at the time of the inspection, there were loose rock, a bucket of bolts, and other material on the upper decks in the mill building. These objects could fall and strike an employee working on a lower level. There was also a vibrating screen on the upper deck. The toeboards on the decking reduced the risk, but they did not eliminate it. Thus, I find that employees in the mill building were working in an area "where falling objects may create a hazard." The Secretary established a violation of this standard.

Hard hats have been standard equipment in the mining industry for many years. Most companies require employees to wear hard hats except when they are in vehicles or offices or when they are in areas where there is clearly no danger of falling objects. Consequently, I reject the company's fair notice arguments with respect to this citation. I find that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized that the safety standard required the wearing of hard hats in the mill. *See, Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990) (citation omitted); *see also, Weirich Brothers, Inc.*, 28 FMSHRC 66, 68-69 (Feb. 2006) (ALJ). I question whether an MSHA inspector would say that hard hats are "silly," but assuming that he did, this statement should have raised red flags in the minds of company management, especially since another inspector issued a citation that required the wearing of hard hats. A call to the MSHA field office would have clarified the issue. Given that there were raised decks in the mill, there was a danger that objects would fall to the floor and injure someone standing below.

I affirm the Secretary's negligence and gravity determinations. I have taken into consideration the fact that another MSHA inspector stated that hard hats are not required in my low negligence finding. A penalty of $60.00 is appropriate for this violation.

I. Citation No. 6360924

On January 20, 2006, Inspector Stevenson issued Citation No. 6360924 under section 104(a) of the Mine Act alleging a violation of section 56.15003 as follows:

> Suitable protective footwear was not being worn at the plant. Hazards were present at the plant that could cause injury to feet. Employees handle pallets, tools, and heavy machinery parts in the mill.

Inspector Stevenson determined that an injury was unlikely but that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was low. The safety standard provides that "[a]ll persons shall wear suitable protective footwear when in or around an area of a mine or plant where a hazard exists which could cause an injury to the feet." The Secretary proposes a penalty of $60.00 for this citation.

The inspectors observed that employees were not wearing protective footwear. The shoes being worn did not have hard toes. (Tr. 52). Maintenance tasks, such as changing screens, expose employees to potential foot injuries. It is MSHA policy, as set forth in its Program Policy Manual ("PPM"), that "substantial hard-toed shoes or boots" are the "minimum protection acceptable for most mining applications." (Ex. P-22). Inspector Jacobsen testified that the only miners who might not be required to wear hard-toes shoes would be equipment operators or control booth operators. (Tr. 54). He admitted that there is no written list of conditions that must be present to trigger the requirement for hard-toed boots or shoes. (Tr. 66-67).

Glen Clayton testified that the same MSHA inspector who advised him that hard hats were not required in the mill also told him that hard-toed shoes were not required because a miner's feet were only exposed to being struck by hand tools. (Tr. 119). No employee has ever sustained a foot injury at the mill. Mr. Sarabia testified that he also discussed hard-toed shoes with the MSHA inspector. (Tr. 130). The inspector told him that hard-toed shoes were not required. Todd Clayton testified that more than one MSHA inspector has told the company that hard-toed shoes are not required in the mill building.

My findings with respect to this citation are the same as with the previous citation. The Secretary established that there was a danger that heavy objects could fall and hit a miner's foot. Employees change shaker screens, for example. The record establishes that hazards existed in the mill that could injure a person's foot.

Hard-toed boots or shoes have been standard equipment in the mining industry for many years. Equipment operators and control booth operators are not regularly exposed to the danger of potential foot injuries. Thus, the PPM provides that there may be "some instances where heavy leather shoes or boots will provide adequate safety for the feet." (Ex. P-22). But it is clear that MSHA requires hard-toed shoes in most situations. Consequently, I reject the company's fair notice arguments with respect to this citation. I find that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized that the safety standard required the wearing of hard-toed footwear in the mill. I have taken into consideration the fact that another MSHA inspector stated that hard-toed shoes are not required in my low negligence finding. The gravity is also low. A penalty of $60.00 is appropriate.

J. Citation No. 6360925

On January 20, 2006, Inspector Stevenson issued Citation No. 6360925 under section 104(a) of the Mine Act alleging a violation of section 56.18002(a) as follows:

> Work place examinations for each working place at least once each shift for conditions that may adversely affect safety or health of persons at the mill were not effective. There were 16 total citations issued on this inspection.

Inspector Stevenson determined that an injury was unlikely but that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health." The standard also states that "[t]he operator shall promptly initiate appropriate action to correct such conditions." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Jacobsen testified that the safety standard requires operators to make workplace examinations and then to correct any problems found. (Tr. 55). He testified that, given the number of obvious violations found during the MSHA inspection, he did not believe that the examinations were being done. It was not the number of citations issued that led the inspectors to issue this citation, but the fact that several of the violations were obvious and the conditions were not corrected. (Tr. 55, 68-69).

As evidence of this violation, Inspector Jacobsen pointed to a number of obvious violations that were cited but not contested by Clayton's Calcium. (Tr. 56-58; Ex. P-24). Although the operator had examination records, the inspectors did not believe that the examinations fulfilled the requirements of the standard.

Clayton's Calcium argues that the mill has been in the same basic condition for many years and has been frequently inspected by MSHA. It has only received three citations since January 2003. Consequently, it argues that the citation should be vacated.

In order to determine whether a violation occurred, the language of the standard must be examined. The Commission has identified three requirements of section 56.18002 as follows: (1) daily workplace examinations are mandated for the purpose of identifying workplace safety or health hazards; (2) the examinations must be made by a competent person; and (3) a record of the examinations must be kept by the operator." *FMC Wyoming Corp.*, 11 FMSHRC 1622, 1628 (September 1988). The record-keeping requirement is set forth in subsection (b) of the standard. The Secretary defined a competent person as "a person having the abilities and experience that fully qualify him to perform the duty to which he is assigned." 30 C.F.R. § 56.2.

The Commission held that the term "competent person" within the meaning of the standard "must contemplate a person capable of recognizing hazards that are known by the operator to be present in the work area or the presence of which is predictable in view of a reasonably prudent person familiar with the mining industry." *FMC Wyoming* 1629. There is no evidence that the person conducting the examinations was not familiar with or could not recognize safety hazards that are typically present in a mill environment.

Inspector Jacobsen testified that Clayton's Calcium kept a record of its workplace examinations. (Tr. 58). He stated that the citation was issued because the examinations were not meeting the requirements of the standard as evidenced by the number of obvious violations. The Secretary's Program Policy Manual on section 56.18002 provides, in part:

> Evidence that a previous shift examination was not conducted or that prompt corrective action was not taken will result in a citation for violation of §§ 56/57.18002(a) or (c). This evidence may include information which demonstrates that safety or health hazards existed prior to the working shift in which they were found. Although the presence of hazards covered by other

> standards may indicate a failure to comply with this standard, MSHA does not intend to cite §§ 56/57.18002 automatically when the Agency finds . . . a violation of another standard.

(Program Policy Manual, Volume IV, Subpart Q).

I have vacated citations issued under this standard when the Secretary based the citations solely on the obvious nature of the violations found during the inspection. *See, for example, Dumbarton Quarry Associates*, 21 FMSHRC 1132, 1134-36 (Oct. 1999). Other administrative law judges have also vacated citations under similar circumstances. *See, Lopke Quarries, Inc.*, 22 FMSHRC 899, 911-12 (July 2000); *Alan Lee Good*, 22 FMSHRC 1081, 1088-89 (Sept. 2000). In this instance, however, I find that many of the violations found during the January 2006 inspection were so obvious that I can only conclude that the workplace examinations were rather cursory and superficial. Many of the violations found by the inspectors would have been caught by the type of examination required by section 56.18002. (Tr. 56-58 ; Ex. P-24). It is highly likely that many of these conditions developed since the previous MSHA inspection. For example, Inspector Stevenson discovered that guards around moving machine parts were missing or loose, exposing miners to a serious hazard. A reasonably prudent person familiar with the mining industry and the protective purposes of the standards would have recognized that these conditions created hazards that violated safety standards, that these conditions should be recorded, and they needed to be corrected. Consequently, the citation is affirmed. I affirm the inspector's negligence and gravity determinations. A penalty of $60.00 is appropriate.

K. Citation No. 6374779

On April 5, 2006, MSHA Inspector Kenneth Poulson issued Citation No. 6374779 under section 104(a) of the Mine Act alleging a violation of section 56.5001(a)/.5005 as follows, in part:

> The plant operator was exposed to a shift-weighted average of 89.979 mg/m^3 of nuisance dust on 01/20/2006. This exceeded the threshold limit value (TLV) of 10.00 mg/m^3 times the error factor (1.11 for total dust sampling and analysis). Respiratory protection was not being used and a respiratory protection program . . . was not in place. All feasible engineering controls were not in use to control employee's dust exposure.

Inspector Poulson determined that an illness was reasonably likely and that any illness could reasonably be expected to be permanently disabling. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides, in part, that "exposure to airborne contaminates shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists. . . ." Section 56.5005 provides, in part, that when "engineering control measures have not been

developed or when necessary by the nature of the work involved . . . , employees may work for reasonable periods of time in concentrations of airborne contaminates exceeding permissible levels if they are protected by appropriate respiratory protective equipment." The Secretary proposes a penalty of $114.00 for this citation.

Sampling for total dust, sometimes called nuisance dust, was performed on the suggestion of Inspector Jacobsen because he thought that the mill looked very dusty. (Tr. 72). When a "total dust sample" is taken on a miner, the results are analyzed for all respirable dusts in his breathing zone, not just silica dust. Inspector Stevenson directly supervised the sampling performed but Jacobsen testified that he reviewed all of the sampling notes and inspection reports. He stated that he discovered no discrepancies or abnormalities in the testing procedure used by Stevenson. (Tr. 73-75).

Inspector Jacobsen admitted that dust sampling is usually performed at metal and nonmetal quarries and mills for the purpose of measuring respirable silica dust. (Tr. 77). He also admitted that silica dust is the primary airborne hazard at the mill. In an MSHA booklet on respirable dust that is given to mine operators, sampling for total dust is only mentioned in an appendix. (Tr. 78). MSHA has sampled the company's mill on a yearly basis, but this was the first time that MSHA has sampled for total dust.

Inspector Poulson testified that he has been trained to conduct dust surveys. (Tr. 85). The dust sample taken by Inspector Stevenson was analyzed by MSHA's laboratory in Pittsburgh, Pennsylvania. (Ex. P-27). The report shows that "the exposure limit on total dust for calcium carbonate is 10 milligrams per cubic meter." (Tr. 86). The concentration "on the sample was 89.9 milligrams per cubic meter." *Id.* Inspector Poulson also testified that mine operators are expected to know that they must comply with the TLVs set forth in the 1973 publication of the American Conference of Governmental Industrial Hygienists ("ACGIH TLV Booklet") adopted by the Secretary in section 56.5001(a). MSHA's PPM provides that "the only nuisance particulates for which a citation can be issued [under section 56.5001(a)] are those listed specifically as nuisance particulates in Appendix E of the [ACGIH TLV Booklet]." (Tr. 89; Ex. P-29). Appendix E of the ACGIH TLV Booklet lists the nuisance particulates that are covered, including calcium carbonate. (Tr. 87-88; Ex. P-28). Sampling at the mill revealed that the dust contained calcium carbonate and it was eight times that permitted by the TLV for nuisance dust.

Inspector Poulson testified that when he reviewed the field notes taken by Inspector Stevenson, he did not find any abnormalities in the manner that Stevenson took the sample. (Tr. 90). Inspector Poulson determined that the violation contributed to a serious health hazard because the miners were not wearing respiratory protection. Poulson testified that the operator came into compliance with the standard by covering all of its augers in the mill. (Tr. 95-96). These augers are used to move material around in the mill. Inspector Poulson admitted that MSHA rarely samples for nuisance dust in Idaho because the primary concern is silica dust, so "we mostly concentrate on that." (Tr. 98).

Glen Clayton testified that MSHA has sampled for respirable silica dust at the mill many times and the results have always demonstrated that miners were not being overexposed to dust. (Tr. 120). He stated that he worked in and around the mill all of his adult life until he retired in 2002 and he has not had any respiratory problems. (Tr. 124).

Mr. Sarabia is the employee who wore the dust pump on the day of the inspection by Mr. Stevenson. He also wore the dust pump when the mill was retested for abatement purposes on May 2, 2006. He testified that he performed the same work on both days. (Tr. 132). He could not offer any explanation as to why the results of the testing performed on January 20 were so different from results of the testing performed on May 2. He testified that no changes were made at the mill between January 20 and May 2. (Tr. 133). He stated that the company always covers the augers when the rock is real dry, but the rock is wet in the winter so dust is not a problem.

Todd Clayton testified that he talked to Inspector Stevenson at the time the dust sample was taken. Stevenson told him that in the 18 years he had worked for MSHA, he had never been asked to sample for total dust. (Tr. 144). The company has never been out of compliance for respirable silica dust.

I find that the Secretary established a violation. I credit the testimony of Inspector Jacobsen and Poulson that the sample was taken using correct sampling procedures for total dust and that the sample was correctly analyzed at MSHA's laboratory. Based on this testimony and the exhibits presented, I find that the results of the sampling performed on January 20, 2006, accurately represent the amount of respirable dust that was present in the breathing zone of the mill operator that day. Clayton's Calcium did not present any evidence to contradict the Secretary's evidence on this issue. The mill operator was overexposed to respirable dust and he was not wearing a respirator.

The primary argument of Clayton's Calcium is that it did not know that it had to sample for nuisance dust and MSHA had never tested the mill for nuisance dust. It maintains that MSHA tested for silica dust on a regular basis and the company "received reports back from MSHA that we were in complete compliance." (Tr. 144, 160). The results of the total dust testing "really shocked" company management, especially since the operating procedures in the mill had not changed. *Id.* Clayton's Calcium believes that it should not be fined for this citation because the company had always been in compliance.

The Mine Act imposes strict liability on mine operators. The Commission and courts have uniformly held that mine operators are strictly liable for violations of safety and health standards at their facilities. *See, Asarco Inc. v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety [or health] standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* At 1197. As a consequence, the Secretary is not required to establish that the mine operator was negligent in order to establish a violation or to assess a penalty.

In this instance, it is clear that the Secretary's health standards require mine operators to control all airborne contaminants listed in the ACGIH TLV Booklet, not just silica dust. The test results show that calcium carbonate was present in the respirable dust at the mill and that the TLV for nuisance dust was exceeded by a factor of eight. Thus, a violation was established.

I reject the company's fair notice argument. MSHA is not required to provide personal notice of all of its safety and health standards to mine operators. Instead, the Secretary must publish the requirements in the Code of Federal Regulations. In this instance, the requirement is both rather specific and clear. The fact that MSHA has only tested for respirable silica dust at the mill does not negate this requirement. I have taken the company's arguments into account in my analysis of the negligence criterion.

I also find that the violation was S&S. The Commission has held that there is a presumption that the violation of the respirable coal dust standard is S&S. *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986), *aff'd sub nom. Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071 (D.C. Cir. 1987); *U.S. Steel Mining Co., Inc.*, 8 FMSHRC 1274 (September 1986); *Twentymile Coal Co.*, 15 FMSHRC 941 (June 1993). In those cases, the mine operator violated 30 C.F.R. § 70.100 or §70.101, which apply only to coal mines. The Commission reached this conclusion because an analysis of the four elements of the S&S test would be essentially the same in each instance in which the Secretary proves a violation of the health standard. This presumption was based, in large part, on the legislative history of the Mine Act. The Commission noted that "prevention of pneumoconiosis and other occupational illnesses is a fundamental purpose underlying the Mine Act." 8 FMSHRC at 895. The Commission has not directly applied this presumption to other dust violations. Consequently, I have not relied on the presumption in reaching my S&S findings.

I find that the violation contributed to a discrete health hazard. I also find that the evidence establishes that there was a reasonable likelihood that the hazard contributed to by the violation would result in an illness of a reasonably serious nature, assuming continued mining operations. Although the respirable dust detected at the mill may not be as pernicious as silica dust, significant exposures to any type of respirable dust is likely to lead to a serious illness. As stated above, the mill operator was exposed to more than eight times the level of total dust permitted under the TLV. Although it is not entirely clear what must be done to keep the dust at acceptable levels, it is appears that simple housekeeping measures may be sufficient. Clayton's Calcium did not have in place a program for monitoring the mill operator's exposure to total dust so it had no way of knowing whether he was being overexposed. Taking into consideration continuing mining operations, I find that the violation was S&S and serious.

Given the factors discussed above, I find that the company's negligence was very low. A penalty of $100.00 is appropriate.

L. <u>Citation No. 6374780</u>

On April 5, 2006, MSHA Inspector Kenneth Poulson issued Citation No. 6374780 under section 104(a) of the Mine Act alleging a violation of section 56.5002 as follows:

> The mine operator has not performed the required dust sampling to determine the adequacy of control measures. The plant operator was exposed to a shift-weighted average of 89.979 mg/m^3 of nuisance dust on 01/20/2006. This exceeded the threshold limit value (TLV) of 10.00 mg/m^3 times the error factor (1.11 for total dust sampling and analysis).

Inspector Poulson determined that an illness was reasonably likely and that any illness could reasonably be expected to be permanently disabling. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides, in part, that "[d]ust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures." The Secretary proposes a penalty of $114.00 for this citation.

Inspector Poulson testified that he issued this citation because of the significant overexposure, the fact that the operator had never sampled for nuisance dust, and his belief that the miners had been exposed to large amounts of calcium carbonate. (Tr. 93). He determined that the violation was serious based on the fact that the exposure was eight times the TLV. Respirable dust tends to accumulate in the lungs over time. (Tr. 95). The testimony and argument offered by the parties on this citation are identical to the testimony and argument offered with respect to the previous citation.

I find that the Secretary established a violation because Clayton's Calcium had not conducted any nuisance dust surveys prior to the issuance of this citation. If an operator does not conduct respirable dust surveys, it cannot determine whether its employees are being overexposed to silica dust or any other types of dust. Although MSHA regularly conducts health surveys at mines, the standard also requires mine operators to monitor airborne contaminants. The operator cannot rely on MSHA's testing alone. I note that Clayton's Calcium contested the dust citations in this case primarily because it felt that MSHA had not provided any notification or advice with respect to testing for total dust. I encourage Clayton's Calcium to contact and work with MSHA's Boise office in developing a plan to solve any respirable dust problems at its mill. The company's own testing performed by a consultant after the citations were issued indicated that the mill operator was not being overexposed. As stated above, a few simple housekeeping measures may eliminate any dust problems.

For the reasons discussed with respect to the previous citation, I find that the violation was serious and S&S and that the company's negligence was very low. A penalty of $90.00 is appropriate.

M. <u>Settled Citations</u>

Clayton's Calcium agreed to withdraw its contest of Citation Nos. 6360911, 6360916, 6360917, 6360920, 6360921, and 6360922. As a consequence, these citations and the associated penalties are affirmed.

II. APPROPRIATE CIVIL PENALTIES

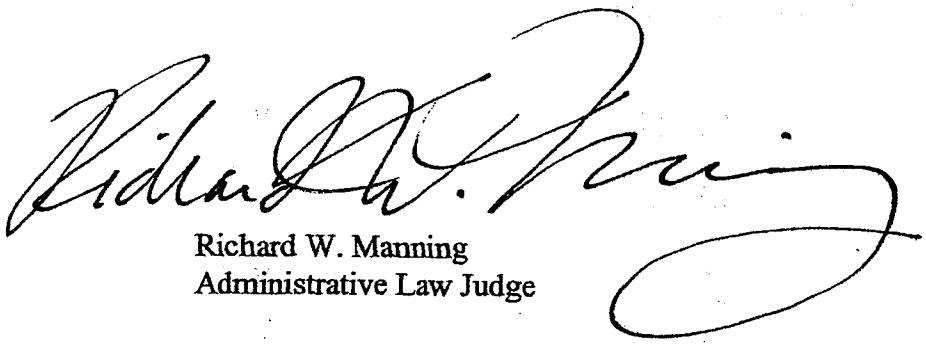
Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The record shows that the mill was issued three citations between January 1, 2003 and December 31, 2005. Clayton's Calcium is a small operator. All of the violations that were affirmed in this decision were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Clayton's Calcium's ability to continue in business. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

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:

Citation No.	30 C.F.R. §	Penalty
WEST 2006-441-M		
6360910	56.9300(a)	$60.00
6360911	56.9300(a)	60.00
6360912	56.11001	100.00
6360913	56.14107(a)	Vacated
6360914	56.20003(a)	50.00
6360915	56.14107(a)	60.00
6360916	56.14107(a)	60.00
6360917	56.14107(a)	60.00
6360918	56.14107(a)	Vacated
6360919	56.14107(a)	50.00
6360920	56.11002	60.00
6360921	56.14112(b)	60.00
6360922	56.14112(b)	60.00
6360923	56.15002	60.00
6360924	56.15003	60.00
6360925	56.18002(a)	60.00
WEST 2006-493-M		
6374780	56.50002	90.00
WEST 2006-525-M		
6374779	56.5001(a)/.5005	100.00
	TOTAL PENALTY	$1,050.00

For the reasons set forth above, the citations and orders are **AFFIRMED, MODIFIED,** or **VACATED**, as set forth above. Clayton's Calcium. Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $1,050.00 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, DC 20001

March 14, 2007

THE AMERICAN COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. LAKE 2005-105-R
v.	:	Order No. 7581153; 6/8/2005
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Respondent	:	Galatia Mine Mine ID 11-02752
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. LAKE 2005-87 A.C. No. 11-02752-54503
v.	:	Docket No. LAKE 2005-117 A.C. No. 11-02752-61764 01
THE AMERICAN COAL COMPANY, Respondent	:	Docket No. LAKE 2005-118 A.C. No. 11-02752-61764 02
	:	Docket No. LAKE 2005-129 A.C. No. 11-02752-64670
	:	Docket No. LAKE 2006-2 A.C. No. 11-02752-67066
	:	Docket No. LAKE 2006-10 A.C. No. 11-02752-69633
	:	Docket No. LAKE 2006-23 A.C. No. 11-02752-72941
	:	Docket No. LAKE 2006-27 A.C. No. 11-02752-73441
	:	Docket No. LAKE 2006-28 A.C. No. 11-02752-72416-01

:	Docket No. LAKE 2006-29
:	A.C. No. 11-02752-72416-02
:	
:	Docket No. LAKE 2006-43
:	A.C. No. 11-02752-75198
:	
:	Galatia Mine

DECISION

Appearances: Marco M. Rajkovich, Jr., Esq., Noelle Holladay True, Esq., Rajkovich, Williams, Kilpatrick & True, Lexington, Kentucky, for the Contestant/Respondent; Christine Kassak-Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Respondent/Petitioner;

Before: Judge Feldman

These consolidated contest and civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). The hearing in these matters was conducted on October 17, 2006, in Owensboro, Kentucky. There are 12 dockets in this consolidated proceeding - - 11 civil penalty proceedings and one contest proceeding. These proceedings concern 98 citations and orders. At the hearing the Secretary of Labor ("the Secretary") and The American Coal Company ("American Coal") advised that they had settled 96 of the 98 citations and orders in issue. The record was left open for the parties to submit their written comprehensive settlement agreement for approval. The settlement motion was received on March 7, 2007. The parties have agreed that American Coal will pay a total civil penalty of $163,314.00 in satisfaction of the 96 citations and orders instead of the $271,668.00 civil penalty initially proposed by the Secretary. The parties' settlement agreement is approved below.

At the evidentiary hearing, American Coal continued its contests of Citation No. 7581904 in Docket No. LAKE 2005-129 and Citation No. 7581788 in Docket No. LAKE 2006-28. The Secretary has proposed a total civil penalty of $899.00 for these citations. Based on the evidence adduced at the hearing, as well as the arguments presented in the parties' post-hearing briefs, the Secretary's $899.00 civil penalty proposal for Citation Nos. 7581904 and 7581788 shall be affirmed. Consequently, American Coal's total liability for the subject 98 citations and orders is $164,213.00.

I. Statement of the Case

Citation Nos. 7581904 and 7581788, both designated as significant and substantial (S&S),[1] each allege a violation of the Secretary's mandatory safety standard in section 75.380(a), 30 C.F.R. § 75.380(a). The citations were issued on two separate occasions in different longwall sections of American Coal's bituminous Galatia Mine. The citations were issued because stage loaders had migrated into adjacent ribs at the headgate belt entries, significantly impeding access to entries designated as primary and secondary escapeways.

Specifically, the provisions of section 75.380(a), in pertinent part, provide: ". . . at least two separate and distinct travelable passageways shall be designated as escapeways and shall meet the requirements of this section." Section 75.380(a) incorporates by reference numerous subsections of section 75.380, discussed *infra*, that specify the requirements for these designated escapeways. Consequently, the provisions of section 75.380 must be read in their entirety in order to ascertain the plain meaning of this regulatory standard.

Section 75.380(b)(1) requires escapeways to be provided "from each working section." The term "working section" is defined in the Mine Act and the Secretary's regulations as "all areas of the coal mine from the loading point of the section to and including the working faces." 30 U.S.C. § 878(g)(3); 30 C.F.R. § 75.2. The question presented is whether the operative language in section 75.380(b)(1), describing an escapeway as beginning "from" each working section, requires a mine operator to maintain an unobstructed escapeway from the working faces, or, from the loading point. American Coal does not dispute the severity of the obstructions. Rather, American Coal argues that section 75.380(b)(1) only requires it to maintain clear escapeways from the loading point. Thus, American Coal argues that the cited belt entry blockages located inby loading points do not constitute violations of section 75.380.

The working section is the area of an underground mine where miners perform their work of extracting coal. It is the miners' point of departure from the depths of the mine to the surface in the event of an emergency. It is clear that the plain language of section 75.380, that requires unobstructed escapeways from each working section, obliges mine operators to maintain a clear escape route from the working faces, where the miners are situated, to the surface. Consequently, Citation Nos. 7581904 and 7581788 shall be affirmed.

II. Findings of Fact

Citation Nos. 7581904 and 7581788 were issued based on stage loader migration towards the coal ribs at the Sixth and Seventh North longwall headgates, respectively. The headgate for the Sixth North longwall section became the tailgate for the Seventh North longwall section.

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[1] A violation is properly designated as significant and substantial if there is a reasonable likelihood that the hazard contributed to by the violation will result in a serious injury. *Nat'l. Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

The Sixth and Seventh longwall sections are each approximately 1,000 feet long. The coal seam at these sections is approximately six to six and one-half feet high. The entries, including the headgate, are approximately 18 feet wide and seven feet high.

In order to appreciate the nature and location of the impediments caused by the position of the stage loaders in proximity to the rib in the headgate entries at the Sixth and Seventh North longwall sections, it is helpful to describe the longwall operations at the Galatia Mine. The headgate and tailgate entries are at opposite ends of each longwall that is 1,000 feet in length. Unlike continuous mining sections, which have multiple entries with multiple means of access to designated escapeways, longwall sections only have one route of access to the designated escapeway entries. Specifically, the sole access from the longwall face to the primary or secondary escapeway is by travel outby the headgate belt entry to connecting crosscuts.

