

## MARCH AND APRIL 2009

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## **MARCH AND APRIL 2009**

Review was granted in the following cases during the months of March and April 2009:

Secretary of Labor, MSHA v. Eastern Associated Coal Corporation, Docket No. WEVA 2007-335.  
(Judge Weisberger, January 27, 2009)

Secretary of Labor, MSHA v. Coal River Mining, LLC., Docket Nos. WEVA 2006-125-R, et al.  
(Judge Barbour, January 28, 2009)

Secretary of Labor, MSHA v. Wolf Run Mining Company, Docket No. WEVA 2008-804. (Judge  
Feldman, February 26, 2009)

No case was filed in which review was denied during the months of March and April 2009:



## **COMMISSION DECISIONS AND ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 4, 2009

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

v.

ROWAN CONSTRUCTION COMPANY

Docket No. SE 2009-125-M

A.C. No. 08-01215-131854

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 14, 2008, the Commission received from Rowan Construction Company ("Rowan") a motion 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).

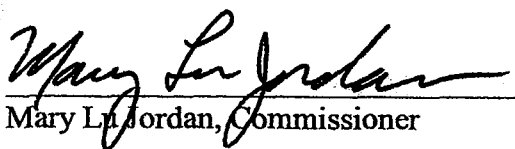
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

Here, the proposed assessment was delivered to Rowan's building, but another tenant at that location accepted delivery of the assessment. Sometime later, the tenant gave the assessment

to Rowan. Thereafter, Rowan timely notified the Secretary of its intent to contest the assessment.<sup>1</sup>

Accordingly, the proposed penalty assessment is not a final order of the Commission, and Rowan's motion is moot. 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. *See State of Alaska Dep't of Transp. and Pub. Facilities*, 29 FMSHRC 389, 390 (June 2007). Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

  
Michael F. Duffy, Chairman  
Mary L. Jordan, Commissioner  
Michael G. Young, Commissioner  
Robert F. Cohen, Jr., Commissioner

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<sup>1</sup> The facts concerning the delivery of the assessment to Rowan, which are stated in an affidavit, are unopposed by the Secretary and accepted as stated for the limited purpose of considering the motion.



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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 12, 2009

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

v.

NELSON QUARRIES, INC.

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Docket Nos. CENT 2006-151-M  
CENT 2006-201-M  
CENT 2006-203-M

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

## DECISION

### BY THE COMMISSION:

In these civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"), Administrative Law Judge Richard W. Manning concluded that Nelson Quarries, Inc. ("Nelson Quarries") violated 30 C.F.R. § 56.6130(a) when it failed to store an explosive in a magazine, and that the violation was significant and substantial ("S&S").<sup>1</sup> 30 FMSHRC 254, 260-61 (April 2008) (ALJ). He further determined that the operator violated 30 C.F.R. § 56.6300(b) when an employee who allegedly lacked adequate training and experience used explosives while unsupervised. *Id.* at 265. The judge also held that Gene Andres, Ronnie Head, and Jeff Benedict were agents of Nelson Quarries within the meaning of the Mine Act, and that their negligence was imputable to the operator for unwarrantable failure purposes for three citations and one order.<sup>2</sup> *Id.* at 262-63, 284-85, 288-89. Nelson Quarries filed a petition for discretionary review, challenging the judge's determinations that the violation of section 56.6130(a) was S&S, that the operator

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<sup>1</sup> The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

<sup>2</sup> 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.

violated section 56.6300(b), and that the three individuals were agents. The Commission granted the petition. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

In October and November 2005, Nelson Quarries operated five portable limestone quarries in Allen and Crawford Counties, Kansas. 30 FMSHRC at 255. Nelson Quarries is owned in part by Kenneth Nelson. Gov't Ex. 137, at 9-2; Tr. 661. During the time in question, the operator referred to Patrick Clift and Mike Peres as superintendents, and to Andres, Head, and Benedict as foremen of Plants 4, 5, and 2, respectively. N. Br. at 6; Tr. 42, 184, 473-74, 558, 661, 663.

Inspectors from the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted hazard inspections of the plants after a former employee of Nelson Quarries filed a complaint with MSHA listing unsafe conditions that allegedly existed at the plants. 30 FMSHRC at 255-56. In addition, the inspectors conducted regular inspections of the plants. Those regular and hazard inspections gave rise to the three citations and one order that are the subjects of these proceedings. Tr. 185.

A. Citation No. 6291250

On November 15, 2005, MSHA Inspector Dustan Crelly conducted regular and hazard<sup>3</sup> inspections of Plant 4 at the Cherryvale location. Tr. 183. When he arrived at the mine, Inspector Crelly introduced himself and asked for the person in charge. Tr. 184. Gene Andres stated that he was the foreman and accompanied the inspector throughout the inspection. Tr. 188; Gov't Ex. 12, at 4.

Inspector Crelly inspected the parts trailer, which was a semi-van with doors toward the back of the trailer. Tr. 193, 194. He observed two partial rolls of primer or shock tubing<sup>4</sup> stored under shelves toward the front of the trailer. Gov't Ex. 13; Tr. 191, 194. The shock tubing was not in the original manufacturer's packaging. Tr. 193. The material had apparently been in the parts trailer for some time. 30 FMSHRC at 261-62; Tr. 195, 216. Inspector Crelly issued Citation No. 6291250, alleging a violation of section 56.6130(a) because the shock tubing was

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<sup>3</sup> The hazard complaint received by MSHA alleged in part that "Explosives are left unguarded and hid around the plants to save time and money (Cherryvale)." Gov't Ex. 11.

<sup>4</sup> Shock tubing is used as a lead line to detonate high explosives, and is considered a low explosive. 30 FMSHRC at 259; Tr. 191.

not stored in a magazine.<sup>5</sup> 30 FMSHRC at 258. The inspector designated the violation as S&S and as caused by the operator's unwarrantable failure to comply with the standard. *Id.* at 258, 259.

B. Order No. 6291251

On November 16, 2005, Inspector Crelly inspected the crusher shack at Plant 4 and discovered a stick of Boostrite, a high explosive, stored in the shed next to initiation devices. Tr. 206-07. The inspector asked Travis Tomlinson, the crusher operator, why the Boostrite was being stored in the crusher shed. Tr. 204-05. Tomlinson replied that on the preceding Monday, he had used one stick in the hopper of the crusher to break up large or hung-up material. 30 FMSHRC at 263; Tr. 204-05. Tomlinson stated that, while he was using the explosives, Andres was loading trucks. 30 FMSHRC at 265; Tr. 207-08. He further explained that rather than put the Boostrite back in the magazine, he had just placed it in the crusher shack. Tr. 205. The inspector stated that he observed Tomlinson smoking in the crusher shack. 30 FMSHRC at 263; Tr. 209-10. The inspector determined that Tomlinson was inexperienced in the handling and use of explosives, and that he had used the Boostrite while he was not in the presence of an experienced miner. 30 FMSHRC at 263. Accordingly, the inspector issued Order No. 6291251, alleging a violation of section 56.6300(b).<sup>6</sup> *Id.* The inspector designated the alleged violation as S&S and as caused by the operator's unwarrantable failure. Gov't Ex. 15.

C. Citation No. 6291595

On October 26, 2005, Inspector Chrystal Dye arrived at Plant 5 to conduct an inspection. Tr. 531, 553. When she asked for the person in charge, Ronnie Head introduced himself as the foreman and accompanied Inspector Dye throughout the inspection. Tr. 558. During the inspection, Inspector Dye tested the parking brake of a Euclid haul truck while it was empty on a slight grade and determined that the brake did not hold the truck against movement. 30 FMSHRC at 283; Tr. 553-54. She also noted that the condition had been documented since late September 2005 by three different truck operators in preshift reports. 30 FMSHRC at 283; Tr. 555. Inspector Dye asked Head if he knew about the condition, and he stated that he did. Tr. 555. Head explained that he had called the mechanic to fix the parking brake, but that the mechanic had allegedly stated that the brake did not need to work. *Id.* Inspector Dye issued Citation No.

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<sup>5</sup> 30 C.F.R. § 56.6130(a) states that "[d]etonators and explosives shall be stored in magazines."

<sup>6</sup> 30 C.F.R. § 56.6300(b) provides that "[t]rainees and inexperienced persons shall work only in the immediate presence of persons trained and experienced in the handling and use of explosive material."

6291595, alleging a violation of section 56.14101(a)(2).<sup>7</sup> 30 FMSHRC at 283. She designated the alleged violation as S&S and caused by the operator's unwarrantable failure. *Id.*

D. Citation No. 6321288

On October 5, 2005, Inspector James Timmons went to Plant 2 to investigate allegations about an accident included in the hazard complaint.<sup>8</sup> When he arrived at the plant, the inspector asked to see the foreman on the site, and Jeff Benedict stated that he was the foreman. Tr. 663. The inspector was informed that on September 23, 2005, Travis Larson had been directed by Benedict to operate the IH 530 front-end loader, which had non-functioning service brakes, to remove a lime pile. 30 FMSHRC at 287; Tr. 663-64. When Larson had driven up a ramp and raised the bucket, the loader's motor failed. Tr. 664. The loader then ran down the ramp and through a guardrail. *Id.* Before the accident, the mine superintendent, Patrick Clift, had instructed Benedict not to use the loader until a mechanic had worked on the loader's brakes. 30 FMSHRC at 288; Tr. 666, 675. The inspector issued Citation No. 6321288, alleging a violation of 30 C.F.R. § 56.14100(c).<sup>9</sup> 30 FMSHRC at 287. He designated the alleged violation as S&S and as caused by the operator's unwarrantable failure.

Nelson Quarries challenged these citations and this order in addition to 96 other citations and orders not currently before the Commission on review. *Id.* at 255. The matter was heard by Judge Manning.

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<sup>7</sup> 30 C.F.R. § 56.14101(a)(2) provides, "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."

<sup>8</sup> The hazard complaint stated in part:

A new hire was put on a loader at Gas City. He had no training. There were no brakes on the loader. He rolled the bucket back to kill the engine. The loader operator rolled down the hill through a rail. He tipped over. It took quite some time to get him out.

Gov't Ex. 11.

<sup>9</sup> 30 C.F.R. § 56.14100(c) provides:

When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

E. The Judge's Decision

The judge concluded that, as alleged in Citation No. 6291250, the operator violated section 56.6130(a) when it stored shock tubing, which is an explosive, in the parts trailer and not in a magazine. 30 FMSHRC at 260-61; 30 C.F.R. § 56.6130(a). He further determined that the violation was S&S because the shock tubing was reasonably likely to propagate a fire in the trailer and was reasonably likely to misfire, if used. 30 FMSHRC at 261. In addition, the judge found that the violation was caused by unwarrantable failure because the condition was obvious and had existed for some time. *Id.* at 262. He also held that Gene Andres was an agent of Nelson Quarries and that his negligence was imputable to the operator for purposes of penalty assessment and unwarrantable failure findings. *Id.* Accordingly, the judge assessed a penalty of \$1,000, as proposed by the Secretary. *Id.* at 259, 263.

The judge next determined that Nelson Quarries violated section 56.6300(b) as alleged in Order No. 6291251 based on his findings that Travis Tomlinson, who was inexperienced, used explosives to shoot material out of the hopper without the presence of a miner who was trained and experienced in the use of explosives, such as Gene Andres. *Id.* at 263-65. In so concluding, the judge credited the testimony of Inspector Crelly and the Secretary's exhibits. *Id.* at 265. He also upheld the S&S designation based on his determination that it was reasonably likely that the hazard contributed to by the violation would result in death or serious injury assuming continued normal mining operations, since inexperienced and untrained miners pose a hazard to themselves when handling explosives. *Id.* The judge further determined that the violation was unwarrantable, noting that the violation had been obvious; there had been little to no supervision of the use and storage of explosives; no effort had been made to properly train Tomlinson; and nothing in the record suggested that the incident giving rise to the order had been an isolated or unusual event. *Id.* at 265-66. Accordingly, concluding that the operator had exhibited indifference and a serious lack of reasonable care, the judge assessed a penalty of \$1,500, rather than the penalty of \$1,300 proposed by the Secretary. *Id.* at 263, 266.

As to Citation No. 6291595, the judge determined that the operator violated section 56.14101(a)(2) because the parking brake on the haul truck did not function properly. *Id.* at 283. The judge further determined that the violation was S&S, noting that the condition had existed for almost a month, and it was reasonably likely that the hazard contributed to by the violation would lead to a serious accident. *Id.* at 284. The judge upheld the unwarrantable failure designation, concluding that Head, who was an agent whose conduct was imputable to the operator, knew of the condition, that the condition posed a significant risk to employees, and that Head allowed the truck to be used. *Id.* at 284-85. Accordingly, the judge assessed a penalty of \$625, as proposed by the Secretary. *Id.* at 283, 285.

The judge upheld the violation of section 56.14100(c) and the S&S designation alleged in Citation No. 6321288 arising from the accident that occurred when Larson used the loader with defective brakes. *Id.* at 289. The judge also upheld the unwarrantable failure designation based on his finding that Benedict, who was the agent of Nelson Quarries when he directed Larson to

operate the loader, demonstrated a serious lack of reasonable care. *Id.* The judge determined that because Benedict disregarded the instruction of his supervisor to remove the loader from service, the operator's negligence was not as high as it otherwise would have been. *Id.* Accordingly, the judge assessed a penalty of \$800, rather than the penalty of \$1,500 proposed by the Secretary. *Id.* at 287, 289.

The operator filed a petition for discretionary review challenging the judge's foregoing determinations, which the Commission granted.

## II.

### Disposition

#### A. Whether the judge correctly determined that the operator's violation of section 56.6130(a) was S&S?

Nelson Quarries argues that the judge erred in finding that its violation of section 56.6130(a) was S&S. N. Br. at 1-3. It contends that the judge failed to give sufficient weight to evidence that hazards related to shock tubing are from fumes from burning plastic rather than from explosions, that the shock tubing's blast would be limited, and that blow-outs are caused by improper transportation of shock tubing and not by improper storage. *Id.* The Secretary responds that the evidence focused upon by the operator does not relate to either of the two bases for the judge's S&S determination – that the improperly stored shock tubing was reasonably likely to propagate a fire and was reasonably likely to misfire, if used. S. Br. at 24-25.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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.

*Id.* at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies*

criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. See *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

We conclude that substantial evidence supports the judge's S&S determination.<sup>10</sup> As the judge found, the improperly stored shock tubing could propagate a fire. 30 FMSHRC at 260-61. It is undisputed that the protective packaging of the shock tubing had been removed, and that the shock tubing was not in any other container. 30 FMSHRC at 259; Tr. 193. The shock tubing would burn vigorously in the event of a fire. 30 FMSHRC at 261; Tr. 199. Smoking was permitted in the area, and the inspector observed cigarette butts in and around the trailer. 30 FMSHRC at 261; Tr. 201. Miners entered the parts trailer on a daily basis for first aid materials, hearing protection, and to review information on a bulletin board. Tr. 201, 312.

Moreover, there is substantial evidence to support the judge's conclusion that the improperly stored shock tubing could misfire, if used. 30 FMSHRC at 261. The Secretary's expert, Thomas Lobb, testified that since the shock tubing was not stored in its packaging, the shock tubing could be degraded so that it would misfire when it was used. Tr. 238-41. He explained that if the tubing lost its integrity or the explosive powder migrated, there could be a shut-down in the explosive train or a loss of detonation pressures inside the tubing, resulting in a misfire. Tr. 239-40. Migration of the explosive powder within the tubing could occur if the shock tube windings are oriented vertically. Tr. 238-39; Gov't Ex. 14b, at 3. In the parts trailer at the time of the citation, one roll of shot tubing was leaning at an angle, so that the windings were not in a horizontal position. Tr. 201-02; Gov't Ex. 13c. Because the shock tubing was not stored in its packaging or any other container, it could also be contaminated by grit and sand, which typically exist in a parts trailer. 30 FMSHRC at 259; Tr. 200. The operator's witness, Jon Bruner, testified that the exposure of the tube ends to dirt or moisture could cause the shock tubing to misfire. 30 FMSHRC at 259; Tr. 264-66.

We are not persuaded by the operator's argument that the judge failed to give sufficient weight to evidence that it maintains detracts from the S&S finding. The evidence relied upon by the operator does not detract from the judge's determination that the violation was S&S because the improperly stored shock tubing could propagate a fire, or misfire, if used. For instance, even if we were to conclude, as asserted by the operator, that hazards associated with improperly stored shock tubing are from fumes from burning plastic rather than from explosions, such a conclusion does not detract from the judge's finding that the improperly stored shock tubing could also propagate a fire.

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<sup>10</sup> When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).



Nor are we persuaded by the operator's argument that the judge failed to give sufficient weight to evidence that the shock tubing's blast would be limited. Nelson Quarries notes that the Secretary's expert, Thomas Lobb, indicated that the tubing may be relatively safe from a distance of 25 meters away. N. Br. at 1. It emphasizes that, in contrast, the material safety data sheet ("MSDS") states that shock tubing is "packed or designed so that any hazardous effects arising from accidental functioning are confined within the package." *Id.* at 1-2 (quoting Gov't Ex. 14b, at 17). The operator's argument based on the MSDS assumes that the shock tubing was still in its packaging. Here, however, the protective packaging of the shock tubing had been removed, and hazardous effects would therefore not be confined within the package. Tr. 193.

Finally, the judge did not err by failing to give more weight to evidence that "blow outs" due to powder migration are caused by shock tubing being transported over mining roads while the windings are in a vertical orientation, rather than by improper storage. N. Br. at 2. The document relied upon the operator provides that if shock tubing "is in a spool holder with shock tubing windings oriented vertically, powder migration may occur." Gov't Ex. 14b, at 3. Here, the hazards due to improper storage identified by the judge included the propagation of a fire and the possibility of misfiring if the shock tube were used, rather than a "blow out" during transportation. 30 FMSHRC at 260-61.<sup>11</sup> Accordingly, we affirm the judge's determination that Nelson Quarries' violation of section 56.6130(a) was S&S.

B. Whether the judge correctly concluded that the operator violated section 56.6300(b)?

The operator requests that the Commission vacate the judge's determination that it violated section 56.6300(b) because it contends that the judge erred in crediting the testimony of Inspector Crelly that Tomlinson was inexperienced in the handling and use of explosives. N. Br. at 3-5. It maintains that it provided credible testimony that Tomlinson had been trained by other company personnel before coming to work at Plant 4. *Id.* at 5. It disputes the inspector's testimony that he witnessed Tomlinson smoking in the crusher operator's shack because Tomlinson should not have been in the crusher shack during the inspection since the crusher was not operating during that time. *Id.* at 3. It further notes that the judge did not rely upon Inspector Crelly's testimony with regard to other unrelated citations. *Id.* at 3-5. The Secretary responds that the Commission should affirm the violation. S. Br. at 27-29.

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<sup>11</sup> The operator also contends that the shock tubing was not in plain view, as testified by Inspector Crelly, because it was at the far end of an unilluminated trailer, underneath shelving and against the wall. N. Br. at 3. As the Secretary argues (S. Br. at 25 n.10), it appears that the operator's argument that the shock tubing was not in plain view is an objection to the judge's negligence finding. In any event, we conclude that substantial evidence supports the judge's finding. The inspector testified that he immediately observed the shock tubing when he entered the trailer. Tr. 194; Gov't Ex. 13c. In addition, Gene Andres was responsible for daily examinations of the parts trailer, and the shock tubing had been in the trailer for some time, perhaps since June 2005. 30 FMSHRC at 262; Tr. 194-95, 202-03, 216.

Section 56.6300(b) requires that "Trainees and inexperienced persons shall work only in the immediate presence of persons trained and experienced in the handling and use of explosive material." 30 C.F.R. § 56.6300(b). Inspector Crelly testified that Travis Tomlinson had told the inspector that Andres was loading trucks on the day that Tomlinson used explosives in the hopper, so nobody was supervising him. Tr. 208. Andres acknowledged that he must not have been with Tomlinson while he was shooting the hopper. Tr. 306. The judge found that because Andres was operating a loader at the time, Tomlinson had used explosives when he was not in the immediate presence of someone trained and experienced in the use of explosive material. 30 FMSHRC at 265. The operator has not challenged that finding on review.

The remaining factor relevant to the finding of violation is whether Tomlinson was inexperienced in the use and handling of explosives and, thus, required the immediate presence of an experienced miner. The judge explicitly considered the operator's evidence that Nelson Quarries states should have been credited. Specifically, the judge noted Clift's testimony that Tomlinson had been trained to handle and use explosives, that other Nelson Quarries employees had shown Tomlinson how to shoot out crushers at other plants owned by the company, and that Tomlinson had helped other more experienced miners perform the task before he did so on his own. *Id.* at 263-64. He also noted Andres' testimony denying that he ever told Inspector Crelly that Tomlinson was not qualified to handle and use explosives and that he had only meant that he had not personally trained Tomlinson. *Id.* at 264. In addition, the judge noted Nelson Quarries' argument that Tomlinson came to Plant 4 already trained. *Id.* However, the judge credited the Secretary's evidence over the operator's evidence. *Id.* at 265.

The Commission has recognized that a judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has also recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Nonetheless, the Commission will not affirm such determinations if they are self-contradictory or if there is no evidence or dubious evidence to support them. *Id.* at 1881 n.80; *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989).

We conclude that overturning the judge's credibility determinations is unwarranted, and that substantial evidence supports the judge's determination that Tomlinson was neither sufficiently trained nor experienced in the handling or use of explosives to use them without supervision. 30 FMSHRC at 265. Inspector Crelly testified that when he asked Andres if Tomlinson was experienced or trained in the handling of explosives, Andres had replied, "no," and that Andres usually shot the hopper. Tr. 207, 211-12; Gov't Ex. 12, at 11. The inspector also noted that Andres had stated that he knew it was wrong to have an inexperienced person using powder or explosives. Gov't Ex. 12, at 8. The inspector testified that Tomlinson had also

informed him that he was “uncomfortable doing it.” Tr. 207. The inspector noted Andres’ statements in his field notes. Gov’t Ex. 12, at 11. Andres reviewed the inspector’s notes, made changes, and signed his name to the notes. *Id.*; Tr. 212. Andres did not make any changes to the summary of his statements regarding Tomlinson’s experience. Gov’t Ex. 12, at 11.

Moreover, the judge’s conclusion that the operator failed to present “credible” evidence “to show that Tomlinson had actually been trained or was sufficiently experienced” is supported by substantial evidence. 30 FMSHRC at 265. Clift’s testimony that other miners had trained Tomlinson on using explosives and that he had observed Tomlinson use explosives in a crusher was vague as to details and dates. *Id.*; Tr. 275. Furthermore, Clift acknowledged that he himself had little experience with explosives. Tr. 286. Andres testified that he had only been told by others that Tomlinson had been trained and that he had never seen any task-training records. Tr. 318-19. The operator provided no documentary evidence, such as training records, revealing that Tomlinson had been trained. In addition, the operator did not present testimony at the hearing by Tomlinson regarding his training or testimony by other miners who had allegedly trained him.

Tomlinson’s actions in storing a high explosive in the crusher shack and in smoking around the explosives also demonstrate a lack of training and experience requiring the immediate presence of an experienced miner. Rather than returning Boostrite, a high explosive, to the magazine, Tomlinson stored it near initiation devices in the crusher shack. *See* 30 FMSHRC at 263; Gov’t Ex. 137f, at 8-4; Tr. 204, 206, 212. Andres remarked, “I liked to have had a heart attack when I saw the explosive in there.” Tr. 314-15; Gov’t Ex. 137g, at 9-5. Furthermore, we do not find persuasive the operator’s argument that Tomlinson could not have been observed smoking in the crusher shack since Tomlinson was not working in the crusher shack during the inspection. Inspector Crelly testified that he observed Tomlinson smoking near the explosives, which may have occurred when Tomlinson and Andres accompanied him during the inspection. Tr. 210. In any event, the inspector noted in his field notes that he observed an ash tray and cigarette butts in the operator shack. Gov’t Ex. 12, at 8. Thus, there is substantial evidence supporting the judge’s finding that the inspector had, in fact, seen Tomlinson smoking near the explosives.

Finally, we reject the operator’s argument that the judge erred in crediting Inspector Crelly’s testimony because the judge declined to credit the inspector’s testimony with regard to other citations. The Commission has recognized that it does “not subscribe to a ‘false in one, false in everything’ rule of testimonial evidence.” *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 813 (Apr. 1981). Thus, if the judge declined to credit the inspector’s testimony regarding one citation, he is not required to discredit the inspector’s testimony as to all citations. Moreover, in the instances referred to by the operator, the judge did not specifically discredit Inspector Crelly’s testimony. Rather, he concluded, after weighing the record evidence, that the Secretary had not established violations. *See* CENT 2006-230-M: 30 FMSHRC at 308-09; Gov’t Ex. 112a; CENT 2006-230-M: 30 FMSHRC at 309; Gov’t Ex. 113; CENT 2006-237-M: 30 FMSHRC at 309, 313; Gov’t Ex. 129 and 30 FMSHRC at 314; Gov’t Ex. 131a.

In sum, substantial evidence supports the judge's finding of violation. Accordingly, we affirm the judge's determination that Nelson Quarries violated section 56.6300(b).

C. Whether the judge correctly determined that the three employees in question were agents of the operator?

Nelson Quarries contends that the judge erred in concluding that Andres, Head, and Benedict were its agents and that their negligence related to Citation Nos. 6291250, 6291595, and 6321288, and Order No. 6291251, was imputable to the operator for unwarrantable failure purposes. N. Br. at 5-7. The operator explains that although it referred to the three employees as foremen, they were, in fact, only lead men who did not have the authority to hire, fire, or discipline employees, to assign equipment, or to perform any duty that was not well established by company protocol. *Id.* It asserts that, on the other hand, Peres and Clift were the foremen of the plants and functioned as management. *Id.* at 6. Accordingly, it requests that the Commission vacate the judge's unwarrantable failure determinations. *Id.* at 7. The Secretary responds that substantial evidence supports the judge's finding that Andres, Head, and Benedict were agents of Nelson Quarries. S. Br. at 17-23.

Section 3(e) of the Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or part of a . . . mine or the supervision of the miners in a . . . mine." 30 U.S.C. § 802(e). The Commission has recognized that the negligence of an operator's "agent" is imputable to the operator for penalty assessment and unwarrantable failure purposes. *Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-97 (Feb. 1991) ("*R&P*"); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982) ("*SOCCO*"). In contrast, the negligence of a rank-and-file miner is not imputable to the operator for the purposes of penalty assessment or unwarrantable failure determinations. *Whayne*, 19 FMSHRC at 451, 453; *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *SOCCO*, 4 FMSHRC at 1463-64.

In considering whether an employee is an operator's agent, the Commission has "relied, not upon the job title or the qualifications of the miner, but upon his function, [and whether it] was crucial to the mine's operation and involved a level of responsibility normally delegated to management personnel." *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560 (Sept. 1996) (quoting *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995)) (alteration in original). We consider factors such as the ability of the employee to direct the workforce, whether the employee holds himself out as a person with supervisory responsibilities and is so regarded by other miners, and whether the actions of the employee in directing the workforce have an impact on health and safety at the mine. *Ambrosia*, 18 FMSHRC at 1553-54, 1560-61; *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 119, 130 (Feb. 1999) (holding that leadmen who acted in a supervisory capacity and were in a position to affect safety were agents of the operator to whom employees would logically voice their complaints). We are mindful that the term, "agent," must be interpreted in light of the overall purpose of the Mine Act to protect the health and safety of miners. *See RNS Servs., Inc. v. Sec'y of Labor*, 115 F.3d 182, 187 (3d

Cir. 1997) (construing Mine Act provision broadly to effectuate statutory purpose of protecting miner safety); *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 155 (2d Cir. 1999) (same).

The judge's conclusion that the employees acted as agents whose conduct was imputable to Nelson Quarries is amply supported by substantial evidence. The Commission has concluded that in carrying out required examination duties for an operator, an examiner may be appropriately viewed as being charged with responsibility for the operation of part of a mine. *R&P*, 13 FMSHRC at 194; *see also Pocahontas Fuel Co. v. Andrus*, 590 F.2d 95 (4th Cir. 1979) (holding that preshift examiner's knowledge was imputable to the operator for unwarrantable failure purposes under principles of respondeat superior); *Ambrosia*, 18 FMSHRC at 1561 (finding relevant that employee made required daily examinations and entered findings in an examination book). It is undisputed that Andres, Head, and Benedict were responsible for conducting the daily workplace examinations at the plants. 30 FMSHRC at 262, 284; Tr. 832; *see also* Tr. 280-81.

In addition, Andres, Head, and Benedict demonstrated that they had been charged with responsibility for the operation of part of the mine or for the supervision of employees through their actions in directing work to be done at the plants. 30 FMSHRC at 262, 284-85, 288. In an interview with MSHA, Benedict stated that he could direct the work force assigned to him. Gov't Ex. 137b, at 6-2. Similarly, Andres testified that he could direct the crew and assign tasks. Tr. 308; Gov't Ex. 137g, at 9-2; *see also* Gov't Ex. 137f, at 8-2 (Tomlinson's statement that Andres directed the work force on his crew). Inspector Dye testified that, during the inspection, Head directed the work force at the plant and addressed problems that the employees were having as they repaired items that had been cited. Tr. 559.

Evidence of the manner in which Andres, Head, and Benedict were treated by those with whom they worked also supports the judge's agency determination. Employees who were on the crews of Andres, Head, and Benedict treated them as supervisors. For instance, when asked by MSHA who his foreman was, Tomlinson replied, "Gene Andres. I answer to him." Gov't Ex. 137f, at 8-2. During Inspector Dye's inspection, when employees had problems with their work, they contacted Head. Tr. 559. Travis Larson used a front-end loader when directed to do so by Benedict, even though the loader had been removed from service. 30 FMSHRC at 288-89; Tr. 663. Moreover, Peres and Clift relied upon the supervisory functioning of Andres, Head, and Benedict. Tr. 602-04. Peres testified that he reviewed the workplace examination reports about weekly and otherwise relied upon the reports of the foremen. *Id.*

Andres, Head, and Benedict also identified themselves as functioning in supervisory roles. Each identified himself as a foreman when the MSHA inspectors arrived at the plants and requested the person in charge. Tr. 184, 558, 663. Similarly, the employees held themselves out as representatives of Nelson Quarries when they accompanied the inspectors during the subject inspections. Tr. 188, 558. There was no indication that Nelson Quarries, through Clift or Peres, took any actions to indicate that Andres, Head, or Benedict were not in charge at their respective plants. *See* Tr. 278.

Moreover, Nelson Quarries itself identified the three as foremen in reports that it was required to file with MSHA. For instance, the legal identity report for Plant 4 identifies Andres as "Foreman" under the section entitled, "person at mine in charge of health and safety (superintendent or principal officer)." Tr. 184; Gov't Ex. 10. The legal identity report for Plant 2 identifies under the "person at mine in charge of health and safety" as "Jeff Benedict, Foreman." Tr. 283. An MSHA report required for mine start-up and closure activity lists Head as the person in charge at Plant 1 from December 2004 to June 2005. Gov't Ex. 139; Tr. 565-66. Inspector Dye stated that she had no reason to believe that the notations in the report would not apply to Plant 5. Tr. 566. While the identification of Andres,<sup>12</sup> Head, and Benedict as foremen is not necessarily dispositive of their status as agents, it is very relevant that Nelson Quarries and the employees themselves represented to MSHA that they were the persons in charge at the plants. *R&P*, 13 FMSHRC at 195; *see also Ambrosia*, 18 FMSHRC at 1561 n.12 (finding relevant, based on analogy to common law agency principles, that employee held himself out as the employee in charge at the mine and signed MSHA documents as mine foreman).

Finally, the record shows that the employees exercised managerial conduct at the time of the alleged violations and that their actions impacted safety. With respect to Citation No. 6291250, Andres was responsible for daily examinations of the parts trailer. Tr. 280-81, 309-310, 832. The shock tubing existed in the trailer for some time, perhaps since June 2005, approximately five months before the citation was issued. 30 FMSHRC at 260; Tr. 296; Gov't Ex. 13b. As to Order No. 6291251, Andres, a certified blaster, acknowledged that he would normally be with the crusher operator when he shot explosives, but that he was not with Tomlinson when he used the explosives during the time in question. 30 FMSHRC at 264; Tr. 306; Gov't Ex. 137g, at 9-5. As to Citation No. 632188, Benedict instructed Larson to move a lime pile with a front-end loader that did not have functioning brakes.<sup>13</sup> 30 FMSHRC at 287, 289; Gov't Ex. 40; Tr. 663, 665-66, 840-41. With respect to Citation No. 6291595, the pre-shift

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<sup>12</sup> In an unrelated proceeding, MSHA issued citations to Andres pursuant to section 110(c) of the Mine Act, and Andres apparently paid the related civil penalties. Tr. 833, 836, 1172-74. Section 110(c) provides in part that, "Whenever a corporate operator violates a mandatory health or safety standard . . . , any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties . . . that may be imposed upon a person under [section 110(a)]." 30 U.S.C. § 820(c).

<sup>13</sup> The operator states that lead men lacked the authority to assign equipment. N. Br. at 7; Tr. 823, 842. Clift testified that he had told Benedict to take the loader out of service until the mechanic could repair it. Tr. 841. The Commission has recognized that unauthorized acts of misconduct may be within an agent's scope of employment and imputable to the operator for unwarrantable failure purposes. *R&P*, 13 FMSHRC at 197. It appears that Benedict had the authority to direct work at the quarry, but in doing so, directed an employee to use equipment that had been taken out of service. We conclude that the judge correctly determined that Benedict was acting as an agent for Nelson Quarries when he directed Larson to operate the front-end loader because he was acting within his authority to direct the workforce. 30 FMSHRC at 288.

reports established that the parking brake had not been working on the haul truck since late September 2005. 30 FMSHRC at 283; Tr. 554-55. Although Head knew that the truck had faulty brakes, he allowed the truck to be used and did not remove it from service. 30 FMSHRC at 283; Tr. 561-63.

We find unpersuasive the operator's argument that Andres, Head, and Benedict had no managerial responsibilities as evidenced by the hazard complaint's statement that members of the Nelson family, such as Clift and Peres, were in charge at every quarry and made all of the decisions, and that quarry foremen, such as Andres, Head, and Benedict, had no power. Gov't Ex. 11, ¶¶ 12, 14. As the judge concluded, evidence that Clift and Peres could make the ultimate decisions does not negate the fact that Andres, Head, and Benedict also were given responsibilities that are normally delegated to management personnel. 30 FMSHRC at 262.

In light of the level of the three men's respective responsibilities, the fact that none had the authority to hire, fire, or discipline employees does little to detract from the conclusion that each was an agent of the operator. First of all, it appears that Andres, Head, and Benedict were involved in decisions concerning hiring, firing, and disciplining employees by making recommendations. 30 FMSHRC at 262, 285.<sup>14</sup> Secondly, the Commission has never suggested that the authority to take such actions, in and of itself, is a prerequisite to a finding of agency. That the ultimate authority to hire, fire, or discipline miners resides at a higher level of an organization is simply not surprising, given the potential impact of such decisions, and thus is of little relevance to a determination of whether a lower level supervisor was acting as an agent of the operator, where other circumstances indicate that an agency relationship existed.<sup>15</sup>

In that regard, it is significant that Andres, Head, and Benedict had been identified on legal identity and required start-up and closure reports filed with MSHA as the "person at mine in charge of health and safety (superintendent or principal officer)" at the plants. Tr. 184, 283, 565-66; Gov't Exs. 10, 139. We have found that such evidence is "relevant by analogy to common law agency principles" and may, if unrebutted, support a finding that the persons so

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<sup>14</sup> For instance, in an interview with MSHA, Andres acknowledged that he could make recommendations regarding hiring and firing, and could recommend that employees be disciplined "or maybe talk to them if they [did] something wrong." Gov't Ex. 137g, at 9-2; see also Gov't Ex. 137a, at 6-2. Travis Tomlinson confirmed that Andres "could put [him] to shoveling if he wanted to, but he never has." *Id.* at 8-2.

<sup>15</sup> Nor do we find compelling the evidence focused upon by the operator that Andres, Head, and Benedict were paid hourly wages rather than a salary as an indication that they were rank-and-file miners. See *Mettiki Coal Corp.*, 13 FMSHRC 760, 769-72 (May 1991) (imputing negligence of hourly employee assigned to conduct monthly electrical inspections to the operator). It is undisputed that Andres, Head, and Benedict were compensated at a higher rate than other members of their crews. Tr. 823.

identified were empowered to act on behalf of the operator. *Ambrosia*, 18 FMSHRC at 1561 n.12.

In sum, the actions of Andres, Head, and Benedict in conducting daily examinations and directing the work force, the representations made to MSHA concerning their authority, the manner in which they were treated by others and by themselves, and their actions at the time of the violations constitute substantial evidence supporting the judge's agency determinations. Thus, we affirm the judge's determinations that Andres, Head, and Benedict were acting as agents for Nelson Quarries with respect to Citation Nos. 6291250, 6321288, and 6291595 and Order No. 6291251 and that their conduct was imputable to the operator.<sup>16</sup> We therefore affirm the judge's unwarrantable failure findings.

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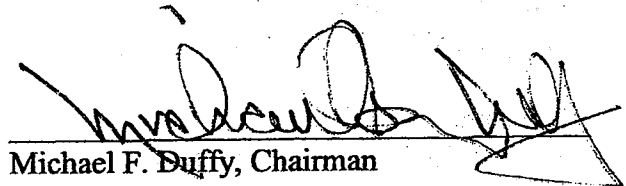
<sup>16</sup> We are mindful that under some collective bargaining agreements, a more senior rank-and-file employee is sometimes referred to as a "lead man." It does not necessarily follow that such employees should be considered agents of the operator or that their conduct is imputable to the operator. Their status must be determined under the terms of the analysis we have undertaken in this case in order to determine whether they should be considered agents of the operator for purposes of imputed liability.



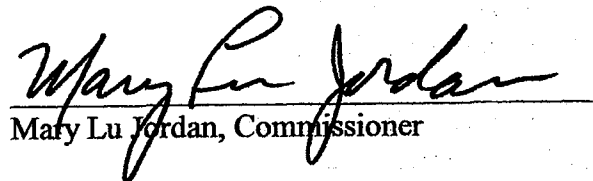
III.

Conclusion

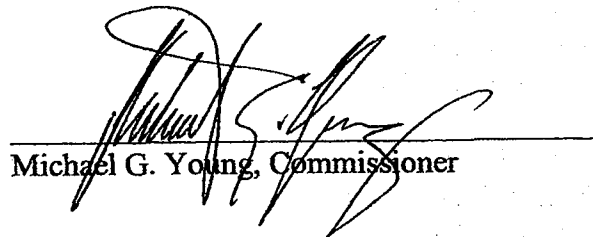
For the reasons discussed above, we affirm the judge's conclusion that Nelson Quarries' violation of section 56.6130(a) set forth in Citation No. 6291250 was S&S; affirm the judge's conclusion that Nelson Quarries violated section 56.6300(b) as set forth in Order No. 6291251; and affirm the judge's determinations that Andres, Head, and Benedict were acting as agents for Nelson Quarries and affirm the judge's unwarrantable failure findings with respect to Citation Nos. 6291250, 6321288, and 6291595 and Order No. 6291251.



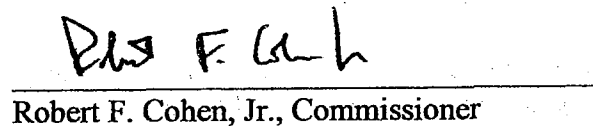
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 12, 2009

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

v.

MT. VIEW RESOURCES

Docket No. WEVA 2008-1853

A.C. No. 46-08804-152682

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 18, 2008, the Commission received a motion seeking to reopen a penalty assessment issued to Mt. View Resources ("Mt. View") 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).

The Department of Labor's Mine Safety and Health Administration issued Proposed Penalty Assessment No. 000152682 to Mt. View proposing civil penalties for several citations issued in April 2008. According to James F. Bowman, who filed the motion, Mt. View intended to contest the proposed penalties for nine citations, but failed to timely file its contest of the proposed penalties because the proposed assessment was "misplaced or lost."<sup>1</sup> He states that the

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<sup>1</sup> The request to reopen was sent by James F. Bowman, who describes himself as a "Consultant/Litigator." Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall into one of the categories in Rule 3(b), which include parties, representatives of miners, an "owner, partner, officer or employee" of certain parties, or "[a]ny other person with the permission of the presiding judge or

operator does not dispute proper service of the proposed assessment. He submits, however, that "[s]ome" certified mail is received by Federal Express at the mine site where office personnel has changed "on occasion," and that the proposed assessment was not received by the company's accounting department for distribution.

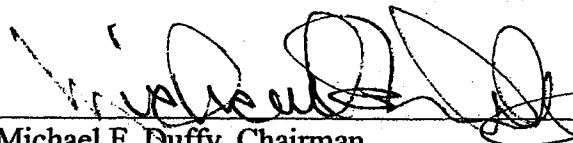
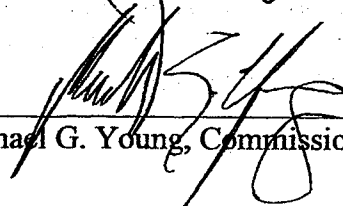
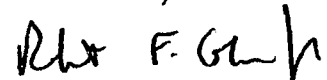
In response, the Secretary opposes Mt. View's request to reopen. She asserts that the operator's explanation that the proposed assessment have been misplaced or lost does not qualify as exceptional circumstances that warrant reopening.

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

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the Commission." 29 C.F.R. § 2700.3(b). It is unclear whether Mr. Bowman satisfied the requirements of Rule 3 when he filed the operator's request. We have determined that, despite this, we will consider the merits of the operator's request in this instance. However, in any future proceeding before the Commission, including further proceedings in this case, Mr. Bowman must demonstrate to the Commission or presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seek permission to practice before the Commission or judge pursuant to Rule 3(b)(4).

Having reviewed Mt. View's motion to reopen and the Secretary's response, we agree with the Secretary that Mt. View has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Mt. View's conclusory statement that it failed to timely file because the proposed assessment was misplaced or lost does not provide the Commission with an adequate basis to justify reopening. Nor is an adequate basis provided by Mt. View's vague statements that "[s]ome" certified mail is received by Federal Express at the mine site where office personnel has changed "on occasion," and that the proposed assessment was not received by its accounting department for distribution. Accordingly, we deny without prejudice Mt. View's request.<sup>2</sup> See, e.g., *Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

  
Michael F. Duffy, Chairman  
Mary Lu Jordan, Commissioner  
Michael G. Young, Commissioner  
Robert F. Cohen, Jr., Commissioner

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<sup>2</sup> The words "without prejudice" mean that Mt. View may submit another request to reopen the case so that it can contest penalty assessments. In the event that Mt. View chooses to refile its request to reopen, it should provide additional documentation to support its allegations.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

March 13, 2009

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

v.

DOUBLE BONUS COAL COMPANY,

DYNAMIC ENERGY, INC.,

FRONTIER COAL COMPANY,

BLUESTONE COAL CORPORATION,

JUSTICE HIGHWALL MINING, INC.,

and

PAY CAR MINING, INC.

Docket No. WEVA 2008-879  
A.C. No. 46-09020-123653

Docket No. WEVA 2008-880  
A.C. No. 46-09020-130296

Docket No. WEVA 2008-1354  
A.C. No. 46-09020-148893

Docket No. WEVA 2008-1355  
A.C. No. 46-09020-145248

Docket No. WEVA 2008-1356  
A.C. No. 46-09062-147434

Docket No. WEVA 2008-1448  
A.C. No. 46-09062-144939

Docket No. WEVA 2008-1357  
A.C. No. 46-09227-145258

Docket No. WEVA 2008-1358  
A.C. No. 46-08684-146783

Docket No. WEVA 2008-1661  
A.C. No. 46-08684-150175

Docket No. WEVA 2008-1359  
A.C. No. 46-09123-147164

Docket No. WEVA 2009-727  
A.C. No. 46-09031-162833

Docket No. WEVA 2008-1563  
A.C. No. 46-08884-148891

Docket No. WEVA 2009-812  
A.C. No. 46-08884-170006

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

## ORDER

### BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). In each of the captioned cases, the Commission received a request 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).

Shortly before separate orders in the cases were finalized, the Secretary filed an opposition in one of the cases (*Pay Car Mining, Inc.*, Docket No. WEVA 2009-812), and indicated that she planned to file supplemental responses in many of the other cases, opposing the requested relief on the same or similar grounds as stated in her response in Docket No. WEVA 2009-812. The Commission takes the grounds for the Secretary's opposition very seriously. Rather than address the Secretary's change in position, in the interest of efficiently deciding multiple cases involving related operators, the Commission has decided to consolidate all of the cases<sup>1</sup> and issue the following order:

1. If the Secretary wishes to file an amended response regarding her position on reopening any of the above-captioned cases in addition to Docket No. WEVA 2009-812, she must do so simultaneously in those cases, and within 10 days of the issuance of this order. In any amended response, the Secretary can refer to and incorporate her response in Docket No. WEVA 2009-812.
2. The operators may file individual replies or a joint reply within 10 days of service of the Secretary's amended response.<sup>2</sup> In so doing, the operators should address the Secretary's allegations in detail, and must file affidavits from the involved operator personnel, contractors, and any other person whose testimony may be needed to explain fully the reasons for and circumstances surrounding the defaults. The operators should describe the details of their various systems for dealing with correspondence from MSHA during the period covered by these

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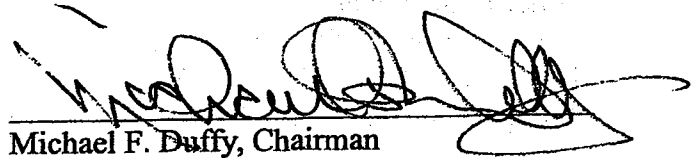
<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2008-879, WEVA 2008-880, WEVA 2008-1354, WEVA 2008-1355, WEVA 2008-1356, WEVA 2008-1357, WEVA 2008-1358, WEVA 2008-1359, WEVA 2008-1448, WEVA 2008-1563, WEVA 2008-1661, WEVA 2009-727, and WEVA 2009-812, all involving related operators and similar procedural issues. 29 C.F.R. § 2700.12.

<sup>2</sup> The operator may at that time also file a reply to the opposition to reopening the Secretary filed in *Justice Highwall Mining, Inc.*, Docket No. WEVA 2009-727.

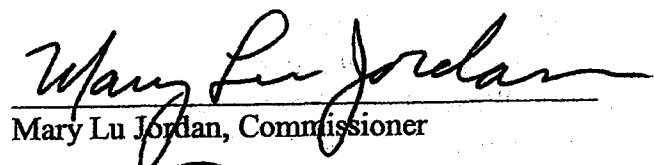


cases. Copies of documents relevant to the operators' explanation should also be included. Failure of an operator to completely respond to the Secretary could result in the Commission's denying the operator's request to reopen with prejudice.<sup>3</sup>

3. If the Secretary chooses to respond to the operators' replies, she shall do so within seven days of service of the replies.



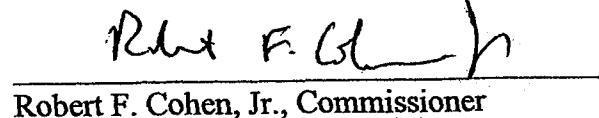
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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<sup>3</sup> The requests to reopen were sent by James F. Bowman, who describes himself as a "Consultant/Litigator." Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall into one of the categories in Rule 3(b), which include parties, representatives of miners, an "owner, partner, officer or employee" of certain parties, or "[a]ny other person with the permission of the presiding judge or the Commission." 29 C.F.R. § 2700.3. It is unclear whether Mr. Bowman satisfied the requirements of Rule 3 when he filed the operators' requests. We have determined that, despite this, we will consider the merits of the operators' requests. However, in any future proceeding before the Commission, including further proceedings in these cases, Mr. Bowman must demonstrate to the Commission or presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seek permission to practice before the Commission or judge pursuant to Rule 3(b)(4).

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 18, 2009

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

v.

SIERRA CASCADE, LLC

Docket No. WEST 2008-1408-M  
A.C. No. 35-01066-145141

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 11, 2008, the Commission received from Sierra Cascade LLC ("Sierra") a request 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).

The Secretary states that she does not oppose the reopening of the proposed penalty assessment.<sup>1</sup>

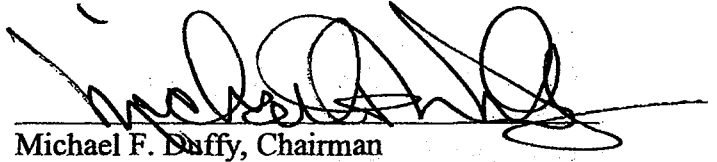
We have held, however, that in appropriate circumstances, we possess jurisdiction to

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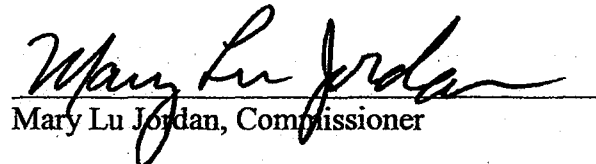
<sup>1</sup> The record indicates that operator's counsel called the District Office of the Department of Labor's Mine Safety and Health Administration ("MSHA") after the proposed penalty assessment was issued to determine the status of Sierra's prior request for a conference and was under the impression that the notice of assessment remained the subject of conferencing and could be revised.

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

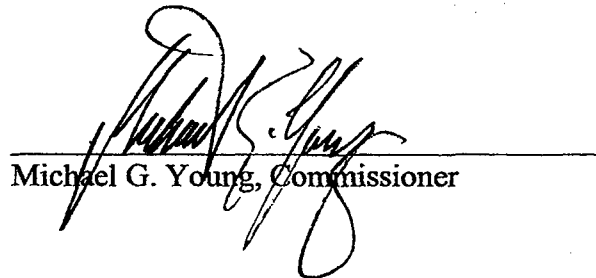
Having reviewed Sierra's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent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



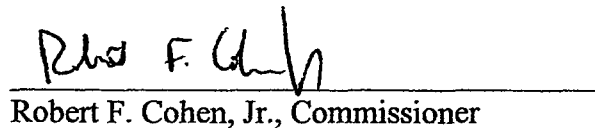
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 18, 2009

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

v.

SHELTON BROTHERS  
ENTERPRISES, INC.

Docket No. KENT 2008-1407  
A.C. No. 15-15978-148474 N624

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 8, 2008, the Commission received from Shelton Brothers Enterprises, Inc. ("Shelton") 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).

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).

The Secretary states that she does not oppose the reopening of the proposed penalty assessment.<sup>1</sup>

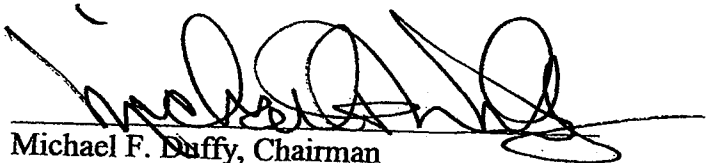
We have held, however, that in appropriate circumstances, we possess jurisdiction to

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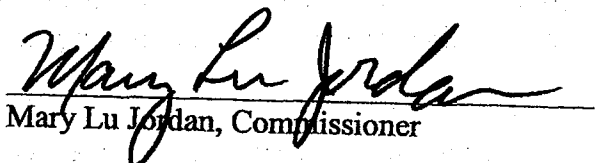
<sup>1</sup> The record indicates that delivery of the proposed penalty assessment was attempted but not effective. Although such delivery does constitute service under 30 C.F.R. § 100.8, the operator appears to have never received the proposed assessment. Upon learning that the proposed assessment was delinquent, the operator promptly filed this request to reopen.

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

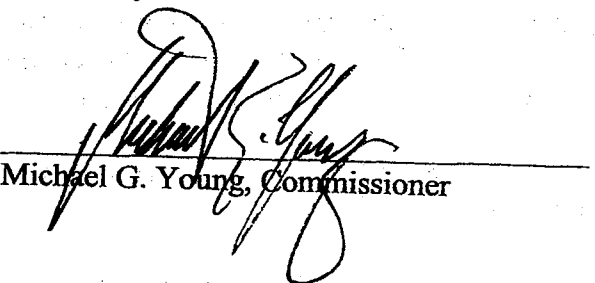
Having reviewed Shelton's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent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



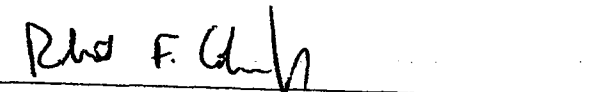
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 18, 2009

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

v.

XMV, INC.

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Docket No. WEVA 2009-47  
A.C. No. 46-08131-152112

Docket No. WEVA 2009-48  
A.C. No. 46-08845-152118

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

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 7, 2008, the Commission received requests to reopen two penalty assessments issued to XMV, Inc. ("XMV") that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>1</sup>

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 June 3, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued two proposed penalty assessments to XMV. After receiving no response, MSHA sent XMV delinquency notifications on or around August 27, 2008, for the two penalty assessments at issue. According to James F. Bowman, who filed the requests to reopen,<sup>2</sup> XMV

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2009-47 and WEVA 2009-48, both captioned *XMV, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

<sup>2</sup> The requests to reopen were sent by James F. Bowman, who describes himself as a "Consultant/Litigator." Commission Procedural Rule 3 provides that, in order to practice before

failed to timely respond to the proposed penalty assessments because of confusion among those office employees signing for the assessments and the failure to use normal internal document routing procedures, resulting in the failure of the documents to reach the proper offices on a timely basis.



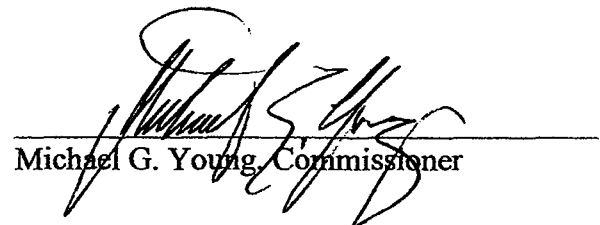

The Secretary states that she does not oppose the reopening of the assessments. She urges the operator to take all steps necessary to ensure that future penalty assessment contests are filed in a timely manner.

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

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the Commission, a person must either be an attorney or fall into one of the categories in Rule 3(b), which include parties, representatives of miners, an “owner, partner, officer or employee” of certain parties, or “[a]ny other person with the permission of the presiding judge or the Commission.” 29 C.F.R. § 2700.3. It is unclear whether Mr. Bowman satisfied the requirements of Rule 3 when he filed the operator’s request. We have determined that, despite this, we will consider the merits of the operator’s request in this instance. However, in any future proceeding before the Commission, including further proceedings in this case, Mr. Bowman must demonstrate to the Commission or presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seek permission to practice before the Commission or judge pursuant to Rule 3(b)(4).

Having reviewed XMV's request and the Secretary's response, we conclude that XMV has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments. Accordingly, we deny without prejudice XMV's request.<sup>3</sup> See *Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

  
Michael F. Duffy, Chairman  
Mary Lu Jordan, Commissioner  
Michael G. Young, Commissioner  
Robert F. Cohen, Jr., Commissioner

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<sup>3</sup> The words "without prejudice" mean that XMV may submit another request to reopen the case so that it can contest penalty assessments. In the event that XMV chooses to refile its requests to reopen, it should disclose with greater specificity, and with appropriate documentation, the reasons for its failure to contest the proposed assessments in a timely manner.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 18, 2009

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

v.

MICHAEL CLINE

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Docket No. YORK 2009-25-M  
A.C. No. 30-00025-151256 A

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 6, 2008, the Commission received from Michael Cline ("Cline") a motion by counsel seeking to reopen a penalty assessment against Cline under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that may have 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.

In his motion, Cline states that in January 2008, he was informed, through counsel, that the Department of Labor's Mine Safety and Health Administration ("MSHA") intended to assess a civil penalty against him as a result of an alleged "knowing" violation of the same standard referenced in the citation issued to his employer, Orica USA, Inc. ("Orica"), on June 4, 2007. Cline also states that, in January 2008, he was transferred from Orica's New York office to one of its offices in Texas. On May 20, 2008, MSHA apparently issued a proposed penalty assessment to Cline, alleging that he was personally liable under section 110(c) of the Mine Act for a citation issued to Orica. *See* 30 U.S.C. § 820(c). In his motion, Cline asserts that, on September 5, 2008, he received a delinquency letter from MSHA that had been forwarded to him in Texas from Orica's New York office. According to Cline, that letter was the first indication to

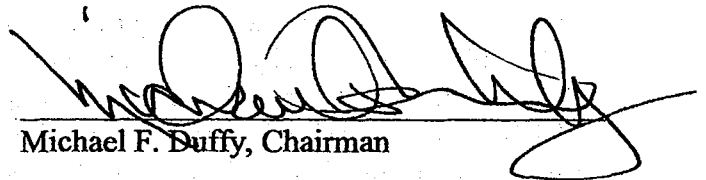
him that MSHA had proposed a civil penalty against him. The motion further states that neither Cline nor the attorney representing him had ever received the proposed penalty assessment prior to that time. On September 11, 2008, MSHA faxed Cline's counsel a copy of the proposed assessment. On September 18, Cline's counsel notified MSHA by letter that Cline wished to contest the penalty. The Secretary states that she does not oppose Cline's request to reopen the penalty assessment.