The relevant three parallel entries at the Sixth and Seventh North longwall sections are the No. 3 headgate or belt entry, the No. 2 primary escapeway, and the No. 1 secondary escapeway. (Joint Ex. 2; Gov. Ex. 4). Crosscuts from the No. 3 headgate belt entry are used to access the No. 2 and No. 1 entries. The specific route to the surface from the face in an emergency is outby the No. 3 belt entry and through the last open crosscut into the No. 2 or No. 1 designated escapeway entry. (Gov. Ex. 4).

The No. 3 headgate belt entry can comprise part of a section 75.380 escapeway even though the No. 3 entry is not a designated escapeway entry. In fact, American Coal asserts the escapeway starts at the loading point which is located in the No. 3 belt entry.

The component parts of a longwall unit are: the shields; a shearer; a pan line; and a stage loader. The shields, located above the pan line, hold up the roof and afford miners protection from roof falls during the coal extraction process. The shearer contains two cutting drums. It runs on a track up and down the pan line the full length of the longwall, cutting coal and spraying water to control dust. The extracted coal falls on the pan line which is approximately four and one-half feet wide. Chains, stretching from the headgate to the tailgate, provide the motion for the pan line which transports the coal to the headgate area where it is transferred from the pan line onto the stage loader. The width of the pan line in the No. 3 belt entry where the pan line connects to the stage loader is approximately three feet wide.

As noted, the stage loader is located in the headgate entry outby the face. The height and width of the stage loader varies at different locations. The height of the stage loader conveyor motor assembly, including the side rail, is approximately four and one-half feet high. The stage loader belt width ranges from 48 inches wide to as much as 13 feet wide. The width of the tailpiece is approximately three feet wide.

When facing the face, the headgate belt entry has ribs with crosscuts on the outermost left side, and a solid rib of coal on the right side. Normally, the stage loader remains stationary in the center of the headgate entry. However, the stage loader can migrate toward the rib or toward the solid block of coal depending on the alignment of the longwall shearer. For example, cutting coal deeper at the tailgate area of the longwall causes the stage loader to migrate from the center of the entry to the rib.

There are two reasons for American Coal to prevent stage loader migration. First, as the stage loader approaches the rib it decreases clearance between the loader and the rib obstructing access through the headgate to the designated escapeway entries. Second, the stage loader can be damaged if it migrates against the rib.

To counteract migration from centerline to rib, the longwall shearer must be adjusted to cut deeper into the headgate area to cause the stage loader to migrate toward the solid block of coal until it is centered in the headgate entry. Stage loader migration does not occur immediately or over a single shift. Rather, migration is gradual in that it takes several eight hour shifts for the stage loader to migrate noticeably. So too, deeper or shorter cuts required to correct migration are time consuming and cannot be accomplished quickly. Correcting migration takes approximately two to four shifts. (Tr. 434).

As previously stated, the headgate entry dimensions are approximately 18 feet wide and seven feet high. The stage loader and motor assembly is approximately four and one-half feet high and has a maximum width of 13 feet. (Tr. 382). Paul Kraus, American Coal's Manager of Health and Safety, testified the fundamental goal in longwall mining is to keep the stage loader positioned "right dead on" in the center of the headgate entry. (Tr. 382). Maintaining the stage loader in the center of the headgate provides miners with a two and one-half feet wide travelway between the stage loader and the rib which can be used to traverse through the headgate to the designated escapeway entries. When stage loaders migrate against the rib, miners must climb over the loaders to access the designated escapeway entries, with only approximately two and one-half feet clearance between the top of the loaders and the headgate roof.

The coal seam at the longwall sections in the Galatia Mine dip from the headgate to the tailgate. The coal seam also rolls, which means it goes up and down. Consequently, Kraus stated longwalls are normally aligned to mine the headgate approximately 50 feet further ahead than the tailgate. (Tr. 385-86). The deeper cuts at the headgate keep the stage loader in the center of the entry.

However, Kraus related that roof falls in the tailgate require deeper cuts in the tailgate area in order to create a clear tailgate entry as quickly as possible. Thus, a tailgate roof fall may require tailgate advancement of 75 feet or more, which would cause the stage loader to migrate from the centerline towards the rib. Kraus attributed the migrations cited in Citation Nos. 7581904 and 7581788 to adverse roof conditions in the tailgate areas of the Sixth and Seventh North longwall sections that required adjusting the longwall shearer to cut deeper into the tailgates.

On May 11, 2005, Mine Safety and Health Administration (MSHA) Inspector Steven Miller issued Citation No. 7581075 citing a violation of section 75.380(a) because a safe egress route was not provided from the Sixth North longwall face. (Gov. Ex. 11). The citation was issued because the stage loader had migrated to the headgate rib requiring miners to climb over the loader. Although Citation No. 7581075 is not a subject of this proceeding, it was issued for an identical obstruction in the same headgate entry cited in Citation No. 7581904 that American Coal contests in these proceedings. Miller designated the cited violative condition as

non-S&S because he did not personally observe anyone attempting to climb over the stage loader. Shortly after issuing Citation No. 7581075, Miller met with American Coal management and hourly employees at which time he expressed MSHA's concern with the hazards associated with stage loader migration. Citation No. 7581075 ultimately was terminated on June 15, 2005, after adjustments were made that caused the stage loader to migrate back to the center of the entry providing four feet clearance between the rib and the stage loader. American Coal did not contest Citation No. 7581075.

a. Citation No. 7581904

Following Miller's May 2005 meeting with American Coal, on June 7, 2005, MSHA Inspector Arthur Wooten conducted a follow-up inspection of the Sixth North longwall. Although the tailgate is not considered an escapeway, it provides an alternative escape route from the face if escapeways are inaccessible because of adverse conditions at the headgate. On June 7, 2005, the Sixth North tailgate was not travelable because of unsupported roof. The tailgate was deemed unsupported because American Coal's roof control plan requires supplemental roof support when the tailgate shield is more than five feet from the closest roof bolt support in the tailgate. On June 7, 2005, the tailgate shield was approximately nine feet away from roof bolt support in the tailgate. Consequently, Citation No. 7581701 was issued on June 7, 2005, for American Coal's failure to follow its approved roof control plan because of the inadequately supported tailgate. American Coal did not contest Citation No. 7581701.[2]

During the course of Wooten's June 7, 2005, inspection, he noted that the Sixth North longwall headgate belt entry was blocked because the stage loader's conveyor motor assembly had migrated to within three to five inches of the headgate rib. While the belts were running, Wooton observed a miner climb over the four and one-half feet high stage loader motor assembly to access the face. The miner had approximately two and one-half feet clearance between the top of the loader and the mine roof. At the time, the mine floor was muddy, and the miner had mud up to the top of his boots. Wooton was concerned, given the muddy conditions, that a miner could slip and sustain serious injury while attempting to climb over the loader.

As a result of his observations, Wooten issued Citation No. 7581904 citing a violation of section 75.380(a) because a safe means of escape was not provided from the Sixth North longwall face. (Gov. Ex. 2). Wooten designated the violation as S&S because there was no "speedy access to the escapeways" for miners working at the face at a time when there was no viable tailgate option because of unsupported roof. Wooten also believed a serious slip and fall injury was likely because of the muddy conditions in the headgate area. (Tr. 138, 150-51). Wooten attributed the violation to a moderate degree of negligence because he did not observe management personnel witness the miner climb over the stage loader. The Secretary proposes a civil penalty of $375.00 for Citation No. 7581904.

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[2] MSHA records reflect American Coal has paid the $60.00 civil penalty proposed by the Secretary for Citation No. 7581701.

b. Citation No. 7581788

Inspector Miller inspected the Seventh North longwall section on September 8, 2005. Miller observed a miner climb over the stage loader in the vicinity of the stage loader's rock crusher. At that time, Miller noted the stage loader motor assembly had migrated to within approximately ten inches of the headgate rib. Miller also noted that conditions in the headgate were muddy. Based on his observations, Miller issued Citation No. 7581788 citing a violation of section 75.380(a). The violation was designated as S&S because of the likelihood of a slip and fall injury, as well as the likelihood of serious injury or death in the event miners were prevented from accessing the designated escapeways during an emergency. The cited condition was attributed to a moderate degree of negligence. The citation was terminated on September 9, 2005, after the stage loader had adequately migrated back toward the tailgate once again providing safe egress to the escapeway. (Gov. Ex. 10). The Secretary has proposed a $524.00 civil penalty for Citation No. 7581788.

III. Further Findings and Conclusions

a. Factual Basis of Violation

As a threshold matter, at trial, the parties stipulated that the cited obstructions were significant as the stage loaders essentially were against the ribs in the Sixth and Seventh North longwall headgate entries. Although the distance from each stage loader to its respective rib varied by several inches, the parties also stipulated that the degree of impediment caused by each stage loader was essentially the same. (Tr. 71, 265).

American Coal, in essence, presents alternative arguments. First, American Coal challenges the fact of a violation of section 75.380 because it asserts that miners had an alternative to climbing over the stage loader obstructions to reach the designated escapeway entries. Second, based on its interpretation of the cited regulatory standard, American Coal asserts the obstructions do not constitute violations because section 75.380 does not require mine operators to maintain escapeways in working sections.

With respect to its first argument, American Coal asserts the migration of the stage loaders does not constitute violations of section 75.380(a) because climbing over the pan line to reach the designated escapeway entries is an acceptable alternative to climbing over the stage loaders. (*Am. Coal post-hrg. br.* at p. 5). As previously noted, the headgate belt entries have ribs with crosscuts on one side, and a solid ribs of coal on the other side. In this case, the stage loaders had migrated within inches of the ribs. American Coal asserts, after de-energizing the pan, a miner could: (1) climb over the pan assembly at the face; (2) walk outby in the headgate entry through the wider travelway between the stage loader and the solid rib of coal; (3) climb over the conveyor tailpiece; and (4) walk to the last open crosscut from the No. 3 headgate entry into the No. 2 primary escapeway.

Section 75.380(d)(1) requires these escapeways to be kept in a safe condition "*to assure passage of anyone, including disabled persons.*" (Emphasis added). The problem with American Coal's suggested escape route is that the pan line is three feet high and a minimum of three feet wide, and as wide as five feet counting the spill trays. (Tr. 421-22). Moreover, the belt tailpiece is three feet high and four feet wide. (Tr. 424). Clearly, American Coal's evacuation route, that involves significant climbing and crawling over belts, particularly when viewed in the context of exigent circumstances such as fleeing from smoke or fire, does not satisfy the "assurance of passage" requirements of section 75.380(d)(1). In addition, it is self evident that section 75.380 does not sanction injured miners navigating over inclined pans and belts during an emergency evacuation. Thus, American Coal's assertion that the facts do not support the fact of a violation of section 75.380(a) is unpersuasive.

b. Plain Meaning of Section 75.380

The provisions of section 75.380 require the maintenance of at least two separate and distinct travelable passageways designated as primary and alternative (secondary) escapeways. Sections 75.380(f)(1) and 75.380(h). Section 75.380(g) requires that ". . . the primary escapeway must be separated from belt and trolley entries for its entire length, to and including the first connecting crosscut outby each loading point . . . ."

American Coal's remaining argument, that the cited obstructions do not constitute violations, is based on its interpretation of section 75.380 that escapeways begin at the loading point. American Coal asserts, if section 75.380 only requires a mine operator to maintain an unobstructed escapeway from the loading point, instead of from the working face, the obstructions inby the loading points near the headgate faces do not constitute violations. To support its assertion, American Coal relies on deposition statements and testimony by Inspectors Miller and Wooten concerning MSHA's policy that two separate and distinct escapeways must be provided from the tailpiece (loading point). (*Am. Coal post-hrg. br.* at pp. 6-8).

The MSHA policy relied upon by American Coal is consistent with the provisions of section 75.380(g). This mandatory safety standard requires that belt entries must be separated from the primary escapeway at the crosscut outby the loading point. It does not relieve a mine operator of its obligation to maintain section escapeways in belt entries that provide access to the primary escapeway at the first crosscut outby the loading point. In other words, escapeways must be maintained in belt entries up to the first connecting crosscut before the loading point at which point the separate primary escapeway begins. Consequently, the testimony of Miller and Wooten is not inconsistent with the issuance of the subject citations.[3]

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[3] Section 75.1704 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 75.1704 (1976) (setting forth approval of escapeways) is the predecessor to section 75.380. While not controlling, MSHA's policy manual summarizing the escapeway requirements in section 75.1704 is instructive. The policy manual refers to "section escapeways" as ". . . that portion of the escapeway system beginning at the working faces and extending to the section loading point area." (Gov. Ex. 7, p.2).

Turning to the specific regulatory provisions, it is axiomatic that the "language of a regulation is . . . the starting point for its interpretation." *Jim Walter Resources*, 28 FMSHRC 983, 987 (December 2006) *citing Dyer v. United States*, 832 F.2d at 1066. In this regard, a regulation must be read in its entirety to understand its intended purpose. *Mettiki Coal Company*, 13 FMSHRC 3, 7 (January 1991). Significantly, the provisions of section 75.380(b)(1) do not expressly require escapeways to be provided only from the loading point. Rather, section 75.380(b)(1) expressly requires escapeways to be provided "*from* each working section." (Emphasis added). The term "working section" is defined as "all areas of the coal mine from the loading point of the section to and including the working faces." 30 C.F.R. § 75.2

American Coal has made the meaning of "from" the focus of its argument. Absent a technical term or statutory definition, the Commission applies a word's ordinary meaning. *JWR* 28 FMSHRC at 987. "From" is defined as "a function word to indicate a starting point: as (1) a point or place where an actual physical movement (as of departure, withdrawal or dropping) has its beginning." *Webster's Third New Int'l Dictionary, Unabridged* 913 (1993).

Applying the plain meaning of the word "from" to determine where the escapeway begins, it is clear that escapeways include the working section as the point of departure. Any other interpretation would turn section 75.380 on its head for it would deprive miners of the assurance of a clear escapeway from the area where it is needed most - - the area where they are working.

Moreover, contrary to American Coal's assertions, section 75.380(b)(2) permits the escapeway to begin at the loading point *only* during installation and dismantling of the loading point. In fact, the very reason section 75.380(b)(2) is an exception is because escapeways normally begin at the working face. The face as the normal starting point for an escapeway is supported by the preamble to section 75.380. While a preamble is "not officially promulgated" and does not take precedence over the express provisions of a regulation, an examination of the preamble of section 75.380 is helpful in placing the loading point exception in section 75.380(b)(2) in context. *Martin County Coal Corporation*, 28 FMSHRC 247, 269 (May 2006) (concurring opinion). The relevant portion of the preamble states:

> Paragraph [75.380](b) *requires escapeways from each working section* and from each area where mining equipment is being installed or removed. *These escapeways must be continuous to the surface* escape shaft opening or to the escape shaft or slope facilities to the surface. Paragraph (b) (2) recognizes that during the installation or removal of mechanized mining equipment, *the term working section, as defined, may not be appropriate* because in one case the loading point may not yet be located by the installation of a belt tailpiece or feeder and in the other, it may have already been removed. In these cases, the required escapeways must begin at the projected location of the loading point in areas

> where equipment is being installed and at the location of the last loading point for the section when equipment is being removed. This aspect of the final rule clarifies the existing provision and is necessary to provide safe escape for miners from hazards that may develop during this phase of the mining operation.

57 Fed. Reg. 20904 (May 15, 1992) (emphasis added).

The purpose of section 75.380 is to provide miners with a safe escape route. The loading point as a departure point for the escapeway only arises when there is no working section because miners are working assembling or disassembling equipment at the loading point. Thus, as explained in the preamble, the loading point serves as the departure point for an escapeway in section 75.380(b)(2) only when the traditional working section - - from the loading point to and including the working faces - - does not exist.

Finally, in its brief, American Coal refers to equipment in working sections that may cause an impediment to evacuation, such as longwall equipment that narrows clearance along the face, to support its theory that working sections are not part of an escapeway. (*Am. Coal post-hrg. br.* at p. 7). Section 75.380(d)(4)(iv) requires escapeways to be maintained at least six feet wide, except where equipment essential to longwall operations necessitates a narrower escapeway. In such instances, section 75.380(d)(4)(iv) requires escapeways to be of sufficient width to enable miners, including disabled persons, to escape quickly in an emergency. Thus, impediments caused by normal operations in a longwall section do not constitute violations of section 75.380.

However, Kraus conceded stage loader migration is not a normal consequence of the mining cycle. (Tr. 393-94). Kraus testified the stage loader should remain "right dead on center" in the headgate entry. (382-83). This would allow a passageway with two and one-half feet clearance from the rib that would not materially impede an evacuation. In contrast, the cited migrations, approximately five to ten inches from the rib, are prohibited by section 75.380(d)(4)(iv) because they would prevent miners from escaping quickly.

In the final analysis, where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning, or, unless such a meaning would lead to absurd results. *See Dyer v. United States,* 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light co.,* 11 FMSHRC 1926, 1930 (October 1989); *Consolidation Coal Co.,* 15 FMSHRC 1555, 1557 (August 1993). The plain meaning of the provisions of sections 75.380(b)(1) and 75.380(g) is that escapeways must be maintained from the working face to the crosscut outby the loading point, at which point the primary and alternate escapeways must be kept separate and distinct.

Having determined that section 75.380, when read in its entirety, is not ambiguous, we need not address the question of deference, and whether the Secretary's interpretation is reasonable. However, I note that even if there were ambiguity, the Secretary's assertion that section 75.380 should be applied to prohibit obstructed access to escapeways is a reasonable interpretation that furthers the safe evacuation of miners that section 75.380 seeks to ensure.

General Elec. Co. v. EPA, 53 F.3D 1324, 1327 (D.C. Cir. 1995) (agency's reasonable interpretation of its regulations entitled to deference); *Emery Mining Corp. v. Sec'y of Labor,* 744 F.2d 1411, 1414 (10th Cir. 1984). American Coal would be precluded from claiming a lack of notice of such an application of section 75.380(a) by the Secretary given its prior receipt of Citation No. 7581075 on May 11, 2005, for a stage loader obstruction identical to the obstructions in the contested citations. Accordingly, the escapeway obstructions cited in Citation Nos. 7581904 and 7581788 establish the fact of violations of section 75.380(a) and American Coal is liable for these violative conditions.

c. Significant and Substantial

A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984); *Nat'l. Gypsum Co,* 3 FMSHRC at 825. The Commission has explained that an S&S finding requires the Secretary to establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). The Commission has also emphasized it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *Id.* at 1868. The Commission subsequently reasserted its prior determinations that, as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

The likelihood of injury posed by the violative condition must be viewed in the context of continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC 1125, 1130 (August 1985). Consideration should be given to both the time the violative condition existed before the citation was issued and the time it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (November 1998); *Halfway, Inc.*, 8 FMSHRC 12 (January 1986).

The hazard contributed to by the obstructions is twofold. Namely, the violations create a hazard in the event of a slip and fall, as well as an impediment to escape in the event of a mine fire or explosion. As noted above, consideration must be given both to the length of time these obstructions existed when the citations were issued, and the length of time these conditions would have continued to exist had they not been the subject of citations requiring abatement.

Stage loader migration is a slow process that takes time to correct. Significantly, the evidence does not reflect that these conditions were noted in pre-shift or on-shift examinations as conditions needing remedial action. Consequently, one must assume these conditions would have continued to exist for a significant period. The fact that American Coal eventually would have corrected the migration problem to avoid damage to the stage loaders is not a mitigating circumstance.

In the context of continued exposure to the resultant hazard, the muddy conditions support the Secretary's assertion that miners will sustain slip and fall injuries of a reasonably serious nature while attempting to climb over the top of the stage loader that is four and one-half feet above the ground. The contribution of obstructed escapeways to the reasonable likelihood of the occurrence of serious injury or death in the event of a fire or explosion is self evident. Accordingly, the significant and substantial designations in Citation Nos. 7581904 and 7581788 shall be affirmed.

d. Pertinent Penalty Criteria

Section 110(i) of the Mine Act 30 U.S.C. § 820(i), sets forth the statutory civil penalty criteria used to determine the appropriate civil penalty to be assessed. In this regard, section 110(i) provides, in pertinent part:

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

Commission judges make *de novo* findings with respect to the penalty criteria in section 110(i) based on the record in adjudicatory proceedings, and they are not bound by the Secretary's proposed civil penalties. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Applying the general statutory penalty criteria, American Coal is a large mine operator that produced more than 21 million tons of coal at its Galatia Mine in calender year 2004. It does not contend that the Secretary's civil penalty proposal will adversely affect its ongoing operations. The Secretary does not contend that American Coal's history of violations is an aggravating factor, or, that it did not abate the cited conditions in a timely manner.

While adverse roof conditions in the tailgate, or dipping of the coal seam, as causes of the migration may be viewed as a mitigating circumstance, any mitigation is negated by American Coal's failure to note the migration for correction in its pre-shift or on-shift reports. Consequently, the conditions cited in Citation Nos. 7581904 and 7581788 are attributable to at least a moderate degree of negligence. Finally, the subject violations are serious in gravity given their S&S nature and the fact that they impact all miners in the working section.

Applying the civil penalty criteria in section 110(i), I conclude the Secretary's proposed $375.00 for Citation No. 7581904 in Docket No. LAKE 2005-129, and $524.00 civil penalty for Citation No. 7581788 in Docket No. LAKE 2006-28, are the appropriate penalties to be assessed. The higher civil penalty for the violation in Citation No. 7581788 is justified because it was a repetition of the condition that was cited earlier in Citation No. 7581904.

IV. Settlement Terms

As noted, the parties seek approval of their agreement to reduce the civil penalty for 96 of the citations and orders in issue from $271,668.00 to $163,314.00. The parties' settlement agreement is of record and is incorporated by reference. The parties settlement includes an agreement with respect to Order No. 7581153 that is the subject of the contest proceeding in Docket No. LAKE 2005-105-R that is the only contest case in these matters.

The settlement terms include vacating Citation No. 7581747 in Docket No. Lake 2006-43. In addition the terms of the agreement provide for deleting the significant and substantial (S&S) designation from the following citations: Citation No. 7596479 in Docket No. LAKE 2005-117; Citation Nos. 7581379, 7581606 and 7581611 in Docket No. LAKE 2005-129; Citation No. 7579448 in Docket No. LAKE 2006-2; Citation No. 7581780 in Docket No. LAKE 2006-10; Citation Nos. 7581973, 7581786, 7581800, 7582071, 7582072, 7582103 and 7582079 in Docket No. LAKE 2006-28; and Citation Nos. 7582510 and 7581241 in Docket No. LAKE 2006-29.

I have considered the representations and documentation submitted in the settlement motion and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Consequently, the motion for approval of settlement shall be granted and American Coal will be ordered to pay a total civil penalty of $163,314.00 in satisfaction of the 96 citations and orders that are the subject of their settlement agreement.

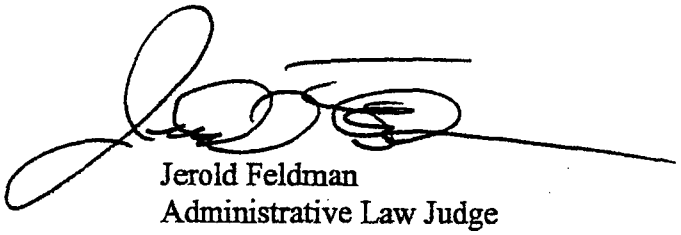
ORDER

ACCORDINGLY, the parties' settlement motion **IS GRANTED**. Pursuant to the parties' agreement, The American Coal Company **IS ORDERED TO PAY** $163,314.00 in satisfaction of the 96 citations and orders that are the subject of their settlement agreement.

Consistent with this Decision, **IT IS ORDERED** that 104(a) Citation Nos. 7581904 and 7581788 **ARE AFFIRMED**.

IT IS FURTHER ORDERED that The American Coal Company shall pay the $899.00 civil penalty proposed by the Secretary for Citation Nos. 7581904 and 7581788.

IT IS FURTHER ORDERED that The American Coal Company **shall pay a total civil penalty of $164,213.00** in satisfaction of the 98 citations and orders that are the subject of these proceedings. Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, the captioned contest and civil penalty matters **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

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/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 23, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 2006-100-M A. C. No. 11-02161-84185
v.	:	
CARMEUSE LIME, INC., Respondent	:	South Chicago Plant

DECISION

Appearances: Christine M. Kassak Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, on behalf of the Secretary of Labor;
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, on behalf of Carmeuse Lime, Inc.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of a Civil Penalty filed by the Secretary of Labor ("Secretary"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 ("Act"). The petition alleges that Carmeuse Lime, Inc. ("Carmeuse"), is liable for one violation of the Secretary's safety and health standards applicable to surface metal and nonmetal mines, and proposes the imposition of a civil penalty in the amount of $5,500.00. A hearing was held in Chicago, Illinois, and the parties waived posthearing briefing. For the reasons set forth below, I find that Respondent committed the alleged violation, but that it was not the result of an unwarrantable failure to comply with the mandatory standard, and impose a civil penalty in the amount of $1,250.00.

Findings of Fact - Conclusions of Law

Carmeuse Lime operates a facility, the South Chicago Plant, at which it processes material. Stone is shipped in, stored in silos, and processed through kilns, by use of material handlers and conveyor belts. On January 9, 2006, William R. Garrison, an inspector employed by the Secretary's Mine Safety and Health Administration ("MSHA"), visited Carmeuse's plant to conduct an investigation of a complaint that had been made regarding an electrical "flash" incident. After completing the investigation on January 10, he conducted a follow-up to a regular inspection he had done in December 2005. On January 11, he reviewed a new system for reporting and correcting hazardous conditions, that had been implemented in response to a

citation that had been issued because of shortcomings in that area. Tr. 23.

The new system required a person performing a workplace examination to note any hazardous conditions or items that needed attention on a form printed on the back of his daily time sheet. The time sheets/workplace examination reports had to be turned in to a supervisor, who certified the "time" component for payroll purposes. The supervisor also reported any repair or maintenance items that needed to be addressed to Richard D. Miller, the maintenance supervisor, by entering the information into a computerized system. Miller began his day at 5:30 a.m., by checking the system, assuring that work orders had been printed, and scheduling work for the maintenance crew, which reported at 6:30 a.m. Tr. 87-89. Conditions that involved safety were assigned #1 priority. Tr. 76-78. Matters that required immediate attention were handled by phone. The maintenance crew would first address the #1 priority items, and would note completion of the assigned task on the work order and their time sheets. Tr. 89.

In evaluating the new maintenance system, Garrison reviewed workplace examination records to identify hazardous conditions that had been reported recently, and then checked on whether they had been corrected. A time sheet/report dated January 8, 2006, by James Ross, reported that during his workplace examination on the third shift, there was an exposed electrical wire leading to the head pulley motor of the feed conveyor to the #4 kiln. Ex. G-3. The form bore the initials of Art Arroyo, Ross' foreman, who acknowledged to Garrison that he had received the form. Tr. 26, 33. When Garrison checked the #4 kiln, he found that the condition had not been corrected.[1] Because the condition had been allowed to exist for eight shifts, he issued Order No. 6184464, pursuant to section 104(d)(2) of the Act, charging that the violation was the result of Carmeuse's unwarrantable failure.[2]

Respondent does not contest the fact that the regulation was violated. However, it strongly disputes the unwarrantable failure designation, and the amount of the proposed civil penalty.

Order No. 6184464

Order No. 6184464 alleges a violation of 30 C.F.R. § 56.12004, which requires that "Electrical conductors exposed to mechanical damage shall be protected." Garrison described the violation in the "Condition or Practice" section of the order as follows:

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[1] The broken conduit was the only condition noted on workplace examination forms reviewed by Garrison, that had not been corrected. Tr. 55.