Here, Cline never received notification of the proposed penalty assessment as required under Commission Rule 25.<sup>1</sup> Under the circumstances of this case, we conclude that Cline was not notified of the penalty assessment, within the meaning of the Commission's Procedural Rules, until at least September 11, 2008, when he received a copy of the assessment from MSHA. Cline, through his attorney, notified MSHA of his intent to contest the proposed penalty assessment against him by letter dated September 18, 2008. We conclude from this that Cline timely notified the Secretary that he wished to contest the proposed penalty, once he had actual notice of the proposed assessment. *See Stech, employed by Eighty-Four Mining Co.*, 27 FMSHRC 891, 892 (Dec. 2005).

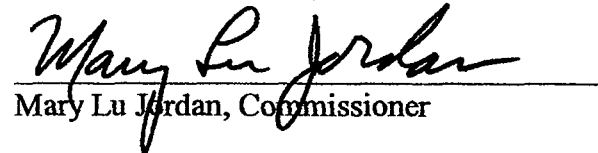
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<sup>1</sup> Commission Procedural Rule 25 states that the "Secretary, by certified mail, shall notify the operator or *any other person against whom a penalty is proposed* of the violation alleged, the amount of the proposed penalty assessment, and that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty assessment." 29 C.F.R. § 2700.25 (emphasis added). Here, the Secretary was required to send the penalty proposal at issue here to Cline at his home address or "in care of" counsel at counsel's address.

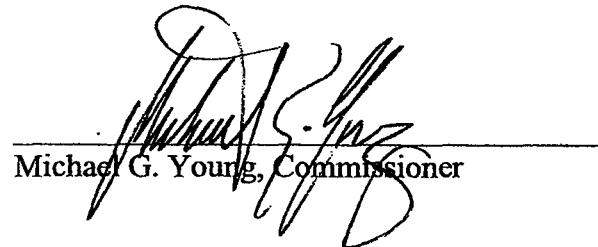
Accordingly, the proposed penalty assessment is not a final order of the Commission. We remand this matter to the Chief Administrative Law Judge for assignment to a judge. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.



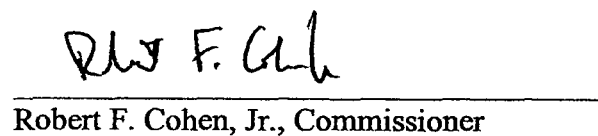
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 19, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2009-810
ADMINISTRATION (MSHA)	:	A.C. No. 46-09020-164130
	:	
v.	:	Docket No. WEVA 2009-811
	:	A.C. No. 46-09020-167075
DOUBLE BONUS COAL COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On February 5, 2009, the Commission received motions seeking to reopen two penalty assessments issued to Double Bonus Coal Company ("Double Bonus") that may have become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>1</sup>

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).

Double Bonus seeks reopening on the grounds that it never received the two assessment forms.<sup>2</sup> It submits evidence that Assessment No. 000164130 was returned undelivered to the

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2009-810 and WEVA 2009-811, both captioned *Double Bonus Coal Co.* and involving similar procedural issues. 29 C.F.R. § 2700.12.

<sup>2</sup> The requests to reopen were sent by James F. Bowman, who describes himself as a "Consultant/Litigator." Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall into one of the categories in

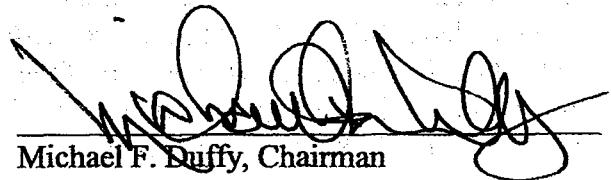
Department of Labor's Mine Safety and Health Administration because of a supposedly wrong address. It also alleges that Assessment No. 000167075 was delivered to a neighboring mine and never received by Double Bonus. The Secretary of Labor states that, based on the circumstances alleged in the motions, she does not object to reopening the assessments.

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

---

Rule 3(b), which include parties, representatives of miners, an "owner, partner, officer or employee" of certain parties, or "[a]ny other person with the permission of the presiding judge or the Commission." 29 C.F.R. § 2700.3(b). It is unclear whether Mr. Bowman satisfied the requirements of Rule 3 when he filed the operator's requests. We have determined that, despite this, we will consider the merits of the operator's requests in this instance. However, in any future proceeding before the Commission, including further proceedings in these cases, Mr. Bowman must demonstrate to the Commission or presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seek permission to practice before the Commission or judge pursuant to Rule 3(b)(4).

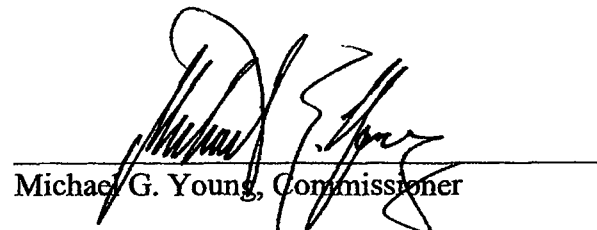
Having reviewed Double Bonus' requests and the Secretary's responses, we conclude that the proposed assessments at issue have not become final orders of the Commission. We deny Double Bonus' motions as moot and remand this matter to the Chief Administrative Law Judge for further proceedings as appropriate, pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. *See Lehigh Cement Co.*, 28 FMSHRC 440, 441 (July 2006). Because each motion specifies the individual penalties in the respective assessments that Double Bonus wishes to contest, those statements in the motions can serve as the operator's notices of contest. Consequently, and consistent with Rule 28, the Secretary shall file petitions for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



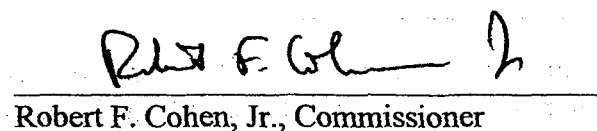
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

March 31, 2009

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

v.

BIG RIDGE, INC.

Docket No. LAKE 2008-516  
A.C. No. 11-03054-145023

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 2, 2008, the Commission received from Big Ridge, Inc. ("Big Ridge") 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).

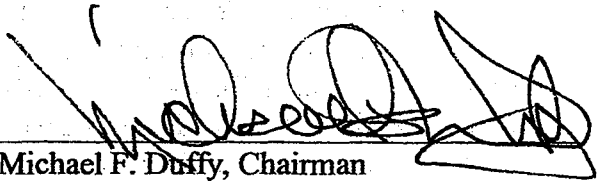

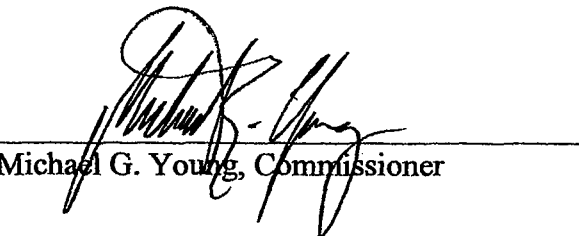
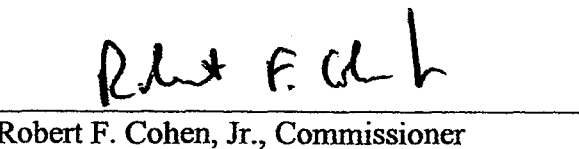
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On April 1, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed assessment that included penalties associated with 50 citations, totaling \$259,795. According to MSHA records, Big Ridge received the assessment on April 8. On May 16, 2008, Big Ridge sent MSHA the assessment form that indicated the citations it wished to contest and a check for the amount of the uncontested penalties. Big Ridge states that its safety manager did not file the contest within 30 days because of "overwhelming business matters at the time" and that the failure to file was the result of "inadvertence or a mistake and miscommunication within the operator's organization." In a letter dated May 22, MSHA informed Big Ridge that its May 16 filing was untimely and that its hearing request was denied.

In response to Big Ridge's motion to reopen, the Secretary states that she does not oppose Big Ridge's request.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessment forms 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 Big Ridge's request and the Secretary's response, we conclude that Big Ridge's summary statement in its motion that it failed to timely file a contest because of "overwhelming business matters" and "miscommunication" does not provide the Commission with an adequate basis to justify reopening. Accordingly, we deny without prejudice Big Ridge's request.<sup>1</sup> See, e.g., *Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

  
Michael F. Duffy, Chairman  
Mary Lu Jordan, Commissioner  
Michael G. Young, Commissioner  
Robert F. Cohen, Jr., Commissioner

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<sup>1</sup> In the event that Big Ridge chooses to refile its request to reopen, it should provide additional documentation to support its allegations.



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

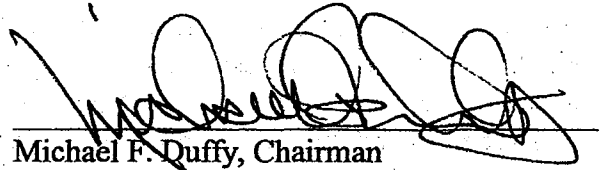
Docket No. LAKE 2008-515  
A.C. No. 11-03054-141423

31 FMSHRC 366

In response, the Secretary states that she does not oppose Big Ridge's request to reopen.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessment forms 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 Big Ridge's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.



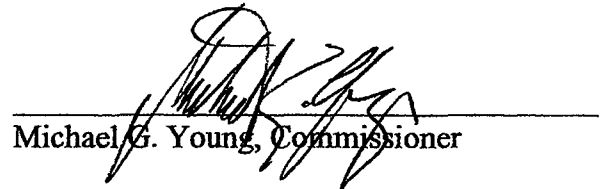
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Michael F. Duffy, Chairman



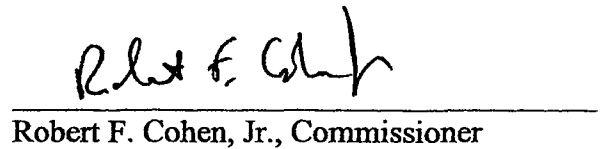
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Mary Lu Jordan, Commissioner



---

Michael G. Young, Commissioner



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Robert F. Cohen, Jr., 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 7, 2009

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

v.

CLEAN ENERGY MINING COMPANY

Docket No. KENT 2008-1458  
A.C. No. 15-10753-149793

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 14, 2008, the Commission received from Clean Energy Mining Company ("Clean Energy") 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).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of 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).

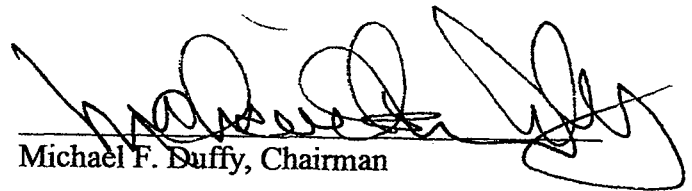
The Secretary states that she does not oppose the reopening of the proposed penalty assessment.<sup>1</sup>

The record indicates that due to an employee's error, Clean Energy inadvertently failed to transmit the proposed penalty assessment to counsel and that, as a result, counsel never filed the contest.

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<sup>1</sup> We consider the Secretary's position in this case in light of the provisions of the "Informal Agreement between Dinsmore & Shohl Attorneys and Department of Labor – MSHA – Attorneys Regarding Matters Involving Massey Energy Company Subsidiaries" dated September 13, 2006. Therein, the Secretary agreed not to object to any motion to reopen a matter in which any Massey Energy subsidiary failed to timely return MSHA Form 1000-179 or inadvertently paid a penalty it intended to contest so long as the motion to reopen is filed within a reasonable time. Thus, we assume that the Secretary is not considering the substantive merits of a motion to reopen from any Massey Energy subsidiary so long as the motion is filed within a reasonable time. Such agreements obviously are not binding on the Commission, and the Secretary's position in conformance with the agreement in this case has no bearing on our determination on the merits of the operator's proffered excuse.

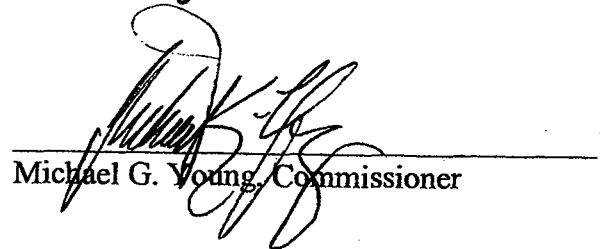
Having reviewed Clean Energy's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly,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



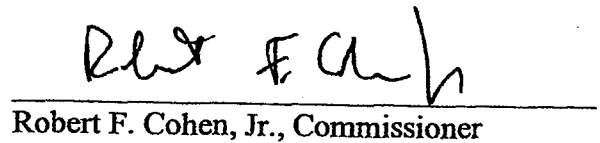
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., 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 17, 2009

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

v.

GRAYMONT (PA) INC.

Docket No. PENN 2008-467-M

A.C. No. 36-06468-142578

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

ORDER

BY THE COMMISSION:

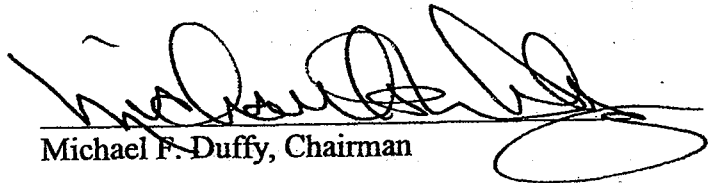
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 1, 2008, the Commission received a request to reopen a penalty assessment issued to Graymont (PA) Inc. ("Graymont") that had become a final order of the Commission pursuant to 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).

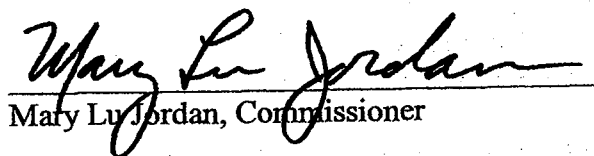
However, we have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a)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

The Secretary states that she does not oppose the reopening of the proposed penalty assessment. The request to reopen states that the contest of the proposed penalty assessment was not timely filed because Graymont's safety director was absent from work due to an operation and did not return until after the period for contesting the assessment had passed.<sup>1</sup>

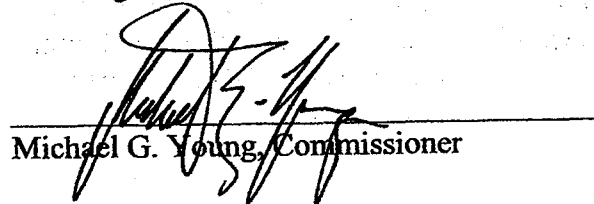
Having reviewed Graymont's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent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



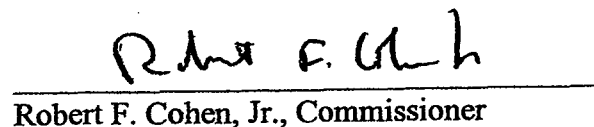
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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<sup>1</sup> The request to reopen was sent by Brian D. Barrett, who describes himself as a "Safety Consultant." Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall into one of the categories in Rule 3(b), which include parties, representatives of miners, an "owner, partner, officer or employee" of certain parties, or "[a]ny other person with the permission of the presiding judge or the Commission." 29 C.F.R. § 2700.3(b). It is unclear whether Mr. Barrett satisfied the requirements of Rule 3 when he filed the operator's request. We have determined that, despite this, we will consider the merits of the operator's request in this instance. However, in any future proceeding before the Commission, including further proceedings in this case, Mr. Barrett must demonstrate to the Commission or presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seek permission to practice before the Commission or judge pursuant to Rule 3(b)(4).

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April 17, 2009

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

v.

EXTRA ENERGY, INC.

Docket No. WEVA 2009-44

A.C. No. 46-05741-143195

Docket No. WEVA 2009-45

A.C. No. 46-05741-139339

Docket No. WEVA 2009-46

A.C. No. 46-08647-135933

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

ORDER

**BY: Jordan and Cohen, Commissioners**

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On October 7, 2008, the Commission received requests to reopen three penalty assessments issued to Extra Energy, Inc. (“Extra”) that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>1</sup>

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 January 10, 2008, February 7, 2008, and March 6, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued three separate proposed penalty assessments to Extra. According to James F. Bowman, who filed the requests to reopen as Extra's representative, Extra paid six of the eight penalties proposed in the March assessment

<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2009-44, WEVA 2009-45, and WEVA 2009-46, all captioned *Extra Energy, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

(Docket No. WEVA 2009-44), but did not otherwise respond.<sup>2</sup> Consequently, on April 16, 2008, May 7, 2008, and May 29, 2008, MSHA sent three separate delinquency notices to Extra with respect to the unpaid assessments. Extra now requests reopening of all three assessments so that it may contest the penalties it did not pay, as well as one of the March assessment penalties (for Citation No. 7277203) that it states it paid in error. Extra claims that it instructed an unnamed “representative” to contest the penalties in each assessment it did not pay, but that individual did not do so, apparently after Extra failed to return a phone call seeking confirmation from the company regarding its intent to contest the penalties.

The Secretary opposes reopening on the ground that Extra’s explanation for failing to timely file notices of contests in the three cases is conclusory and does not constitute the “exceptional circumstances” necessary to support reopening. The Secretary further states the reopening is unjustified here because Extra failed to identify facts which, if proven, would establish a meritorious defense, and because of Extra’s failure to explain why the operator, after it was sent delinquency notices by MSHA, waited four to five-and-a-half months to request reopening of the assessments.

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 noted that Rule 60(b) “is a tool which . . . courts are to use sparingly . . .” *Atlanta Sand & Supply Co.*, 30 FMSHRC 605, 608 (July 2008) (citing *JWR*, 15 FMSHRC at 789). 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).

We conclude that relief is not justified in this case. Although relief from a final order may be warranted in cases of inadvertence, mistake, surprise or excusable neglect, none of these circumstances are apparent here. Assuming that the operator’s assertions are true, they present a scenario that does not justify reopening of the final order.

In each of its three motions the operator states that its “representative told the respondent that a telephone call verifying the operator [sic] intention to contest was not returned. Therefore, he did not file the case.” This statement could have two different meanings, both

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<sup>2</sup> Pursuant to Commission Procedural Rule 3(b)(4), 29 C.F.R. § 2700.3(b)(4), James F. Bowman has been granted leave to practice before the Commission. *Double Bonus Coal Co.*, 31 FMSHRC \_\_\_\_, Nos. WEVA 2008-879 et seq. (Apr. 7, 2009).

equally non-meritorious as a justification for the failure to contest the proposed assessments. The first possibility is that on three separate occasions (after receipt of the proposed assessment issued on January 10, 2008, after receipt of the proposed assessment issued on February 7, 2008, and then again after the proposed assessment issued on March 6, 2008) the representative told the operator that a telephone call regarding the contest was not returned and that therefore he did not contest the penalty. In other words, under this interpretation of the operator's claim, this remarkable chain of events occurred three separate times over a three month period.

The other possible interpretation is that the representative had only one conversation with the operator, stating that a contest was not made because an earlier phone call (or calls) was not returned. If this occurred after the initial assessment, then the operator continued to rely on this representative to contest the two subsequent assessments, knowing that he had not properly handled the first one, and knowing that if the operator failed to return the representative's phone call in the future, it took the risk that the representative would not file a timely penalty contest on the operator's behalf.<sup>3</sup> If this confession was made to the operator after the third penalty assessment, the first two had become final long before that conversation took place, but the representative had taken no steps to alert the operator to the communication problems between them that allegedly resulted in the untimely contests.<sup>4</sup>

Moreover, Extra Energy filed its motion to reopen approximately four to five-and-a-half months after it was sent separate delinquency notices. It has provided no explanation for this delay. However, the operator has the burden of establishing its entitlement to extraordinary relief. Delay in seeking that relief, if unexplained, has been a relevant consideration in denial of motions to reopen. See *Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009) (citing *Central Operating Co. v. Utility Workers of America*, 491 F.2d 245, 253 (4th Cir. 1974) (finding "inexcusable dereliction" and denying motions to vacate when defendants waited almost four months after receiving notice of default judgments) and *McLawhorn v. John W. Daniel & Co.*, 924 F.2d 535, 538 (4th Cir. 1991) (finding that unexplained delay of three-and-half months was not reasonable)).

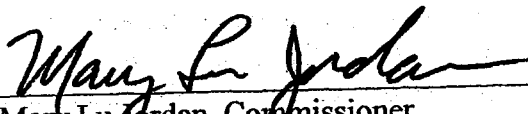
In sum, the operator's sole excuse for not filing timely notices of contest is that its representative was instructed to file the contests and failed to do so in each case, allegedly only

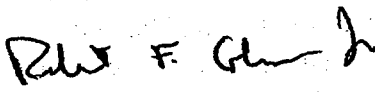
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<sup>3</sup> As the Federal Circuit suggested in its decision affirming a Merit Systems Protection Board ruling not to waive the time limit for filing an appeal, when the attorney did not receive a timely reply from his client providing information needed for the appeal, "all he had to do was make a telephone call to [the client]." *Phillips v. U.S. Postal Service*, 695 F.2d 1389, 1391 (Fed. Cir. 1982).

<sup>4</sup> In addition, Extra's motion provides no explanation as to how one of the assessments was inadvertently paid.

because a telephone call (or calls) was not returned.<sup>5</sup> Consequently, we deny Extra Energy's request to reopen. See *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062-63 (Dec. 2008) (denying relief because operator's excuse was insufficient); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067-68 (Dec. 2008) (same).

  
Mary Lu Jordan, Commissioner

  
Robert F. Cohen, Jr., Commissioner

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<sup>5</sup> Accordingly, we conclude that a dismissal without prejudice is not justified here. In our view, this motion does not fail due to lack of detail or documentation. It fails because the excuse presented simply does not demonstrate the level of care needed to justify reopening. Cf. *Atlanta Sand*, 30 FMSHRC at 608 (denying relief without prejudice because operator provided no specific facts justifying relief, but noting that "Rule 60(b) was not intended as a license for parties to fail to exercise due diligence in regard to litigation").



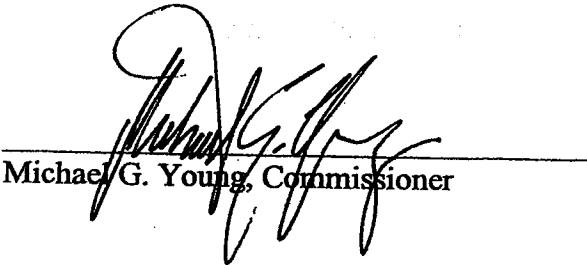
Chairman Duffy and Commissioner Young:

While we do not disagree with our colleagues that the excuse presented by the operator for its failure to timely contest the three proposed penalty assessments issued by MSHA is insufficient to establish that reopening of the assessments is warranted in this instance, and would accordingly deny the requests, we would not go so far as to specify that the denial was with prejudice. The Commission has, almost consistently, denied a vaguely explained and supported request to reopen without prejudice to the operator renewing its request to reopen with greater specificity and support for the request. See, e.g., *Solar Coal Co.*, 30 FMSHRC 1049, 1050-51 (Dec. 2008); *S&M Coal Co.*, 30 FMSHRC 1053, 1055 (Dec. 2008); *Freeman Rock, Inc.*, 31 FMSHRC 91, 93 (Feb. 2009); *Mt. View Res.*, slip op. at 3, 31 FMSHRC \_\_\_, Docket No. WEVA 2008-1853 (Mar. 12, 2009); *XMV, Inc.*, slip op. at 3, 31 FMSHRC \_\_\_, Docket No. WEVA 2009-47 (Mar. 18, 2009). Further, in such cases we have also permitted an operator to explain why it delayed in filing for reopening for a number of months even after have been alerted to the delinquency by a notice from MSHA. See, e.g., *Pinnacle Mining Co.*, 30 FMSHRC 1071, 1074 (Dec. 2008); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009).

In light of these cases we would accord the operator in this instance the same leniency and deny the motion to reopen without prejudice to allow the operator an opportunity to refile its request with a more thorough explanation for its failure to timely contest the proposed penalties and to timely respond to the delinquency notices.<sup>6</sup>



Michael F. Duffy, Chairman



Michael G. Young, Commissioner

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<sup>6</sup> The operator, of course, is free to file a motion for reconsideration of this decision pursuant to Commission Procedural Rule 78(a). See 29 C.F.R. § 2700.78(a).

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 17, 2009

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

v.

S & S ROCK

Docket No. SE 2009-116-M  
A.C. No. 40-03000-152339

Docket No. SE 2009-117-M  
A.C. No. 40-03000-158636

Docket No. SE 2009-118-M  
A.C. No. 40-03000-164351

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

**ORDER**

**BY THE COMMISSION:**

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act").<sup>1</sup> On November 17, 2008, the Commission received from S & S Rock ("S & S") motions by counsel 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).

However, 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

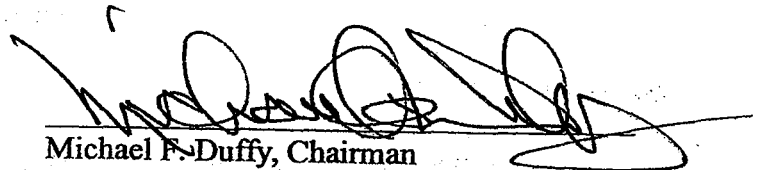
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<sup>1</sup> Pursuant to Commission Procedural Rule 12, 29 C.F.R. § 2700.12, on our own motion, we hereby consolidate Docket Nos. SE 2009-116-M, SE 2009-117-M, and SE 2009-118-M, as all three dockets involve similar procedural issues and similar factual backgrounds.

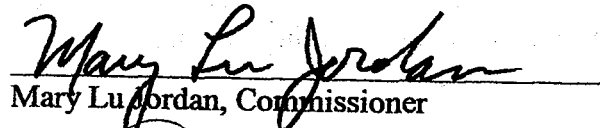
Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. See 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal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

The Secretary states that she does not oppose the reopening of the proposed penalty assessments. The president of S & S stated in an affidavit that the company previously had hired a representative to submit the contests of the proposed penalty assessments but the prior representative had failed to do so, unbeknown to S & S.

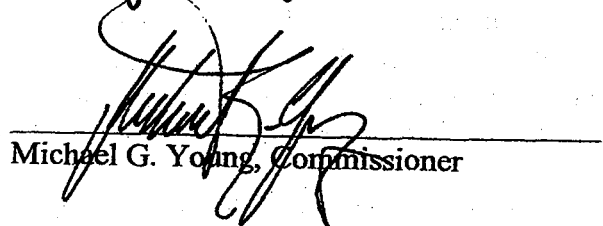
Having reviewed S & S's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent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



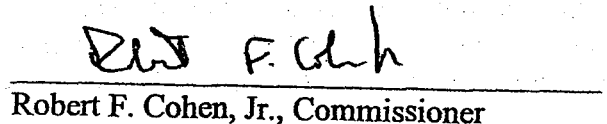
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., 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 17, 2009

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

v.

LUEDERS LIMESTONE, LP

Docket No. CENT 2009-96-M  
A.C. No. 41-04257-149058

Docket No. CENT 2009-97-M  
A.C. No. 41-04257-158646

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act").<sup>1</sup> On November 20, 2008, the Commission received from Lueders Limestone, LP ("Lueders") motions by counsel 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).

However, 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

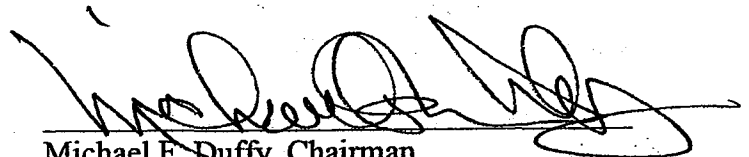
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<sup>1</sup> Pursuant to Commission Procedural Rule 12, 29 C.F.R. § 2700.12, on our own motion, we hereby consolidate Docket Nos. CENT 2009-96-M and CENT 2009-97-M, as both dockets involve similar procedural issues and similar factual backgrounds.

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

The Secretary states that she does not oppose the reopening of the proposed penalty assessments. The record indicates that, because of health problems, the operator's general partner was absent from his job during much of the relevant time period, and the individuals who became responsible for timely contesting the proposed penalties failed to do so.

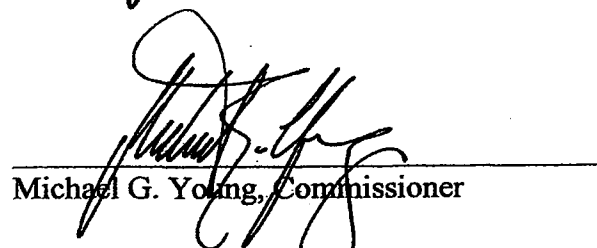
Having reviewed Lueders' requests and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent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



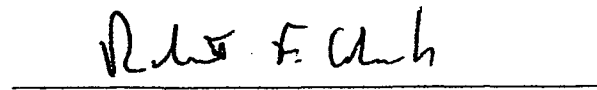
Michael F. Duffy, Chairman



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 23, 2009

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

v.