[2] The parties stipulated that the procedural prerequisites for a section 104(d)(2) order are not in dispute, i.e., that a valid order previously had been issued pursuant to section 104(d)(1) of the Act, and there had been no intervening "clean" inspection. Ex. Jt.-1.

> The 480 volt power cable for the drive motor on the #29 stone conveyor located at the feed end for the #4 Kiln had exposed energized conductor to mechanical damage. The conduit provided had broken exposing the inner conductors. The cable was 81 inches above the floor adjacent to the walkway. This condition was reported on the work place exam on the 3rd shift January 8, 2006, to mine management. Mine management has engaged in aggravated conduct by acknowledg[ing] a safety hazard and not taking corrective action. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-2.

Garrison determined that it was unlikely that the violation would result in an injury, but that an injury could be fatal. He determined that the violation was not significant and substantial ("S&S"), that one employee was affected, and that the operator's negligence was high. The Order was issued pursuant to section 104(d)(2) of the Act, because Garrison determined that the violation was the result of Carmeuse's unwarrantable failure to comply with the standard. A civil penalty in the amount of $5,500.00 has been proposed for this violation.

The Violation

The conduit in question had pulled apart where a flexible metal segment connected to a fixed segment. A gap of approximately one inch existed, exposing the inner conductors to mechanical damage. The condition is depicted in a photograph taken by Garrison. Ex. G-4. Consequently, the standard was violated.

For a number of reasons, Garrison determined that the condition was "unlikely" to result in an injury. The inner conductors, which supplied 480-volt electrical power to the conveyor's head pulley, were insulated, and that insulation was not compromised. Tr. 28, 31. The gap in the conduit was small, and was located 81 inches, nearly seven feet, above the adjacent walkway. The area was traversed infrequently, as little as once per shift. Tr. 31, 47, 94. Consequently, there was virtually no possibility of mechanical damage to the internal conductors from outside sources, and almost no likelihood of anyone coming into contact with the wires themselves. Garrison's primary concern was that vibration would cause the "rigid" edge of the pulled-apart conduit to wear through the insulation on the conductors, and thereby energize the conduit, the head pulley motor, and the frame of the conveyor.[3] Tr. 36, 63. However, he was in agreement with Carmeuse's witness that there was only a small amount of vibration caused by the head pulley motor. Tr. 40, 48, 91. In addition, he explained that a ground fault system, which he tested and found to be working properly, would protect the motor housing and conveyor frame from becoming energized, and another system would deenregize the conductors in the event of phase-to-phase contact. Tr. 32, 58, 62-63. Consequently, in order for an injury to have occurred,

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[3] Garrison originally described the edge as "sharp," but later rejected that characterization in favor of "rigid." Tr. 32, 36.

the insulation on the conductors would have had to wear through to the point that the conduit became energized, the working safety systems would have had to fail, and a person would have had to come into contact with an energized metal part.

There was no disagreement with Garrison's assessments that an injury that might result from a person contacting an energized 480-volt circuit would most likely be fatal, and that one person was affected by the violation. He rated Respondent's negligence as high because the condition had been made known to mine management at least six shifts earlier, and it had not been corrected. Tr. 30. As noted above, Respondent's disagreement is with the negligence finding and the resultant significant civil penalty.

Unwarrantable Failure

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

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek* [*Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).
>
> Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because

supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

Critical factors weigh on both sides of the unwarrantable failure determination. The Secretary relies heavily on the fact that the condition existed for over six shifts after it had been reported to management in the workplace examination report. Respondent argues that the condition was not extensive or obvious, posed virtually no danger to miners, and was about to be corrected when the order was issued.[4]

The workplace examination record noting the condition was turned over to management at the end of the January 8 midnight shift, i.e., about 7:00 a.m. on Monday morning, January 9, 2006.[5] It should have been entered into the maintenance computer system on January 9, which most likely would have resulted in repairs being made by the day shift maintenance crew on January 10. The actual entry was not made until January 10, which resulted in a maintenance work order being assigned to an electrician on January 11, and eventual repair that day. Tr. 102, 104-05; ex. R-2. The reason for this one day lapse is not known. Respondent pointed out that the responsible foreman was involved in the complaint investigation on January 9. Tr. 43-45. But, that would not have consumed all of his time. Tr. 67-69.

In her closing argument, counsel for the Secretary cited cases in which unwarrantable failures were found because hazardous conditions were allowed to exist for several shifts. *See Consolidation Coal Co.*, 23 FMSHRC 588 (June 2001) (*Consol I*) (condition that existed for a minimum of several shifts was the result of an unwarrantable failure); *Consolidation Coal Co.*, 22 FMSHRC 328 (March 2000) (*Consol II*) (condition that existed for two days was the result of an unwarrantable failure). However, there are significant factors that distinguish those cases.

In *Consol I*, the violative condition, accumulations of coal spillage and pulverized rib sloughage, was extensive and widespread. The violation was S&S.[6] Despite Respondent having

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[4] The Secretary does not contend that the condition was extensive, or that the operator was placed on notice that greater compliance efforts were necessary.

[5] There is no evidence that the condition existed prior to the January 8 midnight shift. Garrison originally testified that dust deposits indicated that the condition may have existed earlier. Tr. 42. However, he did not explain how he could have made such a determination from his observations on January 11, and later stated that he did not know the rate that dust was deposited in the area, and did not know if the condition existed earlier. Tr. 60.

[6] A violation is properly characterized as S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature" under continued normal mining

been put on actual notice by MSHA that greater efforts were necessary to achieve compliance with the standard, no efforts were being made to correct the condition because Respondent had deliberately subordinated its cleanup responsibilities to its desire to complete construction. In *Consol II*, the violation of a standard governing supplementary roof support materials was also S&S. Consol had been specifically alerted to the presence of the violation by an MSHA inspector two days earlier, putting it on notice that greater efforts were needed to comply with the regulation. At the time the citation was issued, the condition had not been corrected and there was no indication that it would have been corrected in the near future, because management officials had not followed-up to assure that corrective action had been accomplished.

Here, the condition was not obvious, and was located in a somewhat remote area.[7] The condition did not pose an imminent danger, and was not determined to be S&S. It posed little danger to miners, as evidenced by the factors that resulted in the assessment that it was unlikely to result in an injury.[8] While corrective action had been delayed by one day, effective actions had been taken to assure that the condition was repaired. As noted above, Respondent had not been placed on notice that greater compliance efforts were required.

Because the condition was not dangerous, transmitting a maintenance request through Respondent's established system was an appropriate manner in which to address the problem.[9] As Garrison stated, it is reasonable to allow more time to correct a non-S&S violation than an

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operations. *Cement Div. Nat'l. Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

[7] I conclude that the condition was not obvious because of its nature and location. Ex. G-4. Aside from the fact that persons rarely traveled the walkway, the condition was located almost seven feet above the walkway surface, and it is not likely that a person would look up and see it. There is no evidence that the condition had been reported in any other workplace examination reports.

[8] The degree of danger posed by a condition is one of the critical factors in determining whether a violation was the result of an unwarrantable failure. *Lafarge Construction Materials*, 20 FMSHRC 1140, 1145 (Oct. 1998) (*citing BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Construction. Inc.*, 14 FMSHRC 1125, 1129 (July 1992); and *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988)); *Midwest Material,* 19 FMSHRC at 34-35.

[9] Initiating corrective action through a regular supply system was criticized in *Consol II*, 22 FMSHRC at 332-33. However, that did not appear to be the lynchpin of the Commission's decision. Had Consol's system functioned properly, the condition would have been corrected the day after the inspector pointed it out, and it is unlikely that a citation would have been issued.

S&S violation.[10] Tr. 59. He also found a similar, though more obvious, condition in the same area on a conduit enclosing conductors to the kiln's bindicator. Ex. G-5. That condition was noted and placed into the maintenance system on January 10 and was scheduled for repair on January 11. Ex. R-2. Garrison did not characterize that violation as an unwarrantable failure. Ex. R-5.

Considering all of the factors discussed above, particularly the fact that the condition posed very little danger to miners, I find that Respondent's failure to enter the condition into its maintenance system on January 9, which delayed repairs for one day, did not exhibit reckless disregard, negligence, or indifference rising to the level of an unwarrantable failure. Rather, its negligence was moderate to high.

The Appropriate Civil Penalties

Carmeuse Lime is a medium-sized mine, as is its controlling entity. Ex. Jt-1. Respondent does not contend that payment of the penalties would impair its ability to continue in business. The violation was promptly abated in good faith. Respondent's history of violations is set forth in exhibit G-1. The Proposed Assessment form, filed with the petition, reflects that in the two years preceding the issuance of the subject Order, Respondent was cited for 178 violations on 92 inspection days. Under the regular assessment formula, that would result in allocation of 18 out of a possible 20 penalty points for violation history, which reflects a relatively poor history of violations.[11]

The non-S&S violation cited in Order No. 6184464 is affirmed. The gravity of the violation was moderate, not serious.[12] The operator's negligence was moderate to high, but the violation was not the result of an unwarrantable failure. A civil penalty of $5,500.00 was proposed by the Secretary, based largely upon the characterization of the violation as having been the result of the operator's unwarrantable failure. The regular assessment formula would yield a penalty in the range of $800.00 to $1,500.00. Upon consideration of the lower negligence finding and the other factors enumerated in section 110(i) of the Act, I impose a penalty in the

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[10] Respondent received a citation in 2004, for a condition that appears to have been very similar to that at issue here. Ex. R-4. Although all of the circumstances surrounding that violation are not known, the inspector specified an abatement period of three days.

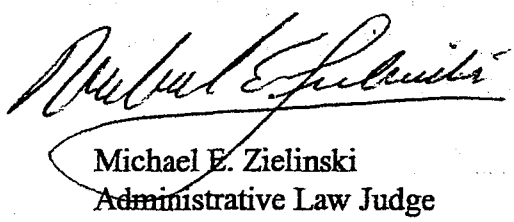
[11] Regular assessments are computed through a process that assigns points to the various penalty factors. 30 C.F.R. § 100.3.

[12] Although it is possible that a fatal injury could have resulted from the violation, the hazard created by the edge of the conduit wearing through the insulation on the conductors would most likely have been immediately neutralized by the ground fault protection system. Because the possibility of injury was extremely remote, I find that the gravity of the violation was moderate. *See Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000).

amount of $1,250.00.

ORDER

Order No. 6184464 is modified to a citation issued pursuant to section 104(a) of the Act, and is **AFFIRMED**, as modified. Respondent is directed to pay a civil penalty of $1,250.00. Payment shall be made within 45 days.



Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 23, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2006-128-M A.C. No. 03-00876-83577 E24
v.	:	Docket No. CENT 2006-159-M A.C. No. 03-00876-86215 E24
AUSTIN POWDER COMPANY, Respondent	:	Granite Mountain Quarry #2

DECISION

Appearances: Thomas A. Paige, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, and Ronald M. Mesa, Conference & Litigation Representative, Mine Safety and Health Administration, Dallas, Texas, for Petitioner;
Adele L. Abrams, Esq., Beltsville, Maryland, for Respondent.

Before: Judge Manning

These cases are before me on two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Austin Powder Company ("Austin Powder"), 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"). Austin Powder contested two citations issued by the Secretary under section 104(a) of the Mine Act. An evidentiary hearing was held in Little Rock, Arkansas. The parties introduced testimony and documentary evidence and filed post-hearing briefs.

I. THE CITATIONS AT ISSUE

McGeorge Contracting Company ("McGeorge") operates the Granite Mountain Quarry #2 in Pulaski County, Arkansas. Austin Powder is an independent contractor at the quarry. The parties agree that both McGeorge and Austin Powder are subject to the jurisdiction of the Mine Act. As an independent contractor, Austin Powder delivered and stored explosive materials at the quarry but it did not provide any blasting services at the mine.

MSHA Inspector Steve Medlin inspected the quarry on December 6, 2005. Inspector Medlin issued Citation No. 6250692 to Austin Powder under section 104(a) of the Mine Act alleging a violation of section 56.6132(a)(5) as follows:

> The vents in the cap magazine number 8 [were] covered up. This hazard exposes miners to the possibility of receiving injuries should the explosives become over-heated. The foreman stated, new wood had been installed in the magazine, and was not aware the vents had been covered.

Inspector Medlin determined that an injury was unlikely but that any injury resulting from the violation is likely to be fatal. He determined that the violation was not of a significant and substantial nature ("S&S") and that Austin Powder's negligence was moderate. The safety standard provides that "[m]agazines shall be – [v]entilated to control dampness and excessive heating within the magazine." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Medlin also issued Citation No. 6250695 to Austin Powder under section 104(a) of the Mine Act alleging a violation of section 56.6132(a)(4) as follows:

> The top of magazine number eight was not covered with non-sparking material. This hazard exposes miners to the possibility of receiving injuries should the electric blasting caps become set off. This area is traveled on a daily basis to get supplies for the day's shot.

Inspector Medlin determined that an injury was unlikely but that any injury resulting from the violation is likely to be fatal. He determined that the violation was not S&S and that Austin Powder's negligence was moderate. The safety standard provides that "[m]agazines shall be – [m]ade of nonsparking material on the inside." The Secretary proposes a penalty of $60.00 for this citation.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Plain Language of the Secretary's Explosives Standards.

The parties do not dispute that the conditions described in the citations existed at the time of the inspection. They also do not dispute that two products manufactured by Austin Powder were in the magazine, Electro-Star detonators and Rock Star detonators. Nothing else was stored in the magazine. Finally, the parties agree that both of these products are detonators, as that term is defined at 30 C.F.R. § 56.6000, as follows:

> Any device containing a detonating charge used to initiate an explosive. These devices include electric or nonelectric instantaneous or delay blasting caps and delay connectors. The term "detonator" does not include detonating cord. Detonators may be either "Class A" detonators or "Class C" detonators, as

classified by the Department of Transportation in 49 CFR 173.53 and 173.100.

The Department of Transportation ("DOT") has modified its system of classifying explosive materials. "Class A" explosives are now known as "Division 1.1" explosives and "Class B" explosives are now called "Division 1.4" explosives. (49 C.F.R. § 173.53). According to the specification sheets for Electro-Star and Rock Star detonators, they are classified as Division 1.4 explosives.[1] (Exs. D-6 & D-7). These specification sheets also make clear that they are electric detonators.

There are several sections in MSHA's explosives standards that are relevant in these cases. These standards have a number of provisions relating to the storage of explosive materials.[2] First, the safety standards provide that detonators shall not be stored in the same magazine with other explosive materials. (30 C.F.R. § 56.6100(a)). Clearly, Austin Powder did not violate this safety standard at the cited magazine. Blasting agents, on the other hand, may be stored in the same magazine as other explosive material, as long as they are separated to prevent contamination. (Section 56.6100(b)). Explosives and electric detonators must be stored in nonconductive containers. (Section 56.6102(b)). All detonators and explosives must be stored in magazines. (Section 56.6130(a)). The storage requirements for blasting agents differ from the requirements for explosives and detonators. For example, packaged blasting agents are not required to be stored in a magazine. (Section 56.6130(b)).

The Secretary has defined "Magazine" as a "bullet-resistant, theft resistant, fire-resistant, weather-resistant, ventilated facility for the storage of explosives and detonators (BATF Type 1 or Type 2 facility)." 30 C.F. R. § 56.6000. The term BATF refers to the Bureau of Alcohol, Tobacco and Firearms of the U.S. Department of Justice. The BATF regulations define "Type 1" facilities as "[p]ermanent magazines for the storage of high explosives." (27 C.F.R. § 55.203(a)). "Type 2" facilities are "[m]obile and portable indoor and outdoor magazines for the storage of high explosives." (27 C.F.R. § 55.203(b)). Both regulations provide that "[o]ther classes of explosive materials may also be stored" in these magazines.

The plain language of these standards makes clear that explosives and detonators must be stored in magazines that are bullet-resistant, theft resistant, fire-resistant, weather-resistant, and ventilated. As stated above, magazines are classified as BATF Type 1 or Type 2 magazines. Blasting agents, on the other hand may be stored in other storage facilities. The Secretary defines a "storage facility" as "the entire class of structures used to store explosive materials." (30

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[1] DOT defines Division 1.1 as "explosives that have a mass explosion hazard." 49 C.F.R. § 173.50. "A mass explosion is one which affects almost the entire load instantaneously." *Id.* Division 1.4 is defined as "explosive devices that present a minor explosion hazard." *Id.*

[2] The Secretary defines "Explosive Material" to include "explosives, blasting agents, and detonators." 30 C.F.R. § 56.2.

C.F.R. § 56.2). This definition goes on to state that a " 'storage facility' used to store blasting agents corresponds to a BATF Type 4 or 5 storage facility."[3] Thus, blasting agents may be stored in storage facilities that do not fit within MSHA's definition of "magazine."

Under the Secretary's safety standards, magazines must be made of nonsparking material on the inside and must be ventilated. (Section 56.6132(a)(4) & (a)(2)). There is no dispute that the cited magazine did not meet these requirements.

Austin Powder argues that when MSHA incorporated the BATF definitions of magazine types, as discussed above, it incorporated the BATF's entire enforcement structure. As stated in footnote 3, below, the BATF allows detonators that do not "mass detonate" to be stored in Type 4 storage facilities. Austin Powder presented evidence that its Electro-Star Detonators and Rock Star detonators will not mass detonate. That means that if one detonator package explodes, it should not set off other adjacent packages. I credit this evidence. Austin Powder also presented evidence that the cited magazine fits within the BATF definition of a Type 4 magazine. Indeed, its witness testified that a BATF inspector visited the quarry shortly before Inspector Medlin and did not find any violation of BATF regulations.

Austin Powder contends that because the Secretary separately defined the terms "magazine" (Type 1 and Type 2 BATF facilities) and "storage facility" (Type 4 and 5 BATF facilities) she cannot take a safety standard that solely references magazines and apply it to storage facilities. "The Secretary has improperly attempted to extrapolate magazine requirements onto Type 4 storage facilities, which are unique from magazines by all definitions codified by MSHA and adopted from the BATF." (Austin Br. 9). Austin Powder contends that MSHA's safety standards make clear that only detonators that are "sympathetic or mass detonating" are required to be stored in magazines. It argues that the detonators were in a Type 4 storage facility which is not required to be in compliance with section 56.6132. "Inspector Medlin's novel interpretation of this standard's requirements as being applicable to 'storage facilities' is both contrary to the plain language of the standard and the final rule's preamble, but also contrary to the actual requirements of the BATF magazine specification requirements that MSHA incorporated by reference into the relevant explosives standards in 30 CFR Part 56." *Id.* at 11. Austin Powder also notes that it has about 150 of these Type 4 storage facilities at mines in the United States and it has never been cited for a violation of section 56.6132 or required to modify them to meet these requirements.

I reject Austin Powder's arguments. MSHA's regulations do not differentiate between different types of detonators. As stated above, section 56.6130(a) plainly and clearly provides that detonators must be stored in magazines. The Secretary's definition of detonators includes

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[3] Under the BATF regulations "Type 4" are "[m]agazines for the storage of low explosives." (27 C.F.R. § 55.203(d)). This definition goes on to state that "[d]etonators that will not mass detonate may also be stored in Type 4 magazines." "Type 5" are magazines for the storage of blasting agents."

DOT Type 1.4 (Class C) detonators. None of MSHA's explosives storage standards provide that detonators that do not "mass detonate" may be stored in a storage facility that is not a "magazine" as that term is defined by MSHA. Consequently, all detonators must be stored in magazines. MSHA's safety standards only mention "Type 4" containers in reference to blasting agents, not detonators. Under the definition of "storage facility," the Secretary provides that a facility used to store blasting agents may be a BATF Type 4 facility. (Section 56.2).

B. Regulatory History of the Secretary's Explosives Standards.

In making its argument, Austin Powder relies heavily on the preamble to a final rule published on December 30, 1993. (Ex. D-1). This final rule revised portions of MSHA's existing explosives standards. This amendment to the safety standards did not change the cited safety standard (56.6132) or the standard requiring that detonators be stored in magazines (56.6130(a)). The definition of "magazine" was revised and a definition of "storage facility" was added. The old definition of "magazine," which stated that a magazine is a "facility for the storage of explosives, blasting agents or detonators," was deleted. (Ex. D-1, 58 Fed. Reg. 69597)[4]

The Secretary makes clear in the preamble that all magazines must be constructed to comply with the BATF specifications for Type 1 or 2 magazines. *Id.*, 58 Fed. Reg. 69598. "Sections 56/57.6132 require a magazine to be structurally sound, noncombustible . . . , bullet-resistant, made of nonsparking material on the inside, ventilated to control dampness and excessive heating, ..." *Id.* The Secretary goes on to state:

> MSHA's intent is to distinguish the circumstances under which a magazine and storage facility are used. For example, paragraph (a) of 56/57.6130 requires that detonators and explosives, not blasting agents be stored in magazines; while paragraph (b) states that blasting agents may be stored either "in a magazine or other facility" but "[f]acilities other than magazines used to store blasting agents shall contain only blasting agents."

Id. This statement strongly supports the language of section 56.6130(a) and the Secretary's arguments in this case.

The preamble goes on to state:

> As used, "magazine" refers to a type of storage facility for highly sensitive explosive materials such as explosives and detonators which are subject to sympathetic detonation. Because blasting agents are not as highly sensitive as detonators and explosives,

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[4] I note that this old definition is still present at section 56.2. This appears to be in error.

> blasting agents need not be stored in a magazine or facility that meets the construction criteria of §§ 56/57.6132.

Id., 58 Fed. Reg. 69599. Austin Powder argues that the preamble's reference to detonators "which are subject to sympathetic detonation" shows that the cited magazine was not required to meet the standards of 56.6132. (The term "sympathetic detonation" has the same meaning as "mass detonation"). I disagree with this argument. I find that all this language does is further explain why detonators and explosives must be stored in a magazine that meets the standards of section 56.6132. Explosives and detonators are more sensitive than blasting agents.[5] The preamble language does not clearly convey the idea that only detonators subject to sympathetic detonation must be stored in magazines. In addition, the word "which" is generally used to introduce non-restrictive clauses.

Next, the preamble states:

> In summary, MSHA's definition of the term "magazine" is consistent with the BATF regulations. In fact, the Agency's definition of "magazine" is modeled after BATF's definition, except that it explicitly lists within the definition the construction criteria for magazines used for the storage of explosive materials.

Id. I agree with Austin Powder that MSHA incorporated BATF's construction criteria for magazines when MSHA changed the definition of "magazine" in 1993, but nothing suggests that MSHA changed what must be stored in magazines at mine sites. The safety standard requiring that detonators and explosives be stored in magazines was not changed. (Section 56.6130(a)).

The preamble next summarizes the distinctions between the four types of magazines under BATF regulations. In the preamble, MSHA states that it uses the same construction criteria except that MSHA uses the term "magazine" for Type 1 and Type 2 facilities and the term "storage facility" for Type 4 and Type 5 facilities. The preamble then states:

> MSHA's final rule does not require BATF Type 4 storage facilities to be bullet-resistant. The only storage facilities that need to be bullet-resistant are magazines (BATF Type 1 and 2 facilities) used for the storage of highly sensitive explosive material such as

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[5] Unfortunately, the Secretary's definitions of "blasting agent" are not helpful. The definition in section 56.6000 is "any substance classified as a blasting agent by the Department of Transportation in 49 CFR 173.114a(a)." The definition in section 56.2 is the same except that it makes reference to "49 CFR Section 173.114(a) (44 FR 31182, May 31, 1979)." Section 173.114 no longer exists. "Blasting Agent" is an "explosive material that meets prescribed criteria for insensitivity to initiation." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 54 (2d ed. 1997). Ammonium nitrate/fuel oil (ANFO) is an example of a blasting agent.

> explosives and detonators which are subject to sympathetic detonation.

Id. Again, Austin Powder argues that this language shows that only mass detonating detonators are required to be stored in magazines. For the same reasons discussed above, I find that this language cannot be logically used create two categories of detonators when the actual safety standards do not mention such a distinction. There is nothing in the language of the safety standards that suggests that certain types of detonators must be stored in magazines but that other types may be stored in storage facilities that do not meet the requirements of section 56.6132.

Finally, the preamble states "[i]n summary, MSHA believes that the definition of 'storage facility' as clarified by the final rule, provides mine operators with objective criteria, consistent with BATF, relative to storage requirements for the entire range of explosive materials." *Id.* Austin Powder contends this language demonstrates that the Secretary intended to incorporate all of the BATF's explosives storage regulations into MSHA explosives standards. It is clear that the BATF allows detonators that are not mass detonating to be stored in Type 4 facilities. These facilities are called "storage facilities" in MSHA's regulations and these facilities are not required to comply with section 56.6132. Thus, Austin Powder argues because the Secretary specifically stated in the 1993 rulemaking that MSHA's storage requirements were "consistent with BATF . . . for the entire range of explosive materials," the Secretary clearly intended to allow detonators that are not mass detonating to be kept in storage facilities rather than magazines.

Although Austin Powder's argument has some superficial appeal, I agree with the Secretary that MSHA's standards do not distinguish between mass detonating detonators and detonators that are not subject to mass detonation. The preamble does not support Austin Powder's arguments. The Secretary argues that "in the preamble to the explosives standards it is clear that MSHA drew the regulatory line, *not* between classes/divisions of detonators, but between *blasting agents* and *detonators*." (S. Br. 6) (emphasis in original). I agree.

C. Mining Community Provided with Fair Notice of Standard's Requirements.

Austin Powder also argues that it was not provided with fair notice of the Secretary's interpretation of the safety standard, in part because it has never been cited for storing detonators that are not mass detonating in a Type 4 storage facility rather than in a magazine. It states:

> Secretary affirmatively amended the 1991 regulation to include separate definitions for magazines and storage facilities, in response to commentators' concern over Type 4 being included with Type 1 and Type 2. This history shows an active decision to not include Type 4 within the scope of magazine requirements promulgated at 30 C.F.R. § 56.6132.

(Austin Br. 14). I agree that the Secretary distinguished magazines from storage facilities in the new standards. But the Secretary did not change the requirement that detonators must be stored in magazines that meet the construction criteria for BATF Type 1 or 2 magazines. The definition of "storage facility" clearly states that a facility "used to store *blasting agents* corresponds to a BATF Type 4 storage facility." (Emphasis added). There is no provision stating that detonators that are not capable of mass detonation may also be stored in facilities that correspond to a BATF Type 4 facility.

I find that the safety standards at issue here are quite clear. Section 56.6130(a) states that "detonators and explosives shall be stored in magazines." This standard could not be written more clearly. Although the 1993 amendments to the explosives standards clarified the definition of "magazine" and added a definition for "storage facility," MSHA did not change the requirement that all detonators, including DOT Division 1.4 detonators, must be stored in magazines. I find that Austin Powder and the mining community were provided with fair notice of this requirement.

Austin Powder also makes reference to the Memorandum of Understanding between the Secretary and BATF ("MOU"). (Ex. G-14). It states that under the MOU, MSHA "inspects magazines and storage facilities at mine sites and has adopted BATF rules and regulations." (Austin Br. 5). I disagree. The MOU simple authorizes MSHA inspectors to enforce BATF regulations at mine sites on behalf of the BATF. It does not state that MSHA has adopted BATF regulations as its own explosives standards. Indeed, the MOU provides that "[i]n the event that [BATF regulations] conflict with a MSHA requirement, MSHA shall enforce the regulations or standards which provide for the greater safety or security of persons in or around a mine." (Ex. G-14, 45 Fed. Reg. 25565).