PENN VIRGINIA RESOURCE  
PARTNERS

Docket No. VA 2008-369

A.C. No. 44-07081-144739 T513

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 25, 2008, the Commission received from Penn Virginia Resource Partners ("Penn Virginia") a motion 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).

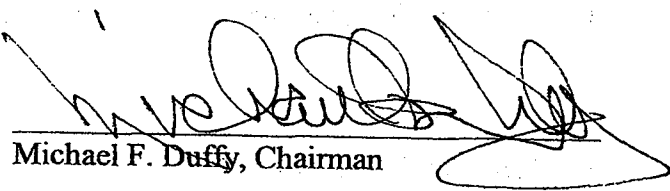
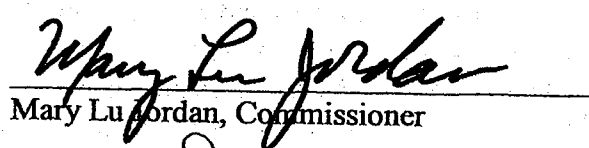
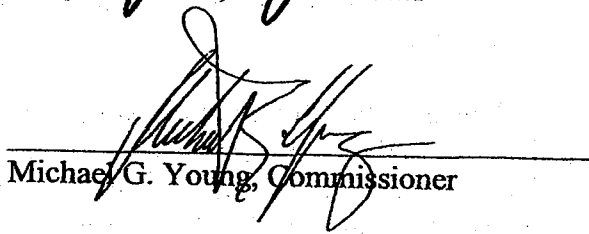
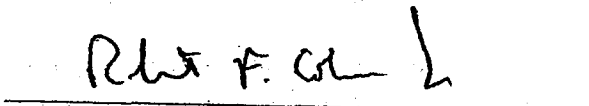
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

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

good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Penn Virginia argues, among other things, that it believed in good faith it did not have to contest the penalty in order to maintain its contest of the underlying order. The Secretary states that she does not oppose reopening the proposed penalty assessment on this basis. Moreover, Penn Virginia promptly filed its motion to reopen the penalty assessment upon discovering that the Secretary considered it to be a final order.

Having reviewed Penn Virginia's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.<sup>1</sup> Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

  
Michael F. Duffy, Chairman  
Mary Lu Jordan, Commissioner  
Michael G. Young, Commissioner  
Robert F. Cohen, Jr., Commissioner

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<sup>1</sup> In granting Penn Virginia's motion to reopen, the Commission has not considered the merits of the operator's argument concerning its reading of section 105(a), and does not need to do so at this time.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

April 17, 2009

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

v.

MANALAPAN MINING COMPANY

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:  
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Docket No. KENT 2009-9  
A.C. No. 15-18267-157148

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 7, 2008, the Commission received from Manalapan Mining Company ("Manalapan") 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).

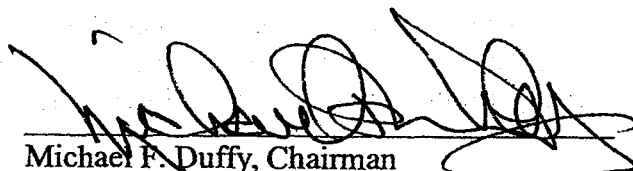
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On July 16, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued proposed penalty Assessment No. 000157148 to Manalapan. In its letter, Manalapan asserts that it would be a great hardship for it to pay the total balance of outstanding penalty assessments shown on Assessment No. 000157148.

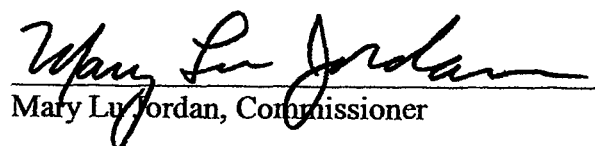
In response, the Secretary states that inability to pay a penalty is not a grounds for reopening and notes that another one of the unpaid assessments that constitutes Manalapan's total outstanding balance has already been reopened pursuant to an earlier request by Manalapan. The Secretary further notes that, if the operator does not pay the revised balance, the Secretary will refer the matter to the Department of the Treasury, with whom the operator may be able to agree upon an installment payment plan.

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

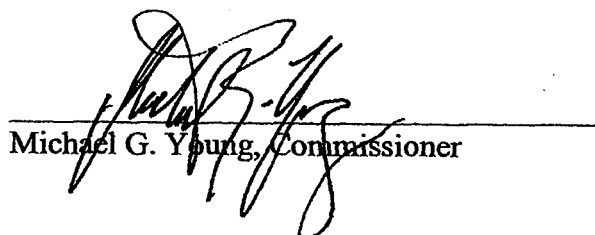
Because Manalapan's request for relief does not explain the company's failure to contest the proposed assessment on a timely basis, and is not based on any of the grounds for relief set forth in Rule 60(b), we hereby deny the request for relief without prejudice. *See FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007). The words "without prejudice" mean that Manalapan may submit another request to reopen Assessment No. 000157148 so that it can contest specific citations and proposed penalties.<sup>1</sup>



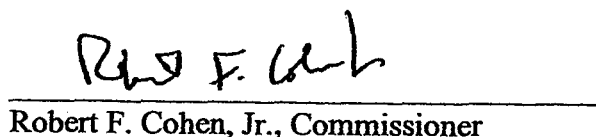
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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<sup>1</sup> If Manalapan submits another request to reopen, it must identify the specific citations and proposed penalties it seeks to contest from Assessment No. 000157148. Manalapan must also establish good cause for not contesting those citations and proposed penalties within 30 days from the date it received Assessment No. 000157148 from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Manalapan should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented Manalapan from responding within the time limits provided in the Mine Act, as part of its request to reopen. Manalapan should also submit copies of supporting documents with its request to reopen.

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Washington, D.C. 20001-2021

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 17, 2009

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

v.

BIG RIVER MINING, LLC

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Docket No. WEVA 2009-1  
A.C. No. 46-09136-156167

Docket No. WEVA 2009-358  
A.C. No. 46-09136-159271

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

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 1 and November 24, 2008, the Commission received from Big River Mining, LLC ("Big River") motions to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>1</sup>

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).

With respect to each of the assessments, which were issued by Department of Labor's Mine Safety and Health Administration in July and August, 2008, Big River states that it intended to contest several of the proposed penalties on each of the assessments. It explains that due to a change in the company's safety director position, however, it failed to file the contests, and its new safety director only learned of the delinquencies well after assuming the position. In affidavits, the safety director states that the 1000-79 forms for these two penalty contests were

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2009-1 and WEVA 2009-358, each captioned *Big River Mining, LLC*, and involving similar procedural issues. 29 C.F.R. § 2700.12.



not in the files left by his predecessor, and that he first learned that the assessments had not been contested when he discovered them listed as delinquent in the MSHA Data Retrieval System. The Secretary states she does not oppose Big River's requests to reopen the assessments.

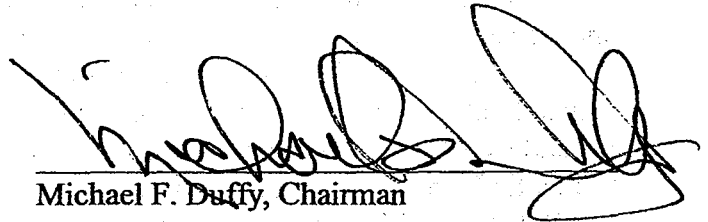
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the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

Big River requests that, for each assessment, it "be granted such additional time as required to complete the 1000-179 form to show which of the enforcement actions and penalties it contests."<sup>2</sup> However, it is incumbent upon an operator that has failed to comply with the section 105(a) time limit to present to the Commission in its request to reopen the final order not only the basis for reopening, but the specific penalties it wishes to reopen. For the Commission to reopen the orders and grant Big River even more time to consider which penalties it wishes to contest conflicts with the 30-day time limit for both contests of penalties and payment of uncontested penalties.

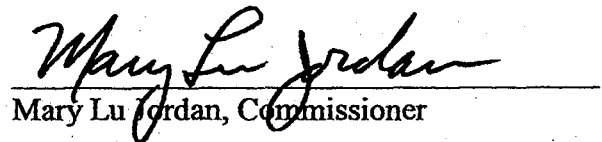
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<sup>2</sup> Inexplicably, Big River does so in Docket No. WEVA 2009-358 despite attaching to its motion a copy of Assessment No. 000159271 on which over half of the penalties have been checked for contest.

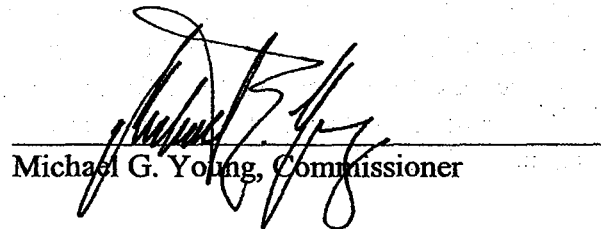
Consequently, we dismiss Big River's requests without prejudice. However, the operator may file an amended request to reopen which includes the specific penalties in each assessment it wishes to contest upon reopening and indicates that it has paid the other penalties.



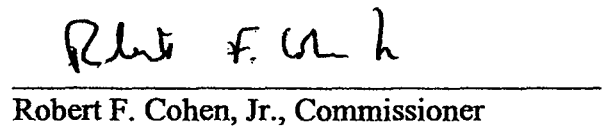
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 23, 2009

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

v.

BLACK BUTTE COAL COMPANY

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Docket No. WEST 2009-166

A.C. No. 48-01180-160106

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 10, 2008, the Commission received from Black Butte Coal Company ("Black Butte") a motion from 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).

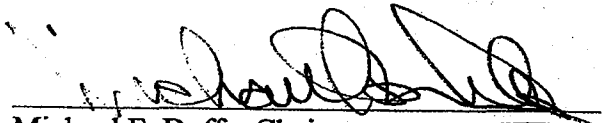
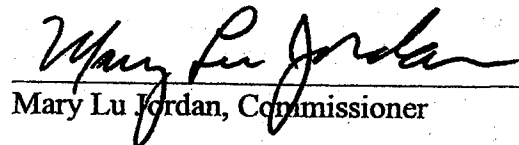
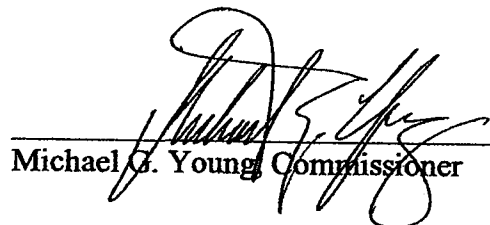
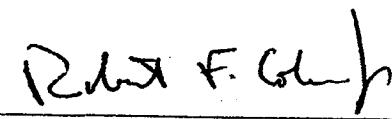
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

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

merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

The Secretary states that she does not oppose the reopening of the proposed penalty assessment. The record indicates that, because of a transition between old and new safety managers, there was a miscommunication with counsel regarding whether the contest form had been sent.

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

  
Michael F. Duffy, Chairman  
Mary Lu Jordan, Commissioner  
Michael G. Young, Commissioner  
Robert F. Cohen, Jr., Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 27, 2009

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

v.

CINTAS CORPORATION

Docket No. LAKE 2008-594-M  
A.C. No. 12-02063-148442 K850

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

ORDER

BY THE COMMISSION:

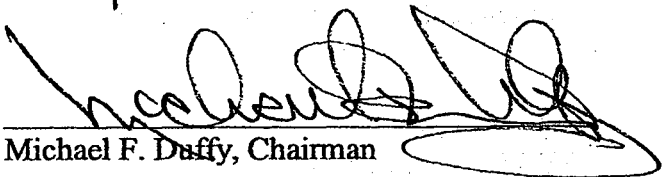
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 8, 2008, the Commission received from Cintas Corporation ("Cintas") a letter seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

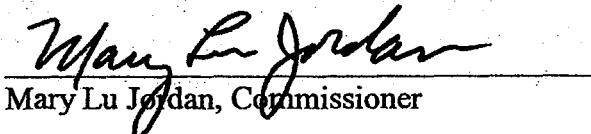
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a)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

The Secretary states that she does not oppose the reopening of the proposed penalty assessment but has no written record of having received a contest form. The record indicates that a company official apparently contacted the district office of the Department of Labor's Mine Safety and Health Administration ("MSHA") within 30 days of receiving the proposed penalty assessment and informed MSHA employees by telephone that it was contesting the proposed penalty at issue.

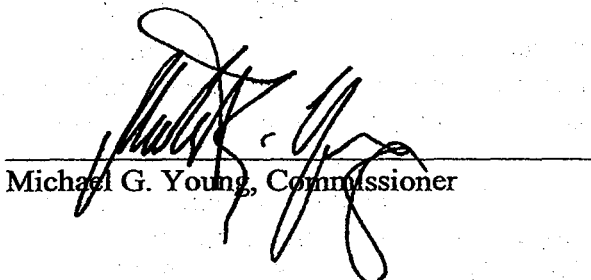
Having reviewed Cintas' request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent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



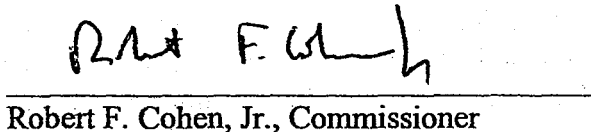
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., 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 27, 2009

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

v.

WEBSTER COUNTY COAL, LLC

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Docket No. KENT 2008-1465

A.C. No. 15-02132-151119

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 20, 2008, the Commission received from Webster County Coal, LLC ("Webster") a request 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).

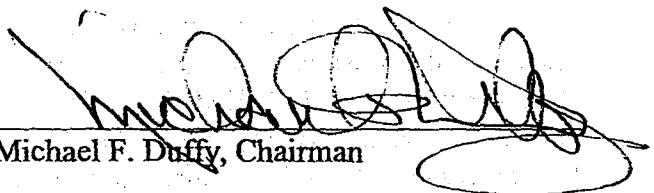
On January 28, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued two orders to Webster's Dotiki Mine. Webster contested those orders, Nos. 6696967 and 6696968. The proceedings were assigned docket numbers KENT 2008-548-R and KENT 2008-549-R and stayed pending assessment of proposed penalties. MSHA issued a proposed penalty with respect to Order No. 6696967 in Assessment Case No. 000150871 on May 15, 2008. MSHA issued a proposed civil penalty with respect to Order 6696968 in Assessment Case No. 000151119 on May 19, 2008. Webster received both assessments on May 22, 2008. In its motion, Webster asserts that it mailed the assessment form for Case No. 000150871 on June 13, 2008, indicating its contest of several proposed penalties, including the penalty related to Order 6696967. Webster asserts that it believed it had contested the assessment including Order No. 6696968 at the same time. Webster learned that it had failed to timely contest the proposed penalty when it received a delinquency notice on August 8, 2008 and shortly thereafter

filed the instant motion. Webster states that an internal investigation revealed that the assessment form was not submitted in a timely manner because of an "unintentional mistake" that caused the form not to be processed at the same time as the form for the other order.

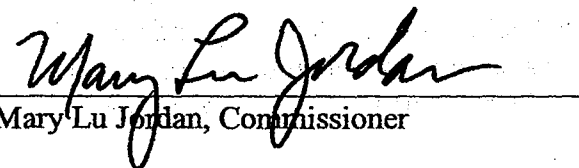
The Secretary states that she opposes the reopening of the proposed penalty assessment on the grounds that the operator makes no showing of exceptional circumstances warranting reopening.

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

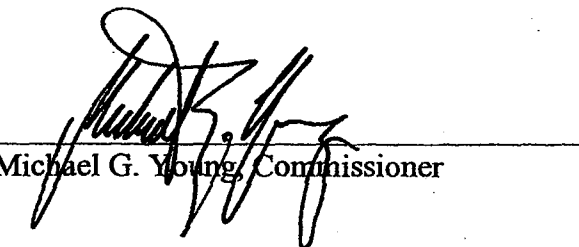
Having reviewed Webster's request and the Secretary's response, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Webster's failure to timely contest the penalty proposal and whether relief from the final 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.



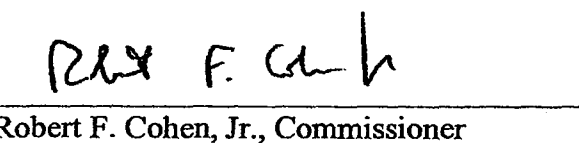
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 27, 2009

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

v.

THE BANNER COMPANY, LLC

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Docket No. VA 2008-384  
A.C. No. 44-07181-140627

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

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 4, 2008, the Commission received from The Banner Company, LLC ("Banner") a motion 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).

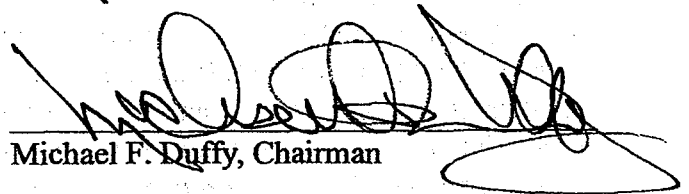
On February 14, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued proposed penalty assessment No. 000140627 to Banner, covering Citations Nos. 6635214 and 7318977. On May 14, 2008, MSHA sent Banner a letter indicating that the penalty had become delinquent. In its motion, Banner asserts that its safety director believed he had contested the two penalties associated with the two citations at issue. It alleges that the failure to contest the penalties "arose either by [Banner's] inadvertence or mistake or MSHA's failure to accurately process [the penalty assessment form]."

The Secretary states that she opposes the reopening of the proposed penalty assessment on the grounds that the operator's conclusory statement that its safety director intended to contest the penalty assessment is insufficient to warrant reopening. She further notes that MSHA has no

record that it ever received a contest of the penalty assessment and the operator provides no evidence that it ever filed such a contest. The Secretary also states that the operator failed to explain why, given that the notice of delinquency was issued in May 2008, the operator did not submit its motion to reopen until August 2008.

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

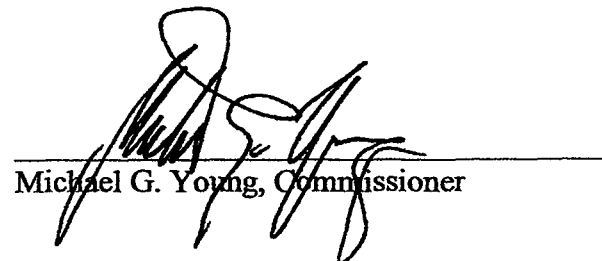
Having reviewed Banner's request and the Secretary's response, we agree with the Secretary that Banner has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment, and submit its motion to reopen. Banner's conclusory statement that it believed it had contested the proposed penalty assessment does not provide the Commission with an adequate basis to justify reopening. Accordingly, we deny without prejudice Banner's request. *See, e.g., Eastern Associated Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).



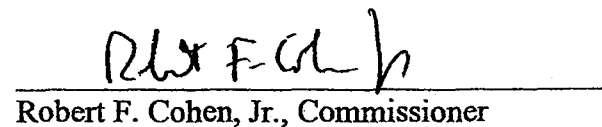
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 27, 2009

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

v.

OLD DOMINION ENERGY, INC.

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Docket No. VA 2008-227  
A.C. No. 44-07018-134221-02

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On April 8, 2008, the Commission received from Old Dominion Energy, Inc. ("Old Dominion") 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). On July 16, 2008, the Commission denied the motion without prejudice. *Old Dominion Energy, Inc.*, 30 FMSHRC 616, 617 (July 2008). On August 5, 2008, Old Dominion filed a motion to reconsider the denial of its motion to reopen.

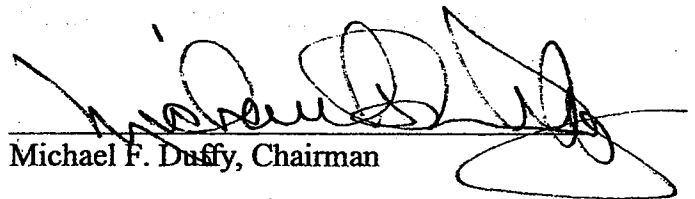
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

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

that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

The Secretary did not oppose Old Dominion's initial request to reopen and has not filed a response to the motion to reconsider. The motion for reconsideration and attachments indicate that Old Dominion failed to timely contest the proposed penalty in question primarily because the assessment form was inadvertently omitted from a fax sent by the operator to its counsel.

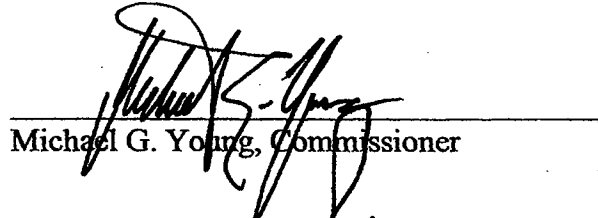
Having reviewed Old Dominion's motion for reconsideration, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.<sup>1</sup> Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.



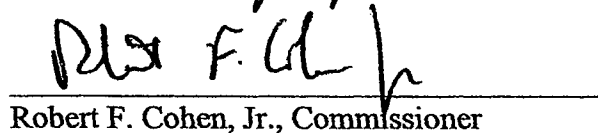
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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<sup>1</sup> We accept for filing Old Dominion's four-day late motion for reconsideration due to the medical reasons provided by counsel.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 27, 2009

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

v.

HARVEST-TIME COAL, INC.

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Docket No. WEVA 2008-965  
A.C. No. 46-09084-139807

Docket No. WEVA 2008-966<sup>1</sup>  
A.C. No. 46-09084-139809

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On April 25, 2008, the Commission received from Harvest-Time Coal, Inc. ("Harvest-Time") a motion by counsel 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).

On February 12, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 00139807 to Harvest-Time. Harvest-Time does not give a reason for failing to contest the proposed assessment but states that it sought to conference the citations at issue with MSHA and that its request was wrongly denied. Neither party mentions nor has submitted the other proposed assessment at issue, No. 000139809, and it is

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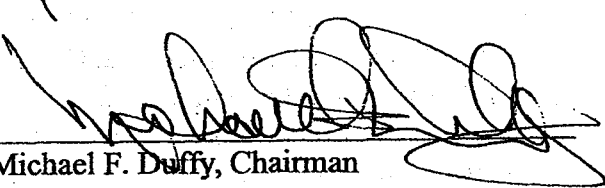
<sup>1</sup> We note that Docket No. WEVA 2008-966 was assigned in error and that all the citations that the operator seeks to contest are contained in Docket No. WEVA 2008-965. All subsequent pleadings in this case should have only one docket number.

therefore impossible to determine why or how long Harvest-Time delayed in responding to the second assessment.

The Secretary asserts that Proposed Assessment No. 000139807 was sent by Federal Express to the address of record for Harvest-Time but was returned as undelivered. According to the Secretary, this constituted service under 30 C.F.R. § 100.8(a) ("Proposed penalty assessments delivered to [the addresses of record] shall constitute service."). The Secretary states that although she does not oppose the reopening of the assessment, she urges Harvest-Time to take all necessary steps to ensure that it timely contests penalty assessments in the future.

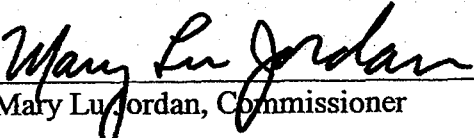
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the 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 Harvest-Time's motion and the Secretary's response thereto, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Harvest-Time's failure to timely contest the penalty proposal and whether relief from the final order should be granted. We also direct the judge to require Harvest-Time to explain whether and when it received the proposed penalty assessment in question, to obtain and submit any missing assessment form and all other relevant documents, to indicate which proposed penalties it seeks to contest, and to explain why it did not file its contest in a timely manner. If it is determined that relief from the final order is appropriate, the cases shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



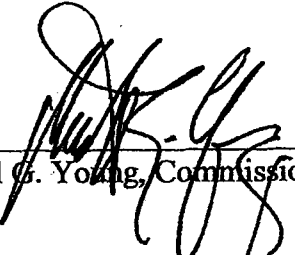
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Michael F. Duffy, Chairman



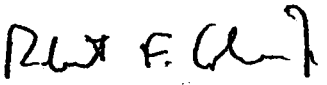
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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner



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Robert F. Cohen, Jr., Commissioner



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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 28, 2009

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

v.

MUHT-HEI INC.  
d/b/a CAMPO MATERIALS

Docket No. WEST-2008-1455-M

A.C. No. 04-05015-137683

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On August 25 and September 8, 2008, the Commission received from Muht-Hei Inc. d/b/a Campo Materials (“Campo Materials”) letters 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).

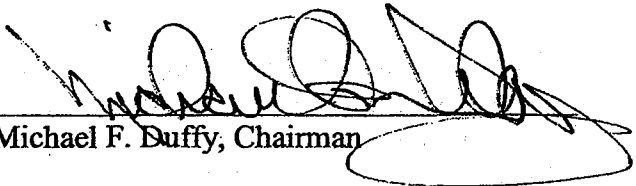
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On January 30, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000137683 to Campo Materials. On April 24, 2008, MSHA sent a notice of delinquency to Campo Materials. Campo Materials, which is run by a Tribal Company owned by the Campo Band of Mission Indians, filed a request to reopen the penalty with the Commission. The Secretary opposed on the grounds that the operator had failed to explain why it had delayed in responding to both the proposed penalty assessment and notice of delinquency. Campo Materials promptly submitted another letter explaining that the delay was a result of two contested tribal elections. In a subsequent letter, the Secretary again opposed reopening and stated that she believed that the circumstances do not constitute an adequate

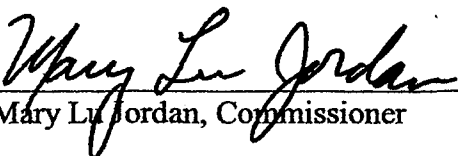
explanation for the operator's failure to timely contest the proposed penalty assessment.

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 mistake, inadvertence, or excusable neglect. See 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. See *Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

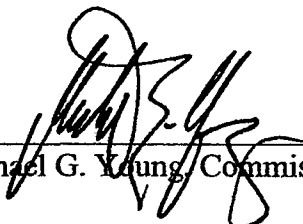
Having reviewed Campo Material's requests and the Secretary's responses, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Campo Material's failure to timely contest the penalty proposals and whether relief from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



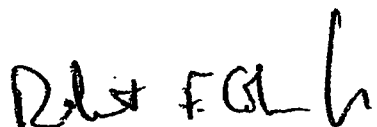
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., 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 4, 2009

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
Petitioner	:	Docket No. LAKE 2009-314-DM
v.	:	NC MD 2009-03
	:	
CARGILL DEICING TECHNOLOGY,	:	Mine ID 33-01994
Respondent	:	Cargill Deicing Technology/Cleveland

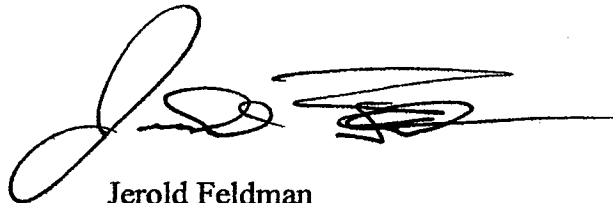
## DISMISSAL ORDER

Before: Judge Feldman

Before me for consideration is an Application for Temporary Reinstatement filed by the Secretary of Labor (Secretary) on February 25, 2009, pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, as amended. 30 U.S.C. §815(c)(2). The Secretary seeks an Order requiring the respondent, Cargill Deicing Technology (Cargill), to temporarily reinstate Kurt R. Pluta to his former position of seasonal employment pending final resolution of Pluta's discrimination complaint filed on January 20, 2009, with the Mine Safety and Health Administration.

On March 2, 2009, shortly after filing the application for Pluta's reinstatement, the Secretary filed a Motion to Dismiss this temporary reinstatement action because, as of February 27, 2009, Cargill has terminated all seasonal employees, presumably for legitimate independent business reasons. Since there is no longer a position available to which Pluta could be reinstated, the Secretary has moved to dismiss this proceeding. Neither Pluta nor Cargill oppose the Secretary's motion.

Good cause having been shown, the captioned temporary reinstatement proceeding **IS DISMISSED without prejudice** to the initiation of any action with respect to Pluta's underlying January 20, 2009, discrimination complaint.



Jerold Feldman  
Administrative Law Judge

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Shawn Mayclin, Surface Supt., Cargill Deicing Technology, 2400 Ships Channel, Cleveland, OH 44113

Gary M. Tiboni, Teamsters Local No. 436, 6051 Carey Drive, Valley View, OH 44125

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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

March 5, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2006-227-M
Petitioner	:	A.C. No. 40-02968-87902
	:	
v.	:	
	:	
MOLTAN COMPANY, LP,	:	
Respondent	:	Mine: Moltan

**DECISION**

Appearances: Joseph Lockett, Esq., U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner  
Larry Gurley, COO, Moltan Company, LP, Memphis, Tennessee, on behalf of the Respondent

Before: Judge Barbour

This case is before me on a petition for the assessment of civil penalties filed by the Secretary of Labor on behalf of her Mine Safety and Health Administration (MSHA) against Moltan Company, LP (Moltan or the company) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (the Mine Act or Act) (30 U.S.C. §§ 815, 820). The Secretary alleges Moltan is responsible for two violations of the Secretary's safety standards for surface metal and non-metal mines. She also alleges the violations were significant and substantial contributions to mine safety hazards (S&S) and were caused by the company's high negligence. Additionally, the Secretary deemed one of the alleged violations was the result of Moltan's unwarrantable failure to comply with the mandatory standard. The Secretary seeks penalties totaling \$3,500. The company denies the allegations. The case was tried in Memphis, Tennessee.

**STIPULATIONS**

The parties have stipulated to the following facts:

1. This case involves a clay processing plant known as the [Moltan] plant, which is owned and operated by [Moltan];

2. [Moltan's] plant is subject to jurisdiction of the . . . Act;
3. The presiding administrative law judge has jurisdiction over this proceeding pursuant to Section 105 of the Act;
4. [Moltan's] operations affect interstate commerce;
5. A reasonable penalty will not affect [Moltan's] ability to remain in business;
6. [Moltan] has not had an accident where an employee suffered fatal injuries;
7. [Moltan] employed approximately two hundred people in 2006; and
8. [Moltan] has employees who worked approximately four hundred thousand hours in 2006.

Tr. 12-13; Gov't Exh. 1.

#### **MOLTAN'S FACILITY, THE INSPECTION, AND THE CITATIONS**

Moltan is a family owned limited partnership that has been in existence since 1978. Tr. 104. Moltan operates a large facility covering approximately twenty to thirty acres consisting of a clay mine and a clay processing plant. Tr. 17. Moltan processes the clay into products such as kitty litter and oil absorbents. *Id.*

#### **CONTENTIONS RELATED TO CITATION NO. 6243221**

In February 2006, Inspector Ed Jewell conducted a regular inspection of Moltan which lasted six days. Tr. 18. Inspector Jewell has been employed by MSHA for nine and a half years. Tr. 14-15. He is certified as an accident investigator and served four years on the national mine rescue team. Tr. 14. Prior to his employment with MSHA, Jewell held various jobs in the coal mine industry, including safety director, maintenance man, electrician, belt mechanic, general laborer, equipment operator, section foreman, and hoisting engineer. These jobs spanned a twenty-three year period. Tr. 15-17. During the inspection, Jewell was accompanied by Vicki LaRue who was being trained as a mine inspector. Tr. 18.

On February 13, while inspecting a building the company refers to as the "old coal shed," Jewell and LaRue observed miner Bobby Manley standing on a rounded cylinder, 19 inches in diameter and eighty-seven inches above a metal rectangular work platform, that in turn was located approximately ten feet above the coal shed floor. Metal railings surrounded the work platform. Tr. 19-20. The miner was not using fall protection. Jewell stated that the employee

appeared to be wiring an electrical motor. Tr. 19. Inspector Jewell took a photograph of the scene. Gov't Exh. 3. Jewell testified the photograph showed the employee being helped down from the chute. It also showed a group of 6 individuals, including the safety director and new hire trainees, on the platform. Tr. 21. The photograph was taken after the employee had come down from a higher point on the chute and was standing on the 19 inch object, but Inspector Jewell stated he would have cited the company for either occurrence as the employee was not wearing fall protection and the likelihood of falling was present in both locations. Tr. 132.

After observing the employee on the chute, Inspector Jewell orally issued a section 107(a) imminent danger order to the safety director, Dan Harder. Tr. 22. He issued the order in writing to plant manager, Jake Green, that afternoon. Tr. 26; Gov't Exh. 4. Inspector Jewell also issued Citation No. 6243221 to Green. The citation charged the company with a violation of 30 C.F.R. § 56.15005, a mandatory safety standard requiring employees to wear safety belts and lines when working where there is a danger of falling. Inspector Jewell testified that the employee should have been tied off. Jewell did not observe any place to tie off, but felt the company could have installed a wire cable to attach a lanyard or could have avoided the need to tie off altogether by placing the employee in a basket attached to a man lift. Tr. 25-26.

Inspector Jewell found there was high negligence on the part of the company for the alleged violation. He stated that the task itself carried an inherent risk and therefore a high degree of care was required by the company. Inspector Jewell did not observe any fall protection in the area which indicated to him that there was a lack of training or monitoring by the company. Tr. 75-76. Jewell also asked an employee if there was fall protection in the area and the employee said there was not. Tr. 27. Inspector Jewell determined the violation was highly likely to cause an injury. The employee was working with both hands and was standing on a narrow, rounded surface. He easily could have fallen to the metal platform. Fatal injuries could be expected from this type of fall as there have been deaths in the industry from falls of ten feet or less. Tr. 28. The employee involved was the person affected by the hazard. Jewell also found the violation was a significant and substantial (S&S) contribution to a mine safety hazard because if the alleged violation continued to exist it was likely to cause a serious injury.

Danny Stanfill testified on behalf of the company. Stanfill has been the plant manager since January 1, 2006. Tr. 105. He has approximately 35 years experience primarily in the electrical industry. Tr. 104. Stanfill has also worked in a printing plant and a hardwood flooring plant, where he eventually became maintenance superintendent. When he began at Moltan in July 2005, he was brought in as assistant plant manager to replace Jake Green who was retiring. Tr. 105.

Stanfill described the scene shown in Gov't Exh. 3. He stated the photograph depicts Bobby Manley installing or wiring up the last motor on the incline conveyor of a pellet mill. Tr. 106. The mill was new and Moltan was testing it to determine whether to make it a permanent part of the plant. (The company has since decided not to use the equipment. Tr. 107.) Stanfill also described the color-coding of hard hats depicted in the photograph. Manley was

wearing a white hat which designated him as a full-time employee in maintenance. Tr. 107-108. The men wearing green hats were described as trainees by Inspector Jewell, but Stanfill indicated the green hats designated packaging department employees. Trainees wore gray hats. Tr. 109. Dan Harder is in the picture wearing an orange hat. Stanfill stated that an orange hat indicated management. *Id.*

Stanfill testified that Manley, who has since retired, was a maintenance electrician with 28 years experience. Tr. 109. Stanfill felt that Manley could not have been standing on the 19 inch diameter cylindrical area as it would not have allowed him comfortable access to complete his task of wiring the motor on the incline conveyor. Rather, Stanfill explained, the photograph showed Manley standing on a flat area that was the inlet to the pellet mill. Tr. 100. Based on Stanfill's electrical experience, he described the photo as showing Manley in the process of wiring the motor. Stanfill did not know why Dan Harder and the other men were on the platform. However, he stated he was later told that Harder was there to give Manley a piece of flexible conduit. Tr. 111. Stanfill did not feel Manley was engaging in an unsafe practice, but rather a routine installation.

Billy Tennyson, lead electrician, testified on behalf of the company. Tennyson has been employed by the company for a little over ten years. Tr. 122. He stated that Manley was a capable electrician with good safety habits. Tr. 124. Tennyson confirmed the hard hat color-coding system that Stanfill explained. Furthermore, Tennyson felt, as Stanfill did, that Manley would not have been working up on the chute as Jewell described because it would have been difficult for Manley to get to the motor. Tr. 126. Tennyson also explained that Harder told him he was handing Manley the flexible conduit and was present when the work was being done. Tr. 127.

#### **CONTENTIONS RELATING TO CITATION NO. 6243229**

As Jewell continued his inspection on February 14, 2006, he observed a lack of proper access to an area that an employee must reach to maintain the plant's crusher. Tr. 32. He issued Citation No. 6423229 alleging a violation of 30 C.F.R. § 56.11001, a mandatory safety standard requiring safe means of access in all working areas. The crusher had twelve grease fittings that needed to be greased with a handheld grease gun every forty hours. Tr. 32-33, 35. Jewell explained an employee would need to go up onto the framework of the crusher to do that work. Tr. 32. The employee would need to hold onto the framework while he greased the fittings. Each fitting needed forty shots from the grease gun.

The crusher is located on a raised platform. The platform's height varies from eight to twelve feet from the ground. Tr. 35. Inspector Jewell measured the area where the employee would walk to reach the grease fitting and found the area was six inches wide. He estimated an employee would have to travel on the narrow area for a distance of eight to ten feet. Tr. 36. Inspector Jewell also indicated that part of the area where an employee would walk was wider than six inches. Photographic evidence was introduced depicting the crusher. Gov't Exh. 6-8. No employees were on the platform at the time of the inspection.

Jewell determined Moltan's negligence to be high as the crusher had been installed for approximately four to five months. Tr. 39, 46. He also talked to an employee, Scott Garrett, who stated that he was given a safety award for his idea of providing better access to the grease fittings, but no action was taken by the company. Tr. 39. Garrett did not testify. Additionally, Jewell stated Garrett said his supervisor, Billy Barns, was aware of the condition and told him to "be careful." Tr. 41. Jewell further explained that even without this information obtained from Garrett he still would have found the company's negligence to be high because management was aware of the need to perform maintenance on the crusher and the mine office was located within fifty yards of the crusher. Tr. 45-46. Jewell felt the violation was obvious and the company's failure to provide safe access was unwarrantable. Jewell considered the gravity to be reasonably likely to cause an injury due to the frequency of greasing that was required. Jewell also observed spilled materials on the platform, along with mud in the very narrow area. Tr. 47-48. This made it even more likely an employee would fall.

Jewell stated that fatalities or severe injuries such as a broken neck or head injury could result from a fall of six to ten feet and he noted the presence of a concrete pillar, wooden pallets, and steel beams under and around the narrow area. Tr. 48. Jewell believed one person would be affected by the hazard. He also found the alleged violation as S&S.

Citation 6243229 was terminated when the company issued a memorandum to workers not to access the area, the crusher platform was permanently blocked off, and grease lines were extended down to the ground level. Tr. 49-50.

Stanfill testified on behalf of the company. He stated that the crusher had been in its present location for approximately seven to eight months. Tr. 115. He confirmed that greasing occurred on a weekly basis and had always been performed from the platform. Tr. 115. Stanfill did not know if the condition had been brought to the attention of a supervisor nor was Stanfill aware of a safety award being given to Garrett. Tr. 117-118.

### **RESOLUTION OF THE ISSUES**

#### **CITATION NO. 6243221**

Citation No. 6243221 states:

A repairman was observed working from an elevated position without wearing proper fall protection, safety belts, and lines. The area the repairman was standing on is 87 inches above a metal flooring of a work platform for the feed conveyor at the "old coal shed." The worker was standing on a 19 inch diameter cylinder type chute. The surface the worker was

standing upon is rounded and not flat. The repairman was wiring a new motor to the head drive of the conveyor. Safety belts and lines are not available at the work area. This condition creates a fall of person hazard.

This condition was a factor that contributed to the issuance of imminent danger order No. 6243220 dated 2/13/06. Therefore, no abatement time was set.

Gov't Exh. 2.

Section 56.15005 states in pertinent part:

Safety belts and lines shall be worn when persons work where there is danger of falling[.]

### **THE VIOLATION**

I find the Secretary established a violation of section 56.15005. The evidence clearly shows that Manley was standing on an object 87 inches above the work platform without hand rails or anything else to contradict or to minimize the danger of falling. Jewell testified that Manley was not wearing fall protection and no witness contended otherwise.

### **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). 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. 3<sup>rd</sup> 133, 135(7<sup>th</sup> Cir. 1995); *Austin Power Co., Inc. v. Sec'y of Labor*, 861 F. 2d 99,103 (5<sup>th</sup> 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).

The Secretary has established a violation of section 56.15005. She also has established a safety hazard contributed to by the violation. Bobby Manley was working without fall protection in an area where there was a danger of falling. Without the protections required by the standard, it is reasonably likely the hazard would have contributed to an injury. Undisputed testimony was given by Inspector Jewell that fatal falls have occurred from heights of 10 feet or less. Tr. 28. There were no hand rails or anything else for Manley to hold on to. The results of a fall could have been fatal or very serious, such as broken bones or even a brain injury. These injuries were reasonably likely to occur, and therefore I conclude the violation was S&S. While I understand that some of Moltan's personnel may feel the hazard was minimized because this was a routine installation occurring in a short period of time, Manley was working without fall protection long enough for the inspector to detect the problem and photograph it, and an accident can occur in an instant.

In view of the type of injuries that were likely to happen if the hazard occurred, I also find the violation was serious.

### **NEGLIGENCE**

Inspector Jewell believed the company was highly negligent. Gov't Exh. 2. I agree with this determination. A high degree of care was required by the company as this task carried with it an inherent risk. Based on the evidence presented, there is no doubt that Manley was standing on an object 87 inches above the platform. As previously noted, there were no hand rails nor was Manley wearing fall protection. The task was being performed in plain sight without the required fall protection. There is no evidence to suggest any safety belts or lines were in the immediate area. A serious, even fatal, hazard was present, yet plant manager Stanfill believed Manley was engaged in a "routine construction installation." Tr. 112. The company fell far short of the standard of care required, and I therefore find the company was highly negligent.

**CITATION NO. 6243229**

Citation No. 6243229 states:

Safe access is not provided at the crusher drive area. The crusher operator must access the drive area to grease 12 fittings every 40 hours. The area of access is not provided with handrails, barriers, or a working platform. The area of access in some places [is] only six inches wide across the structural beams and over drive pulleys. The area of access is 8 to 12 feet in height. Forman Billy Barns, instructed employees to "be careful" while greasing. An employee stated that management was notified of the hazard via "safety suggestion box" and that the idea of providing a safe access was awarded but not acted upon. The management has also failed to provide or instruct the employees, who [grease] and [maintain] this area, to wear fall protection while performing duties. The mine operator and Forman Barns [have] engaged in aggravated conducted constituting more than ordinary negligence in that the work area is not provided with a safe means of access where regular work is required. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov't Exh. 5.

Section 56.11001 states:

Safe means of access shall be provided and maintained to all working places.

**THE VIOLATION**

There has been no evidence or testimony presented to indicate the maintenance was being performed in any other manner than as described by Inspector Jewell. An employee had to travel on the narrow area at a height of eight to twelve feet off the ground while using a handheld grease gun to apply forty shots to twelve fittings at least once a week. There is no question in my mind that this was a dangerous task and that safe access was not provided to the working place by the company. I therefore find the Secretary established a violation of section 56.11001.



## S&S AND GRAVITY

I also find the Secretary has established the violation was S&S. Without providing safe access to the working area as is required by the standard, it was reasonably likely the hazard would have contributed to an injury. An employee who traveled along the very narrow easily could have fallen to the ground, onto the wooden pallets, against the concrete pillar, or against the steel bars and beams. Inspector Jewell testified that the injury could have been serious such as a broken neck or head injury, or even fatal, and I agree. Moreover, in view of the kind of injuries that were likely to result if the hazard occurred, I find the violation was serious.

## UNWARRANTABLE FAILURE AND NEGLIGENCE

Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence . . . in relation to a violation of the Act." *Emery Mining Corp.* 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or "a serious lack of reasonable care." *Id.* 2003-2004; *Rochester & Pittsburg Coal Co.*, 13 FMSHRC 189, 193-194 (February 1991); *see also Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 157 (2d Cir. 1999); *Buck Creek Coal, Inc. v. MSHA*, 53 F.3d 133, 136 (7<sup>th</sup> Cir. 1995) (approving Commission's unwarrantable failure test). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure, and recognized that a heightened standard of care is required of such individuals. *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987) (section foreman held to demanding standard of care in safety matters); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995) (heightened standard of care required of section foreman and mine superintendent). Negligence, of course, is the failure to meet the standard of care required by the circumstances.

I conclude the violation was caused by Moltan's unwarrantable failure to comply with the standard. The condition existed at this particular crusher for at least five months. The maintenance was performed in plain view and within fifty yards of the mine office. Management knew that maintenance was being performed on the crusher in this manner. The hazard posed was significant and the heightened care that was required by the hazard was totally missing. The serious lack of reasonable care reflected both Moltan's unwarrantable failure and its high degree of negligence.

## REMAINING CIVIL PENALTY CRITERIA

### HISTORY OF PREVIOUS VIOLATIONS

The Secretary entered into evidence the "Assessed Violation History Report." Gov't Exh. 12. The Secretary has characterized the company's history of violations as "fairly small." Tr. 101.

I find, based on the record in this case, the applicable history of previous violations is small.

### **SIZE**

The Secretary entered into evidence the "Assessed Violation History Report." Gov't Exh. 12. The parties stipulated to the fact that there were approximately 400,000 hours worked in 2006. This means Moltan's facility is characterized by MSHA as a medium mine. 30 C.F.R. § 100.3. As there is no evidence to contradict this, I find the mine to be medium in size.

### **ABILITY TO CONTINUE IN BUSINESS**

The parties have stipulated that a reasonable penalty will not affect Moltan's ability to remain in business. Tr. 12; Stip. 5. I accept this stipulation.

### **GOOD FAITH ABATEMENT**

The violations were abated in good faith by Moltan and in a timely manner. Gov't Exh. 2; Gov't Exh. 4.

### **CIVIL PENALTY ASSESSMENTS**

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>
6243221	2/13/2006	56.15005	\$2,200

I have found the violation to be serious and the negligence on the part of the company to be high. Given these findings and the other civil penalty criteria, I find the penalty of \$2,200 proposed by the Secretary is appropriate.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>
6243229	2/14/2006	56.11001	\$1,300

I have found the violation to be serious and the negligence on the part of the company to be high. Given these findings and the other civil penalty criteria, I find the penalty of \$1,300 proposed by the Secretary is appropriate.

**ORDER**

Moltan **SHALL** pay total civil penalties of \$3,500 within 40 days of the date of this decision, and upon payment of the penalties, this proceeding **IS DISMISSED**.

*David F. Barbour*

David F. Barbour  
Administrative Law Judge  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 17, 2009

OHIO COUNTY COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. KENT 2006-308-R
v.	:	Order No. 6689096; 05/09/2006
	:	
	:	Docket No. KENT 2006-309-R
SECRETARY OF LABOR,	:	Order No. 6689097; 05/09/2006
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Freedom Mine
Respondent	:	Mine ID 15-17587
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2006-369
Petitioner	:	A.C. No. 15-17587-88177
	:	
	:	Docket No. KENT 2007-46
	:	A.C. No. 15-17587-98358-01
	:	
	:	Docket No. KENT 2007-49
v.	:	A.C. No. 15-17587-98358-02
	:	
	:	Docket No. KENT 2007-77
	:	A.C. No. 15-17587-100975
	:	
	:	Docket No. KENT 2007-82
	:	A.C. No. 15-17587-100975
	:	
OHIO COUNTY COAL COMPANY,	:	Freedom Mine
Respondent	:	

## DECISION

Appearances: Mary Sue Taylor, Esq., U.S. Department of Labor, Nashville, Tennessee,  
on behalf of the Secretary  
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania,  
on behalf of the Company

Before: Judge Barbour

These consolidated cases concern contest and civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* In the contest proceedings Ohio County Coal Company (Ohio County or the company) challenges the validity of a citation and order issued at its Freedom Mine, an underground bituminous coal mine located in Henderson County, Kentucky. In the civil penalty proceedings the Secretary of Labor, on behalf of her Mine Safety and Health Administration, seeks the assessment of various proposed civil penalties for 79 alleged violations.

The matters were the subject of extensive negotiations, and the parties were able to settle many, but not all, of the issues dividing them. When it became apparent the parties could not settle their remaining differences, the cases were scheduled to be heard in Washington, D.C. The trial was to begin at 8:30 a.m., on August 25, 2008, but shortly before the appointed time, I met with counsels to explore whether further negotiations were warranted. Counsels consulted their clients and advised me they wished to postpone the start of the hearing. The Commission made its offices available, and at approximately 10:20 a.m. counsels advised me they agreed on a framework to settle the remaining issues.

The hearing was convened so that counsels could state the outlines of the proposed settlement on the record. As counsel for the company described the proposed settlement, it involved the Secretary agreeing to delete inspectors' findings that several of the alleged violations were of a significant and substantial nature (S&S) and the company agreeing to accept the S&S findings on other of the citations. Additionally, as counsel for Ohio County explained, the parties agreed:

A training class will be conducted at the mine by mine personnel that may be monitored by MSHA [and] that will address the importance of compliance with [30 C.F.R.] 75.400, [(the mandatory safety standard prohibiting accumulations of loose coal, coal dust and other combustible materials)] . . . . In addition, the mine's clean-up plan will be revised to spell out a written procedure for per-operational checks with respect to three types of equipment . . . the diesel man trips, the roof bol[t]ers and the ram cars. . . . [A]s part of the program there will be training given on pre-operational checks and there will be a pre-operational checklist developed that will address the issue of keeping the types of [referenced] equipment . . . free from hazardous accumulations of coal and other combustible materials.

[The] plan [also] will include a card that will be

placed on equipment to indicate the scope of . . . [the pre-operational] checks. . . . [The] card will also include a direction that [when] a deficiency is noted in a pre-operational check, it shall be reported to a foreman. In addition, there will be a provision with respect periodic monitoring [to ensure] . . . [the] checks are being done.

Tr. 6-7.

Three months prior to the hearing, counsels had submitted a motion requesting approval of a settlement of issues related to several of the alleged violations.<sup>1</sup> At the hearing, counsels stated they hoped to submit a motion for the approval of all other issues by September 9, 2008. Tr. 8. However, as counsel for Ohio County noted, “the devil is in the details”, an observation that proved prescient.

Although on September 8, counsels submitted another motion to approve a partial settlement.<sup>2</sup> Only in mid-February 2009, and after continuing discussions and the exchange of several draft settlement motions, did counsels finally agree concerning all of the remaining issues. A joint motion to approve the last parts of the settlement was filed on February 19, 2009.<sup>3</sup>

The settlement, as stated in the parties’ motion as amended, is as follows:

**KENT 2006-369**

<b><u>Citation/ Order No.</u></b>	<b><u>Date</u></b>	<b><u>30 C.F.R.</u></b>	<b><u>Assessment</u></b>	<b><u>Settlement</u></b>
6689120 <sup>[4]</sup>	3/1/06	75.400	\$614	\$614
6689123	3/1/06	75.400	\$614	\$614
6689129	3/6/06	75.400	\$614	\$614
6689145	5/15/06	75.1106-3(a)(3)	\$963	\$500

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<sup>1</sup>On August 7, 2008, I issued a decision approving the partial settlement of the cases.

<sup>2</sup>On September 22, 2008, I issued another partial settlement decision based on the motion.

<sup>3</sup>Two corrections to the February 19 motion were subsequently filed by e-mail. A printout of the e-mail is part of the record. See e-mail, *Errors in KENT 2007-46* (March 6, 2009).

<sup>4</sup>Joint Stipulations and Motion for Approval of Pretrial Settlement (February 19, 2009). In addition to Citation No. 6689120, the Joint Stipulations and Motion includes Citation Nos. 6689123, 6689129 and 6689145.

**KENT 2007-46**

<b><u>Citation/ Order No.</u></b>	<b><u>Date</u></b>	<b><u>30 C.F.R.</u></b>	<b><u>Assessment</u></b>	<b><u>Settlement</u></b>
6689109 <sup>[5]</sup>	2/24/06	75.362(b)	\$4,500	\$3,000
6689468 <sup>[6]</sup>	5/16/06	75.400	\$963	\$963
6689430	5/22/06	75.503	\$440	\$440
6689431	5/22/06	75.400	\$440	\$440
6689432	5/22/06	75.400	\$440	\$440
6689433	5/22/06	75.400	\$440	\$440
6689472	5/23/06	75.202(a)	\$838	\$376
6689473	5/22/06	75.400	\$963	\$963
6689451	6/1/06	75.400	\$440	\$440

**KENT 2007-49**

<b><u>Citation/ Order No.</u></b>	<b><u>Date</u></b>	<b><u>30 C.F.R.</u></b>	<b><u>Assessment</u></b>	<b><u>Settlement</u></b>
6689460 <sup>[7]</sup>	6/2/06	75.400	\$440	\$440
6689542	6/2/06	75.400	\$440	\$440

**KENT 2007-82**

<b><u>Citation/ Order No.</u></b>	<b><u>Date</u></b>	<b><u>30 C.F.R.</u></b>	<b><u>Assessment</u></b>	<b><u>Settlement</u></b>
6689096 <sup>[8]</sup>	5/9/06	75.1107-16	\$3,700	\$3,700

In support of the proposed settlement of the allegations relating to the alleged violations, Section 110(I) of the Act (30 U.S.C. § 820(i), including information regarding Ohio County's size, ability to continue in business and history of previous violations.

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<sup>5</sup>E-mail, *Errors in KENT 2007-46* (March 6, 2007). In addition to Citation No. 6689109, the e-mail includes Citation No. 6689472.

<sup>6</sup>Joint Stipulations and Motion for Approval of Pretrial Settlement (February 19, 2009). In addition to Citation No. 668468, the Joint Motion includes Citations No. 6689430, 6689431, 6689432, 6689433, 6689473 and 6689451.

<sup>7</sup>Joint Stipulations and Motion for Approval of Pretrial Settlement (February 19, 2009). In addition to Citation No. 6689460, the Joint Motion includes Citation No. 6689542.

<sup>8</sup>Joint Stipulations and Motion for Approval of Pretrial Settlement (February 18, 2009).

**KENT 2006-308-R**  
**(104(d)(1) Citation 6689096, 5/9/06, 30 C.F.R. § 75.1107-16)**

**KENT 2006-309-R**  
**(104(d)(1) Order 6689097, 5/9/06, 30 C.F.R. § 75.606)**

Resolution of the penalty issues with regard to Citation No. 6689096 (Docket No. KENT 2007-82) and Order No. 6689097 (Docket No. KENT 2007-82) has resolved the issues raised in contest proceedings KENT 2006-308-R and KENT 2006-309-R, and the parties agree the contests may be dismissed.<sup>9</sup>

**OTHER AGREEMENTS**

In addition to the Secretary agreeing to accept payment as specified for the alleged violations and Ohio County agreeing to pay, the parties further agreed regarding the teaching of a class relating to cleaning combustible materials on mobile equipment, the external operating temperatures of specific types of mobile equipment and the implementation of a list for the pre-operational checks of such equipment. Their agreement states:

- a. Within 30 days of the approval of this settlement . . . Ohio County shall conduct on all three shifts a class lasting a minimum of 30 minutes that shall address the importance of the cleaning of combustible materials from mobile mining equipment and the potential hazards to accumulations of combustible materials on mining equipment. MSHA may monitor such class and Ohio County will provide two day notice to MSHA of the conduct of such classes.
- b. MSHA agrees that the normal operating external operating temperatures of the components of roofbolting machines, including but not limited to motors, valve banks, etc., is 168° F or less.
- c. MSHA agrees that the normal operating external operating temperatures of the components of ramcars, including, but not limited to, motors, hydraulic tanks, etc., is 168° F or less.
- d. MSHA agrees that the normal operating external

---

<sup>9</sup>The settlement relating to Order No. 6689097 was set forth in the parties' September 8, 2008, motion and was approved in the September 22 partial decision.



operating temperatures of the components of diesel mantrips, including motors, is 195° F or less. The external surface temperature of the exhaust is greater than 195° F but less than 302°F, MSHA's limit on such temperatures.

e. Ohio county has proposed revisions to the cleanup plan adopted under 30 C.F.R. § 75.400-2 . . . . Such revised plan shall include the requirement that a written check list for the pre-operational checks of roofbolters, diesel mantrips and ramcars, be developed and affixed to the mobile equipment specified herein. Such checklist shall include requirements that the equipment operator perform a pre-operational check of the exterior surfaces of such equipment for hazardous accumulations of combustibles[,] including coal, coal fines, float coal dust, hydraulic oil, grease and diesel fuel. Such checklist shall be provided on roofbolters, ramcars and diesel mantrips. Upon notification of the absence of such a list on equipment, it shall be replaced by the next shift. Such pre-operational checklist shall include a requirement that the operator report to his supervisor any deficiency in the equipment so that appropriate action may be taken if necessary.

Joint Stipulations and Motion for Approval of Pretrial Settlement (February 19, 2009) at 5-

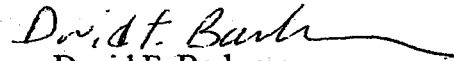
6.

After consideration of the settlement motions, I find the proposed settlement is reasonable and in the public interest. The motion **IS GRANTED** and the settlement **IS APPROVED**.