D. Violations of Section 56.6132 and Application of Penalty Criteria.

To summarize, I find that the Secretary established the two violations of section 56.6132. The Electro-Star and Rock Star detonators stored in the cited magazine were DOT Division 1.4 explosives. MSHA defines "detonator" to include those that are classified as DOT Division 1.4 explosives. Section 56.6130(a) requires detonators to be stored in "magazines." Austin Powder stored the detonators in a facility that did not fit the construction criteria for a magazine, as that term is defined by MSHA. All magazines must comply with the requirements of section 56.6132. Because Austin Powder violated subsections (a)(4) and (a)(5) of that standard, the citations are affirmed. Although the detonators stored in the cited magazine are of the type that are not subject to sympathetic detonation, I find that such detonators are not exempted from the requirement that detonators be stored in magazines.[6] Only blasting agents are exempted from this requirement.

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[6] I note that the cited magazine also did not meet other construction requirements for magazines. It was not bullet-proof, for example. No other citations were issued with respect to the magazine.

I agree with the inspector's determination that the violations are not S&S. I further find that the gravity is somewhat lower than that determined by Inspector Medlin. Given that the detonators will not mass detonate, any injury would most likely result in lost workdays or restricted duty, at most. I also find that Austin Powder's negligence was low. Although I have found that the safety standard was clear, the preamble to the amended explosives standards is somewhat confusing. Austin Powder manufacturers, distributes, sells, and stores explosives for the mining industry throughout the United States. It also provides blasting services at many mines. It has been operating, in good faith, on the assumption that detonators that are not subject to mass detonation may be stored in storage facilities rather than magazines, as those terms are defined by MSHA. Although its assumption is not correct, the preamble to the revised blasting standards led it to believe that it could use BATF Type 4 storage facilities to store its detonators. On this basis, I find that Austin Powder's negligence was low.

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 Austin Powder had not been issued any citations at the Granite Mountain Quarry #2 in the 24 months preceding the inspection. The Secretary provided an 82 page exhibit listing, on a mine-by-mine basis, all of the citations that have been issued to Austin Powder during the preceding 24 months. (Ex. G-2; Stipulation 10 in Secretary's response to hearing order). Although no total was provided, it appears that Austin Powder received one or two citations at each mine. In 2005, the mine worked about 1,035,400 total man-hours. Both of the violations at issue in these cases were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Austin Powder's ability to continue in business. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

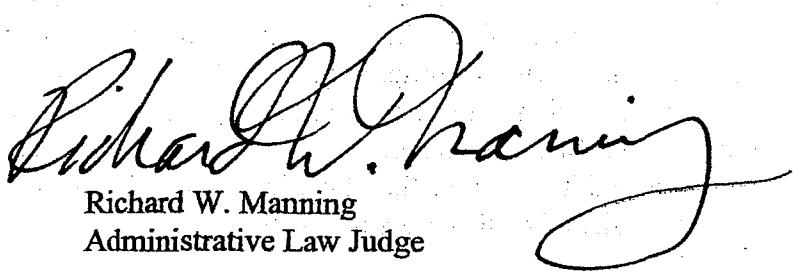
IV. ORDER

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

Citation No.	30 C.F.R. §	Penalty
CENT 2006-128-M		
6250692	56.6132(a)(5)	$40.00
CENT 2005-159-M		
6250695	56.6132(a)(4)	40.00

TOTAL PENALTY $80.00

For the reasons set forth above, the two citations are **AFFIRMED** as modified in this decision. Austin Powder Company is **ORDERED TO PAY** the Secretary of Labor the sum of $80.00 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
OFFICE OF ADMINISTRATIVE LAW JUDGES
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Washington, DC 20001-2021

March 23, 2007

CARMEUSE LIME & STONE, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. KENT 2006-73-RM
v.	:	Citation No. 6108285; 10/31/2005
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. KENT 2006-74-RM
	:	Order No. 6108286; 11/01/2005
	:	
	:	Docket No. KENT 2006-75-RM
	:	Order No. 6108291; 11/02/2005
	:	
	:	Docket No. KENT 2006-76-RM
	:	Order No. 6108300; 11/08/2005
	:	
	:	Docket No. KENT 2006-77-RM
	:	Citation No. 6108303; 11/08/2005
	:	
	:	Docket No. KENT 2006-78-RM
	:	Order No. 6108304; 11/08/2005
	:	
	:	Docket No. KENT 2006-79-RM
	:	Order No. 6108305; 11/09/2005
	:	
	:	Plant Black River Operation
	:	Mine ID 15-05484
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. KENT 2006-203-M
	:	A. C. No. 15-05484-76359
	:	
	:	Docket No. KENT 2006-289-M
	:	A.C. No. 15-05484-84225
v.	:	
	:	Docket No. KENT 2006-307-M
CARMEUSE LIME & STONE, INC., Respondent	:	A. C. No. 15-05484-79301
	:	
	:	Plant Black River Operation

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Notices of Contest and Petitions for Assessment of Civil Penalty brought by Carmeuse Lime and Stone, Inc., against the Secretary of Labor, and by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Carmeuse, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815. The company contests the issuance of one citation and five orders alleging violations of the Secretary's mandatory health and safety standards and one order alleging a violation of the Act. The petitions allege six violations of the Secretary's mandatory health and safety standards and one violation of the Act and seek penalties of $14,183.00. A hearing was held in Covington, Kentucky. For the reasons set forth below, I vacate one order, modify four orders and two citations, and assess a penalty of $7,150.00.

Settled Matters

At the beginning of the hearing, the parties announced that they had settled several orders and citations. (Tr. 10-11.) Order No. 6108286 in Docket Nos. KENT 2006-74-RM and KENT 2006-203-M, issued under section 104(g)(1) of the Act, 30 U.S.C. § 814(g)(1), was modified by deleting the "significant and substantial" designation and the penalty reduced from $1,033.00 to $700.00. (Tr. 11.) Order No. 6108291 in Docket Nos. KENT 2006-75-RM and KENT 2006-289-M, issued under section 104(d)(1), 30 U.S.C. § 814(d)(1), was modified by deleting the "unwarrantable failure" designation and reducing the level of negligence from "high" to "moderate," thus making it a 104(a) citation, 30 U.S.C. § 814(a), rather than a 104(d)(1) order. (Tr. 11-12.) The penalty was reduced from $4,500.00 to $2,000.00. (Tr. 12.) Order No. 6108300 in Docket Nos. KENT 2006-76-RM and KENT 2006-289-M was likewise modified from a 104(d)(1) order to a 104(a) citation by deleting the "unwarrantable failure" designation and reducing the level of negligence from "high" to "moderate." (Tr. 12.) The penalty was reduced from $2,200.00 to $1,500.00. (Tr. 12.) Finally, Citation No. 6108303 in Docket Nos. KENT 2006-77-RM and KENT 2006-307-M was modified from a 104(d)(1) order to a 104(a) citation between the filing of the notice of contest and the civil penalty proceeding and the Respondent agreed to pay the proposed penalty of $350.00 in full. (Tr. 12-14.) The terms of the agreement will be carried out in the order at the close of this decision.

Background

Carmeuse Lime and Stone, Inc., operates the Black Water underground mine and plant on

the Ohio River in Pendleton County, Kentucky. Limestone is mined underground and brought to the plant where it is processed, by heating it in kilns, into lime to be sold for various industrial uses.

MSHA Inspector Richard L. Jones inspected the plant portion of the mine over several days in the fall of 2005. One 104(d)(1) citation and two 104(d)(1) orders, issued by him during the inspection and contained in Docket No. KENT 2006-289-M, were contested at the trial.[1] The violations will be discussed in the order issued.

Findings of Fact and Conclusions of Law

These three violations range from questionable to inexcusable. The Respondent contends that none of the three amount to violations. The Secretary maintains that they all resulted from the Operator's indifference. The evidence, however, supports the Secretary on one, the Respondent on another and arrives at a middle ground on the third.

Citation No. 6108285

This citation was issued on October 31, 2005, and alleges a violation of section 57.11001 of the Secretary's regulations, 30 C.F.R. § 57.11001, because:

> Safe access was not maintained on the pond pump work platform and access ramp. Miscellaneous materials were allowed to accumulate on the ground at the entrance of the access ramp. This included wire rope, machine parts and discarded metal items. On the access ramp, other items were allowed to accumulate including stone spillage, metal pipe and metal pipe couplings. The cover over the valves located just below the walkway level was missing. The end of the access ramp was fairly level[,] but the floating ramp was tilted to the right creating an awkward step-down. A six-inch pump discharge water line lay in the middle of the floating ramp leading to the floating pump station. On the floating platform itself was an accumulation of various materials that included tools, spare parts, discarded items, scrap wood and scrap metal. One of the two pumps had been removed from the floating platform. This caused the float to list sharply. One corner of the work platform was at the water level while the opposite corner was about three feet above the water level. This was a list of about 30 percent. The float was about eight feet wide. This

[1] Section 104(d)(1) of the Act assigns more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

> combination of factors created an unsafe condition for persons to travel or work in. Persons work there about once per month on average. A person could trip and fall against the metal railing, onto the various items on the flooring or onto the metal flooring itself. This could result in lacerations, dislocations, broken bones or other similar lost time type injuries. This condition was easily detectable from various locations including the main roadway which is immediately adjacent the pond. Management personnel travel this way several times per shift including the plant production manager, Eric Caba. Management made no attempt to abate the condition or to barricade the area against entry. This constitutes conduct [of] more than ordinary negligence in that the condition was known but no corrective actions were initiated by management. This is an unwarrantable failure to comply with a mandatory standard.

(Govt. Ex. 3.) Section 57.11001 requires that: "Safe means of access shall be provided and maintained to all working places." Section 57.2, 30 C.F.R. § 57.2, defines *working place* as "any place in or about a mine where work is being performed."

The parties stipulated that: (1) The pump platform is in a pond at Carmeuse's lime plant known as the "high pH" pond, and water from the pond is used in the plant; (2) The platform may have one or two pumps on it, although at the time the citation was issued it had only one, and it floats in the pond when the water is of sufficient level; (3) A grated walkway extends from the shore to the platform; and (4) No persons were assigned to work on the platform when the inspector issued the citation. (Jt. Ex. at 4.) In addition, Inspector Jones testified concerning the condition of the entrance to the walkway, the walkway itself and the platform essentially as he laid it out in the citation. (Tr. 42-61.) He further presented photographs which corroborated his description. (Govt. Exs. 4-8.)

The company witnesses did not dispute the inspector's description of the area to any significant degree; what they and the operator disagree with are his conclusions. The Respondent argues that no violation occurred because: "[T]he pond platform was not a 'working place' at the time the [c]itation was issued; under a reasonable person standard no violation existed; the standard does not apply to the type of conditions cited by the inspector; and the standard is impermissibly vague." (Resp. Br. at 6.) None of these arguments are persuasive.

The company asserts that since the definition of *working place* is any place where work *is* being performed and since no one was assigned to work on the platform or was working on the platform on the day in question, the plain language of the standard is not met because the platform was not a working place at the time of the citation. The company does not claim, however, that work is never performed on the platform; only that it is "episodic and sporadic" rather than routine or regular. (Resp. Br. at 7.) This is a distinction without a difference.

The evidence in this case is clear that work had been performed on the platform in the past and would be performed on the platform in the future. These facts bring the platform within the meaning of the regulation. To hold otherwise would mean that, taking the Respondent's argument to its logical conclusion, any place where work was not being performed at the time the inspector observed a violation would not be a working place. Obviously, to make any sense, the word *is* has to mean now or in the future, not just now.[2] Consequently, I hold that the pond platform was a working place under the regulation.

The operator next maintains that there can be no violation under the Commission's "reasonable person" test. The Commission has held that in determining whether a broadly worded standard that is intended to be applied to many factual situations, such as this one, applies to a specific situation, "it is appropriate to evaluate the evidence in light of what a 'reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard.'" *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (Nov. 1990) (citations omitted). Applying this standard, the Respondent avers that the conditions present did not prevent safe access to the platform and, therefore, would not have put a reasonable person on notice that the standard was violated.

Specifically, the operator claims that the pump discharge water line was obvious and could be stepped over or walked beside, that the missing gratings were off to the side of the walkway as were a wooden pallet and metal pipe and couplings, that there was not appreciably more stone on the walkway at the time the citation was issued than was accepted by the inspector later for abatement purposes, that the wire rope at the entrance to the ramp was pressed flat to the ground and that the tilt of the platform was not sufficient to cause an access problem. Significantly, the operator does not discuss the hoses and discarded tools at the entrance to the ramp, the fact that the walkway was made up of two sections of catwalk, with close to a one foot drop down between the two, which were also loosely connected and could twist, or the fact that the beginning of the second section was in the water.

Furthermore, while individually any of these items might not have limited access, it is the accumulation of multiple deficiencies which caused the problem. The Commission has held that:

> To prove a violation of section 57.11001, the Secretary must establish that a safe means of access to working places was not provided to and maintained for miners gaining access. The Secretary, however, need not prove that safety is diminished to the degree that an accident or injury actually will occur while the

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[2] If work had been performed at a place in the past, but was not being performed there in the present and would not be performed there in the future, it would not be a working place. Whether an area where work had not been performed in the past and was not being performed in the present would be a working place if work were to be performed there in the future would depend on the specific facts. That is not the situation in this case.

miners are using the route.

Dynatec Mining Corp., 23 FMSHRC 4, 19 (Jan. 2001). Here, I find that a reasonably prudent person familiar with the mining industry and the requirements for safe access to the working place in section 57.11001 would recognize that the pervasive clutter, openings in the grates, drop-offs and tilts described by the inspector created numerous stumbling and tripping hazards that impeded safe access to the work place.

Finally, the Respondent argues that "the standard is directed to hazards related to the ability to get to the working place, rather than ones involving tripping or stumbling" and, therefore, does not apply to the situation here, or if it does, it is impermissibly vague. (Resp. Br. at 15-16.) The logic of this argument is hard to discern. Clearly the tripping and stumbling hazards in this case affect the miners' ability to get to the work place. Further, as noted above, the standard meets the "reasonable person" test and, thus, is not impermissibly vague.

In construing an identically worded standard, 30 C.F.R. § 56.11001, the Commission held that "the standard requires an operator to uphold, keep up, continue, or preserve the safe means of access it has provided to a working place." *Lopke Quarries, Inc.*, 23 FMSHRC 705, 708 (July 2001). Clearly, by allowing the accumulation of clutter, missing grate covers, tilting and drop-offs at the entrance to, along the walkway and on the platform itself, the Respondent did not uphold, keep up, continue or preserve a safe means of access to the working place on the platform. Accordingly, I conclude that the company violated section 57.11001 as alleged.

Significant and Substantial

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

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

In order to prove that a violation is S&S, the Secretary must establish: (1) a violation of a safety standard; (2) a distinct safety hazard contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4. Having found a violation of section 57.11001, criterion (1) has been established. Further, as discussed above, the violation created a tripping or stumbling hazard, so (2) has been met.

With regard to (3), I find that there was a reasonable likelihood that the hazard would result in an injury. The inspector testified that:

> What I was more concerned with was a person inadvertently, while they were working or traveling in the area heading towards the pump, that they would inadvertently trip on something. In that case, a part of their body could come in contact with the metal handrail. They could fall onto the stone or onto the gra[t]ing or one of the spare parts and fall into this hole where the controls are for the lines. And I figured someone could end up with a broken bone or laceration, strain, sprain sort of injury.

(Tr. 56-57.)

The Respondent argues that the inspector's use of the word *could* makes his testimony of the speculative type found by the Commission not to support a finding of S&S. *See e.g.*, *Ziegler Coal Co.*, 15 FMSHRC 949, 953-4 (June 1993); *Texasgulf*, 10 FMSHRC at 500-01. Those cases, however, have to do with permissibility violations and the likelihood of a hazard resulting in an injury occurring. Here the inspector did not use the word *could* in describing the likelihood of the hazard resulting in an injury, he used it in connection with the type of injury that might occur. He was clear that a tripping hazard would result in an injury.

I find that the evidence establishes (3); that there was a reasonable likelihood that the tripping and stumbling hazard would result in an injury. I further find that the injury would be of a reasonably serious nature involving broken bones, lacerations, strains and sprains and, therefore, (4) is also established.

Accordingly, I conclude that the violation was "significant and substantial."

Unwarrantable Failure

This violation was also charged as resulting from the "unwarrantable failure" of the company to comply with the regulation. The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987); *Youghiogheny*, 9 FMSHRC at 2010. "Unwarrantable failure is characterized by such conduct as 'reckless

disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (Aug. 1994); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission has set out the following guidelines for determining whether a violation is unwarrantable:

> Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the extent of the violative condition, the length of time that it has existed, the operator's efforts in abating the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's knowledge of the existence of the violation, and whether the violation is obvious or poses a high degree of danger. *See Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). These factors need to be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular factual scenario. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), *appeal docketed*, No. 01-1228 (4th Cir. Feb. 20, 2001). Nevertheless, all relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether the level of the actor's negligence should be mitigated. *Id.*

Consolidation Coal Co., 23 FMSHRC 588, 593 (June 2001).

The Secretary asserts that this violation was unwarrantable because it "was obvious and had existed for [a] long period of time." (Sec. Br. at 15-16.) While the argument correctly sets out two of the "unwarrantable failure" criteria, the record does not support such a finding.

In the first place, there is no evidence in the record to show how long the area had been in the state observed by the inspector. No one could remember the last time someone had worked on the platform. The last record of work being performed on the platform was the repair of a plastic line by a contractor in July 2005. There is no evidence of what the area looked like after

that repair was completed. Thus, I cannot conclude that the violation had existed for a long period of time.

Nor is it clear that the violation was obvious. The Secretary concludes that because the pond was adjacent to a road on which company supervisors at the plant traveled several times a day on their way to the plant, that the violation was obvious. Nonetheless, except for the tilt of the platform, nothing about the entrance, walkway or platform is obvious from the photographs offered into evidence to show what someone walking by the pond could see. (Govt. Ex. 4 & 5.) Further, there was no reason for anyone's attention to be attracted to the walkway and platform when walking by the pond. The evidence indicates that work was performed on the platform closer to once a quarter than the once per month alleged by the inspector. Other than noticing work on the platform, someone who walks by it several times a day would have little reason to observe it. Therefore, I find that the violation was not obvious.

While not discussed by the Secretary, it is also clear that the violation did not pose a high degree of danger. Indeed, the injuries likely to result from the violation fall at the lower end of the reasonably serious spectrum. Likewise, there is no evidence that the operator had been placed on notice that greater efforts were necessary for compliance. In fact, although the platform and pond area had been observed in the past by MSHA inspectors, this was the first time it had been cited. Finally, there is no evidence that the operator had knowledge of the existence of the violation and since it was not obvious it cannot be concluded that the operator should have known about it.

None of the unwarrantable factors are present in this violation. There has been no showing of indifference, willful intent, a knowing violation or a serious lack of reasonable care. The company was no more than ordinarily negligent with regard to this violation. Accordingly, I conclude that the Secretary has not established that this violation resulted from the operator's "unwarrantable failure" to comply with the regulation and will modify the citation from a 104(d)(1) citation to a 104(a) citation.

Order No. 6108304

This order was issued on November 8, 2005, and charges a violation of section 57.9315, 30 C.F.R. § 57.9315, in that:

> Lime dust emissions were not being controlled at the transfer points where belts 89-801 and 89-802 transfer lime onto belts 89-803 and 89-804. A thick dust cloud was intermit[te]ntly produced because dust collectors #844 and #845 were inoperable. This condition exposed persons who would be traveling or working in the area to the hazards that the cloud of dust caused. The dust could get into the eyes of a person and cause diminished visibility. This could cause a person to trip on the walkway or stairs and fall

> against metal structures nearby or onto the metal walkway resulting in injury. The dust could also cause physical injury to the eyes including corneal abrasions. Workplace examination records indicated an employee reported the condition no less than five times, the earliest time was on 10/05/2005. Jerry Hay, Supervisor, had signed the workplace examination cards that listed the hazard. The operator was engaged in conduct constituting more than ordinary negligence in that he was aware of the condition, had not initiated timely corrective actions, or barricaded the affected area against entry, and had allowed persons to continue to work and travel in the area. This is an unwarrantable failure to comply with a mandatory standard.

(Govt. Ex. 9.) Section 57.9315 provides that: "Dust shall be controlled at muck piles, material transfer points, crushers, and on haulage roads where hazards to persons would be created as a result of impaired visibility."

The Respondent argues that this violation occurred on conveyor belts inside a building and that, therefore, it cannot be a violation of this regulation which governs "the dumping of material by trucks or loaders, not the transition between two conveyor belts." (Resp. Br. at 36.) The operator correctly points out that the standard is found in Subpart H of the regulations which is entitled "Loading, Hauling and Dumping." Subpart H, 30 C.F.R. §§ 57.9100-57.9362. The subpart is further broken down into "Traffic Safety," "Transportation of Persons and Materials" and "Safety Devices, Provisions, and Procedures for Roadways, Railroads, and Loading and Dumping Sites." Section 57.9315 is included in the last category. Thus, based on the topic headings, at least, it appears that this argument may have some merit.

However, as the Commission has often pointed out:

> The "language of a regulation . . . is the starting point for its interpretation. *Dyer v. U.S.*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.; Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

Central Sand and Gravel Co., 23 FMSHRC 250, 253-54 (Mar. 2001). Here the meaning of the section is clear, there is no evidence that the Secretary intended the words to have a different meaning and the meaning does not lead to absurd results.

The issue is whether the meaning of *transfer points* is ambiguous in view of the fact that, according to the operator, *muck piles, crushers* and *haulage roads* seem limited to the outdoors.[3] *Transfer point* is not defined in the regulation. It is, however, defined in both editions of the mining dictionary as: "The point where coal or mineral is transferred from one conveyor to another." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 583 (2d ed. 1997) and 1158 (1st. ed. 1968). Therefore, I find that the meaning of *transfer point* is well established in the mining industry and its meaning plain in section 57.9315.

Furthermore, even if the meaning of the regulation were not plain, there is nothing in the context of Subpart H that clearly limits it to outdoors. Sections 57.9260 and 57.9261, 30 C.F.R. §§ 57.9260 and 57.9261, deal with transporting supplies, materials and tools underground, which is obviously not outdoors, and sections 57.9316 and 57.9318, 30 C.F.R. §§ 57.9316 and 57.9318, concern self-propelled mobile equipment which is frequently found indoors at large preparation plants. Thus, the regulation clearly is applicable to the situation cited by Inspector Jones.

The inspector testified that he was on an inclined walkway between belts 803 and 804 at the transfer point where belts 801 and 802 dump material onto 803 and 804 when he first felt and then observed a large cloud of dust giving forth from the transfer point. The dust was so thick that one can barely see the person standing in the cloud when the inspector took a photograph of it. (Govt. Ex. 10.) He described the dust as coming out of nowhere, instantaneously, and being composed of very thick, very fine dust. The cloud lasted about seven or eight minutes.

The inspector determined from witnesses that such dust clouds occurred intermittently and without warning. He also found out that kiln operators, electricians, maintenance people and others walked on the walkway through the area. He concluded that miners on the walkway would be unable to see if a dust cloud happened while they were in the area and could easily stumble on the walkway which was fairly steeply inclined.

Other than arguing that the regulation did not apply, the company did not dispute this evidence or the fact of violation. Accordingly, I conclude that the operator violated section 57.9315 as alleged.

Significant and Substantial

The inspector also found this violation to be "significant and substantial." He testified that if someone is on the walkway when a dust cloud occurs:

> The next second they can't see their feet in front of them and then

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[3] Although not necessary to the disposition of this case, this assertion does not always hold true. I have had cases where crushers were located inside a building. *See e.g., Tilden Mining Co., L.C.*, 20 FMSHRC 80, 81 (Jan. 1998) (ALJ); *Empire Iron Mining Partnership*, 19 FMSHRC 1912, 1919 (Dec. 1997) (ALJ).

naturally, they're going to try to get away from it.

> So they hold their breath and they take off to the nearest step or walkway or whatever and I believe that in a hurry in that situation, they could easily stumble and I think it's reasonably likely . . . some time in the future – I'm not going to speculate when – but some time with this exposure, somebody's going to get hurt.

(Tr. 90-91.) He further opined that injury would occur because:

> A person could fall against a metal structure, strike their face, hand, arm, mouth or anything. Their head. They could fall against a handrail. They could fall while trying to climb down the steps which they could fall then and onto the concrete floor which a three- or four-foot fall a concrete floor even would result in some sort of injury.
>
> Lacerations, broken bones, twisted – twisted ankle. That sort of thing. You know, joint injuries.

(Tr. 92.)

Applying the *Mathies* criteria to this violation, I have already found a violation of a safety standard and I further find that the impaired visibility resulting from the violation created a safety hazard of tripping or falling. As usual, it is the third factor which is contested.

The Respondent argues that the dust was intermittent, the number of miners in the area was low, no injuries had been reported due to the presence of dust in the past and the inspector again used the word *could* to describe the injuries. Therefore, the company maintains, the third and fourth *Mathies* factors are not present.

These arguments do not demonstrate, either individually or together, that it was not reasonably likely that the dust clouds would result in an injury. Further, they are all refuted by the fact that Rick Smith, a kiln operator, wrote up on his "Daily Safety Checklist" that the dust collectors were not working at least 11 times between October 5 and November 8, the date of the citation. (Govt. Ex. 11.) Accordingly, I find that the clouds were not as intermittent as the Respondent would have us believe and that one miner was so concerned about the problem that he took the time to continually write it up.

Based on the inspectors testimony, the photograph of a dust cloud (Govt. Ex. 10), and Smith's complaints, I conclude that it was reasonably likely that a miner would have his visibility impaired by dust and trip or stumble on the walkway or the stairway, receiving reasonably serious injuries such as lacerations, twists or sprains, or even a broken bone. Thus, the third and

fourth *Mathies* criteria are met. Consequently, I conclude that the violation was "significant and substantial."

Unwarrantable Failure

The inspector also found this violation to result from an "unwarrantable failure" on the part of the operator. The company disagrees, asserting that it was acting to address the problem, but no rapid remedy was available. The company's arguments are unconvincing.

The Respondent maintains that its response to the problem was appropriate. It points out that Jerry Hay, a production supervisor, responded to Smith's reports by asking him if the control room computers showed that the dust collectors were operating (they erroneously showed that they were), by asking maintenance employees to check the collectors and by going to the area to see if there was any dust. It notes that Ron Clos, another production supervisor, entered a work order concerning Smith's complaint into the system on October 25. Finally, the Respondent alleges that Gary Galloway, a maintenance supervisor, was looking into a new design for the dust collectors, but since options were limited, it would take a long time to solve the problem.

Contrary to the Respondent, I find that this evidence demonstrates that the company's response was completely inappropriate. At least six of Smith's complaints were received and acted on by Hay, yet it apparently never occurred to him that inasmuch as the complaints were continuing it might be necessary for him to take more than the superficial action he had already taken. He never went to examine the dust collectors. Even though Clos acted on four of the complaints, he never did more than write up a work order and then note on the other three complaints that he had written up a work order. Galloway responded to one complaint merely by noting that the company was "working on a new design." (Govt. Ex. 11.)

In fact, the dust collectors had apparently been dismantled before Smith's first complaint, although no one from the company who testified would admit to having been aware of that when the complaints were made. No one even knew when they had been dismantled, but Galloway guessed it was "probably August, September, something like that . . . ." (Tr. 321.) Thus, the complaints could never have been resolved by the actions taken by Hay and Clos.

To sum up, Smith made 11 complaints that the dust collectors were not working. No one responding to the complaints knew they had been dismantled. No one responding to the complaints bothered to check the collectors to see if they were working. No one responding to the complaints was spurred to investigate further or do anything more than they had already done even though the complaints continued. This clearly exhibits *indifference* or a *serious lack of reasonable care*. Accordingly, I conclude that the violation was the result of the company's "unwarrantable failure" to comply with the regulation.

This violation was originally written as a 104(d)(1) order with Citation No. 6108285

listed as the predicate 104(d)(1) citation.[4] However, I am modifying that citation to a 104(a) citation. In addition, it does not appear that there are any further 104(d) citations or orders in these cases which can serve as a predicate citation for this one. Therefore, I will modify this order to a 104(d)(1) citation.

Order No. 6108305

This order was issued on November 9, 2005, alleging another violation of section 57.11001 because:

> Safe access was not maintained along the travelways [*sic*] in and around the closed loop cooling system for the #4 and #5 kilns. Lime material was allowed to accumulate on the travelways up to about two feet in depth. This created trip, slip, and fall hazards and low clearance where electrical conduits cross over the travelway. Head clearance was about five feet. The south and east sides were not provided with handrails. There was a drop-off of up to about four feet in places for a distance of about forty feet. This could allow a person to fall which could result in sprains, strains, broken bones, or other injuries from falling to the ground below. Persons could be in this immediate area multiple times per shift while performing their normal duties. No barricade was in place to prevent persons from being exposed to the hazards. Lime material buildup in this area began about six months ago but was not completed. Several members of management were aware the condition existed. The operator was engaged in conduct more than ordinary negligence in that the condition was known, no attempt had been made to lessen or eliminate the hazards, and persons were allowed to continue to work in the area.
>
> This is an unwarrantable failure to comply with a mandatory standard.

(Govt. Ex. 14.)

In connection with this order, the inspector was concerned with three things: (1) the build-up of material on what he believed to be a walkway; (2) the low clearance of a conduit

---

[4] Section 104(d)(1) provides that on finding that a violation is S&S and an "unwarrantable failure" the inspector will include such findings in a citation. It then provides that if, during the same or subsequent inspection within 90 days after issuance of the citation, the inspector finds another violation resulting from an "unwarrantable failure" he shall issue an order.

crossing over the walkway; and (3) a four foot drop-off where no handrails were provided. The Respondent argues that the Secretary has failed to prove a violation of the standard. I agree.

The inspector testified that someone would be in the area described in the order because:

> In the event that the plant operator – the kiln operator – sees a spike in temperature, they will send someone to check the coolant level and they would be in the area also to put coolant into the container.
>
> Also, they would be in the area to do cleanup work to keep that dust from accumulating. Remember this is a radiator setup so you have to be able to move air through the radiators. So your intake has to be clear and your exhaust fans will have to be clear so they would be in that area for that as well.

(Tr. 103-04.) However, he later stated that: "The working place would be primarily the steps going up to and including the containment because that's where they're going to go to check the levels to make sure. Other than that, there's not a whole lot that could be done there on a regular basis." (Tr. 116-17.) The inspector opined that this was the path used to check the coolant levels because there were footprints on it. (Tr. 103.)

The bag houses are located to the left of the walkway and the material in the walkway resulted from "dumping the bag houses." (Tr. 189.) However, that was not being done at the time of the inspection, so there should not have been additional build-up on the walkway. Furthermore, as the inspector admitted, the only reason anyone would go to the area would be to check the coolant level. That is done very infrequently, three or four times a year. (Tr. 220, 347.) More importantly, when someone did go to check the coolant level, they did not go by way of the walkway and the area of the drop-off, as envisioned by the inspector, but they would come around from the left and use a ladder. (Tr. 202, 279, 350.)

The Commission has held that an identically worded standard, 30 C.F.R. § 55.11-1, "does not mean necessarily that an operator must assure that every conceivable route to a working place, no matter how circuitous or improbable, be safe." *The Hanna Mining Co.*, 3 FMSHRC 2045, 2046 (Sept. 1981). Here, while the Operator has not shown that there is no reasonable possibility that a miner would go in the areas cited by the inspector, the Secretary has not shown that the inspector's route was ever used as a means of access to check the coolant level. In this regard, footprints on a path between the bag houses and the cooling system, without more, does not indicate that miners were using the walkway to check coolant levels, particularly since there is evidence that that was not the route taken. Moreover, even if the Secretary could show that the areas listed by the inspector were a means of access, it is not obvious from the evidence that they were unsafe. Since the Secretary has the burden of proof, I conclude that she has failed on this violation. Accordingly, I will vacate the order.

Civil Penalty Assessment

The Secretary has proposed a penalty of $1,700.00 for Citation No. 6108285 and a penalty of $2,200.00 for Citation No. 6108304. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (Apr. 1996).

In connection with the penalty criteria, the parties have stipulated that the proposed penalties will not affect Carmeuse's ability to remain in business and that the company employed approximately 120 miners, who worked 247,291 hours in 2005, making the mine a medium size operation. (Jt. Ex. 1.) In addition, I find from the allied papers and the company's Assessed Violation History Report that Carmeuse has an average history of previous violations. (Govt. Ex. 17.) Further, it appears that the operator demonstrated good faith in attempting to achieve rapid compliance after being notified of the violations.

With regard to gravity and negligence, as previously indicated the gravity of Citation No. 6108285 was not very serious and the operator was only moderately negligent in committing the violation. The gravity of Citation No. 6108304 was more serious than the preceding citation, although it too did not involve a life threatening situation. The company was highly negligent in permitting this violation to occur and reoccur.

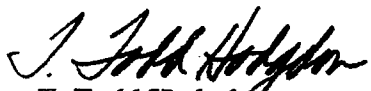
Taking all of these factors into consideration, I conclude that a penalty of $400.00 is appropriate for Citation No. 6108285 and that the penalty proposed by the Secretary of $2,200.00 is appropriate for Citation No. 6108304. I further conclude that the penalties proposed for the violations which the parties settled are appropriate under the six penalty criteria.

Order

In view of the above, Order No. 6108286, in Docket Nos. KENT 2006-74-RM and KENT 2006-203-M, is **MODIFIED**, as agreed by the parties, by deleting the "significant and substantial" designation and is **AFFIRMED** as modified; Citation No. 6108285, in Docket Nos. KENT 2006-73-RM and KENT 2006-289-M, is **MODIFIED** to a 104(a) citation, by deleting the "unwarrantable failure" designation and reducing the level of negligence from "high" to "moderate," and is **AFFIRMED** as modified; Order 6108291, in Docket Nos. KENT 2006-75-RM and KENT 2006-289-M, is **MODIFIED**, as agreed by the parties, to a 104(a) citation, by deleting the "unwarrantable failure" designation and reducing the level of negligence from "high" to "moderate," and is **AFFIRMED** as modified; Order No. 6108300, in Docket Nos. KENT 2006-76-RM and KENT 2006-289-M, is **MODIFIED**, as agreed by the parties, to a 104(a) citation, by deleting the "unwarrantable failure" designation and reducing the level of negligence from "high" to "moderate," and is **AFFIRMED** as modified; Order No. 6108304, in Docket Nos. KENT 2006-78-RM and KENT 2006-289-M, is **MODIFIED** to a 104(d)(1) citation

and is **AFFIRMED** as modified; Order No. 6108305 in Docket Nos. KENT 2006-79-RM and KENT 2006-289-M is **VACATED**; and Citation No. 6108303, in Docket Nos. KENT 2006-77-RM and KENT 2006-307-M is **AFFIRMED**.

Carmeuse Lime and Stone, Inc. is **ORDERED TO PAY** a civil penalty of **$7,150.00** within 30 days of the date of this order.



T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021
March 28, 2007

MONTEREY COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. LAKE 2007-49-R
	:	Citation No. 7488388; 12/12/2006
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEATH ADMINISTRATION (MSHA), Respondent.	:	No. 1 Mine
	:	Mine ID 11-00726

DECISION

Appearances: Thomas C. Means, Esq., Crowell & Moring LLP, Washington, D.C., Counsel for the Contestant;
Christine M. Kassak-Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, IL, Counsel for the Respondent

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Notice of Contest and Motion to Expedite filed by Monterey Coal Company ("Monterey") on February 2, 2007, challenging the issuance of Citation No. 7488388, and contesting the extension of the abatement time that was served on Monterey by the representative of the Mine Safety and Health Administration on January 4, 2007. On February 5, 2007, in a telephone conference call, the parties indicated that they had not been able to resolve the issues raised by the Notice of Contest, and it was agreed to schedule this case for hearing on February 14 and 15, 2007.[1] On February 5, 2007, subsequent to the conference call, the Secretary filed a Motion to Dismiss asserting that inasmuch as Monterey's Notice of Contest was filed thirty days beyond the issuance of the citation in violation of Section 105(d) of the Federal Mine Safety and Health Act of 1977, it was untimely, and should be dismissed. On February 7, 2007, Monterey filed its Opposition to the Motion.

In a telephone conference call with Counsel for both parties on February 8, 2007, the Secretary's motion was denied to the extent that it was held that the Notice of Contest was timely filed regarding the modification of the abatement time served to Monterey by the Secretary's

[1]In the conference call, the Secretary of Labor "the Secretary" advised that she intended to file a Motion to Dismiss, which, if granted, would result in the cancellation of the hearing.

representative on January 4, 2007.[2] The parties were ordered to prepare for a hearing regarding the validity of the underlying citation, and to file pre-hearing briefs setting forth, *inter alia,* their arguments relating to the propriety of litigating this issue, or whether the Secretary should prevail in the granting of its Motion to Dismiss in its entirety.

On February 12, 2007, the Secretary filed a Pre-Hearing Brief, and Monterey filed a Pre-Hearing Memorandum of Points and Authorities.

A hearing was held in St. Louis, Missouri on February 14, and 15, 2007. At the commencement of the hearing, the Secretary's Motion to Dismiss was denied in its entirety. Subsequent to the hearing, Contestant filed a Post-Hearing Memorandum, and Respondent filed a Post-Hearing Statement.

Introduction

Monterey operates an underground coal mine consisting of a longwall, and two continuous miner working sections. Approximately 60 miners work underground on each shift. However, during the change of the shifts there could be 120 miners underground.

The mine has two designated escapeways, a primary and an alternate, to evacuate mines outby from the working sections to the surface.[3] The alternate escapeway proceeds south, in intake belt air, outby the working sections approximately 1,600 feet, to a point approximately 400 feet west of one of the East Hornsby shafts. After proceeding 330 feet beyond the shaft it becomes ventilated by fresh air. The alternative escapeway then travels outby another 200 feet where it makes a 45-degree diagonal turn southwest across a 70-foot entry and then proceeds west ventilated by fresh air. Approximately 200 feet after the alternate escapeway turns west, it passes within approximately 100 feet north of the other East Hornsby shaft. The escapeway continues heading west in fresh air, approximately 13,500 feet to the Main Portal.

The East Hornsby Shaft No. 1 has a diameter of eight feet, and is approximately 308 feet vertically from the bottom to the surface. The East Hornsby Shaft No. 2 has a diameter of 20 feet and is approximately 307 feet vertically from the bottom to the surface. The parties stipulated that "[a] Dover escape capsule . . . that can accommodate between two and four persons . . . is commercially available for use in either of the East Hornsby shafts, assuming it would meet all applicable MSHA standards." Joint Stipulation, Par. 15, ("Jt. Stip.").

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[2]This ruling was put on the record at the commencement of the hearing in this matter on February 14, 2007.

[3]The primary escapeway is not at issue in this case.

The Main Portal shaft is approximately 296 feet from the surface, and served by an elevator which miners use every day to enter and exit the mine.[4] The elevator is equipped with two-way communication equipment, and can accommodate approximately 25 people per trip.

On December 12, 2006, MSHA mining engineer, Jason Robert Stoltz examined Monterey's mine map located on the surface of the mine. Based on his examination of the map relating to the location of the alternate escapeway, he issued a citation alleging a violation of 30 C.F.R. § 75.380(d)(5). Section 75.380(d) provides that "[E]ach escapeway shall be–
xxx
(5) [l]ocated to follow the most direct, safe and practical route to the nearest mine opening suitable to the safe evacuation of miners[.]"

Findings of Fact and Discussion

The Secretary's Case

The Secretary, in her Post-Hearing Statement, takes the position that the issue presented is not the route to the openings to the surface, but whether the nearest opening is suitable for the safe evacuation of miners. It is argued that the escapeway at issue violated Section 75.380(d)(5), because its route to the mine Main Portal, which bypassed the East Hornsby shafts, was not to the nearest mine opening suitable for the safe evacuation of the miners.

The Secretary's argument appears to be predicated upon the testimony of Inspector Stoltz, who indicated that he cited Monterey because the alternate escapeway does not travel to either of the East Hornsby shafts which, until August 2006, had been used as the primary escapeway evacuation route to the surface by way of electrically operated escape facilities that transported miners up the shaft to the surface. Instead, the alternate route comes within a few hundred feet of these shafts, and then continues 13,500 feet to the Main Portal where miners are evacuated to the surface.

According to Stoltz, in essence, the East Hornsby shafts were suitable to accommodate an escape facility, and the East Hornsby No. 2 shaft was used as the primary escapeway when the shafts were previously ventilated by intake air. Also, according to Stoltz, a non-electrical escape capsule could be used in the return air in the East Hornsby shafts. In addition, he alleged that three stoppings could be installed to direct intake air "to within maybe 75 feet of the bottom of shaft." (emphasis added) (Tr. 95). Also, Self Contained Self Rescuers Units (SCSRs) are available to the miners and are "scattered" throughout the escape route. (Tr. 164).

Mark Owen Eslinger, a supervisory mining engineer and a qualified professional engineer, agreed with Stoltz that the alternate escapeway was not the most direct route because it by-passed the East Hornsby shafts, and continued two and one-half miles further to the Main Portal. He opined that if a mine opening can be equipped with an escape facility to hoist miners

[4]The miners travel to and from work in the active working sections in diesel mantrips.

up to the surface, it is "suitable" as this term is used in Section 75.380(d)(5), *supra*. Eslinger indicated that he is aware of mines that use non-electric capsules as escape facilities in return air shafts.[5] He also indicated that capsules could be built big enough to hold a stretcher and four persons to carry it. (Tr. 270).

In addition, according to Eslinger, since the north/south portion of the alternate escapeway is in a belt intake entry, it could become full of smoke as a result of a belt fire. He noted that belts are sources of fire due to friction that results when they rub against metal surfaces, or stuck rollers. Eslinger indicated that the danger of a fire is increased due to the presence of dust that comes off the belt during its operation. He stated that based on his review of MSHA documents, he concluded that belt fires in coal mines outnumber explosions. He also indicated that a secondary explosion resulting after an explosion inby at the working faces, could bypass the East Hornsby shafts and send contaminates directly towards the Main Portal. In this connection, he asserted that the escapeway route contains a transition zone where fresh air flowing east along the west-east portion of the secondary escapeway mixes with intake air flowing outby in the north/south section of the escapeway. Thus, according to Eslinger, if a fire were to occur in the transition zone, "smoke and contaminates would flow towards the main shaft and it would flow up the elevator shaft. ... and it would also flow up the slope." (Tr. 272).[6]

Discussion of the Secretary's Case

The weight to be accorded the Secretary's case is diluted by various facts elicited on cross-examination. Although Stoltz testified on direct examination that he found the alternate escapeway to be not as safe or suitable as one utilizing the East Hornsby's shafts, he conceded on cross-examination that he did not take into account that the East Hornsby's shaft were in return air. Nor did he consider the comparative time needed to escape via the East Hornsby shafts or the route via the Main Portal. Specifically, that he did not consider the relative time that it would take an escape facility to travel from the bottom of the Main Portal and East Hornsby shafts to the surface, and then return to the bottom to evacuate more miners.[7] Nor did he consider the number of miners who could escape from either opening at one time. Also, Stoltz conceded that should there be a fire in the inby working sections, resulting smoke and contaminates would go into the return air, which could result in limited visibility. As a consequence, miners traveling in return air to the East Hornsby shafts could become disoriented. Further, he conceded that in the event of a fire inby at the working faces, the presence of carbon monoxide and the risk of asphyxiation would be higher in return air. Also, he conceded that even with the construction of stoppings to vent intake air to the East Hornsby shafts, it is not possible to totally avoid return air in that area.

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[5]Dean Cripps, an electrical engineer, opined that escape capsules with permissible equipment are very common; that they could utilize a cordless communication system, which is acceptable for use in return air.

[6]This testimony was elicited when Eslinger was called by the Secretary as a rebuttal witness.

[7]The round trip of an escape facility, including the required time to unload at the surface, was referred to as a "cycle".

In the same fashion, Eislinger's opinion that the East Hornsby shafts were "suitable openings" is diluted because it disregards the last phrase of Section 75.380(d)(5) which requires, by its plain language, that the nearest opening be suitable for "the safe evacuation of miners". It is significant to note that these shafts were in return air, and Eslinger agreed on cross-examination, that " ... the preferred choice is to have an escape facility in intake air, or at least not in return air". (Tr. 126). Further, due to the lack of a proper foundation, not much weight was accorded his opinion that a capsule could be built to accommodate a stretcher and four persons. Also, he did not testify to the minimum size of such capsule as compared to the diameter of the East Hornsby shafts.

Monterey's Case

Monterey's evidence, which in the most part has not been impeached or contradicted, indicates that the route via the East Hornsby openings is not as safe as the present alternate route.

Donald Stewart is presently retired, but worked at the subject mine for thirty-one years and still visits the mine weekly in his capacity as President of the Local United Mine Workers. He indicated that, in general, he has sided with MSHA in disputes with the Monterey. He indicated that, in testifying at the hearing, he was presenting the position of the miners that he represents. In this connection, he expressed their concern to evacuate approximately 60 people from the section in fresh air as is utilized in the present alternate escapeway. In contrast, he opined that evacuation via the East Hornsby shafts could expose miners to smoke and contaminates, as a fire or an explosion would be more likely to occur at the face where coal is extracted, rather then at the Main Portal. He opined that the capsule proposed for use at the East Hornsby shafts is not large enough to accommodate a stretcher, especially in a horizontal position. On the other hand, the Main Portal elevator, which he approximated as either ten feet by ten feet, or eight feet by ten feet, can accommodate a stretcher.

Stewart indicated that the Main Portal elevator has a capacity to carry 25 miners at a time, and is used daily by miners to enter and exit the mine. Additionally, he stated that the Main Portal is examined three times daily, whereas the return areas are only examined once a week.

Stewart noted that miners daily travel along the two and a half-mile alternate escapeway on diesel cars.[8] He opined that if the cars failed to operate, it would be still faster to have 60 to 120 miners walk two and a half-miles to be evacuated, rather than to wait in return air at the East Hornsby shafts for a capsule that has a capacity limited to four miners. Since Stewart represents miners, and in this capacity has "always" opposed Monterey's position in disputes with MSHA and the State of Illinois on safety issues (Tr. 143-144), I find him an objective witness and accord considerable weight to his testimony.

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[8]The parties stipulated that "Travel from the East Hornsby Shafts to the Main Portal Shaft by diesel mantrip takes about ten minutes, and on foot between 1 and 1¼ hours." (Jt. Stip., Par. 18).

Donald McBride is a mine inspector and supervises other inspectors for the Office of Mines and Materials, Department of Natural Resources, State of Illinois. He testified on behalf of the state to assist Monterey in its defense against the citation. McBride indicated that the Director of his office considers it unsafe to put an escapeway in return air, as it is a gathering place for gases. For the same reason, it is the position of the State of Illinois that it is not safe for miners to gather in return air awaiting evacuation by a capsule via an East Hornsby shaft.

McBride indicated that he is not aware of any mine using a capsule as an escape facility in return air. He opined that although the East Hornsby shaft opening is closer to the present alternate escape route than the Main Portal, it is not safe or suitable due to the limited capacity of the capsule, and the possibility of persons waiting in contaminated air to be evacuated. He opined that accordingly, it is safer to travel a longer distance to be evacuated by an elevator that has a significantly shorter cycle time and much larger capacity. McBride stated that it is safe to enter return air as part of an escapeway, only for the limited purpose of going around a blockage and then returning to intake air. Since McBride is not employed by either party, and is responsible for enforcing miner safety, considerable weight is placed on his testimony.

John Lanzerotte, Monterey's safety manager, indicated that the diesel vehicles that travel the alternate escapeway have a capacity of 20 people. Also, a slope located a couple of hundred feet from the Main Portal elevator shaft is in fresh air. Thus, miners can escape from the mine by walking out the slope at a seventeen degree grade, or riding a slope car which has the capacity to transport 20 people. Since it is approximately ten feet by six feet, it thus can accommodate a ten foot by two foot stretcher. According to Lanzerotte, it takes the Main Portal elevator 25 seconds to go from the bottom to the surface, 20 seconds to unload, and then 45 seconds to return to the bottom. Since Lanzerotte's testimony was not impeached or contradicted by any of the Secretary's evidence or cross-examination, it is accorded considerable weight.

Gary Hartzog, a mining consultant, who has a bachelor's and master's degree in mining engineering is experienced in the areas of ventilation, and the design of mines and escapeways. He indicated that whereas all the entries outby the active sections carry contaminated air to the East Hornsby shafts, the present alternate escapeway is ventilated by three separate splits of intake air.

Hartzog indicated that it takes approximately ten minutes to travel by diesel from the area of the East Hornsby shafts to the Main Portal shafts. Hartzog, estimated that the cycle time for a capsule operating in the East Hornsby shafts is approximately ten to 15 minutes. Therefore, it would take approximately six hours to evacuate 60 miners, and twice that time should the shifts overlap, requiring the evacuation of a 120 miners.

In general, Hartzog opined that routing the alternate escapeway to the East Hornsby shafts rather than to the Main Portal, would expose miners to hazards to which they are presently not exposed.

Further Discussion and Conclusion

In *Southern Ohio Coal Company*, 14 FMSHRC 1781 (November 1992), the Commission analyzed the language set forth in the requirements of 30 C.F.R. § 75.1704(2)(a).[9] The Commission reasoned that "[t]he language of [Section 75.1704(2)(a), *supra*], 'safest direct practical route', implies that there is one best route. Accordingly, the Secretary, in order to prove a violation, must show that there is a specific escapeway alternative that more fully complies with this criteria than does the cited route." 14 FMSHRC, *supra*, at 1785. Since Section 75.380(d)(5) contains the exact language as the wording quoted from Section 75.1704-2(a), I conclude that the Commissions' analysis is applicable to the case at bar.

Accordingly, to establish a violation herein, the Secretary must prove that an escape route to one of the East Hornsby shafts more fully complies with the criteria of Section 75.380(d)(5), *supra*, than the cited route to the Main Portal shaft. As set forth in *Southern Ohio, Id.*, the Secretary's route must be the "best route." Thus, the Secretary has the burden of establishing that an escapeway route via the East Hornsby shaft is safer than the longer route to the Main Portal, and that the East Hornsby shafts were the nearest openings "suitable for the safe evacuation of miners." Section 75.380(d)(5), *supra*.

Taking into account the evidence adduced as analyzed above (*infra*, p. 3-6), I conclude that the Secretary has failed to establish, by a preponderance of evidence, that the longer alternate escapeway route to the elevator shaft at the Main Portal is not safer than an escapeway terminating at the nearer East Hornsby shaft. In summary, *inter alia,* I note that the latter are located in return air, which is subject to contamination and resultant visibility. Also, the Secretary did not adduce evidence to contradict Monterey's evidence that the East Hornsby escape facility is significantly slower and has far less capacity then the elevator located at the terminus of the present alternate escapeway at the Main Portal.

For all these reasons, I conclude that the Secretary has failed to establish, by a preponderance of evidence, that the present alternate escapeway is not " ... the most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners ...". Section 75.380(d)(5), *supra*. Thus, the Secretary has failed to establish a violation of Section 75.380(d)(5), *supra*.

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[9]Section 75.1704-2(a), *supra*, is the predecessor of Section 75.380(d)(5), *supra*, and contains the same language relating to the requirements of the escapeway, with the exception of the addition of a phrase stipulating that the designated escapeway follow the route "as determined by an authorized representative of the Secretary..."

The Secretary's Post-Hearing Motion

On March 5, 2007, after the Parties filed a Post-Hearing Memorandum and/or Statement, the Secretary filed a Motion to Hold Issuance of Decision in Abeyance and Hold Record Open. In support of its motion to hold the record open 90 days, the Secretary asserts as follows:

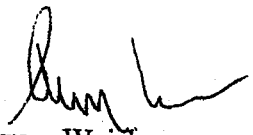
> During this time period, the Secretary will be issuing three major accident reports. The accident reports in the Sago, Aracoma and Darby mine explosions and fires will be published most likely within the next thirty days. In all three cases mine evacuations were undertaken and crews were evacuated. All three reports will make findings regarding how crews were evacuated and will describe inability to evacuate portions or all of the mine except on foot, how the low levels of visibility prevents a miners (sic) from continuing forward on mantrips and in some cases that air reversals caused previous intake air courses to be filled with smoke and CO. This is directly material to the issue in this case. The mine operator contends that the distant mine portal is the only suitable mine opening for the escape of miners, but the Secretary expects that the Judge will have a better sense of the strength of these claims in light of the experiences of three major mine emergency evacuations in 2006.

At the conclusion of the expedited hearing, both parties rested, and the proceedings were concluded. (Tr. 278). In numerous conferences with counsel during the hearing, both parties requested an interest that a decision be rendered as soon as practical, due to the closeness of the time set for abatement. After both parties filed memorandum and/or a statement, the record was evaluated, and a decision was reached. In a telephone conference call on February 23, 2007, the parties were advised that a decision had been reached sustaining the Notice of Contest.

Thus, since the record was closed after the hearing, and the parties subsequently filed a Post-Hearing Memorandum and/or Statement based on the existing record, it would not be in the interests of justice to re-open the record. Further, I note that any reports the Secretary wishes to proffer have not been completed, and thus their contents are speculative. Moreover, even if the reports will consist of findings as summarized by the Secretary, these are not of significant relevance or weight to cause me to keep the record open, or to reconsider my decision. Therefore, the Secretary's post-hearing motion is denied.

Order

It is **Ordered** that the Notices of Contest be sustained, and that Citation No. 7488388 be vacated.[10]



Avram Weisberger
Administrative Law Judge

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Christine M. Kassak-Smith, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., Room 844, Chicago, IL 60604

/lp

[10]The Notice of Contest also challenges the reasonableness of the abatement time set in the modification to the citation. In light of the decision dismissing the citation, this issue has been rendered moot. Accordingly it is not necessary to dispose of it in this decision.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 4, 2007

MICHAEL SONNEY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. CENT 2007-1-DM
v.	:	SC MD 2006-08
	:	
	:	
ALAMO CEMENT CO., LTD.,	:	1604 Plant & Quarry
Respondent	:	Mine ID 41-03019

ORDER OF DISMISSAL

Before: Judge Feldman

This case is before me based on a discrimination complaint filed with this Commission pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (the Mine Act). The complaint was filed by Michael Sonney against the respondent, Alamo Cement Company, LTD (Alamo). On March 9, 2007, Alamo filed a motion to dismiss Sonney's complaint as moot because Sonney is not seeking any tangible relief such as lost pay or reinstatement. Sonney's reply to Alamo's motion was filed on March 26, 2007. For the reasons stated below, Alamo's motion shall be granted and this matter shall be dismissed.