### **ORDER**

Ohio County **IS ORDERED** to pay a total civil penalty of \$14,424 in satisfaction of the violations in question. Payment is to be made to MSHA within 30 days of the date of this decision. In addition, within the same time period Ohio County **IS ORDERED** to implement the agreements

as specified in the "Other Agreements" section of this decision and as stated in the February 19, 2009 motion. Upon receipt of full payment and implementation of the specified agreements, all of the captioned proceedings **ARE DISMISSED**.

  
David F. Barbour  
Administrative Law Judge

Distribution: (Certified Mail)

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 3, 2009

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2007-701
Petitioner	:	A.C. No. 46-09066-123671
	:	
	:	Docket No. WEVA 2007-580
v.	:	A.C. No. 46-09066-119010
	:	
	:	
BROOKS RUN MINING CO., LLC,	:	Mine: Cucumber
Respondent	:	

## **ORDER GRANTING, IN PART, AND DENYING, IN PART, MOTIONS FOR SUMMARY DECISION**

Before: Judge Bulluck

These cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration ("MSHA"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(d), against Brooks Run Mining Company ("Brooks Run" or "Respondent"). The Secretary issued four significant and substantial ("S&S") citations alleging violations of her mandatory safety standard found at 30 C.F.R. § 70.100(a). The parties have filed cross Motions for Summary Decision.

Judicial notice is taken of the disease probability rates concerning respirable dust contained in the Legislative History of the 1969 Coal Act. Section 70.100(a) is lifted, almost verbatim, from section 202(a) of the Mine Act, 30 U.S.C. § 842, which, in turn, was carried over from the 1969 Coal Act without significant amendment.<sup>1</sup> See *Consolidation Coal Co.*, 8 FMSHRC 890, 896 (June 1986).

Based upon the stipulations and uncontested facts represented by the parties, I find that there is no genuine issue as to any material fact. Sec'y Mot. at 1-16; Resp. Mot. at 4-10. Having reviewed the parties' Motions, I conclude that, for the reasons stated below, the Secretary is entitled to summary decision, in part, and the Respondent is entitled to summary decision, in part, as a matter of law.

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<sup>1</sup> See Rep. No. 91-411, 91<sup>st</sup> Cong., 1<sup>st</sup> Sess. 15-16 (1969).

## **I. Factual Background**

Brooks Run Mining Company, Incorporated, operates the Cucumber Mine in McDowell County, West Virginia, which produces approximately 6,000 tons of coal on two nine-hour production shifts per day, seven days a week. The mine has been in operation since February 27, 2006, and has four active mechanized mining units ("MMU")— 001-0, 002-0, 003-0, and 004-0. MMU 001-0 went into producing status on May 8, 2006; MMU 002-0 on May 8, 2006; MMU 003-0 on April 17, 2006; and MMU 004-0 on May 8, 2006. Sec'y Stip 86; Resp. Stip 1. Section 70.100(a) of the Code of Federal Regulations requires that an operator continuously maintain the average concentration of respirable dust in a mine atmosphere at or below 2.0 mg/m<sup>3</sup>. 30 C.F.R. § 70.100(a). To determine whether an operator is complying with the applicable limit for respirable dust, section 20.207(a) requires that each operator take five valid respirable dust samples from the designated occupation in each MMU, and submit them to MSHA for testing.

On June 5, 6, 7, 8 and 9, 2006, Respondent collected five designated occupation samples from MMU 004-0 for the May-June 2006 bimonthly sampling cycle. Sec'y Ex. 1. The results of the five samples showed an average concentration of 4.2 mg/m<sup>3</sup>. Sec'y Ex. 1. On June 16, 2006, MSHA Inspector Michael T. Dickerson issued Citation No. 9967760 to Respondent for exceeding the respirable dust limit of 2.0. Sec'y Ex. 1. Dickerson found that it was an S&S violation that would be highly likely to result in an illness, that the illness would be permanently disabling, that five persons were affected, and that Respondent's negligence was moderate. Sec'y Ex. 1. The citation was terminated on July 6, 2006, after Respondent submitted samples showing an average dust concentration within the applicable limit. Sec'y Ex. 1.

On January 23, 24, and 26, 2007, Respondent collected five designated occupation samples from MMU 003-0 for the January-February 2007 bimonthly sampling cycle. Sec'y Ex. 2. The results of the five samples showed an average concentration of 3.0 mg/m<sup>3</sup>. Sec'y Ex. 2. On February 1, 2007, MSHA Inspector Paul Prince issued Citation No. 9967919 to Respondent for exceeding the respirable dust limit of 2.0. Sec'y Ex. 2. Prince found that it was an S&S violation that would be highly likely to result in an illness, that the illness would be permanently disabling, that five persons were affected, and that Respondent's negligence was moderate. Sec'y Ex. 2. The citation was terminated on March 29, 2007, after Respondent submitted an updated Methane and Dust Control Plan ("Dust Control Plan") and respirable dust samples showing an average dust concentration within the applicable limit. Sec'y Ex. 2; Resp. Ex. 6 and 7.

On January 29, 30, 31, and February 1 and 2, 2006, Respondent collected five designated occupation samples from MMU 001-0 for the January-February 2007 bimonthly sampling cycle. Sec'y Ex. 3. The results of the five dust samples showed an average concentration of 2.7 mg/m<sup>3</sup>. Sec'y Ex. 3. On February 13, 2007, Inspector Prince issued Citation No. 9967921 to Respondent for exceeding the respirable dust limit of 2.0. Sec'y Ex. 3. He found that it was an S&S violation that would be "reasonably likely" to result in an illness, that the illness would be

permanently disabling, that five persons were affected, and that Respondent's negligence was high. Sec'y Ex. 3. The citation was terminated on May 16, 2007, after Respondent submitted a revised Dust Control Plan and respirable dust samples showing an average dust concentration within the applicable limit. Sec'y Ex. 3; Resp. Ex. 6 and 7.

On March 26, 27, and 28, 2006, Respondent collected five designated occupation samples from MMU 004-0 for the March-April 2007 bimonthly sampling cycle. Sec'y Ex. 4. The results of the five dust samples showed an average concentration of 3.9 mg/m<sup>3</sup>. Sec'y Ex. 4. On April 9, 2007, Inspector Prince issued Citation No. 9967966 to Respondent for exceeding the respirable dust limit of 2.0. Sec'y Ex. 4. He found that it was an S&S violation that would be highly likely to result in an illness, that the illness would be permanently disabling, that five persons were affected, and that Respondent's negligence was moderate. Sec'y Ex. 4. The citation was terminated on May 10, 2007, after Respondent submitted an updated Dust Control Plan and respirable dust samples showing an average dust concentration within the applicable limit. Sec'y Ex. 4; Resp. Ex. 6 and 7.

There was no MSHA inspector present at the mine when the respirable dust samples at issue were taken. Resp. Stip. 24. Respondent has not presented any facts that would contradict the validity of the test results.

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

Commission Rule 67(b), governing summary decisions, provides as follows:

A motion for summary decision shall be granted only if the entire record . . . shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

Section 70.100(a), governing respirable dust limitations states:

Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with §70.206 (Approved sampling devices: equivalent concentrations).

30 C.F.R. §70.100(a). To ensure that an operator is in compliance with section 70.100(a),

section 70.207(a) provides, in pertinent part:

Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period . . . . Designated occupation samples shall be collected of consecutive normal production shifts or normal production shifts each of which is worked on consecutive days.<sup>2</sup>

30 C.F.R. §70.207(a). The operator selects the days during the bimonthly period when dust sampling will be conducted. The "designated occupation" is the particular work position on a mechanized mining unit that has been determined by results of respirable dust samples to have the greatest respirable dust concentration. 30 C.F.R. § 70.2(f). The five valid samples are collected using MSHA approved filter cassettes contained in an air sampling unit worn by the miner in the designated occupation. The operator then sends the five dust samples to MSHA's laboratory, where the filters are removed and weighed to determine whether the average dust concentration for each sample is in compliance with the 2.0 milligram limit set by section 70.100(a)<sup>3</sup>. The average concentration of the five respirable dust samples are considered representative of the mine atmosphere over the course of the entire bimonthly sampling period. *Consolidation Coal Co.*, 8 FMSHRC at 900.

If a violation of the applicable respirable dust standard is found, an MSHA inspector issues a citation setting a deadline for abatement. During the abatement period, the operator must take corrective action to lower the concentration of respirable dust to within the permissible level, and then sample each production shift until five valid samples are taken. 30 C.F.R. §70.201(d). MSHA may also require that the operator submit changes, in writing, to its Dust Control Plan. Upon MSHA's receipt of five acceptable dust samples, the citation is terminated. The issuance of the citation and abatement by MSHA typically occur without a visit to, or inspection of, the mine.

In these matters, the Secretary seeks to modify the citations by raising gravity factors of the number of persons affected and the likelihood of injury or illness, and the negligence findings, as well as the penalty amount assessed for each violation. Brooks Run does not challenge the fact of violations or the S&S designation of the citations. It does, however, dispute

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<sup>2</sup> As set forth by 30 C.F.R. § 70.208, the bimonthly periods for "designated area" sampling are February 1-March 31; April 1- May 31; June 1-July 31; August 1- September 30; October 1- November 30; and December 1- January 31.

<sup>3</sup> While Respondent contends that MSHA failed to check the subject dust samples to determine the level of any diesel mantrip exhaust, which could have altered the weight of the sample, it has presented no proof that the samples on which these violations are based were inaccurate. Sec'y Mot. at 6, Stip. 37; Resp. Mot. at 12. See *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1088 (D.C. Cir 1987).

the high and moderate negligence findings, as well as the gravity findings that injury or illness was highly likely, would be permanently disabling, and affected five persons.

## Gravity

### Likelihood of Injury or Illness

The Secretary contends that the high likelihood of injury or illness was appropriately designated for Citation Nos. 9967760, 9967919, and 9967966, based on the degree of overexposure shown by the test results. She states that exposure levels of 3.0 to 4.2 mg/m<sup>3</sup>, which exceed the applicable limit by 150-220%, are highly likely to contribute to the occurrence of the permanently disabling disease of pneumoconiosis. Moreover, the Commission has recognized that any exposure above 2.0 mg/m<sup>3</sup> is significant and substantial, and that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *Consolidation Coal Co.*, 8 FMSHRC at 899.

Brooks Run argues that the gravity findings should be reduced to reflect that the violation is reasonably likely to result in lost workdays or restricted duty. The Secretary counters by presuming that, once the designated samples are out of compliance, everyone on the section is exposed and highly likely to receive permanent, disabling illnesses. The Secretary relies on the probability rates for contracting simple pneumoconiosis "after 35 years exposure." *Id.* at 896. However, the miners were not exposed to excess dust for any significant period of time and, as Brooks Run also points out, during June 2006 through May 2007, only seven out of ninety-one samples were above 2.0 mg/m<sup>3</sup> on different, isolated dates, and for different jobs and different MMUs. These results, when viewed in their entirety, provide a more accurate depiction of the dust levels in the mine.

In preventing disabling respiratory disease, the Commission has stated that "Congress clearly intended the full use of the panoply of the Act's enforcement mechanisms to effectuate this congressional goal, including designation of a violation as a significant and substantial violation." *Consolidation Coal Co.*, 8 FMSHRC at 897, *aff'd sub nom. Consolidation Coal v. FMSHRC*, 824 F.2d 1071 (D.C.Cir. 1987). The Commission has also recognized that, with respect to exposure-related health hazards, some departure from the Secretary's enforcement approach is justified "because of fundamental differences between a typical safety hazard and the respirable dust exposure-related health hazard at issue." *Id.* at 895; *see also Costain Coal, Inc.*, 19 FMSHRC 1653, 1656 (Oct. 1997) (ALJ).

While examining the third element of the *Mathies* test<sup>4</sup>, in the context of respirable dust

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<sup>4</sup> To establish an S&S violation under the *Mathies* test, the Secretary 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

accumulations, the Commission recognized that:

the development and progress of respiratory disease is due to the cumulative dosage of dust a miner inhales, which in turn depends upon the concentration and duration of each exposure, and that proof of a single incident of overexposure does not, in and of itself, conclusively establish a reasonable likelihood that respirable disease will result. There is no dispute, however, that overexposure to respirable dust can result in chronic bronchitis and pneumoconiosis. The effects of the health hazards associated with overexposure to respirable dust usually do not cause immediate symptoms—as noted, simple pneumoconiosis is asymptomatic. This factor makes precise prediction of whether or when respiratory disease will develop impossible. Likewise, it is not possible to assess the precise contribution that a particular overexposure will make to the development of respiratory disease. In sum, the present state of scientific and medical knowledge, as exemplified by the present record, do [sic] not make it possible to determine the precise point at which the development of chronic bronchitis or pneumoconiosis will occur or is reasonably likely to occur.

*Consolidation Coal Co.*, 8 FMSHRC at 898.

A primary purpose of the Mine Act is to prevent or significantly reduce the occurrence of respirable dust induced diseases among coal miners. Congress established the 2.0 mg/m<sup>3</sup> respirable dust standard because it recognized that anything in excess of this level would produce disabling complicated pneumoconiosis or progressive massive fibrosis and other occupation-related diseases in a statistically significant portion of coal miners. *Id.* Consequently, it also recognized that, at levels below 2.2 mg/m<sup>3</sup>, there would be virtually no probability of a miner contracting complicated pneumoconiosis, even after exposure of 35 years. Congress chose to adopt a universal approach to assure that all miners, regardless of their susceptibility to illness or length of time worked, “would be uniformly protected from the incremental health hazards presented by repeated overexposures to respirable dust in coal mines.” *Id.* Where the Secretary has proven, based on designated occupation samples, that an overexposure to respirable dust has occurred in violation of section 70.100(a), there is a presumption that there is a *reasonable likelihood* that the health hazard contributed to will result in an illness. *Id.* at 899.

With regard to Citation Nos. 9967760 and 9967919, the Secretary offers nothing beyond the probability rates at various exposure levels, that each of the individual violations are highly likely to cause pneumoconiosis in each miner exposed. Resp. Mot. at 21. Although each “drop in the bucket” significantly and substantially contributes to a health hazard, it does not logically

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question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).



follow that pneumoconiosis is highly likely to occur as a result of an isolated incident, even at an exposure level of 4.2 mg/m<sup>3</sup>. See *Consolidation Coal Co.*, 5 FMSHRC 378, 381-82 (Mar. 1983) (ALJ) (exposure to a coal mine respirable dust level of 4.1 mg/m<sup>3</sup> over a 5-day period would not, in itself, cause or significantly contribute to the development of chronic bronchitis or coal workers' pneumoconiosis, and its effect on the development of pneumoconiosis would be minuscule). Such a disease results from an aggressive accumulation of respirable dust. *Id.* at 389; see also *Consolidation Coal Co.*, 8 FMSHRC at 898. As there has been no showing of a history of respirable dust violations preceding these citations for the MMUs in question, I am not persuaded that these violations, even at the recorded exposure levels, were anything more than "reasonably likely" to result in an illness.

Conversely, Citation No. 9967966 was the third respirable dust violation to be issued to Brooks Run for MMU 004-00 within six bimonthly sampling cycles. The violations, on average, more than doubled the acceptable 2.0 mg/m<sup>3</sup> limit, recording respirable dust levels of 4.2, 4.4 and 3.9 mg/m<sup>3</sup>, respectively. These citations indicate that miners were repeatedly exposed to very high rates of respirable dust. Sec'y Ex. 1, 4 and 13. Consequently, I find that the violation was "highly likely" to result in an illness.

#### Result of Injury or Illness

Coal workers' pneumoconiosis is a chronic lung disease that is untreatable and irreversible. *Consolidation Coal Co.*, 5 FMSHRC at 381. Complicated pneumoconiosis, or progressive massive fibrosis, destroys the lungs' air exchange capabilities, distorts the remaining lung tissue, and significantly impairs the lungs' capacity to function due to severe internal scarring, contracture of the lungs' with compensatory emphysema, and loss of the vasculature. *Consolidation Coal Co.*, 8 FMSHRC at 899. It commonly causes shortness of breath and coughing, and can result in severe pulmonary impairment and early death. 5 FMSHRC at 381. Lung deterioration can continue even after a miner is no longer exposed to coal dust. *Id.* As stated by the Commission, these facts support a conclusion that there is a reasonable likelihood that illness resulting from overexposure to respirable dust will be of a reasonably serious nature. Consequently, I affirm the Secretary's findings that the resulting illness is likely to be "permanently disabling," and Citation Nos. 9967760, 9967919, 9967921, and 9967966 shall remain as written.

#### Number of Persons Affected

The Secretary argues that all shift members are affected by MMU dust violations because they all work in the vicinity of the sampled designated occupation. She asserts that, rather than five persons affected, the facts indicate that more persons were affected than originally cited and thus, the number should be increased for each citation. Brooks Run counters that the number should be reduced from five to one for each citation, because other shift members typically worked in areas with less or no exposure to the recorded dust levels. It looks to *Costain* for support, where it is concluded that some occupations ordinarily have less dust exposure than the

designated occupation.

Respondent's reliance on *Costain*, however, ignores the fact that this argument was found insufficient to circumvent the standard's purpose. As previously stated, the purpose of section 70.100(a) is to limit the respirable dust exposure of miners in active workings of a mine. "Active workings" is defined as "any place in a coal mine where miners are normally required to work or travel. 30 C.F.R. §70.2(b). Section 70.2(f) defines designated occupation as the occupation on a mechanized mining unit that has been determined by results of respirable dust samples to have the greatest respirable dust concentration." 30 C.F.R. §70.2(f). In *Costain*, the Administrative Law Judge noted that:

the purpose of MSHA's high risk occupation bimonthly sampling program is to monitor the atmospheric conditions in active workings. Monitoring the high risk occupation ensures that, if the high risk miner is not overly exposed, no one on that MMU shift is exposed to impermissible levels of respirable dust. Put another way, monitoring the high risk continuous miner occupation at the face provides the earliest warning of excessive respirable dust in the active workings atmosphere.

*Costain*, 19 FMSHRC at 1659.

It is likely that the continuous miner operator working at the face would have endured a greater level of dust exposure than other occupations, but that fact does not defeat the probability that other occupations also would have been exposed at levels above the maximum 2.0 mg/m<sup>3</sup>. I conclude that all miners working a shift are at risk for overexposure to respirable dust, because they work in the vicinity of the sampled designated occupation.

Brooks Run contends that roof bolter operators typically wear respirators when bolting down wind of the continuous miner. However, Brooks Run does not require the miners to use respirators, nor does it offer any proof that the roof bolter operators were, in fact, wearing the respirators when the dust samples in question were taken, or that they, otherwise, customarily wore them. Resp. Mot. Stip. 25 and 26.<sup>5</sup>

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<sup>5</sup> See for example *Jim Walter Resources, Inc.*, 9 FMSHRC 957, 962 (May 1987)(ALJ), where the "availability" of respirators was discussed:

The operator asserts that it rebuts the presumption of significant and substantial by making respirators available to the miners . . . . The foregoing Commission precedent is not couched in terms of availability. Rather, the Commission holds that the presumption may be rebutted only when the operator establishes that the miners in fact were not exposed to excessive concentrations of respirable

I find that the violations affected the entire shift which, in this case, was the number of MMU miners for each shift for which a sample showed exposure above the established limit. Sec'y Mot. Stip. 77-80, 82 and 83; ex. 5a, 6a, and 20 at ¶ 34. Accordingly, the Secretary's motion to increase the number of miners affected, with respect to all citations, is granted, and the Respondent's motion to reduce the number is denied.

## Negligence

Although the Secretary concedes that Citation Nos. 9967919 and 9967921 appropriately attribute moderate negligence to Brooks Run, she argues that the negligence classifications for Citation Nos. 9967760 and 9967966 should be raised from "moderate" to "high." In contrast, Brooks Run moves that the negligence levels for each citation be reduced to "low" or "none." It argues that it exercised diligence in abating the citations and no identifiable violation of the approved Dust Control Plan existed in relation to the subject citations.

In *Costain*, factually similar to the instant cases, the discussion of the operator's negligence is helpful in assessing Respondent's negligence. The ALJ noted that the density of respirable dust can vary from shift to shift and is affected by various factors, including temperature, humidity, and the amount of coal being produced. Because excessive dust levels are MMU-specific, a dust reading in one MMU is not indicative of dust concentrations in another. *Costain*, 19 FMSHRC at 1656. It is also important to observe whether an operator has a history of respirable dust violations, and a pattern of violating its own Dust Control Plan, regardless of the respirable dust history of the MMU in question. *Id.* He concluded that, "to attribute high negligence to an operator for a section 70.100(a) violation in the absence of a pertinent identifiable dust control plan violation, or an MMU-specific history of violative dust samples providing notice that greater dust control measures at that MMU were required, is tantamount to the presumption of high negligence approach rejected by the Commission in *Peabody Coal*, 18 FMSHRC at 498." *Costain*, 19 FMSHRC at 1658. Such is the case here.

After an operator has received notice of non-compliant conditions, the Commission requires that an operator's good faith efforts must be reasonable when trying to achieve compliance with a standard. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (Aug. 1994). Where an operator reasonably believes in good faith that its efforts are the safest means of compliance, such conduct is not aggravated and does not constitute a finding of more

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dust through the use of personal protective equipment. The distinction is clear. The Commission requires a showing that miners were not exposed because they used respirators. Merely making respirators available without any concern or interest in their actual use falls short of the evidentiary requirement established in *Consolidation Coal*." (citation omitted).

than ordinary negligence. *Utah Power and Light Co.*, 12 FMSHRC 965, 972 (May 1990). In *Peabody Coal*, the Commission reversed and remanded unwarrantable failure and high negligence findings for a 70.100(a) violation, stating that the operator, in an effort to control dust levels, had a "good faith" and "reasonable belief" that its "remedial efforts were working" due to a series of compliant bimonthly sampling results immediately prior to the violative sample that gave rise to the section 70.100(a) citation at issue. *Peabody Coal Company*, 18 FMSHRC 494, 499 (Oct. 1997).

**Citation No. 9967919** was issued on February 1, 2007, in connection with MMU 003-00, which went into producing status on April 7, 2006 – nearly 10 months prior to the issuance of the citation. Respondent was cited on four occasions, from July 2006 - November 2006 for violating Section 70.100(a). Sec'y Ex. 11-14. Those citations were not issued in connection with MMU 003-00. In fact, there is no indication that Brooks Run was cited for respirable dust violations for MMU 003-00 prior to Citation No. 9967919. Resp. Ex. BR-5. In addition, there are no identifiable Dust Control Plan violations that contributed to the issuance of this citation. Therefore, I conclude that there are no previous violations of Section 70.100(a) that would have placed Brooks Run on notice that heightened measures were needed to control the dust levels on MMU 003-00, nor has Respondent exhibited a pattern of violating its Dust Control Plan for this particular MMU. In addition, Respondent, in its effort to suppress airborne dust, utilized 26 non-directional sprays, instead of the 24 required by MSHA. Accordingly, I find that Respondent's negligence was low.

**Citation No. 9967921** was issued on February 13, 2007, in connection with MMU 001-00, which went into producing status on February 27, 2006. On at least three occasions between February 27, 2006, and February 13, 2007, Respondent was cited for failing to comply with its Dust Control Plan. Sec'y Ex. 21, 22 and 26. All citations were terminated the same day. There is no identifiable Dust Control Plan violation that contributed to this citation. There are also no previous respirable dust control violations for this MMU that would have placed Brooks Run on notice that heightened measures were needed to control the dust levels. In accordance with its Dust Control Plan, Respondent utilized 26 non-directional sprays, instead of the 24 required by MSHA, to suppress airborne dust. Resp. Ex. BR-6. I find that Respondent's negligence was low.

**Citation No. 9967760** was issued on June 16, 2006, in connection with MMU-004-00, which went into producing status on May 8, 2006. The documentation submitted indicates that there were no respirable dust violations issued to Brooks Run for MMU-004-00 prior to Citation No. 9967760. There is also no indication of any Dust Control Plan violations that contributed to this citation. It was abated within three weeks when Respondent submitted respirable dust samples showing an average dust concentration within the applicable limit. Respondent has admitted, however, that it used a blowing device that was unfamiliar to many of its miners. As a result, the continuous miner operators did not know where to stand in relation to the equipment, in order to reduce their exposure to respirable dust. This admission evidences Respondent's negligence in failing to train its miners on the appropriate standing position, which deficiency

should have been observed during an on-shift examination required under section 75.362(a)(2). However, when coupled with its history of violation for this MMU, the facts do not justify a finding of high negligence. I find that Respondent's negligence, as originally assessed, was moderate.

*Citation No. 9967966* was issued on April 9, 2007, also in connection with MMU 004-00. Unlike Citation No 9967760, this citation was the third to be issued for a violation of Section 70.100(a) for MMU 004-00 in six bimonthly test cycles. Sec'y Ex. 13. On September 26, 2006, Brooks Run was cited for failing to submit the required bimonthly respirable dust samples for the July - August 2006 period under Citation No. 9967828. Sec'y Ex.12. The samples submitted to abate Citation No. 9967828 were also non-compliant and resulted in issuance of Citation No. 9967868 on November 7, 2006. It is clear that Respondent's repeated violations of section 70.100(a) placed it on notice that greater dust control measures on MMU 004-00 were needed. Respondent's negligence is mitigated, however, by the fact that, after receiving this second violation for exceeding the respirable dust limit, the company revised its Dust Control Plan, which was approved by MSHA. Sec'y Ex. 13. Following the Plan revision, it submitted five valid respirable dust samples that were within the acceptable range. Sec'y Ex. 13. Further, before issuance of Citation No. 9967966, Respondent believed, in good faith, that it had addressed the problems in its Plan, because it had achieved compliance with applicable limits. As a result of revising its Dust Control Plan, it achieved compliance by May 10, 2007. Sec'y Ex. 20. There is also no indication that Respondent was not in compliance with its Dust Control Plan immediately preceding this citation. The record simply does not support a finding of high negligence. Accordingly, I find that Respondent's negligence, as originally assessed, was moderate.

### **III. Penalty**

While the Secretary has proposed an increase in the total civil penalty from \$10,275.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(j). *See Sellersburg Stone Co.*, 5 FMSHRC 287, 291-92 (March 1993), *aff'd*, 763 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Brooks Run is a large operator and, as the Cucumber mine is relatively new, its history of assessed violations is low. See Pet. for Assessment of Civil Penalty, Ex. A (MSHA Form 1000-179). As stipulated by the parties, the total proposed penalty will not affect Respondent's ability to continue in business. Sec'y Mot. at 18, stip. 110; Resp. Mot. at 3. I also find that Brooks Run demonstrated good faith in achieving rapid compliance, after notice of the violations.

The remaining criteria involve consideration of the gravity of the violations and Brooks Run's negligence in committing them. These factors have been discussed fully, respecting each citation. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

Assessment

**Citation No. 9967919**

It has been established that this S&S violation of 30 C.F.R. § 70.100(a) was reasonably likely to cause an illness that would be permanently disabling, that fourteen persons were affected, that it was due to Brooks Run's low negligence, and that it was timely abated. Applying the civil penalty criteria, I find that a penalty of \$2,000.00 is appropriate.

**Citation No. 9967921**

It has been established that this S&S violation of 30 C.F.R. § 70.100(a) was reasonably likely to cause an illness that would be permanently disabling, that seven persons were affected, that it was due to Brooks Run's low negligence, and that it was timely abated. Applying the civil penalty criteria, I find that a penalty of \$1,500.00 is appropriate.

**Citation No. 9967760**

It has been established that this S&S violation of 30 C.F.R. § 70.100(a) was reasonably likely to cause an illness that would be permanently disabling, that seven persons were affected, that it was due to Brooks Run's moderate negligence, and that it was timely abated. Applying the civil penalty criteria, I find that a penalty of \$2,000.00 is appropriate.


**Citation No. 9967966**

It has been established that this S&S violation of 30 C.F.R. § 70.100(a) was highly likely to cause an illness that would be permanently disabling, that eight persons were affected, that it was due to Brooks Run's moderate negligence, and that it was timely abated. Applying the six civil penalty criteria, I find that a penalty of \$2,200.00 is appropriate.

**ORDER**

Accordingly, it is **ORDERED** that the Secretary's Motion for Summary Decision is **GRANTED IN PART** and **DENIED IN PART**, that the Respondent's Motion for Summary Decision is **GRANTED IN PART** and **DENIED IN PART**, and that the Secretary **MODIFY** the Citations as follows: **Citation No. 9967919** to reduce the gravity to "injury or illness

reasonably likely," to increase the persons affected to "14," and to reduce the negligence to "low;" **Citation No. 9967921** to increase the persons affected to "7" and reduce the negligence to "low;" **Citation No. 9967760** to reduce the gravity to "injury or illness reasonably likely" and increase the persons affected to "7;" and **Citation No. 9967966** to increase the gravity to "injury or illness highly likely" and the persons affected to "8." It is further **ORDERED** that Respondent **PAY** a civil penalty of \$7,700.00, within 30 days of this Order. Accordingly, these cases are **DISMISSED**.