I. Statutory Provisions

This action is being brought under the Mine Act's anti-discrimination provisions in section 105(c). A brief summary of the relevant provisions of section 105(c) follows.

Section 105(c)(1) of the Mine Act provides, in pertinent part:

> No person shall discharge or in any manner discriminate against . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine . . . .

30 U.S.C. § 815(c)(1).

Pursuant to the statutory provisions of section 105(c)(2), 30 U.S.C. § 815(c)(2), an investigation by the Secretary to determine whether a mine operator has engaged in discriminatory conduct is initiated after a miner files a complaint with the Secretary. The complaint must allege that the miner has been the victim of adverse retaliatory action

because he engaged in safety related activity. If, upon investigation, the Secretary believes the miner has been the victim of discriminatory conduct, section 105(c)(2) requires her to file a discrimination complaint on behalf of the miner with this Commission seeking appropriate relief, such as back pay and reinstatement for a terminated miner, as well as the imposition of a civil penalty in satisfaction of a mine operator's offending discriminatory conduct.

If, however, the Secretary finds that no discrimination has occurred, the miner retains the right, under section 105(c)(3) to bring a discrimination action on his own behalf against the mine operator before this Commission. Under such circumstances, section 105(c)(3) provides, in pertinent part:

> The Commission shall afford an opportunity for a hearing . . . and *thereafter shall issue an order*, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, *granting such relief as it deems appropriate*, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate.

30 U.S.C. § 815(c)(3). (Emphasis added).

The Commission, in *Clifford Meek v. Essroc Corp.*, 15 FMSHRC 606 (April 1993), addressed the parameters for providing relief in a discrimination proceeding. The Commission stated:

> The Commission endeavors to make miners whole and to return them to their status before illegal discrimination occurred. *See Munsey, 2 FMSHRC at 3464; Secretary on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2056 (December 1983). "Our concern and duty is to restore the discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of their illegal terminations." *Dunmire*, 4 FMSHRC at 143. Monetary relief is awarded "to put an employee into the financial position he would have been in but for the discrimination." *Secretary on behalf of Gooslin v. Kentucky Carbon Corp.*, 4 FMSHRC 1, 2 (January 1982).

15 FMSHRC at 617.

II. Procedural History

Sonney was employed by Alamo as an Administrative Services Manager from January 2004 until his discharge on July 21, 2006. As a member of management, Sonney was in charge of safety aspects of mining and production operations. Sonney's discrimination complaint was filed with the Secretary on July 31, 2006. Sonney alleged he was the victim of a discriminatory discharge and he sought reinstatement. The Secretary advised Sonney on

September 1, 2006, that her investigation failed to disclose a violation of the provisions of section 105(c) of the Mine Act. Sonney filed this action before the Commission against Alamo in his own behalf on October 2, 2006.

The record reflects a history of acrimony between Sonney and Alamo management. During a January 26, 2007, telephone conference with Sonney and Alamo's counsel, Sonney stated that he had obtained other employment, and that he was not seeking back pay, reinstatement or reimbursement of other expenses. At that time, Sonney stated he only was seeking a determination that his discharge violated the Mine Act because it was motivated by his protected activity. During the telephone conference, I inquired about the status of Sonney's personnel record. In response, Alamo's counsel represented that Alamo would expunge all negative references in Sonney's personnel file that are in any way related to the circumstances in this case.

Since Sonney's July 31, 2006, underlying complaint did not adequately explain why he believed he was discriminated against, on January 29, 2007, Sonney was ordered to state his alleged protected activities, the adverse actions he alleges were motivated by these activities, and the relief he was seeking. 29 FMSHRC 122 (January 2007). Sonney's response to the January 29 Order was filed on February 14, 2007. With respect to the relief sought, in apparent reference to Alamo's response to his allegations of discrimination, Sonney stated he is seeking "[r]eimbursement for time and money spent to defend Alamo's false claims concerning the Complainant."

Alamo replied to Sonney's February 14 submission on February 23, 2007. Regarding the issue of relief, Alamo asserted Sonney's complaint was moot because of the absence of a genuine case or controversy.

During a February 27, 2007, telephone conference, Alamo's counsel advised that he intended to file a motion to dismiss. By Order dated February 28, 2007, filing dates were established for Alamo's motion and for Sonney's opposition.

III. Alamo's Motion

Alamo's dismissal motion was filed on March 9, 2007. In support of its motion, Alamo relies on the proposition that federal courts have recognized that a case is moot "when it is impossible for the court to grant any effectual relief whatever to a prevailing party." *In re Kurtzman*, 194 F. 3d 54, 58 (2nd Cir. 1999). By way of analogy to this action brought under the Mine Act, Alamo argues that courts have held a suit for damages under Title VII of the Civil Rights Act is moot where the court is powerless to fashion any type of effective relief for a plaintiff. *Arline v. Potter*, 404 F. Supp. 2d 521, 530 (S.D. N.Y. 2005); *Christoforou v. Ryder Truck Rental, Inc.*, 668 F. Supp. 294, 301, n.3 (S.D. N.Y. 1987) (claim for injunctive relief found moot where the plaintiff was no longer employed by the former employer and did not wish to be); *Cramer v. Va. Commonwealth Univ.*, 486 F. Supp. 187, 193 (E.D. Va. 1980); *Locke v. Bd.*

of Public Instruction for Palm Beach County, 499 F. 2d 359, 363 (5th Cir. 1974) ("[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them."). Alamo avers that Title VII cases are instructive because the relief provisions of 42 U.S.C. § 2000e-5(g) are similar to the type of relief normally awarded under section 105(c) of the Mine Act. Namely, 42 U.S.C. § 2000e-5(g) provides that the court shall provide appropriate relief, including back pay and reinstatement, if it finds unlawful employment practices.

With respect to Sonney's complaint, Alamo asserts Sonney is seeking a declaratory judgement that lacks a justiciable controversy between the parties. In this regard, Alamo points to Sonney's representations in the January 26, 2007, telephone conference that he was only seeking a determination that Alamo had discriminated against him, and, that he was not seeking to recover any monetary damages. To further support its claim, Alamo relies on Sonney's January 29, 2007, response to interrogatories wherein Sonney stated:

> Complainant does not seek monetary compensation per a 105 (c) discrimination complaint nor any type of reinstatement allowable by the Mine Act regarding adverse action initiated by Respondent towards Complainant.

(*Alamo motion*, Ex. A at p.4)

Consequently, Alamo contends Sonney has no personal stake in a civil penalty proceeding that must be brought by the Secretary to impose administrative civil liability under the Mine Act. *Mississippi River Revival, Inc., v. City of Minneapolis*, 319 F.3d 1013, 1016 (8th Cir. 2003) (citizen plaintiffs under the Clean Water Act lack Article III standing to recover civil penalties for past violations owed the United States Treasury).

With regard to Sonney's only identifiable claim for reimbursement "for time and money spent to defend Alamo's false claims," Alamo asserts that Sonney's claim for recovery of costs incurred, in the absence of a justiciable case or controversy, cannot revive an otherwise moot cause of action. *Foster v. Carson*, 347 F.3d 742, 746 (9th Cir. 2003) (attorney fee claim not sufficient to revive an otherwise moot action); *Cramer*, 486 F.Supp. at 192, n.7 (entitlement to attorney's fees does not avoid dismissal for mootness).

Finally, in its Motion to Dismiss, Alamo represents that it now has removed all references in Sonney's personnel record to the disciplinary write-up that was the basis for Sonney's June 20, 2006, discharge, and it has provided assurances that it will provide neutral employment references in response to all future requests from prospective employers.

IV. Sonney's Reply to Alamo's Motion

Sonney replied to Alamo's dismissal motion on March 26, 2007. However, Sonney failed to specify the relief he is seeking in this proceeding.

Discussion and Evaluation

As a general proposition, "[u]nder Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 42 U.S. 472, 477 (1990). The Commission addressed the concepts of declaratory relief and mootness in *Mid-Continent Resources, Inc.*, 12 FMSHRC 949 (May 1990). The Commission, noting that Article III prohibits declaratory relief in moot cases, identified the characteristics of a case lacking justiciable controversy:

> The presence of a controversy must be measured at the time the court acts. It is not enough that there may have been a controversy when the action was commenced if subsequent events have put an end to the controversy or the opposing party disclaims the assertion of the countervailing rights. A case is moot when the issues presented no longer are "live" or the parties no longer have a legally cognizable interest in the outcome.

12 FMSHRC at 955(*citing* 10A *Wright & Miller* § 2727 (pp.602-17) (footnotes omitted)).

Courts have granted declaratory relief although actions may not have ripened into a current controversy where imminent litigation will occur between the parties, or, where an allegedly moot question will recur. *Id.* (citations omitted). Although the elements of mootness are relevant in an administrative proceeding, the Article III "case or controversy" requirements do not literally apply to federal agencies like this Commission. *Id.* Rather, the propriety of granting declaratory relief is committed to the sound discretion of the Commission's administrative law judges. *Id.* at 954.

In this matter, Sonney is seeking a determination that he was discriminated against, but he is not seeking reinstatement or recovery of monetary damages directly resulting from the alleged discrimination. Courts provide relief not vindication. *Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1986) (federal courts do not sit to bestow vindication in a vacuum). Courts cannot decide questions that do not affect the rights of litigants in the case before them. *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974). The Secretary has the sole authority to impose a civil penalty for an alleged violation of the anti-discrimination provisions in section 105(c) that can be challenged by a mine operator before this Commission.

In this case, the Secretary investigated Sonney's complaint and concluded the facts did not support a violation of section 105(c). Sonney cannot act as an *alter ego* of the Secretary and once again seek to impose civil liability on Alamo. Put another way, Sonney has no personal stake in Alamo's administrative liability and, therefore, he is not a proper party in a matter that has become solely a civil penalty action against Alamo.

In the final analysis, the factual predicate for Sonney's status as a 105(c)(3) party is lacking - - appropriate relief that can be fashioned by this Commission. Sonney has already received assurances that his personnel record has been cleansed and that Alamo will not provide negative employment recommendations. *Weiss v. Regal Collections*, 385 F.3d 337, 340 (3rd Cir. 2004) (an offer of complete relief will generally moot a plaintiff's claim and remove any personal interest in the outcome of litigation). The only remaining issue is Sonney's dissatisfaction with the Secretary's conclusion that his termination did not constitute a violation of section 105(c). Sonney's dissatisfaction with the Secretary's investigative findings does not create a justiciable case or controversy.

Declining to adjudicate this matter presents neither a likelihood of relevant future imminent litigation between the parties, nor a chance that questions relevant to the Mine Act concerning Sonney's termination will recur. Reduced to its simplest form, what Sonney seeks is a Commission adjudication of the investigative conclusions of the Secretary. However, this Commission "is not as a general matter authorized to review the Secretary's exercise of prosecutorial discretion." *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006).

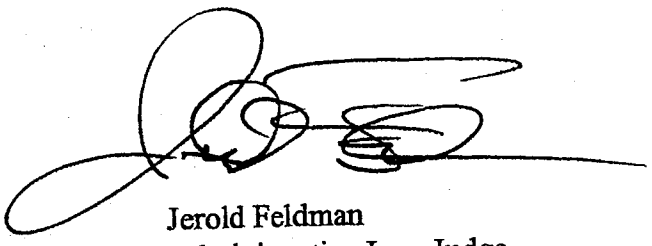
Sonney cannot overcome the lack of a justiciable controversy given the absence of tangible relief in this matter simply by bootstrapping his costs to pursue his moot claim. In other words, a moot claim cannot be revived by seeking the reimbursement of the cost to bring it. *Foster*, 347 F.3d at 746. Thus, Sonney's discrimination complaint shall be dismissed as moot.

In reaching the conclusion that the absence of appropriate relief disqualifies a miner from bringing a 105(c)(3) cause of action, I am cognizant of the countervailing argument that the Commission would be derelict in its duties if it avoided a finding of discrimination on the merits that may discourage future discriminatory conduct. However, it is not this Commission's role to unilaterally bring to light all acts of discrimination. In fact, the Commission frequently approves settlement agreements in discrimination cases despite the mine operator's failure to admit that discriminatory conduct occurred. Rather, the Commission's mission is adjudication, not enforcement and prosecution.

ORDER

In view of the above, **IT IS ORDERED** that Alamo Cement Company, LTD, shall provide, **in writing**, to Sonney and to me, within fourteen (14) days of the date of this Order, representations that all disciplinary references in Sonney's personnel file have been expunged, and that prospective employers will be provided with neutral recommendations that will not adversely affect Sonney's prospects for employment.

IT IS FURTHER ORDERED that, upon timely submission of the above written representations, Sonney's discrimination complaint **IS DISMISSED** with prejudice.



Jerold Feldman
Administrative Law Judge

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/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 13, 2007

EMPIRE IRON MINING PARTNERSHIP, Contestant	:	CONTEST PROCEEDING
	:	Docket No. LAKE 2006-60-RM
v.	:	Citation No. 6192002; 02/21/2006
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Empire Mine Mine ID: 20-01012

DECISION

Appearances: Christine M. Kassak Smith, Esq., U.S. Department of Labor, Chicago, Illinois, on behalf of the Petitioner
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, on behalf of the Respondent

Before: Judge Barbour

In this contest proceeding, brought pursuant to section105(d) of the Federal Mine Safety and Health Act of 1977, 20 U.S.C. § 815(d) (the Mine Act or Act), Empire Iron Mining Partnership (Empire) contests the validity of a citation issued on February 21, 2006, at its Empire Mine. The citation arose out of an accident that occurred on November 6, 2005, when Chad Weston, an assistant plant operator (a.p.o.), was fatally injured as he and a co-worker attempted to free a stuck equipment part. Weston was pinned between the equipment's frame and the part. He was 28.

The same day, the Secretary's Mine Safety and Health Administration began an investigation of the accident. As a result of the investigation, the Secretary took enforcement actions, including issuance of the contested citation. Citation No. 6192002 charges Empire with a violation of either 30 C.F.R. § 56.12016 or 30 C.F.R. § 56.14105. The citation states:

> 56.12016: On November 6, 2005, two miners were attempting to free a stuck cooler pallet at [U]nit 4. The electric power was not de-energized, the power switch was not locked out, and no other measures were taken to prevent the equipment from being energized without . . . [the two miners'] knowledge while . . . [the work of freeing the stuck cooler pallet] was being performed.

> Or, in the alternative [Empire violated] 30 C.F.R. § 56.14105 [in that]: Maintenance was being performed on the cooler pallet dump arm although the electric power was not de-energized and . . . the person was not protected from hazardous motion.

Gov't Exh. 2.[1]

In addition to alleging alternative violations and the fact the violation was reasonably likely to result in a fatal accident, the citation charges the violation was a significant and substantial contribution to a mine safety hazard (S&S) and was the result of Empire's moderate negligence.

Empire timely contested the citation, asserting, among other things, there was no violation of either standard, or, if there was, the S&S and other findings were incorrect. The Secretary answered by asserting the citation was properly issued in all respects. The matter was heard in Marquette, Michigan. Following the hearing, counsels submitted helpful briefs.

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[1]Section 56.12016 states in part:

> Electrically powered equipment shall be de-energized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch . . . .

Section 56.14105 states in part:

> Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the Machinery or equipment blocked against hazardous motion.

Originally, the citation asserted the fatal accident was the result of a violation of either or both standards. Gov't Exh.1. Prior to the hearing, the Secretary moved to amend the citation to charge the violation was the result of one or the other of the standards and to charge the violation was reasonably likely to result in a fatal accident. Motion to Amend Citation 2-3. Counsel for Empire took no position on the motion, and it was granted. Order Granting Motion to Amend Citation (May 4, 2006). On May 31, 2006, MSHA issued the amended citation to Empire. The amended citation is the subject of this proceeding.

STIPULATIONS

The parties agreed to numerous stipulations regarding jurisdiction and the factual circumstances leading to the citation. Joint Exh. 6. The stipulations are referenced in this decision as appropriate.[2]

THE MINING PROCESS

The case involves the making of pellets used in manufacturing steel. The process begins with the mining of taconite ore at the Empire Mine, one of two open pit mines owned by Empire.[3] Once extracted, the ore is taken to an ore concentrator, where iron is separated from rock. John Kosher, a metallurgical engineer, who is the manager of operations at Empire's mines, described what happens next. Tr. 124, 129, 162. After the ore is concentrated and filtered at the concentrator, it is sent to the pellet plant, where it is fed into balling drums. In the drums it is combined with a binder. The binder fixes the concentrate and the material passes through the drums and is formed into balls or pellets. The pellets travel into a kiln, where they are heated. The heat fuses the binding agent and the concentrated ore. Tr. 136. The hot pellets are transferred to a cooler. From the cooler they are moved to a storage pile or they are shipped directly to purchasers.

The alleged violation took place at one of the mine's coolers.[4] The cooler is a large, circular machine with 30 pallets that rotate around its circumference. The cooler's drive motor is electrically powered. The hot pellets are dumped onto the pallets and air is forced over and around the pellets, cooling them while the pallets rotate. Tr. 17; Joint Exh. 6, Stip. 16. As Kosher explained, the pellets are loaded onto a pallet so 60 percent of the load is on one side, which means the weight of the pellets is off-center. A dump arm with a wheel is attached to each pallet. A rail above the wheel prevents the pallet from rotating into the dump position. However, as a pallet reaches the dumping point, the rail transitions from almost horizontal to almost vertical. With the rail no longer holding down the dump arm and pallet, gravity causes the pallet to move into a nearly vertical position, and the pellets fall off the pallet into a hopper.

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[2]One stipulation needs clarification. It states the citation "allege[s] a violation of . . . [section] 56.12016 and/or [section] 56.14105." Joint Exh. 6, Stip. 7. As indicated in n.1 and as reflected in counsel for the Secretary's statements both at trial and on brief, the Secretary's position is one or the other of the standards was violated, not both. *See* Tr. 50-51; Sec. Br. 5.

[3]"Taconite" is defined as "[a]ny bedded ferruginous chert of the Lake Superior district." United States Department of the Interior, *A Dictionary of Mining, Mineral, and Related Terms* (1968) 1116. "Taconite ore" is defined as "[a] type of highly abrasive iron ore now extensively mined in the United States." *Id.*

[4]There are four coolers at the pellet plant. According to Empire's counsel, the cooler involved in the accident has been in place since the "late 1970's." Tr. 26.

Nothing other than gravity causes the pallet to dump. Tr. 22; Joint Exh. 6 at 16. From the hopper the pellets travel by conveyor belt to a storage pile or to a loading area. Tr. 130-132, 136, *see also* Tr. 20-22, 41. [5]

Occasionally a pallet sticks in a horizontal position and will not dump. A stuck pallet commonly occurs when a cooler is restarted after a shutdown. Tr. 26, Tr. 141, 164. As hot air again moves over and around the pellets, the pallets heat up. This sometimes causes the pallets to change shape and bind to one another. Tr. 141; *see* Joint Exh. 6, Stip. 26. A stuck pallet will not tip as the guide rail rises to vertical.

When a pallet sticks, a hydraulic cylinder attached to the dump arm is compressed. Compression initiates the "sure dump system." Tr. 138. The cylinder starts to apply force to the arm and "more often than not . . . [the force] will be sufficient to cause the pallet to break free." Tr. 138. The hydraulic "sure dump system" has nothing to do with the cooler's electrical system. Tr. 139, 142, 170.

Also, when a pallet is stuck, an alarm sounds in the cooler control room. If the pallet continues to stick, the cooler shuts down. Tr. 23. The heated pellets start to fuse in five minutes once the cooler stops. Tr. 24; *see also* Tr. 95. Therefore, as soon the alarm sounds, the control room operator contacts an a.p.o. and another miner and assigns them to free the pallet. [6]

After receiving the assignment, the miners get a portable hydraulic pump (porta-power) and take it to the stuck pallet. Tr. 24; Joint Exh. 6 at Stips. 24, 25. At the pallet one of the miners places the head of the porta-power under the pallet's dump arm. A hose extends from the porta-power to an area some distance removed from the pallet. The other miner operates the porta-power from the end of the hose and away from the cooler. Tr. 24. The miner pumps the porta-power until hydraulic pressure forces the pallet dump arm to lift and free the pallet. Tr. 24; *see also* Tr. 165; Joint Exh. 6 at 25. As the freed pallet rotates upward, the wheel quickly and forcefully can move back to its proper position against the guide rail. Tr. 25, 139-140.[7]

THE ACCIDENT

On November 6, after being instructed to free a stuck pallet, Weston and Jeremy Ring,

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[5]The cooling and dumping process is visually depicted in a video entered into evidence by the company. Emp. Exh. 8.

[6]Although one miner can do the job, in most cases two are sent. Tr. 24.

[7]Counsel for Empire described the process of freeing the pallet: "[W]hat you are doing is applying force to [the pallet dump] arm in order to assist the pallet to dump by gravity. . . . [Y]ou jack [the dump arm] with the porta-power, [and] it then goes back up against the . . . guide rail in a rather forceful fashion. It's a simple task." Tr. 25.

who is also an a.p.o., hurried to the cooler.[8] They approached the pallet. Weston had the porta-power. Weston tried to position the porta-power correctly, but could not. According to Ring, Weston then moved closer to the pallet to try again. Tr. 108. He still could not properly position the porta-power. Ring testified, Weston "handed . . . [the porta-power] to me and I went around the back side of the wheel part . . . . [and] as soon as I put it back there . . . [the arm] released by itself. And that's when I seen . . . [Weston] hanging there." Tr. 108-109. For some reason, Weston had moved between the dump arm and the guide rail. Tr. 26-27.[9] When the pallet broke free and the arm moved on its own, Weston's head was caught in the pinch point between the dump arm and the rail.[10]

When Ring and Weston tried to unstick the frozen pallet, the cooler drive motor was not de-energized or locked out. Tr. 90-91. This was not unusual. It was an accepted work practice at the mine to try to unstick a pallet without first de-energizing the power to the drive motor. Tr. 92-93. Asked if he ever received instructions on how to de-energize the cooler drive motor, Ring answered, "No, because we never [de-energized it]." Tr. 95; *see also* Tr. 97-99.

MSHA'S ACCIDENT INVESTIGATION AND THE CITATION

Dethloff investigated the accident for the agency. Prior to joining MSHA, Dethloff worked for 16 years at a taconite facility in Northern Minnesota. Tr. 39-40. His job duties included working at a kiln and cooler similar to Empire's. Tr. 40-41.

As part of the investigation, Dethloff inquired about the cooler. Tr. 40-41. He was told it had been shut down for repairs and was restarted on the evening of November 5. Tr. 70; *see* Gov't Exh. 6, Stip. 26. On November 6, after the pallet froze and the control room operator assigned Weston and Ring to free it, the two miners hurried to the pallet to carry out the task. According to Dethloff, putting the head of a porta-power under the dump arm usually is not

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[8]Ring explained, when a pallet sticks, it is important to respond immediately because if hot pellets fuse a jackhammer is required to separate them. Tr. 88. The jackhammer has a bit approximately 11 feet long. When the fused pellets are broken up, the miner doing the work stands outside and away from the pallet. The miner is not endangered by the pallet dump arm. Tr. 108. Nor is he or she on a part of the cooler that moves. Tr. 104.

[9]Kosher testified, to get between the dump arm and guide rail, Weston had to take down one of two restrictive chains, step over the remaining chain, step up on a ledge and lean into the area between the rail and the arm. Tr. 143-144.

[10]Neither the company nor MSHA could explain why Weston moved as he did. Tr. 27. The hazard of the pinch point was well known and was "covered in training." Tr. 27. MSHA inspector and accident investigator William Dethloff testified Weston was properly trained to free a stuck pallet. In fact, Weston's instructor told Dethloff he specifically instructed Weston not to place himself between the pallet dump arm and guide rail. Tr. 70-71.

dangerous. A miner steps back once the porta-power is placed and before the dump arm frees the pallet. Or, if the pallet swings free before the miner steps back, the dump arm moves away from the miner's hand. Tr. 105. Moreover, the miner can and should reach in from outside the restraining chains. Tr. 143.[11] Locking out or de-energizing the cooler drive motor does not prevent the dump arm from moving. Tr. 67, 74. The pallet can break free and move on its own. Tr. 46. Dethloff described the movement, which has nothing to do with the cooler drive motor (Tr. 56-57), as "very rapid [and] violent." Tr. 46. Ring described it as "deadly." Tr. 105.

The operation of the cooler is centered in the control room. The control room operator is not in visual contact with the cooler. Rather, he or she monitors its operation through reports generated by the equipment's computerized control system.[12] Dethloff requested information from Empire concerning logs (computer printouts) of the cooler's operation on November 6. Gov't Exh. E-4. Dethloff reviewed the logs and concluded they showed, after the pallet stuck and the cooler stopped, the control room operator made 22 attempts in approximately three

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[11]Kosher agreed the job, if done correctly, is minimally hazardous. Tr. 145. His description of how the job should be done essentially tracked Dethloff's:

> [O]ne [miner] will reach in [and] place the porta-power. The [miner] behind him is normally holding the pump to be able to start pumping the hydraulic jack. Once the porta-power's in place, the [miner] can stand back. His partner is pumping there. They are standing away from the equipment. They're not . . . on top of the equipment. They're not standing in . . . any area that anything can move toward them. In fact, everything is going to be moving away from them.

Tr. 145.

[12]The system was explained by Allan Whitford, the Senior Processing Control Engineer at the Empire Mine. The system is in fact a part of the computer system that controls the entire pellet plant. It is called the Distribution Control System (DCS). Among other things, the DCS, which was first utilized at the plant around 1999, takes the place of individual start and stop stations. The DCS also monitors the processing of the pellets. Tr. 176. The control room operator oversees the DCS system by checking eight separate computer control stations in front of him or her.

minutes to restart the cooler. All of the attempts were unsuccessful. Tr. 42-43; *see also* Tr. 57, 178.[13]

Dethloff identified photographs of the cooler dump area and the dump system. Tr. 60; Joint Exh. 1. He explained, one of the photographs depicts two dump system limit switches: the alarm switch and the stop switch. Tr. 61-62; Joint Exh. 3. When a pallet is stuck, the alarm switch sends a signal to the control room, alerting the control room operator. When the sure dump system fails to free the pallet, the stop limit switch sends a second signal to the control room operator and stops the cooler. Tr. 62; Joint Exh. 3; *see also* Tr. 169, 177, 186. The cooler's electrical control circuit is disrupted. The cooler drive motor will not start as long as a stuck pallet alarm condition exists. Tr. 178. Once the pallet is free and a start command is issued, the cooler will resume operation. Tr. 185.

Dethloff learned the alarm switch malfunctioned prior to the accident and the control room operator did not receive an alarm indicating a stuck pallet. Tr. 62. However, the stop switch operated as designed. It shut down the cooler by opening the electrical circuit necessary to run the cooler. Tr. 67, 82. Dethloff noted, however, the switch did not cut off electricity to the circuit. He also noted the stop switch could fail, and if it did, without the cooler being de-energized or locked out, power could flow to the cooler drive motor. Tr. 76, 79.[14]

Based on information MSHA gathered during the investigation, Dethloff issued the contested citation to Empire. Tr. 43. Because Dethloff never had issued a citation alleging alternative violations, he "had help . . . writing" the citation. Tr. 43, 74. The citation also was the first time Empire was cited for failing to de-energize and lock out the cooler or for failing to lock the pallet dump system against motion when trying to unstick a pallet. *See* Tr. 117.

Because section 56.14105 applies when repairs or maintenance are undertaken on machinery, Dethloff was asked whether freeing the pallet was "maintenance work." Tr. 76. He responded, "I believe it is. . . . If you don't free the stuck pallet, you're not producing." Tr. 76. However, he agreed freeing the pallet did not require removing, replacing or lubricating any parts

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[13]Dethloff testified, when the control room operator pushes the start button, there is a five-second delay in starting the cooler; then, "If there is a problem, . . . [the control system] takes away the start voltage." Tr. 54. Dethloff noted the logs indicated "about every five or six seconds" the control room operator was "trying to give . . . [the cooler] the start command." Tr. 54.

[14]Raymond Sundquist, Empire's Coordinator of Work Performance for Electrical, agreed when the stop switch worked, the circuit was disrupted, but the circuit and drive motor were still powered, as opposed to being entirely de-energized. Tr. 199-200.

of the cooler. Tr. 81.[15]

ABATEMENT OF THE CITATION

Shortly after the accident and almost three months before the citation was issued, the company requested and received MSHA's permission to guard the area involved in the accident. Tr. 75. Kosher testified, "having had somebody . . . climb up and actually get . . . into a position where he could be hurt, I felt it was prudent to put a guard up." Tr. 132-133. According to counsel for the Secretary, because the guard was in place when the contested citation was issued, "there was no need to require . . . [guarding] for termination of . . . [the] citation." Tr. 32. Miners "were already gonna be protected from hazardous motion by the guard . . . [I]t didn't help to require them to . . . block . . . [the arm] if they [could not] get to it. So, once the guard was in place, MSHA . . . perceived . . . the only termination for the . . . citation . . . was to establish new policies and procedures to require . . . cooler drives be de-energized and locked out and [to] post warning signs and . . . [to de-energize the cooler by] turning the power off." Tr. 35. Dethloff agreed abatement procedures did not address blocking the parts against hazardous motion because "with the area guarded the employees were protected against hazardous motion." Tr. 46. Rather than blocking the pallet against motion, Empire abated by implementing:

> New policies and procedures . . . requiring . . . the cooler drive be de-energized and locked out with a warning notice signed and posted at the switch by the individuals doing the work prior to freeing a stuck cooler pallet . . . .

Tr. 45. In addition, according to Dethloff, "Miners required to free stuck pallets were trained on or plans implemented to train absent personnel upon return in the new policies and procedures." Tr. 45.

THE ISSUES

At the hearing and on brief, the parties sharply disagreed whether MSHA could validly issue a citation alleging alternative violations and, if so, whether there was a violation of either section 56.12016 or section 56.14105. In the pleadings, they also disagreed whether a violation of either standard was S&S, was likely to result in a fatality and was the result of the company's

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[15]Sundquist did not consider using the porta-power to unstick the pallet to be maintenance work, but he did not explain why. Tr. 198. In addition, Michael Luke, Empire's Senior Coordinator for Pellet Plant Operations, did not consider the work to be in the nature of repair or maintenance. He described the task as "operational." Tr. 207.

moderate negligence.[16] I will address the issues in the order they were presented by the parties.

THE ALTERNATIVE VIOLATIONS

Counsel for the Secretary stated citing violations in the alternative is "rare," but it "has been done before in other cases before the . . . [Commission] . . . .[a]nd is specifically permitted under Federal Rule of Civil Procedure 8[(e)(2)], which . . . allows . . . a party . . . to set forth two or more statements of a claim alternatively." Tr.11-12.[17] Counsel also noted alternative pleading has been allowed by other Commission judges. *See* Sec. Br. 6 n.11. Counsel maintained the "essence of the allegations" under either section 56.12016 or section 56.14105 is "essentially the same and the requirements of the two standards are similar. Basically, it has to do with "[Empire's] failure to de-energize or turn off the power to a cooler's drive motors while repair and maintenance work was being performed on a stuck cooler pallet. . . . [T]he Secretary is alleging . . . the cooler's drive motors were not de-energized or had their power turned off. And . . . there was no protection for persons from hazardous motion of the equipment." Tr. 12.[18]

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[16]In its contest, Empire asserted the inspector's "evaluation" was without foundation in fact or law, which I interpret as raising the validity of the inspector's modified finding the violation was reasonably likely to result in a fatal injury as well as the validity of his negligence finding. Notice of Contest 2. The Secretary generally denied Empire's allegations. Answer 2.

[17]The rule states in part:

> A party may set forth two or more statements of a claim . . . alternatively . . . . When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.

Fed. R. Civ. P. 8(e)(2).

[18]Counsel acknowledged the genesis of the agency's decision to allege alternative violations lay in *Phelps Dodge Corporation v. FMSHRC*, 681 Fed. 2d 1189, a decision in which the United States Court of Appeals for the Ninth Circuit held the "main concern" of then mandatory standard 30 C.F.R. § 55.12-16, later renumbered § 56.12016, was protection from electrical shock and the standard could not be applied to dangerous machinery motion without abusing the Secretary's discretion. *Phelps Dodge*, 681 F. 2d at 1192-93. Apprehensive one of the Commission's judges or the Commission itself might follow *Phelps Dodge* and conclude section 56.12016 was not violated, the Secretary elected also to cite section 56.14105. Tr. 14. However, the Secretary also made clear her position *Phelps Dodge* applied only in the Ninth Circuit, a circuit that does not include the Empire Mine.

Counsel for Empire countered section 104(a) of the Act, 30 U.S.C. § 814(a), does not permit alternative pleading because it specifically requires the Secretary to describe "with particularity the nature of the **violation**, including a reference to the **provision** of the Act, standard, rule, regulation, or order alleged to have been violated." 30 U.S.C. § 814(a) (*emphasis supplied).* Counsel emphasized the Act states "violation," not "violations," and "provision," not "provisions." Tr. 28. This means under section 104(a) "[t]he Secretary is not permitted to select a number of different provisions in the hope that she can make one of the charges stick." Emp. Br. 8-9. Counsel acknowledged the Commission's judges have allowed alternative pleading, but counsel argued they erred. Unlike federal civil actions to which the Federal Rules apply, the contest of a citation is not static litigation requiring no action by the operator until the litigation is completed. Rather, a citation requires an operator to do an act (i.e., to abate) while the litigation is incomplete. The operator should not be put in a position where it has to guess action it is required to take. Counsel noted the alternatively pleaded standards require different actions: section 56.12016 requires a lockout of the power switches and section 56.14105 requires the machinery or equipment to be blocked against hazardous motion. Counsel also noted while section 56.12016 applies to electrically powered equipment, section 56.14105 applies more generally. Counsel asserted the different requirements of the standards prevented Empire from determining what it had to do to abate the citation and prevented it from being able to prepare adequately for the hearing. *Id.* 11 (*citing Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 369 (March 1993); *Twentymile Coal Co.*, 26 FMSHRC 666, 675-676 (August 2004)).

I conclude the Secretary has the better part of the argument, and the assertion of alternative violations in this case does not run counter to the Act. I find the ruling of Commission Judge Richard Manning in *CDK Contracting Company*, 23 FMSHRC 783 (July 2001) instructive.[19] Judge Manning's reasoning is couched in succinct and cogent language. He stated: "It is well settled that administrative pleadings are liberally construed and easily amended, as long as adequate notice is provided and there is no prejudice to the opposing party." *CDK Contracting*, 23 FMSHRC at 784. Here, Empire had adequate notice of the alternative standards and was not prejudiced by the charge it violated one of them.

First, the allegations arose out of an investigation to which the company was a party and involved equipment and circumstances of which the company had full knowledge. In addition, the alternatively charged violations were based on the same underlying facts.

Second, the company had adequate time to prepare for trial. The citation alleging alternative violations was issued a little more than three months after the accident, the case was assigned to me approximately a month and a half after the citation was contested, and the trial took place slightly less than four months after that. Discovery was fully conducted. There is no indication Empire was dissatisfied with the discovery process or was unprepared in any way for the trial.

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[19]Empire's arguments for the most part repeat those presented to Judge Manning.

Third, the Secretary is not alleging violations of totally disparate standards. Rather, as Judge Manning observed, the standards are similar. *See CDK Contracting*, 23 FMSHRC at 784.

Fourth, and contrary to Empire's assertion (Emp. Br. 11), the company knew what to do to abate the citation. As Dethloff explained, the abatement procedures the company chose addressed de-energizing the cooler, in that the company implemented new policies and procedures requiring the cooler drive to be de-energized and locked out and a warning sign to be posted at the switch before a miner worked to free a stuck pallet. Tr. 46.[20]

Finally, I note, although the vast majority of citations allege the violation of a single standard, there are instances – *e.g.*, conflicting circuit courts of appeals rulings on the applicability of a standard or a lack of clarity where particular facts fall within similar standards – when alternative allegations are necessary to effective enforcement of the Act. To construe section 104(a) of the Act to prevent alternative pleading would violate the liberal and flexible spirit of administrative law and would deprive the government of an infrequently used but essential tool to achieve the Act's objectives.

THE VIOLATION

30 C.F.R. § 56.12016

As noted above (*see* n.18), the Secretary believed *Phelps Dodge* required her to assert Empire violated either section 56.12016 or section 56.14105. Because the hazard in the instant proceeding was not one of electrical shock but, rather, of a moving equipment part, the Secretary feared if *Phelps Dodge* were followed, Empire would be "off the hook" unless she could show another violation. Nonetheless, because the court's decision is not binding outside the Ninth Circuit (this case arose in the Sixth Circuit), before I consider whether section 56.14105 was violated, the Secretary invites me to depart from the holding in *Phelps Dodge* and find section 56.12016 applies.

The issue of whether to follow *Phelps Dodge* is not new to the Commission. At least one of the Commission's judges, Arthur Amchan, expressed his belief *Phelps Dodge* was wrongly decided. Rather than agree with the majority in the case, Judge Amchan stated:

> The dissenting opinion of Circuit Judge Boochever . . . is far more compelling. He found that the plain language of the standard was clear and unambiguous and saw no reason to qualify its application on account of the title of the sub-

[20]Of course, on its own volition it also chose to install a guard at the dump arm area. Tr. 46, 115-116.

part in which the regulation was placed.

James M. Ray, employed by Leo Journagan Construction Co., Inc., 18 FMSHRC 892, 897 (June 1996). The judge also stated he "agree[d] with the dissent that the Commission should defer to an agency interpretation of the standard which appears to better effectuate the purposes of the Act, [rather] than [to] one limiting its reach to situations in which there is a danger of electrical shock." 18 FMSHRC at 897. Despite Judge Amchan's rejection of *Phelps Dodge*, in a subsequent Equal Access to Justice case, the Commission declined to express its view whether *Phelps Dodge* was "correctly decided or not." *James M. Ray, employed by Leo Journagan Construction Co., Inc.*, 20 FMSHRC 1014, 1025 (September 1998). Thus, the Commission left the door open for the Secretary to press her position and for Commission judges to respond *ad hoc*.

It is tempting to agree with Judge Amchan and to reach the less than startling conclusion the standard means exactly what it says – to wit, that "[e]lectrically powered equipment shall be de[-]energized before mechanical work is done on such equipment." Were I to accept this plain meaning of the standard, I would be led, inexorably, to finding a violation of section 56.12016, since it is clear the cooler was not de-energized and freeing the stuck pallet was mechanical work. *See Ozark-Mahoning Co.*,12 FMSHRC 376, 379 (March 1990).[21] However, and as I have noted, the Commission has not yet expressed its views on *Phelps Dodge*, and restraint is always prudent when considering departure from a decision of a United States circuit court of appeals.

Other matters also warrant caution. The hazard leading to the citation – the hazard of an injury caused by a sudden, unexpected movement of the dump arm – was not the result of the failure to lock out or de-energize the cooler drive motor. Tr. 67-68. In fact, the sudden movement had nothing to do with electricity. Tr. 56-57,198. Nor does the record reveal another electrically-related hazard that would have been prevented by compliance with the standard.[22] Moreover, the

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[21]Ring's credible testimony the cooler was not de-energized or locked out on November 6 was not surprising, since he also testified it was an acceptable work practice at the mine to free a pallet without first de-energizing the power to the cooler drive motor. Tr. 90-92; *see also* Tr. 95. Indeed, Kosher testified, prior to the accident the company had no "de-energization" procedure for circumstances involving the freeing of a stuck pallet. Tr. 156. Moreover, although the stop switch halted operation of the cooler by disrupting completion of the drive motor electrical circuit, power was still available to the circuit and the motor. *See* Tr. 199-200. In addition, "mechanical" is defined as "of, relating to or concerned with machinery or tools." *Websters Third New Dictionary* (1993)1400. The pallet was an integral part of the cooler, which, in turn, was a large piece of machinery. The work of freeing the pallet was "relate[d] to" and was "concerned with" the cooler and the pallet, as was the work of positioning a porta-power under the pallet drive arm.

[22]There was no testimony establishing the dangers faced by miners if the cooler drive motor unexpectedly started up while a miner was trying to free a stuck pallet. Nor was there evidence of other electrical hazards compliance would prevent. *See, e.g.*, n. 8 *infra*.

Secretary has not previously cited Empire for a violation of section 56.12016 under these circumstances.

Weighing all of these factors, I cannot dismiss out-of-hand Empire's argument the application of section 56.12016 constitutes an abuse of discretion. I, therefore, conclude the better course is to leave undecided that which does not need a decision and to move to consideration of the Secretary's alternative allegation.

SECTION 30 U.S.C. § 56.14105

Section 56.14105 requires in pertinent part: "Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment is blocked against hazardous motion." I find freeing the stuck pallet involved the "repair or maintenance" of the cooler. As the Secretary points out, the words "repair and maintenance" connote the act or acts of putting machinery and equipment back in good condition after damage and/or restoring machinery and equipment to functioning condition. Sec. Br. 23. Ring and Weston were trying to return the pallet and, hence, the cooler to functional condition. Thus, they were engaged in repair or maintenance work. Compliance with the standard required the power to the cooler drive motor to be "off" prior to Ring and Weston attempting to free the pallet. It was not "off" within the meaning of the standard because, although the stop limit switch halted the cooler drive motor, it did not de-energize or lock out the power. Tr. 76, 79. To be "off" the power should have been completely removed from the cooler drive motor, and it was not. Nor was the pallet dump arm "blocked against hazardous motion." Its rapid and unencumbered movement killed Weston.[23]

S&S AND GRAVITY

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S, "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). To establish the S&S nature of a violation, the Secretary must prove: (1) the

[23]I recognize the Secretary did not establish the existence of a feasible means for Empire to block the dump arm. MSHA Inspector Robert Leppanen made suggestions, but could not say they ever had been tried by an operator, and Kosher testified without dispute a feasible blocking system would require much development. Tr. 114,120-121,150. This stated, I also recognize a lack of feasible compliance is not a defense to a violation. Compliance and its means are the operator's responsibility, and if an operator cannot feasibly meet its responsibility, the Act provides the option of a variance. 30 U.S.C. § 811(c). Here, of course, the issue of a variance has not arisen because the Secretary has accepted a procedure falling outside the standard (*i.e.*, guarding) as equivalent to compliance.

underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (January 1984); *accord Buck Creek Coal Co., Inc.* 52 F. 3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec'y of Labor*, 81 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985). Further, an S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (August 1985); *U.S. Steel*, 7 FMSHRC at 1130.

Finally, the S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September 1996).

Given my conclusion the Secretary established a violation of section 56.14105, the first of the *Nat'l Gypsum* factors has been met. The next question is whether the record supports finding the failure to disconnect the power to the cooler drive motor and to block the pallet dump arm against motion resulted in a discrete safety hazard. It is a question that is answered only in part. There is nothing in the record establishing a hazard posed to those working to free a stuck pallet if the company fails to disconnect power to the cooler drive motor. *See* Tr. 56-57, 198. However, there is no question a hazard was posed by the failure to block the dump arm. Tr. 198. The hazard proved fatal to Weston. Moreover, at the time of the violation there was nothing to prevent Weston or other miners from placing themselves between the arm and the guide rail. Therefore, I conclude there was a reasonable likelihood the failure to block the arm against unexpected motion would result in an injury. In reaching this conclusion I find even though miners were instructed not to do what Weston did, in the context of continued mining operations it was likely others would disregard their training and be seriously injured or killed. The history of mining is replete with the injury and deaths of those who did not follow proper procedures, and it is the operator's duty to guard against such aberrant behavior. For these reasons, I find the violation was S&S.

Finally, the violation obviously was serious. The effect of the failure to block the arm against sudden, unexpected motion killed Weston. I am well aware of Dethloff's and Kosher's agreement the job of freeing a stuck pallet was not inherently dangerous provided proper procedures were followed (Tr. 105, 145), but I also am cognizant that I must focus on the effect of the hazard if it occurs, and here the effect was fatal.

NEGLIGENCE

Inspector Dethloff found the violation was due to "moderate" negligence. Gov't Exh. 1. His reason for finding Empire negligent involved his belief the company should have been aware of the hazards inherent in the unexpected movement of the dump arm. Tr. 44-45. The record reveals the company took measures to protect its miners by instructing them how to safely free a stuck pallet. In fact, as Dethloff testified, Weston's instructor specifically told Weston not to place himself between the pallet dump arm and guide rail. Tr. 70-71. For these reasons, I conclude that while the company did not exhibit the care required by the circumstances, it was cognizant of the hazard and took steps to protect against it; and because the company had no reason to believe Weston would disregard his training, I conclude its negligence was low.

ORDER

Citation No. 6192002 **IS AFFIRMED** to the extent it alleges an S&S violation of section 56.14105, one that was reasonably likely to result in a fatal injury. Line 11 of the citation **IS MODIFIED** to indicate Empire's negligence was low. Empire's contest **IS DISMISSED**.

David F. Barbour

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 20, 2007

MICHAEL SONNEY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. CENT 2007-1-DM
v.	:	SC MD 2006-08
	:	
	:	
ALAMO CEMENT CO., LTD.,	:	1604 Plant & Quarry
Respondent	:	Mine ID 41-03019

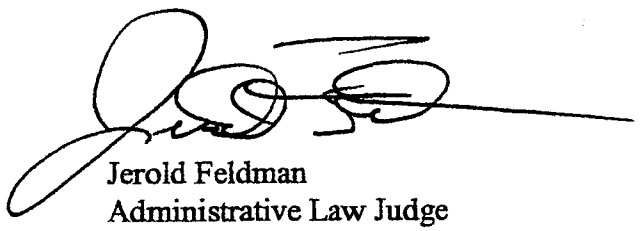
FINAL ORDER

Before: Judge Feldman

This case is before me based on a discrimination complaint filed with this Commission pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (the Mine Act). The complaint was filed by Michael Sonney against the respondent, Alamo Cement Company, LTD (Alamo).

Sonney's discrimination complaint was dismissed as moot by Order dated April 4, 2007. The Order noted that dismissal of Sonney's complaint would become effective upon Alamo's timely filing of written assurances that it would provide neutral employment references to Sonney's prospective employers, and that all disciplinary references had been removed from Sonney's personnel record. 29 FMSHRC __, slip op. at 7.

The required written representation was filed by Alamo's counsel on April 16, 2007.[1] Accordingly, Sonney's discrimination complaint **IS DISMISSED** with prejudice.



Jerold Feldman
Administrative Law Judge

[1] Alamo's April 16, 2007, submission was filed by facsimile. The facsimile was followed by an original letter sent by regular mail received on April 18, 2007.

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 8, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 2006-172-M A.C. No. 01-00043-32236
v.	:	
LEHIGH CEMENT COMPANY, Respondent	:	Leeds Plant
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 2006-173-M A.C. No. 01-00043-49139
v.	:	
GARY STRUNK, employed by LEHIGH CEMENT COMPANY, Respondent	:	Leeds Plant

ORDER DENYING MOTION FOR SUMMARY DECISION

In these civil penalty cases, the Secretary is petitioning to assess Lehigh Cement Corporation (Lehigh) a civil penalty of $6,000 for an alleged violation of 30 C.F.R. § 56.14100(b), a mandatory safety standard requiring defects on any equipment that affect safety to be corrected in a timely manner to prevent the creation of hazards to persons (Docket No. SE 2006-172-M). The alleged violation is set forth in Citation No. 6092574, which was issued on September 11, 2003.[1] The citation was issued pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1). In addition to alleging the violation, the Secretary also alleges the violation was a significant and substantial contribution to a mine safety hazard (S&S) and was the result of Lehigh's unwarrantable failure and high negligence.

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[1] The citation originally alleged a violation of 30 C.F.R §56.14102, a mandatory standard requiring braking systems on railroad cars and locomotives to be maintained in functional condition. On November 29, 2006, the citation was amended to allege a violation of section 56.14100(b). Order (November 29, 2006).

The citation states in part:

> There is a severe oil leak on the locomotive. Oil was running out onto the walkway for the locomotive and down the wheel and brakes on the right side. Oil has accumulated on the tracks where the locomotive must operate. The operator of the locomotive stated that the stopping distance of the locomotive has been compromised due to oil on the wheels, brakes and rails. Trucks must cross the tracks on a regular basis. The locomotive operator said some trucks would cross too close to the moving locomotive. The locomotive operator had given information about the excessive oil leak to the shipping supervisor who issued a work order on April 19, 2003 for the repair of the oil leak. The mobile equipment supervisor was called and informed of the leak. He said the locomotive repair was beyond his department's capability and the problem was given to the purchase manager to get bids for the repair. The failure of management to correct the severe oil leak constitutes more than ordinary negligence and the management has engaged in aggravated conduct making this violation an unwarrantable failure to comply with a mandatory standard.

Citation No. 6092574.

The Secretary also is petitioning for the assessment of an individual civil penalty of $1,000 against Gary Strunk, Lehigh's assistant plant manager (Docket No. SE 2006-173-M).[2] The Secretary charges Strunk knowingly authorized, ordered, or carried out the violation alleged in Citation No. 6092574. Strunk answered by denying he committed a knowing violation and by asserting no basis exists for assessing a civil penalty. Answer and Affirmative Defenses of Respondent 1.

Lehigh and Stunk are represented by the same counsel. On November 20, 2006, the Commission's chief judge assigned the cases to me. In the meantime, counsel for the Secretary and counsel for Lehigh and Strunk jointly moved for consolidation of the cases for trial and decision. I granted the motion on December 13, 2006. I also ordered counsels to consult to determine if the cases could be settled and to report the results of their discussions to me by January 19, 2007. Subsequently, counsel for the Secretary reported a settlement was not

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[2] Although the Secretary refers to Mr. Strunk as the plant manager, counsel for Lehigh and Strunk states Mr. Strunk is the assistant plant manager. Respondent's Opp. to Sec.'s Mot. 1 n. 1.

possible, and on February 7, 2007, I scheduled the cases to be heard on June 7, 2007, in Birmingham, Alabama.

DISCOVERY DISPUTE

The petitions were filed in September 2006. They were timely answered in October. On November 6, 2006, the Secretary served discovery requests on Lehigh, including interrogatories, requests for production of documents and requests for admissions. The Commission's rules required the discovery requests to be responded to fully and in writing within 25 days of service unless the party initiating discovery agreed to a longer time. 29 C.F.R. § 2700.58. On November 11, 2006, counsel for the Secretary agreed to an e-mail request from Respondents' counsel to respond by December 15, 2006. Affidavit in Support of Motion 1. The responses were not furnished by December 15. On December 21, 2006, and January 4, 2007, counsel for the Secretary sent e-mail requests for the promised responses. The first request resulted in counsel for Lehigh and Strunk stating he would "get . . . [the responses] out shortly" and the second request resulted in counsel stating, "I have them to get out to you today." *Id.* 3.

The responses were not received; so on January 17, 2007, counsel for the Secretary moved for summary decision in both cases. Counsel for the Secretary asserted there were no genuine issues as to any material facts and the Secretary was entitled to judgment as a matter of law. In counsel's view, the "undisputed facts" warranting summary decision resulted from the Secretary's request for admissions, which, lacking a response, were deemed admitted. The Secretary pointed to Fed.R.Civ.P. 36(a), which provides that if a party fails to respond to a request for admissions, the matters set out in the request are deemed admitted.

Counsel for Lehigh and Strunk asked for and was granted an extension of time in which to respond to the motion. Counsel noted in the request that "coincidentally" he had "served full and complete discovery responses" on the same day counsel for the Secretary filed her motion for summary decision. Letter of Thomas Benjamin Huggett (February 9, 2007). The extension of time was granted.

Not surprisingly, when counsel ultimately responded, he opposed the motion. First, counsel pointed out the Secretary's discovery requests were related to the case against Lehigh and not to the case against Mr. Strunk.[3] Thus, in counsel's view, there is no basis to conclude there are "undisputed facts" regarding the Secretary's claims concerning Strunk, and Strunk's denial of the alleged violation as stated in his answer remains extant, as does his denial of any basis to assess a civil penalty. Answer and Affirmative Defenses of Respondent 1. Counsel also noted the Secretary's counsel did not file a motion to compel Lehigh to answer the discovery prior to filing the motion for summary decision. Finally, counsel stated Lehigh has answered the

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[3] In fact, counsel is correct in this regard. The Secretary's requests for admissions are addressed to Lehigh only, and Docket No. SE 2006-172-M is the sole case referenced in the caption.

discovery requests and he asserts the Secretary has not been prejudiced by the company's delay in responding. Respondents' Opp. to Sec's. Mot. 3-4. [4]

RULING ON MOTION

The motion **IS DENIED** for several reasons. First, and as pointed out by counsel for the Respondent, it is denied with regard to Docket No. SE 2006-173-M because there has been no showing the Secretary initiated discovery in the case. Therefore, were I to accept the Secretary's argument Fed.R.Civ.P. 36(a) applied, I would not find its application appropriate in Mr. Strunk's case. In other words, I would not find at this point in the proceeding there are undisputed facts in Docket No. SE 2006-173-M.

Second, with regard to Docket No. SE 2006-172-M, there is no doubt counsel for Lehigh has been slipshod in meeting his discovery obligations. He failed to answer the discovery requests by the due date imposed under the Commission's rules, and, to the obvious frustration of counsel for the Secretary, he failed to meet subsequent dates counsel imposed upon himself. I sympathize with counsel for the Secretary and I note, in addition to counsel for Lehigh's delay and repeated requests for more time, in each instance it was counsel for the Secretary who had to take the initiative and request information regarding the status of the discovery responses.

This stated, counsel for Lehigh has noted correctly the liberal nature of discovery in Commission proceedings, one effect of that liberality being a reluctance on the part of the Commission's judges in the absence of prejudice strictly to enforce the discovery timelines set forth in the Commission's rules. In addition, counsel also has noted correctly the lack of a motion to compel on the part of counsel for the Secretary. While such a motion is not always required, where a party seeks summary decision based on a failure to respond to discovery, a "best practice" in Commission litigation is to seek an order to compel. The point, after all, is to use discovery to prepare for trial, not to circumvent it.

Here, because Lehigh now has answered the Secretary's discovery requests, because there has been no showing of prejudice to the Secretary due to the delay in Lehigh's answers and because there has been no prior motion to compel on the Secretary's part, the motion with regard to Docket No. SE 2006-172-M also **IS DENIED**.