  
Jacqueline R. Bulluck  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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April 10, 2009

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

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 2008-287-M  
A.C. No. 14-01477-136068

Docket No. CENT 2009-061-M  
A.C. No. 14-01477-165617-01

Plant 1

Docket No. CENT 2008-334-M  
A.C. No. 14-01478-139550

v.

Docket No. CENT 2008-574-M  
A.C. No. 14-01478-150353

Plant 2

Docket No. CENT 2008-285-M  
A.C. No. 14-01597-136070

NELSON QUARRIES, INC.,  
Respondent

Docket No. CENT 2008-487-M  
A.C. No. 14-01597-143393

Docket No. CENT 2008-564-M  
A.C. No. 14-01597-146991

Plant 4

**DECISION**

Appearances: Ronald S. Goldade and Hillary A. Smith, Conference & Litigation  
Representatives, Mine Safety and Health Administration, Denver,  
Colorado, and Jennifer A. Casey, Esq., Office of the Solicitor, U.S.  
Department of Labor, Denver, Colorado, for Petitioner;  
Paul M. Nelson, Nelson Quarries Inc., Jasper, Missouri, for Respondent.

Before: Judge Manning



These cases are before me on seven petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Nelson Quarries, Inc., 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 ten citations issued by MSHA under section 104(a) of the Mine Act at three plants operated by Nelson Quarries. The parties presented testimony and documentary evidence at the hearing held in Topeka, Kansas.

At all pertinent times, Nelson Quarries operated quarries in southeastern Kansas. The quarries mine limestone and then crush and screen the material for sale. The operations are portable and do not necessarily operate twelve months a year.

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

### **A. CENT 2008-287-M; Plant 1**

On July 24, 2007, former MSHA Inspector Chrystal Dye issued Citation No. 6421431 alleging a violation of section 56.14131(a). (Tr. 18; Ex. G-1). The citation alleges that the driver of the Dresser Haulpak truck was not wearing his seat belt when he drove it from the parking space to the north side of the plant. Inspector Dye determined that an injury was reasonably likely and that any injury would likely be fatal. She determined that the violation was significant and substantial ("S&S") and that the negligence was moderate. The safety standard provides that "[s]eat belts shall be provided and worn in haulage trucks." The Secretary proposes a penalty of \$975.00 for this citation.

Inspector Dye testified that when she asked James Shaw, the driver of the truck, to open the door, he was not wearing his seat belt. (Tr. 19). He drove about a quarter of a mile from the parking lot to where she was standing without wearing a seat belt. (Tr. 27). She determined that the violation was S&S because Shaw would be hauling rock with the truck later in the shift. The road from the plant to the pit contained inclines and declines as well as other traffic. There had also been a lot of rain in eastern Kansas in the summer of 2007. She testified that if Shaw were to hit bad road without wearing a seat belt, he could have been seriously injured. (Tr. 20-21). She testified that MSHA's program policy manual and a history of fatal accidents support her S&S finding. (Tr. 22-25; Exs. G-2, G-3). Because Nelson Quarries has a policy that requires equipment operators to wear seat belts, she determined that the negligence was moderate. (Tr. 25).

There was no dispute that Shaw was not wearing a seat belt. I find that the Secretary established a violation but that, under the particular facts of this case, the violation was not S&S. 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).

The truck had been parked all morning because it had been tagged out for repairs. (Tr. 31). At the request of Inspector Dye, Shaw drove the truck from the parking area to the area where she was inspecting trucks for the sole purpose of permitting her to inspect it. Patrick Clift, a foreman for Nelson Quarries, testified that he flagged Shaw down and asked him to temporarily stop driving his own truck so he could drive the subject haul truck to Inspector Dye. (Tr. 37). The ground was level in that area. (Tr. 32). When Inspector Dye later inspected the haul truck that Shaw was actually driving that day, he was wearing his seat belt. Although Clift told the inspector that the subject haul truck would be used later that day, it was actually taken back to the parking lot for further repairs. (Tr. 33). It was never Clift's intention that Shaw would change trucks that day. Shaw continued to drive the truck he had been assigned at the start of the shift. (Tr. 37-38). Clift was surprised when he learned that Shaw was not wearing a seat belt because he is a good employee who always wears his seat belt.

Shaw testified that he normally wears his seat belt. (Tr. 43). He also testified that when he was asked to drive the subject haul truck to Inspector Dye, he parked the truck he was driving, got in the other truck and drove it about 50 feet to the inspector. This was not an ordinary event and he forgot to put on his seat belt. (Tr. 27, 43-44). He left the truck he had been operating with the motor running because he was going to get back in it to continue hauling rock that day.

I agree with the Secretary that, under ordinary circumstances, the failure of a haul truck driver to wear a seat belt creates a serious safety hazard. In this instance, however, the truck was driven a short distance, up to a quarter mile, over level terrain. Shaw was not going to be hauling rock with that truck because he was only driving it to the inspector. I credit the testimony of Clift and Shaw on this citation. It was not reasonably likely that Shaw would be involved in an accident that would result in a serious injury. The violation was not S&S. I also find that the operator's negligence was low. The evidence establishes that Shaw normally wears a seat belt and that he forgot in this instance because he was asked to perform an unusual task. A penalty of \$100.00 is appropriate for this citation.

**B. CENT 2009-061-M; Plant 1**

At the conclusion of the hearing, the parties agreed to settle the two citations at issue in this docket. (Tr. 354-55). This docket involves Citation Nos. 6321528 and 6321529. Respondent agreed to withdraw its contest of Citation No. 6321528 and pay the proposed penalty. The Secretary agrees to modify Citation No. 6321529 to delete the S&S determination. Respondent agrees to pay the proposed penalty for that citation as well. The settlement is approved.

**C. CENT 2008-334-M; Plant 2**

1. On September 5, 2007, MSHA Melvin Lapin issued Citation No. 6421143 alleging a violation of section 56.14211(b). (Ex. G-6). The citation states that two employees were working on the Dresser Haulpak truck at the ready line with the box in the raised position. The box was not blocked against motion to prevent the box from falling and the wheels of the truck were not blocked with a chock. One employee was under the box on the truck's frame adding hydraulic oil to the tank and the other employee was under the truck. Inspector Lapin determined that an injury was highly likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that "[p]ersons shall not work on top of, under, or work from a raised component of mobile equipment until the component has been blocked or mechanically secured to prevent accidental lowering." The standard also requires that the equipment "be blocked or secured to prevent rolling." The Secretary proposes a penalty of \$3,700.00 for this citation.

Inspector Lapin testified that he began a regular inspection of Plant 2 on September 5 and that he was accompanied by his supervisor, Joe Steichen. After they stopped at the scale house to introduce themselves, they started to drive to the plant to meet up with Jeff Benedict, the lead man. On the way to the plant, they saw a dump truck with its box raised. They decided to see why the box was raised. The "box" is the truck bed that carries rock. As they got closer, they saw a miner between the raised box and the frame of the truck. It looked like he was pouring oil into the hydraulic tank for the truck. There was another miner under the truck next to the right wheels. Lapin got out of the MSHA vehicle to see if there was any kind of support for the box. (Tr. 82). When he saw that the box was not supported or blocked against motion, he issued an oral imminent danger order and told the miner under the box to move away from the truck. (Ex. G-5). He subsequently learned that the miner under the box was Billy Doolittle and the miner under the truck was Nate Schmidt. When Doolittle did not remove himself, Lapin put his hand on Doolittle's shoulder and again ordered him to get out from under the box. (Tr. 83). Doolittle was kneeling on the truck's framework just behind the cab. Lapin testified that Doolittle was in a position on the frame that, if the box were to fall, it would fall directly on him. Lapin assumed that the hydraulic system had a leak because new oil does not normally have to be added to a closed system. (Tr. 84, 105). Lapin also noticed that the wheels of the truck were not chocked.

Lapin issued two citations to Nelson Quarries as a direct result of the practice he observed. Citation No. 6421143 alleges that the box was not blocked against motion and the wheels were not chocked to prevent it from rolling. Inspector Lapin testified that he was concerned for Doolittle's life because he was working directly under the box of the truck. He was concerned about Schmidt because he was working under the truck just inches from the right drive wheel. The truck was manufactured with a hole on each side of the frame supporting the box and on each side of a frame on the truck body. When the box is in a raised position, the holes line up so that a "safety bar" or "retaining pins" can be inserted. (Tr. 92-93, 108; Exs. G-7, G-11). Inspector Lapin testified that if a safety bar had been inserted in these holes, the box would have been adequately "blocked or mechanically secured to prevent accidental lowering" in conformance with the safety standard. (Tr. 105-06). Although there apparently were safety bars at the plant, Jeff Benedict could not locate one on September 5. (Tr. 93-94). The shop manual for the dump truck specifically states: "Do not allow anyone beneath the [dump box] unless 'body-up' retaining cables or pins are installed." (Ex. G-7 p. 3). The operator's manual for the truck provides instructions on the storage and use of "body-up pins" and states: "Do not work under raised body unless body safety cables, props, or pins are in place to hold the body in the up position." (G-8, G-9).

Inspector Lapin testified that Doolittle could have been fatally injured. He based this conclusion on a number of factors including MSHA Fatalgrams he has reviewed. (Tr. 100-; Ex. G-12). He admitted, however, that he knows of no fatal accidents caused by a falling box on a Dresser haul truck. (Tr. 139). The inspector believed that the bed of the truck could have fallen because hydraulic systems can fail. (Tr. 144). In addition, a gust of wind could have come up and moved the truck because the raised box would act as a sail and the wheels were not chocked. Although the parking brake was apparently set, the wheels were not against a berm.

As discussed in more detail below, Inspector Lapin has extensive experience with mobile equipment. He testified that the box on a dump truck can unexpectedly come down. (Tr. 103). The truck was not locked and the controls for the box were near the door. Someone could enter the cab of the truck and accidentally knock the controls for the box. The inspector determined that it was highly likely that Doolittle would be injured given his position on the frame of the truck under the raised box. (Tr. 115-120). Supervisory Inspector Steichen agreed with Inspector Lapin's characterization of the violation. (Tr. 150).

Paul Nelson testified about the design of the Dresser haul truck. He said that it uses an electro-hydraulic system that operates a pilot system to control the hydraulics on the truck. (Tr. 215-17). An electric solenoid is used to engage a small hydraulic system, called the pilot system, that actually operates the main hydraulic system. The advantage is that it is easier to operate and it eliminates much of the "mechanical linkage that can wear out and cause problems." (Tr. 216). This system provides a greater measure of safety because, if you lose pilot pressure, the oil is trapped in the hydraulic cylinders which holds the bed up. (Tr. 217; Ex. R-334-D8). The only way for the bed to come down is if you have a fault in the system such as a blown O-ring or hydraulic line. Nelson testified that it is very unlikely for the bed to come down from a raised

position on this particular model of Dresser truck. (Tr. 218). He said that the safety pins should be installed, but the system used on this type of Dresser truck is very reliable and an accident was unlikely. Nelson also testified that the bed of the truck is designed so that, as the bed is raised, its center of gravity is almost vertical with the hinge for the bed with the result that very little force is needed to hold the bed up. It is close to being balanced. (Tr. 220). This fact makes it even more unlikely that the bed will come down unexpectedly. Nelson also testified that it is his understanding that the hydraulic tank is on the side of the truck frame and that the tank for the transmission fluid was between the frame members. Thus, Doolittle may have been adding transmission fluid.

I find that the Secretary established an S&S violation of the safety standard. Inspector Lapin is a journeyman heavy equipment mechanic. (Tr. 103). He worked for 29 years for a sand and gravel company in Oregon. During much of that time he worked in the shop, first as a trainee, then as a lead man, and finally as a foreman. (Tr. 76-78). Lapin performed maintenance on a wide variety of mining equipment including front-end loaders, bulldozers, dump trucks, and a dragline. He was subsequently a production foreman at the quarry. I find that Inspector Lapin was a very credible witness on matters relating to heavy equipment and I give his testimony great weight. There is no doubt that the Dresser Haulpak truck used by Nelson Quarries is well designed, as testified to by Mr. Nelson. That design, however, does not eliminate the hazard of working under the raised bed of the truck. As the Commission has stated, the Secretary is not required to prove that it is more probable than not that the cited condition will result in an accident. Her burden is to establish that it is reasonably likely that the *hazard contributed to* by the violation will result in an injury of a reasonably serious nature. Based on the evidence presented by the Secretary, it is clear that the violation contributed to a serious risk that the bed of the truck would fall and kill Mr. Doolittle. Hydraulic and other systems on mining equipment can fail in unexpected ways and the cited safety standard was written to protect miners in such instances.

I also find that the negligence of the operator was moderate. It is clear that it is company policy that miners block the raised bed of dump trucks before performing maintenance on them. In addition, Doolittle's negligence cannot be directly imputed to the company. Nevertheless, a safety bar could not be located in the vicinity of the ready line, even after Benedict looked. That indicates that, although Nelson Quarries understands the importance of blocking raised equipment, it does not always give its employees the tools to protect themselves. A penalty of \$3,700.00 is appropriate.

2. On September 5, 2007, Inspector Lapin issued Citation No. 6421144 alleging a violation of section 56.18006. (Ex. G-13). The citation alleges that the company failed to indoctrinate a newly hired employee (Mr. Doolittle) in safety rules and safe work procedures. Based on discussions with Doolittle, the inspector determined that Doolittle was unaware of the requirement to block the box after it was raised. Inspector Lapin determined that an injury was highly likely and that any injury could reasonably be expected to be fatal. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that

"[n]ew employees shall be indoctrinated in safety rules and safe work procedures." The Secretary proposes a penalty of \$3,200.00 for this citation.

Inspector Lapin testified that when he asked Billy Doolittle about the use of a safety bar, Doolittle acted as if he did not know what a safety bar was. (Tr. 94-96). When the inspector showed Doolittle where the safety bar would be inserted, he still did not act as if he knew what the inspector was talking about. The inspector testified that he did not use the term "body-up pin" with Doolittle, but that when he showed Doolittle the holes for the safety bar or pins, Doolittle did not then say anything to indicate that he knew what the holes were for. (Tr. 108-09, 142). Doolittle had worked at the plant for a little less than two weeks. (Tr. 128). He told the inspector that he had received a few hours of training at one of the company's other plants. Based on his interview with Doolittle, Lapin testified that he did not believe that Doolittle had been adequately trained on the task of blocking the box and truck against motion. (Tr. 96, 124-25). If Doolittle had been indoctrinated in safety rules and safe work practices, he would have known that he should not work under the raised bed of the truck without first blocking it against motion. (Tr. 126).

Inspector Lapin also testified that he looked at the company's training records. In addition to other records, he saw training records for Doolittle and Schmidt. (Tr. 129). Although Doolittle may have received new miner training, Lapin believed that such training was inadequate since he did not know how to block the bed of the truck against motion. *Id.* The inspector determined that a serious accident was highly likely because inadequate training can result in serious accidents. (Tr. 130, 132-33). Steichen testified that he agrees with this assessment. (Tr. 152). Steichen testified that when he asked Doolittle if he knew how to block the box, he replied "no." (Tr. 151; Ex. G-15).

Patrick Clift testified that he provided Doolittle and Schmidt with the MSHA required training. (Tr. 155-56). In particular, Clift showed them the safety features on a Dresser dump truck, including the safety pins, and instructed them on maintenance procedures. Clift testified that he made sure that they understood what he was telling them by asking them questions. (Tr. 157). Clift said that he stressed the use of safety pins with these two miners during his training. *Id.* He testified that he showed Doolittle where the pins were to be inserted to support the bed and explained that they must be used when the bed is in the air. (Tr. 167-68). Clift signed new miner and task training records for these two miners. (Tr. 158; Ex. R-334-D4, D5, D6 & D7). Clift stated that he has been training miners for about four years. None of the training that Clift performed occurred at Plant 2. Nelson Quarries uses similar Dresser and Caterpillar trucks at its plants. Clift testified that Doolittle and Schmidt would have been given additional training when they started working at Plant 2.

Nathan Schmidt is a truck driver at Plant 2. He testified that he was given training by Patrick Clift along with Mr. Doolittle. He testified that Clift showed them the safety pins and told them that they must be used when the bed is raised. (Tr. 175). Schmidt said that he did not know that Doolittle had not pinned the truck bed on September 5. (Tr. 177). Schmidt also

testified that he knew that the truck bed should be blocked against motion before anyone works under it. (Tr. 180). He also testified that Darick Johnson, a loader operator who has worked for Nelson Quarries since 2000, was in the same area putting hydraulic fluid into his loader. (Tr. 182). Mr. Johnson testified that he was in the oil trailer when the MSHA inspectors arrived. (Tr. 188). Johnson also testified that on another occasion, prior to this inspection, he helped Doolittle install safety pins for the bed of his truck. (Tr. 193, 207). He did not know why safety pins could not be located when the MSHA inspectors were present. (Tr. 207).<sup>1</sup>

There have been very few decisions interpreting the cited safety standard. In *Weathers Crushing, Inc.*, 22 FMSHRC 1032 (Aug. 2000) (ALJ), a miner who was hired to operate a rock crusher was killed a little more than two hours after he had begun working at the plant. The mine operator only provided on-the-job training for about thirty minutes before he was told to operate the crusher. He was apparently instructed to use a sledge hammer to break up any rock that obstructed the crusher. MSHA determined that the head of the sledge hit the miner in the face as he was attempting to dislodge a rock. The administrative law judge held that the mine operator violated the safety standard because it merely "familiarized [the miner] with unsafe work procedures, after which he was essentially cast adrift." 22 FMSHRC at 1039.

In the present case, Inspector Lapin issued the citation because it did not appear to him that Doolittle knew that he should block the bed of the truck against motion and chock the tires before beginning work. The inspector was especially concerned because, when he showed Doolittle the holes at the back of the truck where a safety bar or pin could be inserted, Doolittle did not seem to know what he was talking about. This conduct indicated to the inspector that he had not been indoctrinated in safety rules and safe work procedures.

Patrick Clift testified that Doolittle took the required new miner training and that he was also given task training on trucks. The records corroborate this testimony. (Ex. R-334-D5 & D7). This training was completed on August 27, 2007. Doolittle was task-trained on 35 ton Caterpillar trucks, 35 ton Dresser trucks, and 50 ton Dresser trucks. The Secretary did not establish that the company's training program violated the provisions of 30 C.F.R. Part 46. Clift testified that he instructed Doolittle on the use of safety pins when performing maintenance on dump trucks. (Tr. 157). At the hearing, the Secretary questioned the adequacy of the training because it was performed at a different plant. Although I would tend to agree that some training would by necessity need to be at the plant where a new miner would be working, it escapes me how training on the safety features and procedures of a truck would be different at another plant. The Dresser trucks were the same in all relevant respects.

Does the Secretary establish a violation of this safety standard by introducing evidence to show that a new miner did not appear to know how to safely perform the task he was assigned? Inspector Lapin testified that Doolittle did not seem to know that the bed should have been

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<sup>1</sup> Mr. Doolittle no longer works for Nelson Quarries and he did not testify at the hearing. Doolittle was replaced by someone else because he was incarcerated. (Tr. 162).

blocked against motion. Does this fact establish that Doolittle was not properly instructed on safety rules and safe work procedures? Inspector Steichin testified that Doolittle told him that he did not know how to block the box. (Tr. 151). In the other cases involving this standard, it was quite clear that the new miner in question had not been trained.<sup>2</sup> In this case, on the other hand, there is evidence that Doolittle had been trained on the use of safety pins or bars, but that he failed to follow correct safety procedures. Many violations under the Mine Act are a direct result of a miner failing to follow safe procedures when performing a task. Clearly, a citation alleging a violation of training rules would not be appropriate whenever a newly hired miner fails to follow an MSHA standard or a company safety rule.

Although this citation presents a very close issue, I find that the Secretary did not establish a violation. I credit the testimony of Patrick Clift. I find that the testimony of Mr. Clift rebuts the Secretary's *prima facie* case. His testimony is corroborated by the training records and the testimony of Schmidt. Doolittle had been properly trained but he was not an attentive or safety-conscious employee because he failed to follow the company's safety procedures when performing maintenance on the Dresser truck. The evidence shows that he had been indoctrinated in these safety procedures but he chose to ignore them. This citation is vacated.

#### **D. CENT 2008-574-M; Plant 2**

On February 2, 2008, MSHA Inspector James Timmons issued Citation No. 6421756 alleging a violation of section 56.9300(a). (Ex. G-18). The citation alleges that there were no berms present on the east or west side of the ramp entering the pit. It states that there was a drop-off of about 5 feet down on each side of the roadway and there was evidence that the road had been used in the cited condition. Inspector Timmons determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. He determined that the violation was 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 in equipment." The Secretary proposes a penalty of \$263.00 for this citation.

Inspector Timmons testified that he observed that there were no berms on the east and west side of the ramp entering the pit. (Tr. 291). He stated that there was a five-foot drop-off from the edge of the roadway to a pond below. Using a stick he measured the water to be about three feet deep at that point. (Tr. 292). He believed that the drop-off was sufficient to overturn a vehicle. He determined that the violation was S&S because it was the primary roadway between the pit and the plant. Large trucks and other vehicles use this roadway on a regular basis. (Tr.

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<sup>2</sup> In *Knock's Building Supplies*, 20 FMSHRC 535, 543 (May 1998) (ALJ), a truck driver and his foreman, who were both new employees, were not aware of the applicable MSHA standards and it was clear that no training on safety rules and safe work procedures had been given. In *Root Neal & Company*, 22 FMSHRC 94, 105 (Jan. 2000) (ALJ), it was clear that the miner was asked to perform an installation and repair task that he had not been trained to do.



300). The road was about 20 feet wide at the cited location. There were tire tracks near the edge of the roadway. (Ex. G-19). The inspector testified that if a large piece of equipment were to go off the side of the road into the water, it is reasonably likely that the results would be fatal. (Tr. 294, 296; Ex. G-19). The unbermed area along the roadway was about 25 to 30 feet long. (Tr. 299).

Inspector Timmons marked the negligence as moderate rather than high because Benedict told him that a new drainage culvert had been installed under the road in that area the day before and the berm had not yet been replaced. (Tr. 295, 302). The inspector testified that berms should have been constructed as soon as feasible during the road reconstruction. (Tr. 319).

Patrick Clift testified that the tire tracks that the inspector observed were likely from a loader that was used to spread out additional base rock along the road. (Tr. 329). New rock base would have been applied after the culvert was cleaned out. Clift also testified that the drop-off was not as great as the inspector believed it to be. (Tr. 332-34). He also said that, because the roadway was level in the cited area, it had not been bermed in the past. (Tr. 335). Berms had been constructed on the ramp itself, but once the road flattened out near the culvert, berms had never been present. (Tr. 341).

I find that the Secretary established an S&S violation of the safety standard. Although it is not entirely clear how far down the ramp the berm had previously been constructed, I find that berms were required at the cited area. The drop-off was significant and it was right at the bottom of the ramp where the road begins to curve. (Ex. R-574-D1). The Secretary established that the grade and depth of the drop-off was sufficient to cause a vehicle to overturn or endanger persons in mobile equipment. The equipment operator could be seriously injured or killed. Assuming continued mining operations, it was reasonably likely that the hazard contributed to would result in an injury of a reasonably serious nature. I credit the Secretary's evidence on this citation. A penalty of \$263.00 is appropriate.

#### **E. CENT 2008-285-M; Plant 4**

On November 15, 2007, Inspector Timmons issued Citation No. 6421702 alleging a violation of section 56.14131(a). (Tr. 53; Ex. G-4). The citation alleges that the operator of the 773 Caterpillar haul truck was observed operating the truck at the dump ramp without wearing his seat belt. The operator told the inspector that he had been trained to wear the seat belt, but that he forgot to put it on. Inspector Timmons determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that "[s]eat belts shall be provided and worn in haulage trucks." The Secretary proposes a penalty of \$308.00 for this citation.

Inspector James Timmons testified that Earl Priest, the operator of the Caterpillar 773 haul truck, was not wearing his seat belt. (Tr. 53). Timmons testified that he stopped Priest as

he was coming down the ramp from the crusher because he wanted to ask him where the foreman was. Priest was not wearing a seat belt. Priest told him that he got out of the truck for a moment while he was at the crusher and he forgot to put it back on when he returned to the truck. (Tr. 62, 66). Inspector Timmons determined that the violation was S&S because there was other mobile equipment in the area, the driver was coming down a ramp from the crusher, and he was heading toward the pit to pick up more rock. (Tr. 55). The inspector testified that, without a seat belt, Priest could have been seriously injured or killed in the event of an accident. The inspector determined that the operator's negligence was moderate because the company has a seat belt policy. As far as he knows, the two seat belt citations at issue in these cases are the only seat belt citations ever issued to Nelson Quarries.

Priest testified that he normally wears his seat belt because the floor of the pit is very rough and he would get "knocked around pretty good" if he were not wearing his seat belt. (Tr. 65). He stated that he was hauling rock from the pit to the crusher on November 15. Priest acknowledged that Nelson Quarries has a policy requiring that seat belts be worn at all times. (Tr. 69; Ex. R-285-2). He was not disciplined for failing to wear a seat belt.

I find that the Secretary established an S&S violation of the safety standard. There is no dispute that Priest was not wearing his seat belt when he drove down the ramp from the crusher. The Secretary established that it was reasonably likely that the hazard contributed to by the violation would result in an injury of a reasonably serious nature. Priest dumped the rock at the crusher and proceeded down ramp on the way to the pit. Had he not been stopped by the MSHA inspector, he would have driven into the pit. Priest acknowledged that the floor of the pit was rough and that a seat belt was necessary to prevent injury. I find that the company's negligence was slightly less than moderate because the company had a seat belt policy. Priest's negligence should not be imputed to the company because he was an hourly worker. A penalty of \$275.00 is appropriate.

**F. CENT 2008-487-M; Plant 4**

At the beginning of the hearing, Nelson Quarries agreed to withdraw its contest of the citations at issue in this docket. (Tr. 10-11). The settlement is approved.

**G. CENT 2008-564-M; Plant 4**

On November 19, 2007, Inspector Timmons issued Citation No. 6421704 alleging a violation of section 62.120. (Ex. G-16). The citation alleges that the results of a full shift sample taken on that date showed that the driver of the Caterpillar haul truck received an action level noise dose of 88 percent. The citation noted that the noise level exceeded the action level dose of 50 percent of the personal exposure level (PEL). The miner was not enrolled in a hearing conservation program. Inspector Timmons determined that an injury was unlikely but that any injury would likely to be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The health standard provides that "[i]f during any work

shift a miner's noise exposure equals or exceeds the action level the mine operator must enroll the miner in a hearing conservation program that complies with § 62.150 of this part." The Secretary proposes a penalty of \$100.00 for this citation.

Inspector Timmons issued the citation after conducting a noise survey at the quarry. He issued the citation because he believed that the noise level exceeded the action level for the driver of the Caterpillar halt truck, Rick White. (Tr. 234). If a miner exceeds the action level, the mine operator must enroll him in a hearing conservation program that complies with section 62.150. The exposure level met the action level threshold because it was above 80 dBA but was below the PEL of 90 dBA. (Tr. 235). The dosimeter indicated that the driver had been exposed to a time-weighted average sound level of 88.5 dBA. The term "action level" is defined as "[a]n 8-hour time-weighted average sound level (TWA) of 85 dBA, or equivalently a dose of 50%, integrating all sound levels from 80 dBA to at least 130 dBA." (Section 62.101). The operator of the truck was hauling rock and the window on the driver's side was open. (Tr. 255). Other trucks were being operated on the same day, but only Rick White was found to be above the action level for noise. (Tr. 261, 263, Ex. R-564-D1).

At the hearing, Inspector Timmons described how he took the measurement using a dosimeter. (Tr. 238-46). He followed standard MSHA procedures, except he placed the noise microphone in a different location than is prescribed in MSHA's "Metal and Nonmetal Health Inspections Procedures Handbook." (Ex. G-17). The Handbook instructs inspectors to attach the mike to clothing on the miner's shoulder that would normally be between the principal noise source and the miner's ear. *Id.* at 2-3. The Handbook states that, based on the recommendations of the manufacturer, the mike should be "located at the top of the shoulder midway between the neck and end of the shoulder, with the microphone diaphragm pointing in a vertical upward direction." *Id.* at 2. Inspector Timmons attached the mike to the miner's collar in a position that was almost vertical. (Tr. 241). Inspector Timmons testified that Richard McCutcheon, industrial hygienist for the Rocky Mountain District, advised him that it would be appropriate to attach the mike to the collar. (Tr. 241-42, 252). When the microphone is attached to clothing on the miner's shoulder when he is operating mobile equipment, it could come off or the wind screen on the mike could fall off when the miner puts on his seat belt. (Tr. 243). McCutcheon told him that there would be a minimal difference in the dBA reading if the microphone were placed on the miner's collar.