The parties are reminded the cases are set to be heard on June 7, 2007, in Birmingham. Unless extraordinary circumstances arise prior to that time, the trial will not be delayed. In fact, it may be moved to an earlier day in the week, if the judge's docket allows. Counsels are

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[4] Counsel for Lehigh also stated in the motion, "To the extent the timeliness of the responses established the initial response, Lehigh Cement respectfully requests that its affirmative answers to the Admission be accepted as an amendment." Respondents' Opp. to Sec's Mot. 4. Since I do not find the lack of a timely response determinative of the facts, I need not rule on this request.

expected to cooperate with one another and to meet their professional responsibilities so as to be prepared for trial on all of the issues no later than May 17, 2006, and counsels must advise me on or before that date if the cases are settled without having to do so on the record in Birmingham.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 17, 2007

TRANS ALTA CENTRALIA MINING, LLC, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 2007-102-RM
	:	Citation No. 7284647; 10/31/2006
v.	:	Docket No. WEST 2007-103-RM
	:	Citation No. 7284648; 10/31/2006
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Respondent	:	Centralia Coal Mine Mine ID 45-00416
INTERNATIONAL UNION OF OPERATING ENGINEERS, Applicant	:	COMPENSATION PROCEEDING Docket No. WEST 2007-172-C Citation No. 6384697; 9/12/2006
v.	:	
TRANS ALTA CENTRALIA MINING, LLC, Respondent	:	Centralia Coal Mine Mine ID 45-00416

ORDER LIFTING STAY,
CONSOLIDATING CASES
AND
NOTICE OF HEARING

Before: Judge Barbour

Docket No. WEST 2007-172-C is before me on a complaint filed pursuant to section 111 of the Mine Safety and Health Act of 1977 (Mine Act or Act). 30 U.S.C. § 821. In the case the International Union of Operating Engineers (Union) seeks compensation for miners idled at a coal processing plant that is owned and operated by Transalta Centralia Mining, LLC (Transalta). A reading of section 111 reveals it provides miners with the right to receive full pay for certain time periods if they are idled by withdrawal orders. First, if a mine or a part of a mine is closed by an order issued under sections 103, 104 or 107 of the Act, all idled miners working on the shift when the mine was closed are entitled to full compensation at the regular rate of pay for the time period they were idled or for the balance of the shift, whichever is less. If the order has not been terminated before the next working shift, all miners idled by the order are entitled to compensation at the regular rate of pay for the time they are idled up to 4 hours for the shift. Second, and additionally, if the mine is closed by an order issued under sections 104 or 107 for failure to comply with a mandatory safety standard, miners are entitled to compensation at their regular rates of pay for the time they were idled or for up to one week, whichever is less. Third, if an operator fails to comply with a closure order issued under section 103, 104 or 107, all miners who would have been idled by the order, but instead continued to work, are entitled to full compensation at their regular rate of pay in addition to the pay they received for the work they performed between the time the order was issued and the time it was complied with, vacated or terminated. Pay entitlement under the first provision accrues to idled miners regardless of the outcome of any litigation challenging the withdrawal order.

Although the complaint does not specifically state that part of section 111 under which the Union seeks compensation, the complaint notes miners were idled by Order No. 7284647 and by "Order" No. 7284648.[1] These enforcement actions were issued pursuant to sections 107(a) of the Act and 104(d)(1) of the Act respectively. 30 U.S.C. §§ 817(a), 814(d)(1). Order No. 7284647 alleges an imminent danger existed at the plant due to the failure of certain parts of the plant's superstructure. Citation No. 7284647 states it was issued "in conjunction with . . . Order [No.] 7284647" and charges the imminent danger existed because Transalta's management "failed to maintain the superstructure of the . . . plant" in violation of mandatory safety standard 30 C.F.R. §77.200.[2]

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[1] Order 7284648 is actually a citation.

[2] Section 77.200 states: "All mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees."

In answering the compensation complaint, the company, which previously contested the order (Docket No. WEST 1007-102-R) and the citation (Docket No. WEST 2007-103-R), stated the complaint should be stayed pending the outcome of the contest proceedings, which in turn were stayed pending the filing of a proposed civil penalty for the alleged violation of section 77.200 set forth in Citation No. 7284648. The Union was ordered to state its position on the company's request. Order to State Position (March 13, 2007). The Union responded the compensation complaint should go forward. The Union noted the first sentence of Section 111 states if a coal or other mine is closed by an order issued pursuant to Section 107 of the Act (30 U.S.C. §817), certain miners shall be entitled to compensation, "regardless of the result of any review of such order." 30 U.S.C. §821.

I agree with the Union the case should go forward, but I reach the conclusion for a somewhat different reason. As I interpret the complaint, the Union is seeking compensation under the second compensation provision of section 111. [3] (I note again the Union's reference to both Order No. 7284647 and to "Order" No. 7284648. I also note its statement, "[T]he Company has confirmed that our members were idled as a result of the above mentioned Orders". Complaint Letter (January 2, 2007) (emphasis supplied)). As applicable to the case at hand, this means the Union is seeking, in addition to the amounts to which its members are entitled for closure of the mine for an alleged imminent danger, compensation for miners idled for up to one week by the company's alleged failure to comply with section 77.200.

Because the Act states that miners be compensated "after all interested parties are given an opportunity for a public hearing , which shall be expedited", it is imperative a hearing on the merits of the order and citation be scheduled to determine, inter alia, whether Order No. 7284647 was issued for a valid violation of section 77.200 as alleged in Citation No. 7285648. Put another way, it is important to determine whether there is a causal nexus between the fact of violation (assuming a violation of section 77.200 as alleged in Citation 7285648 is established) and the imminent danger withdrawal order (Order No. 7284647). The issue can most speedily be determined by lifting the stay in the contest proceedings, consolidating them with the instant proceeding and trying the three proceedings together.

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[3] The union is not represented by counsel. Perhaps as a result, its complaint is somewhat inartful. It is not however, incomprehensible. Although the specific provision under which compensation is sought is not stated, reading the complaint in conjunction with the subject order and citation makes clear in addition to compensation under the first provision of section 111, the Union is concerned with entitlement to compensation due to the mine being closed by an order issued for failure to comply with a mandatory safety standard.

ACCORDINGLY, the parties are advised the stay in Dockets No. WEST 2007-120-RM and WEST 2007-103-RM is **DISSOLVED**. Docket Nos. WEST 2007-120-RM, WEST 2007-103-RM and WEST 2007-172-C **ARE CONSOLIDATED** for hearing and decision. A hearing in the consolidated cases will be convened at 8:30 a.m., on **May 23, 2007**, in **Olympia, Washington**. The issues in the contest proceedings are whether the contested citation and order were validly issued, including whether an imminent danger existed as alleged in Order No. 7284647 (WEST 2007-102-M) and if so, whether the imminent danger was the result of Transalta's failure to comply with section 77.200 as alleged in Citation No. 7284648 (WEST 2007-103-R).[4] In addition, if the violation occurred, the questions of whether the violation was a significant and substantial contribution to a mine safety hazard and whether the violation was the result of Transalta's unwarrantable failure to comply with section 77.200 are at issue. The issues in the compensation proceeding include whether Order No. 7284647 was issued for a failure to comply with section 77.200 and if so, the identify of those entitled to compensation and amounts to which they are entitled.[5]

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

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[4] I note the Union has not yet sought to intervene in the contest proceedings.

[5] It is clear from the pleadings miners will be entitled to some compensation. They will obtain it either under the first or the second provision of section 111. It is the obligation of the company, its counsel and the representative of the Union to agree upon the identities of those entitled under both scenarios and upon the amounts each entitled miner should receive in each situation, excluding interest which will be calculated and added as of the date the order becomes final. In this way, once the finality of the order is determined, proper compensation and interest may be promptly awarded. The company and the Union should be able to agree upon such lists without the need for time consuming and complicated discovery. Counsel for Transalta is therefore requested to contact the representative of the Union to discuss the matter. The parties may wish to present agreed upon lists to me at the hearing where they can be entered into the record as a joint exhibit.

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/rao

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 20, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 2007-74 A.C. 15-10753-100293
v.	:	
CLEAN ENERGY MINING COMPANY, Respondent	:	Mine #1

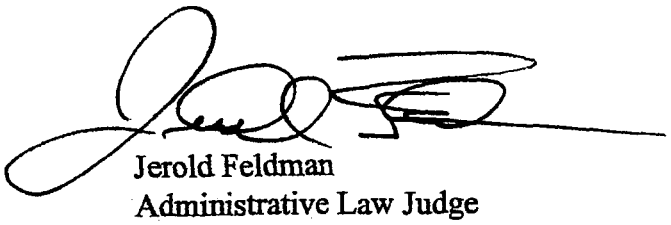
ORDER DENYING RESPONDENT'S MOTION TO DISMISS

Before: Judge Feldman

Commission Rule 28(a), 29 C.F.R. § 2700.28(a), specifies that the Secretary shall file a petition for assessment of civil penalty with this Commission within 45 days of receipt of a mine operator's timely contest of the Secretary's proposed penalty assessment. The Respondent filed its notice of contest with the Secretary's Mine Safety and Health Administration (MSHA) on October 31, 2006. Thus, the date for the Secretary's timely filing of her penalty assessment petition with the Commission was December 15, 2006. However, the Secretary filed her petition on January 12, 2007.

Consequently, the Respondent has filed a motion to dismiss the subject petition for assessment of civil penalty as untimely. The Secretary opposes the Respondent's motion asserting that the delay was caused by the Secretary's mistaken belief, apparently due to a processing error, that the Respondent's contest was received by MSHA on November 28, 2006.

In their filings, both parties acknowledge that, absent a showing of prejudice, the 45-day filing period for the Secretary's petition for assessment of civil penalty is not jurisdictional. *See Lone Mountain Processing Incorporated*, 17 FMSHRC 839 (May 1995) (ALJ) (citations omitted). Moreover, processing guidelines generally are intended to "spur the Secretary to action," rather than to confer rights on litigants that limit the scope of the Secretary's authority. *Sec'y of Labor v. Twentymile Coal Company*, 411 F.3d 256, 261 (D.C. Cir. 2005). Accordingly, the Respondent's motion to dismiss **IS DENIED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001
April 30, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2005-273
Petitioner	:	A. C. No. 36-08603-64393
v.	:	
	:	Docket No. PENN 2006-199
	:	A. C. No. 36-08603-85019
	:	
ROSEBUD MINING COMPANY,	:	Tracy Lynne Mine
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2007-70
Petitioner	:	A. C. No. 36-08603-96072 A
v.	:	
	:	
WENDALL W. SCHICK, Employed By	:	
Rosebud Mining Company,	:	Tracey Lynne Mine
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2007-71
Petitioner	:	A. C. No. 36-008603-96073 A
v.	:	
	:	
ROBERT J. BRINK, Employed By	:	
Rosebud Mining Company,	:	Tracey Lynne Mine
Respondent	:	
ROSEBUD MINING COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. PENN 2005-264-R
	:	Order No. 7052251; 8/23/2005
	:	
	:	Docket No. PENN 2005-265-R
v.	:	Order No. 7052248; 02/23/2005
	:	
	:	Docket No. PENN 2005-266-R
SECRETARY OF LABOR,	:	Citation No. 7052247; 09/23/2005

MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Tracy Lynne Mine
	:	Mine ID 36-08603

DECISION AND ORDER GRANTING MOTION TO QUASH SUBPOENA

On March 23, 2007, Rosebud Mining Company (Rosebud) filed a motion to quash a subpoena served upon Rosebud attorney Joseph A. Yuhas. The subpoena sought to compel Mr. Yuhas to appear for a deposition on April 3, 2007, for questioning regarding statements made by Rosebud miners during accident investigation interviews conducted by the Department of Labor's Mine Safety and Health Administration (MSHA) and the Pennsylvania Department of Environmental Protection Bureau of Mine Safety (State) after a fatal roof fall. Rosebud argues that because Mr. Yuhas attended those interviews as counsel for Rosebud, and because discovery of Mr. Yuhas' recollections of these interviews is prohibited under the work product doctrine, as well as under principles enunciated in *Shelton v. American Motors, Inc.* 805 F2d 1323, 1328 (8th Cir. 1986) governing attorney depositions, the subpoena compelling his deposition should be quashed.

On June 10, 2005, a fatal roof fall occurred at Rosebud's Tracy Lynne Mine, located in Armstrong County, Pennsylvania. The roof fall occurred while the fatally injured miner was installing supplemental roof bolts into the mine roof at an underground intersection. MSHA was notified of the accident at approximately 6:10 a.m. on June 10, 2005, and that same day, MSHA initiated an accident investigation and interviewed certain mine employees.

On June 15, 2005, MSHA re-interviewed the mine employees in the presence of a number of other witnesses including MSHA inspectors and State mine personnel. The interviews were not transcribed or recorded. Also present, in addition to the other witnesses, was Mr. Yuhas, Rosebud's attorney. It appears that MSHA investigators now claim that during those interviews, three miner witnesses stated that they observed a defect in the subject roof prior to the fall. MSHA subsequently issued several citations and orders to Rosebud alleging violations of its roof control plan and of the standard governing pre-shift examinations. Rosebud, through its counsel, Mr. Yuhas, contested those citations before this Commission. During discovery, the Secretary deposed the miners that MSHA officials had previously interviewed during the accident investigation. At their depositions, these miners testified that they had not observed such a defect in the subject roof prior to the roof fall.

As previously noted, the Secretary subsequently served Mr. Yuhas with a subpoena seeking his deposition testimony regarding his recollection of the accident investigation interviews that he attended. Specifically, the Secretary stated that she intended to ask Mr. Yuhas "questions under oath regarding public admissions made by employees of Rosebud Mining Company during the accident investigation of the fatal roof fall which occurred...at Rosebud's Tracy Lynne mine." Thus, it is apparent that the Secretary seeks to depose Mr. Yuhas in an effort to support her contentions regarding alleged inconsistencies between miner's statements made during MSHA's accident investigation interviews and their subsequent deposition testimony.

Mr. Yuhas was present at the interviews, however, Rosebud maintains that, as mine safety counsel for Rosebud, he was therefore listening and processing the information disclosed at the interviews for the purpose of advising his client regarding, and in anticipation of, the possibility of litigation regarding the enforcement action such as those which are the subject of the captioned cases. Rosebud argues that because courts have recognized the near impossibility of disclosing an attorney's recollections of oral interview statements without revealing his or her mental impressions or legal theories, such recollections are afforded near-absolute immunity from discovery under the work product doctrine.

Rosebud further argues that the Secretary cannot circumvent the work product doctrine with her assertion that she seeks only factual information from the interviews. It maintains that any purely factual material Mr. Yuhas obtained from the interviews, even were it separable, is still work product and is protected against discovery absent a showing of substantial need for the information and undue hardship in obtaining the equivalent information by another means. Rosebud argues that the Secretary cannot make this showing, because numerous other witnesses, including her own inspectors, state inspectors and the miners themselves, are available to testify about statements given during the interviews to the extent relevant in the proceedings and that Mr. Yuhas' testimony would thus constitute no more than corroborative evidence, insufficient under established precedent to show substantial need or undue hardship.

In *Hickman v. Taylor*, 329 U.S. 495 (1947), the Supreme Court established the well-recognized attorney work product doctrine.[1] This doctrine protects against the disclosure of "tangible and intangible" work product created in anticipation of litigation. As stated in *Hickman*, work product is reflected "in interviews, statements, memoranda, correspondence, briefs, mental expressions, personal beliefs, and countless other tangible and intangible ways". This Commission has also recognized that matter covered under the work product doctrine is privileged and protected from discovery by its procedural rules. Commission Rule 56(b), 29 C.F.R. § 2700.56(b); *See, e.g. Secretary v. ASARCO, Inc.*, 12 FMSHRC 2548 (December 1990).

As further stated by the Supreme Court in *Hickman*, the rationale for this long-standing doctrine is that:

> [h]istorically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.

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[1]The doctrine has also been partially codified in Rule 26 (b)(3) of the Federal Rules of Civil Procedure. However, since that rule protects only documents and tangible things, it is not directly applicable to this case.

Hickman, 329 U.S. at 510-11. As a result of *Hickman* and to guard against the unnecessary disruption of an attorney's representation of his client, a two-tiered analysis for determining when information is protected from discovery by the work product doctrine has evolved. *See In Re Cendent Corp. Securities Litigation*, 343 F3d 658 at 663 (3rd Cir. 2003); *Baker v. General Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000).

Ordinary work product, which is limited to factual information, is discoverable only if the party seeking the information has a substantial need for the information and cannot without undue hardship obtain the substantial equivalent of the information by other means. *Baker*, 209 F.3d at 1054; see also Fed. R. Civ. P. 26(b)(3). Core or opinion work product, that which encompasses the "mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation" however, is "generally afforded near absolute protection...and is discoverable only upon a showing of rare and exceptional circumstances." *In Re Cendant Corp. Securities Litigation*, 343 F.3d at 663 (internal quotations omitted); *Baker*, 209 F.3d at 1054 (work product based on witness interviews is "opinion work product entitled to almost absolute immunity").

In this regard, the *Hickman* Court stated that "we do not believe that any showing of necessity can be made" to justify production of the attorney's recollections of oral statements made by witnesses, "whether presently in the form of his mental impressions or memoranda." The Supreme Court further stated that such recollections are entitled to heightened protection, because:

> forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness...and forces the attorney to testify as to what he remembers...regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.

Hickman, 329 U.S. at 512-13; *see also Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981) (work product based on oral witness statements reveals "the attorneys' mental processes in evaluating the communications...[and] cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship"), *In Re Grand Jury Proceedings*, 43 F.3d 966, 970 (5th Cir. 1994) (discovery of oral communications made by third parties to attorney allowed "only in a 'rare situation' because of the danger that the attorney's version of such conversations is inaccurate and untrustworthy...[and] will reveal the attorney's mental processes or litigation strategy.").

In accordance with the holding and rationale of *Hickman*, courts have regularly disallowed discovery of attorney recollections of witness interviews made in anticipation of litigation-whether in the form of memoranda or deposition testimony. *See, e.g., In Re Sealed Case*, 856 F.2d 268, 273 (D.C. Cir 1988); *see also In Re Grand Jury Subpoena*, 282 F.3d 156, 160 (2d Cir. 2002); *Shelton*, 805 F.2d at 1328.

Within the above framework of law I find that the testimony the Secretary seeks from Mr. Yuhas clearly falls into the protections of the work product doctrine. Mr. Yuhas, Rosebud's attorney was present at the interviews of the miner witnesses representing the company's legal interests in the event MSHA brought an enforcement action related to the circumstances involved in the roof fall. Any recollection of these interviews would necessarily involve Mr. Yuhas' mental impressions because his memory would likely be limited to what was significant to his representation of Rosebud in this matter. *See, e.g., Shelton*, 805 F.2d at 1329 (attorney's recollection would indicate that "since it was important enough to remember, she must be relying on it in preparing her clients's case."); *see also Director, Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1308 (D.C. Cir. 1997) ("[A] lawyer's factual selection reflects his focus; in deciding what to include and what to omit, the lawyer reveals his view of the case.").

I further find that the Secretary cannot circumvent the work product doctrine by merely asserting that she will not inquire into the mental impressions or work product of Mr. Yuhas. Indeed, as evidenced in the cited cases, it is because of the near impossibility of separating testimony of objective fact from testimony reflecting mental impressions that courts have afforded work product based on oral statements near absolute protection.

Even assuming, *arguendo*, that Mr. Yuhas' testimony could somehow be limited to factual work product without revealing his mental impressions, I find that the Secretary still could not make the required showing of substantial need and undue hardship to overcome the work product protections afforded even factual information. Factual work product is discoverable only if a party can show that (1) it has a substantial need for the information in preparation for its case and (2) that it is unable without undue hardship to obtain the substantial equivalent of the information by other means. *See, e.g., Baker*, 209 F.3d at 1054. Discovery of a witness statement based on allegations of substantial need and undue hardship in otherwise acquiring the information is "generally not allowed if that witness is available to the [requesting] party." See *Baker*, 209 F.3d at 1054. In addition, a party normally cannot show a substantial need for information when "it merely seeks corroborative evidence." *Id.; see Vinson & Elkins, LLP*, 124 F.3d at 1308.

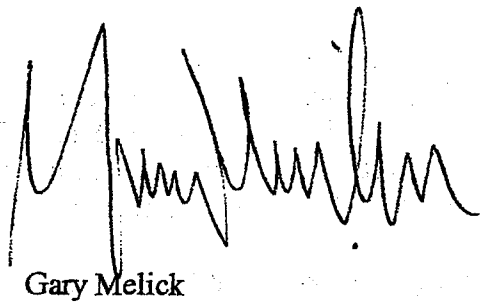
Here, as in *Vinson & Elkins* and *Baker,* the information the Secretary seeks to obtain by deposing Mr. Yuhas is clearly only corroborative evidence. The Secretary apparently believes there are discrepancies between miner statements given during the accident investigation interviews and the miner's deposition testimony. However, there were apparently at least five other witnesses including federal and State investigators present during the interviews who could also provide the Secretary with testimony as to the miners' interview statements. In addition, it is not disputed that the miner witnesses themselves were interviewed by two MSHA special investigators in January 2006 and were also later deposed by counsel for the Secretary in June 2006. Thus, because the purpose for seeking Mr. Yuhas' testimony is only for corroboration of statements of which MSHA is already aware, because other witnesses were present during the interviews and because the witnesses themselves have been available for questioning, there is not substantial need for Mr. Yuhas' testimony, nor would there be undue hardship in acquiring comparable testimony. Under established precedent, the Secretary cannot, in any event, therefore

make the showing required to overcome the work product privilege afforded Mr. Yuhas' recollections of the miners' interview statements.

Under the circumstances, there is no need to discuss Rosebud's proposed alternative rationale, under the *Shelton* case, to protect Mr. Yuhas' recollection of the witness interviews.

ORDER

Rosebud's Motion to Quash the Subpoena of Joseph A. Yuhas is hereby granted.



Gary Melick
Administrative Law Judge
(202) 434-9977

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 2007

ROY G. PETERSON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. CENT 2007-45-DM
v.	:	SC-MD 2006-12
	:	
ALCOA WORLD ALUMINA ATLANTIC,	:	Bayer Aluminum Plant
Respondent	:	Mine ID 41-00320

ORDER TO SHOW CAUSE

This case is before me based on a discrimination complaint filed with this Commission pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, § 815(c)(3) (the Act). The complaint was filed by Roy G. Peterson against Alcoa World Alumina Atlantic (Alcoa). Peterson's complaint, initially filed on September 1, 2006, with the Mine Safety and Health Administration (MSHA), concerns the company's refusal to place him on light duty on several occasions that occurred after several job related injuries in 2002 and 2004. In addition, Peterson complains about tools that he alleges were taken while he was on medical leave during this period. Finally, Peterson complains about the billing of his private insurance for treatment for a job related eye irritation that he sustained in June 2006. Peterson's complaint does not allege that he engaged in any protected safety related activities.

MSHA advised Peterson that its investigation failed to reveal any violation of section 105(c) of the Mine Act. Shortly thereafter, on November 2, 2006, Peterson filed his discrimination complaint with this Commission. After several delays caused by Alcoa's failure to respond to Peterson's complaint, this matter was assigned to me on April 20, 2007.

Alcoa replied to Peterson's complaint on April 12, 2007. Alcoa seeks dismissal of Peterson's complaint because Peterson has failed to allege any activities protected by the Mine Act that allegedly motivated the actions he complains of concerning his medical treatment and/or the loss of his tools.

The following statutory and case law framework is applicable in a discrimination proceeding. Section 105(c)(1) of the Mine Act provides, in pertinent part:

> No person shall discharge or in any manner discriminate against . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine . . . .

30 U.S.C. § 815(c)(1). Section 105(c)(2), 30 U.S.C. § 815(c)(2) requires a miner who believes he was the victim of discrimination to file a complaint within 60 days of the date of the alleged discrimination.

Peterson has the burden of proving a *prima facie* case of discrimination. In order to establish a *prima facie* case, Peterson must establish that he engaged in protected activity, and that the aggrieved action was motivated, in some part, by that protected activity. *See Sec'y of Labor o/b/o Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor o/b/o Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981).

Alcoa may rebut a *prima facie* case by demonstrating, either that no protected activity occurred, or that the adverse action complained of by Peterson was not motivated in any part by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. Alcoa may also affirmatively defend against a *prima facie* case by establishing that it would have taken the adverse actions complained of even if the protected activity had not occurred. *See also Jim Walter Resources*, 920 F.2d at 750, *citing with approval Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

In order to determine if Peterson, considering the facts most favorable to him, has stated a cause of action under the Mine Act, a telephone conference was conducted with Peterson and Alcoa's counsel on April 25, 2007. Peterson stated he was 61 years old and that he had worked for Alcoa as a mechanic for 31½ years. After a medical leave due to a job related shoulder injury, Peterson returned to work in August 2004 until he voluntarily retired on February 1, 2007. During the course of the telephone conference, I explained to Peterson that worker's compensation issues, and union issues such as reimbursement for his lost equipment, do not give rise to Mine Act jurisdiction.

Notwithstanding its untimeliness, although Peterson complained that the company's refusal to offer him light duty after his injuries in 2002 and 2004 was arbitrary because it had provided light duty to others under similar circumstances, he did not claim the company's decision was motivated by protected activity. Similarly, Peterson did not contend that either the loss of his tools, or his worker's compensation dispute concerning his eye condition, was in any way connected to any protected activity. In short, Peterson failed to allege any conduct by Alcoa that violated the anti-discrimination provisions of section 105(c) of the Mine Act.

ORDER

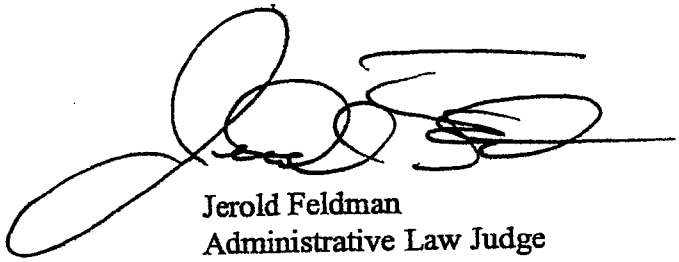
In view of the above, as Peterson has not identified any protected activity that serves as the basis for his complaint, **IT IS ORDERED** that Peterson **SHOW CAUSE, in writing,** why his discrimination complaint should not be dismissed. Specifically, Peterson should provide the following information:

1) State, with specificity, the protected activity that serves as the basis for your complaint. If you are alleging that you communicated safety related concerns to Alcoa supervisory personnel, state the names and job titles of such personnel, and provide a detailed summary of the safety related communications, including the date and time of such communications.

(2) State, with specificity, the adverse actions you are complaining of, the dates of the adverse actions, and specify the dates and details of the protected activity, if any, that you allege motivated each of the adverse actions complained of.

(3) State why you believe your complaint should not be dismissed as untimely because it was not filed within 60 days of the actions that you are complaining of.

IT IS FURTHER ORDERED that Peterson provide the above information **within twenty-one (21) days of this Order**. Peterson may provide any other information he deems relevant. Failure to provide a timely response will result in the dismissal of Peterson's complaint with prejudice. Alcoa **shall have fourteen (14) days to reply** to Peterson's response to this Order to Show Cause.



Jerold Feldman
Administrative Law Judge
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/mh

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