Patrick Clift testified that, after a dosimeter was placed on Rick White and he had been driving around for a while, Inspector Timmons asked him to stop so that the dosimeter could be checked. Clift was with the inspector at that time. Clift testified that he became very concerned when he saw where the mike was placed. He said that Mr. White is a boisterous, talkative man with a full beard. (Tr. 269-70, 280). Clift said that the microphone was rubbing against his beard. Clift testified that when the inspector said that it looked like the driver might be reaching the action level, Clift raised these concerns with the inspector. (Tr. 270). Clift asked Rick White to talk. According to Clift, the dosimeter shot up from 75 into the 115 to 120 range because the mike was right on his neck. It went back down when he stopped talking. Clift told the inspector

that the placement of the mike against his neck and beard was throwing off the results. (Tr. 271-72, 281-82). Clift also testified that the Caterpillar truck that Rick White was driving was a relatively new truck. (Tr. 270). Another similar Caterpillar truck was operating that day doing work that was noisier, but the dosimeter on the driver of that truck did not register noise that was close to the action level. (Tr. 272-74). The other truck drivers at the plant did not have beards. (Tr. 277).

I find that this citation should be vacated. I credit the testimony of Mr. Clift that the microphone for the dosimeter was rubbing against Rick White's beard and neck. Inspector Timmons placed the microphone so close to his neck that his beard was rubbing against it. The placement of the microphone on Mr. White immediately adjacent to his neck raises serious questions as to the validity of the sample. The Handbook specifically requires that the microphone be placed midway between the neck and the end of the shoulder. The Handbook also states that if "unusual conditions arise during the sampling period then the sample may have to be voided." (Ex. G-17 p. 3). Although Inspector Timmons' practice of placing dosimeter microphones on the collar of miners he is testing for noise exposure may be acceptable in other situations, I find that it was not appropriate when he tested Mr. White. The citation is vacated. Nelson Quarries is, of course, required to comply with the provisions of section 62.110.

## II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. Seven citations were issued at Plant 1 on July 24, 2007, in addition to the citation at issue in this case. (Ex. G-26). At Plant 2, 17 citations were issued on September 5, 2007, in addition to the citations at issue in this case and 7 citations were issued in 2005. *Id.* Plant 4 had a history of about 22 paid violations in the two years prior to November 19, 2007. *Id.* Nelson Quarries is a rather small operator and its quarries are small. All of the violations were abated in good faith. Nelson Quarries did not establish that the penalties assessed will have an adverse effect on its ability to continue in business. My gravity and negligence findings are set forth above. If I did not discuss gravity or negligence with respect to a citation, then the inspector's determinations are affirmed. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

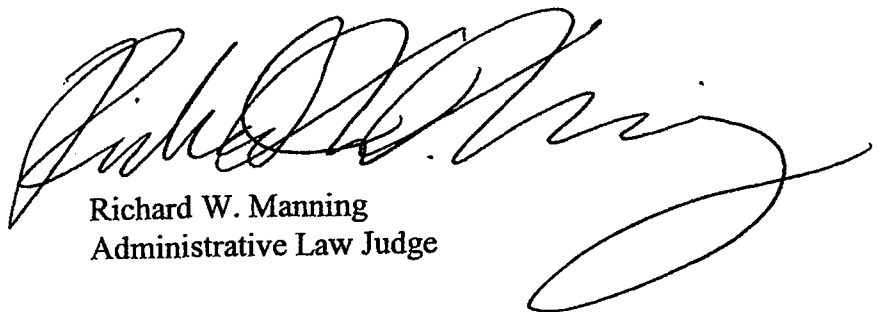
## III. ORDER

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

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
CENT 2008-285-M, Plant 4		
6421702	56.14131(a)	\$275.00

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
CENT 2008-287-M, Plant 1		
6421431	56.14131(a)	\$100.00
CENT 2008-334-M, Plant 2		
6421143	56.14211(b)	3,700.00
6421144	56.18006	Vacated
CENT 2008-487-M, Plant 4		
6421645	50.30(a)	100.00
6421646	50.30(a)	100.00
CENT 2008-564-M, Plant 4		
6421704	62.120	Vacated
CENT 2008-574-M, Plant 2		
6421756	56.9300(a)	263.00
CENT 2009-061-M, Plant 1		
6321528	56.12032	308.00
6321529	56.20003(a)	460.00
TOTAL PENALTY		\$5,306.00

Accordingly, the citations contested in these cases are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above and Nelson Quarries, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$5,306.00 within 40 days of the date of this decision. Upon payment of the penalty, these proceedings are **DISMISSED**. Payment shall be sent to: U.S. Department of Labor, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.



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 20001-2021  
TELEPHONE: 202-434-9964 / FAX: 202-434-9949

April 2, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-122
Petitioner	:	A.C. No. 15-18839-128465
v.	:	
	:	
EXCEL MINING, LLC,	:	
Respondent	:	Van Lear Mine

**DECISION**

Appearances: Thomas Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;  
Noelle Holladay True, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, for the Respondent.

Before: Judge Weisberger

**Statement of the Case**

This case is before me based upon a Petition for a Civil Penalty filed by the Secretary of Labor, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 ("The Act"), alleging that Excel Mining, LLC ("Excel"), violated 30 C.F.R. § 75.517, and seeking the imposition of a civil penalty for this violation.

On August 2, 2007, Mine Safety and Health Administration (MSHA), inspector David Stepp, inspected Excel's Van Lear Mine, an underground coal mine. In the course of his examination of a trailing cable of a roof bolter, he observed a damaged portion of the outer insulation that was approximately three inches long, and a half to one inch wide. Three inner insulated wires carrying 575 volts could be seen, but there was not any visible damage. Stepp issued a citation alleging a violation of Section 75.517, *supra*, which, as pertinent, provides as follows: "power wires and cables ... shall be insulated adequately and fully protected."

A hearing was held in the this matter on November 13, 2008. On February 23, 2009, the Secretary filed Proposed Findings of Fact, Brief and Argument, and Excel filed a Post Hearing Brief. On March 3, 2009 Excel filed a Reply Brief.

**Findings of Fact and Discussion**

At the hearing, the parties filed a set of ten stipulations. Respondent, *inter alia*, stipulated to a violation of Section 517, *supra*. Thus, considering this stipulation and the record in this case, I find that Excel did violate Section 517, *supra*.

The citation at bar was issued as being significant and substantial. In general, Commission law regarding significant and substantial is well established and is as follows:

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

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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.

In *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

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.*, 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 Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).



The record clearly establishes, as set forth above, that the violative condition of the damaged outer insulation of the cable exposed three inner insulated wires carrying 575 volts, which contributed to the hazard of electrical shock or injury. Accordingly, I find that the first and second factors set forth in *Mathies, supra*, have been met. The critical issue for resolution is whether the third element of *Mathies, supra*, has been established i.e., the reasonable likelihood of an injury producing event.

Excel argues, *inter alia*, that, as conceded by Stepp, a person would not receive any electrical shock when all the inner conductors are still insulated. In this connection, Excel cites Stepp's testimony that he did not observe any damage to the inner conductors. Excel also cites the testimony of Michael Hurley, Excel's shift foreman, that with continued normal mining operations in the entry at issue, the damaged portion of the cable would not have been handled.

In *U.S. Steel*, 6 FMSHRC 1573 (July 1984), the operator challenged the decision of the judge that a gash in the outer insulating jacket of a trailing cable in addition to being a violation of Section 517, *supra*, was also significant and substantial. The Commission, in affirming the decision of the judge with regard to significant and substantial held as follows:

The administrative law judge considered those mining conditions to which the damaged cable predictably would be exposed. He found that both the outer and inner layers of insulation provided important protection against electrical shock. These findings are fully supported by the testimony of the MSHA inspector and the operator's witness, each of whom stated that the mining environment is harsh and that damage to the outer layer of insulation weakened the protection afforded by the inner layer.

*U.S. Steel, supra*, at 1575.

In *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1284-1286 (December 10, 1998), an issue presented to the Commission was whether a violation of 30 C.F.R. § 75.604(b)<sup>1</sup> i.e., that splices on a cable were not "effectively insulated" to exclude moisture, was significant and substantial. The operator therein argued that the third element of *Mathies, supra*, was not established by the Secretary, since there were not any exposed leads, and that the Secretary failed to prove "that anyone was or would be exposed to electrical current by handling the cable." 20 FMSHRC, *supra*, at 1285. It is significant that in rejecting this argument, the Commission relied on *U.S. Steel, supra*, and analyzed the holding in *U.S. Steel, supra*, as follows: "... In *U.S. Steel Mining Co.*, [citations omitted] we held that four inches of exposed wire constituted an S&S violation, despite lack of direct evidence that exposed wires were not insulated." 20 FMSHRC, *supra*, at 1286. The Commission also cited *U.S. Steel, supra*, as "recognizing that a tear in the outer jacket of a cable significantly compromises the cable's protective function." (Id.) (emphasis added)

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<sup>1</sup>Section 75.604(b) requires that permanent splices in trailing the cables must be "[E]ffectively insulated and sealed so as to exclude moisture;"

The Commission, in applying *U.S. Steel, supra*, to the evidence of record, cited the testimony of the inspector who “emphasized the danger of these situations [his inability to see bare conductors inside the open splice of the cable], stating that ‘there’s no way of knowing [whether there are holes in the insulation surrounding the wire within the cable].’”(Id). The Commission also noted the inspector’s testimony that “even if no copper wires are exposed, there is a danger of electrocution, because ‘[m]uch like an extension cord with a naked place you may not be able to see the naked place, but you grab a hold of it and you’ll know it.’”(Id.).

The Commission concluded that the record supported the judge’s finding that the violation was S&S, as it was reasonably likely to contribute to a serious electrical injury.<sup>2</sup>

In *Harlan, supra*, the Commission was also presented with the specific issue of whether the third *Mathies*, element was established regarding a violation of Section 517, supra. i.e., a visible rupture in the outer jacket of the training cable of a bolter which exposed the inner insulated conductors. The Commission held that the operator’s argument that reasonable likelihood of injury cannot be established if there is not direct evidence of damaged interior conductors or proof of the existence of exposed uninsulated wire “... is inconsistent with Commission precedent.” *Harlan, supra*, at 1287. (Emphasis added) In this connection, the Commission noted that in *U.S. Steel, supra*, where the parties agreed that the outer jacket had ruptured, but that there was not any evidence that the inner insulation was compromised, “we held that the gash in the outer jacket of the trailing cable constituted an S&S violation of section 517, in part because in the ‘harsh environment of a coal mine’ a tear in the outer jacket weakens the protection afforded by the inner insulation, ‘contribut[ing] significantly and substantially[] to the cause and effect of a safety hazard’ *Id.* at 1574-75.” (Id)

In *Harlan, supra*, the Commission noted that the condition of the cable at issue i.e., the outer jacket was torn but there was not any direct evidence that the inner insulation was damaged, was similar to the condition of the cable at issue in *U.S. Steel, supra*. The Commission found *U.S. Steel, supra*, persuasive in the matter before it, and affirmed the judge’s determination of S&S.

In the case at bar, as in *Harlan, supra*, there is not any dispute that the outer jacket of the cable, which constituted a layer of insulation between the miners and a potentially fatal 550 volt

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<sup>2</sup>Excel argues that the case at bar is to be distinguished from *Harlan, supra*, inasmuch as there was not any evidence presented herein that the cable at issue was lying in water. This difference by itself, is not sufficient to distinguish facts in the instant proceeding from *Harlan, supra*. In *Harlan, supra*, the Commission initially cited other facts of record supporting the Judge’s decision of significant and substantial which appear to be the main bases for the Commission’s holding, and are equally applicable to the case at bar (The inspector’s testimony that although he could not see into the open splice there was no way of knowing whether there were any holes in the insulation surrounding the wire within the cable. Also, the inspector’s testimony that even if no inner wires are exposed there is a danger of electrocution).

current, was torn.<sup>3</sup> I find that the physical condition of the cited cable was similar to that of the cables at issue in *Harlan*, supra, and *U.S. Steel*, supra, which were found to be S&S, in light of, *inter alia*, the harsh environment of a coal mine. Since I am bound to follow established Commission case law, I find, based on *U.S. Steel*, supra, and *Harlan Cumberland*, supra, that the violation herein was significant and substantial.<sup>4</sup>

### **Penalty**

The record does not contain any evidence that Excel's history of violations is such as to have either a positive or negative effect on the level of penalty to be imposed. The parties stipulated that the penalty proposed by the Secretary is appropriate to the size of Excel's business, and will not affect its ability to continue in business.

The Secretary argues that the level of Excel's negligence was moderate given the fact that the damage to the cable was obvious and that the history of violations of Sections 75.517, supra, and 75.604, supra, was "very" significant.<sup>5</sup> Excel did not impeach or contradict Stepp's testimony that the damage was obvious. However, it is significant that Stepp indicated that he noted the damage as he was running his hand over the cable. There is not any evidence as to when the cable had last been touched by Excel's employees or agents. Nor is there any evidence

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<sup>3</sup>In addition, as set forth in the citation at issue, which was admitted in evidence, the bottom of the section was damp. Excel did not rebut or contradict this statement. In this connection, I note the following testimony by Stepp regarding the significance of this condition as follows: "it would be more easily to conduct electricity through the body into the ground." (Tr. 42).

I also note the inspector's testimony that the cable would be handled by the scoop operator in order for the scoop to travel under it. In addition, according to Stepp, one of the bolters would have to handle the cable at issue to move it to one side to allow the roof bolting machine to be moved. Thus, in normal operations miners would be in physical contact with the cable.

<sup>4</sup>Excel, in arguing that it has not been established that the violation was significant and substantial, relies on *Lone Mountain Processing, Inc.*, 29 FMSHRC 557 (June 2007) and *Oak Grove Resources, LLC*, 29 FMSHRC 1089 (November 2007). I note, that *Lone Mountain*, supra, a decision I issued, held that a violation under 30 C.F.R. § 75.604(b) was not significant and substantial, and *Oak Grove Resources*, supra, a decision by a fellow commission judge, also found a violation therein of Section 75.360(b), to be non-significant and substantial. However, both these cases are distinguishable from the instant case on their facts. Further, to the extent that they reach a different conclusion from the case at bar. I choose not to follow them for the reasons set forth above.

<sup>5</sup>I note that the Assessed Violation History Report for Excel indicates that from August 2, 2005, through August 1, 2007, Excel received 15 citations for violations of section 75.517, supra, and 13 citations for violations of Section 75.604(b), supra. (Government Exhibit 1).

in the record that prior to its being cited, the damage to the cable was obvious to visual observation. Further, there is not any evidence in the record as to when the cable was damaged, especially in relation in time to the inspection by Stepp. Thus, it cannot be concluded that Excel had knowledge or notice of the cited condition prior to the inspection.

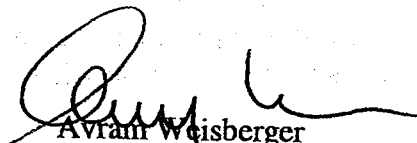
The parties stipulated that Excel demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

For the reasons set forth above, I find that the gravity of the violation was high as it could have resulted in a fatality.

Considering all of the above factors set forth in Section 110(i) of the Act, and placing emphasis on the high level of gravity, I find that a penalty of \$1,657 is appropriate.

### ORDER

It is **Ordered** that, within thirty days of this decision, Excel pay a penalty of \$1,657 for the violation of 75.517, supra.

  
Avram Weisberger  
Administrative Law Judge  
202-434-9940

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/lp

# 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 15, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2008-471
Petitioner	:	A.C. No. 46-04168-134618
	:	
	:	Docket No. WEVA 2009-252
v.	:	A.C. No. 46-04168-159504
	:	
WOLF RUN MINING CO.,	:	Sentinel Mine
Respondent	:	

## DECISION APPROVING SETTLEMENT

Before: Judge Feldman

These proceedings are before me based on petitions for assessment of civil penalty filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, ("Mine Act"), 30 U.S.C. § 815(d). These matters concern Order No. 7101472 in Docket No. WEVA 2008-471 and Order No. 7101465 in Docket No. 2009-252 that allege violations of 30 C.F.R. § 75.220(a)(1) of the mandatory safety standards governing roof control plans. The Secretary asserts that these two violations are attributable to Wolf Run Mining Company's ("Wolf Run's") unwarrantable failure. Section 75.220(a)(1) provides:

Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

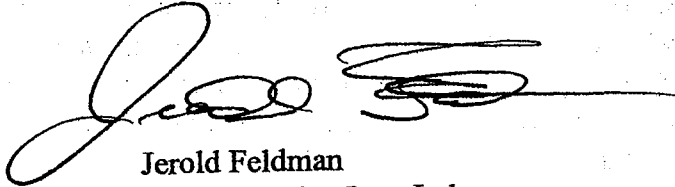
The initial \$163,500.00 proposed penalty included a proposed assessment of \$151,600.00 for the violation in Order No. 7101472 that was designated by the Secretary as "flagrant" in nature. The cited condition occurred when a crosscut had been advanced 43 feet beyond the last row of permanently installed roof support in contravention of the approved roof control plan which limited advancement to 30 feet beyond the last full row of permanent support.

The term "flagrant violation" was introduced in section 110(a)(1) of the Mine Act, as amended by the Mine Improvement and New Emergency Response Act of 2006 ("Miner Act"), 30 U.S.C. § 820(a)(1). A violation is deemed flagrant under this statutory provision if there is "... a reckless or repeated failure [by the mine operator] to make reasonable

efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.” *Id.* Under section 110(a)(1) flagrant violations may be assessed a civil penalty as high as \$220,000.00.

The Secretary now has filed a motion to approve a settlement agreement and to dismiss these matters.<sup>1</sup> The settlement terms include reducing the proposed penalty for Order No. 7101472 from \$151,600.00 to \$45,000.00. Based on this reduction, the parties have agreed to reduce the total civil penalty from \$163,500.00 to \$56,900.00 for the two orders in issue. The substantial reduction in penalty is based on the removal of the “flagrant” classification in Order No. 7101472. Although the “flagrant” allegation was initially based on Wolf Run’s alleged repeated violations of several different provisions of its roof control plan<sup>2</sup>, the Secretary now has concluded that Wolf Run’s negligence, while high, does not rise to a level of repeated misconduct that justifies a “flagrant” classification.

I have considered the representations and documentation submitted in these matters and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the motion for approval of settlement **IS GRANTED**, and **IT IS ORDERED** that the respondent pay a civil penalty of \$56,900.00 within 30 days of this order in satisfaction of the two orders in issue. Upon receipt of timely payment, the captioned civil penalty cases **ARE DISMISSED**.



Jerold Feldman  
Administrative Law Judge

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/rps

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<sup>1</sup> These docket proceedings concern Order Nos. 7101472 and 7101465. The parties have also agreed that Wolf Run will pay the proposed assessment of \$6,100.00 for Order No. 7101363 that is not a subject of these proceedings.

<sup>2</sup> For example Order No. 7101472, initially designated as flagrant, cited a violation of the advancement provision of the roof control plan, while Order No. 7101465 cited a violation of the roof control provision that rib corners must be secured with three bolts on five foot centers.

## **ADMINISTRATIVE LAW JUDGE ORDERS**





# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 21, 2009

HOPKINS COUNTY COAL, LLC,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. KENT 2009-820-R
	:	Citation No. 6694904; 03/23/2009
	:	
v.	:	Docket No. KENT 2009-821-R
	:	Order No. 6694905; 03/23/2009
	:	
SECRETARY OF LABOR,	:	Docket No. KENT 2009-822-R
MINE SAFETY AND HEALTH	:	Citation No. 6694906; 03/23/2009
ADMINISTRATION (MSHA),	:	
Respondent.	:	
	:	Mine ID 15-18826
	:	Elk Creek Mine

**ORDER STAYING PROCEEDINGS**  
**ORDER REQUESTING SECRETARY'S COUNSEL TO REPORT**  
**AND**  
**ORDER DIRECTING COUNSELS TO SUBMIT STIPULATION IF NECESSARY**

These are contest proceedings arising under section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(d)) (Mine Act or Act), in which Hopkins County Coal, LLC ("HCC") challenges the validity of two citations and one order of withdrawal issued to the company at its Elk Creek Mine, an underground coal mine located in Hopkins County, Kentucky.

Citation No. 6694904 (Docket No. KENT 2009-820-R) alleges HCC violated section 103(a) of the Act, when, on March 23, 2009, it:

failed to produce/provide records requested by MSHA  
special investigators during the performance of investiga-  
tive duties under section 105(c) of the Act.<sup>1</sup> On February

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<sup>1</sup>Section 105(c)(2) of the Act (30 U.S.C. § 815(c)(2)) requires the Secretary "[u]pon receipt" of a miner's discrimination complaint to "forward a copy of the complaint to the . . . [operator] and cause such investigation to be made as . . . [the Secretary] deems appropriate." Section 105(c)(2) further states, "If upon such investigation, the Secretary determines that . . . [the operator has discriminated against the complainant, the Secretary] shall immediately file a complaint with the Commission." Under section 105(c)(3) the Secretary must reach a determination whether discrimination occurred within 90 days of the receipt of the miner's

23, 2009[,] written requests for specific documents were given to the operator's legal counsel . . . as directed by the mine operator.

Sections 103(a) and [103](h) of the Act [require] the operator to furnish information requested by the Secretary that she has determined necessary in carrying out the provisions of the Act.[<sup>2</sup>]

In issuing the citation, MSHA Special Investigator Kirby Smith gave HCC 45 minutes, or until 9:00 a.m., to comply. *See* Citation No. 6694904. At 9:00 a.m. the special investigator determined HCC had not complied by providing all of the items requested, and he issued Order No. 6694905 (KENT 2009-821-R) pursuant to section 104(b) of the Act to the company.<sup>3</sup> 30 U.S.C. § 814(b).

In issuing the order, the special investigator stated:

The operator[']s agent . . . refused to comply with . . . Citation No. 6694904 requiring the operator to produce/provide records requested by MSHA Special Investigators during the performance of their official duties in investigation activities under [section] 105(c) of the Mine Act.

Order No. 6694905.

After five minutes passed and the requested documents still were not produced, at 9:05 a.m. Smith issued another section 104(a) citation to HCC for continuing to work in the face of

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complaint. 30 U.S.C. § 815(c)(3).

<sup>2</sup>Section 103(a) authorizes the Secretary to "make frequent inspections and investigations . . . for the purpose of determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision . . . or other requirements of this Act." 30 U.S.C. § 813(a). Section 103(h) in pertinent part requires an operator to "provide such information, as the Secretary . . . may reasonably require from time to time to enable him to perform his functions under this Act." 30 U.S.C. § 813(h).

<sup>3</sup>Section 104(b) of the Act provides for the issuance of an order when an inspector or other authorized representative of the Secretary finds that a violation described in a citation issued under section 104(a) of the Act has not been totally abated within the time originally fixed and that the time should not be further extended.

the order. Citation No. 6694906 (KENT 2009-822-R) states:

The operator[']s agent continued to deny to produce/provide the records requested by [the] MSHA Special Investigator after the reasonable time for abatement had expired on . . . 104(a) [C]itation No. 66904904. The Operator[']s agent continued to refuse to provide the requested records after . . . 104(b) withdrawal [O]rder No. 66904905 was issued.

This citation is issued for continuing to operate in [the] face of a withdrawal order.

Citation No. 6694906.

In issuing the citation, the special investigator indicated it should be abated by 10:00 a.m. Citation No. 6694906. When it was not abated, HCC became subject to the provisions of section 110(b)(1) of the Act, which provides that "[a]ny operator who fails to correct a violation for which a citation has been issued under section 104(a) within the period permitted for its correction may be assessed a civil penalty of not more than \$5,000 for each day during which such failure or violation continues." 30 U.S.C. § 820(b)(1).

### **THE CONTESTS AND THE PARTIES' PLEADINGS**

On the same day the citations and order were issued, HCC filed its subject contests with the Commission.<sup>4</sup> HCC maintained, *inter alia*, that the conditions cited did "not fall within the purview of the Mine Act" and that the citations and order were issued for conditions "not violative of the [Act]." Notice of Contest (March 23, 2009). Due to the penalty strictures of section 110(b)(1), HCC moved for expedition of the proceedings. In its motion to expedite, the company noted that among the materials requested by MSHA were the "personnel files of all employees at the Elk Creek Mine who were disciplined or terminated during the period of January 1, 2004 - January 20, 2009 for engaging in the conduct which led to the termination of Robert Gatlin[, the miner who filed the original complaint with MSHA]." Mot. For Expedit'n of Proceedings 1 (March 23, 2009) (*quoting MSHA letter of February 23, 2009 Carl E. Boone, II, MSHA District 10 Manager to Marco M. Rajkovich, counsel to HCC*). HCC objected that the requested files were "*not* documents required to be recorded and maintained by the operator pursuant to the Mine Act;" that "release of employees' personnel files would violate the employees' rights to privacy and confidentiality;" that "[t]he request [was] unduly burdensome and . . . tantamount to harassment in the overly broad, sweeping request for *all files* covering a

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<sup>4</sup>Although only one contest was filed, it pertained to all three enforcement actions, and the single contest was docketed as three separate cases.

*five-year period.” Id. 2 (emphasis in original).* HCC stated, “Given that the issue is a legal one, . . . [HCC] does not anticipate the necessity for a full evidentiary hearing and, given the nature of the Order and Citations subjecting . . . [HCC] to severe penalties, . . . [HCC] requests that the issue be dealt with *via teleconference today, or as soon thereafter as a telephonic hearing can be scheduled.*” *Id.*

On March 24, the matter was assigned to Commission Administrative Law Judge Jacqueline Bulluck, who at the time was on official duty in Pennsylvania. Shortly thereafter, the Secretary filed an opposition to HCC’s request for expedition. She also filed a motion for summary decision. HCC then filed a response and a cross-motion for summary decision, which was followed by the Secretary’s response. In her opposition and motion for summary decision, the Secretary set out in some detail her version of the events that engendered the citations and order. The Secretary’s chronology was not significantly disputed by HCC.

### **EVENTS LEADING TO THE CONTESTS**

The Secretary noted the alleged discriminatee, Robert Gatlin, filed a complaint with MSHA on January 20, 2009. In the complaint, Gatlin, who was fired on January 8, alleged he was discharged in violation of section 105(c) of the Act by HCC.<sup>5</sup> 30 U.S.C. § 815(c). The company was notified of the January 20 complaint by letter that same day.<sup>6</sup> On January 26, the MSHA district manager advised HCC by letter that MSHA wanted to interview five named miners “as part of . . . [its] investigation of . . . [Gatlin’s] [d]iscrimination [c]omplaint . . . during the fact-finding segment of this investigation.” Sec.’s Mot. for Sum. Decision 2, Exh. 2. The district manager requested HCC contact one of MSHA’s special investigators by February 6

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<sup>5</sup>In the complaint Gatlin summarized the alleged discrimination he suffered by stating:

I feel that I was unfairly terminated due to being directed to do more than my regular job duties on a daily basis, which I would do on weekends for extra pay. I also feel that the comment about the union played a part in my being discharged. I would like my job back, any negative comments deleted from my personnel file and backpay for the time I’ve been off. I feel that my name has been black balled in the mining industry around here and they will not hire me.

Sec.’s Mot. for Sum. Decision (March 26, 2009), Exh. 1 at 2.

<sup>6</sup>In addition to notifying the company of the January 20 complaint, the letter stated that MSHA Special Investigator Kirby Smith would contact the company “during the fact-finding segment of this investigation.” Sec.’s Mot. for Sum. Decision (March 26, 2009), Exh. 1.

“with a convenient date and time to conduct these interviews.” *Id.* By letter dated February 6, counsel for HCC responded that the letter of January 26 had not been sent to him or to the legal department of the company as counsel previously requested. Counsel renewed his request with regard to all further contact concerning any investigations. Counsel also refused to arrange the interviews requested by the district manager. Counsel stated, “[W]e are not in a position to arrange any interviews yet because we fail to grasp, and would appreciate your identifying, what the alleged protected activity is under this Mine Act discrimination complaint. If the protected activity can be identified, I’m confident my client will give further consideration to your request.” *Id.*, Exh. 3.

On February 23, the district manager sent HCC’s counsel the letter referenced in Citation No. 6694904. In it MSHA requested:

1. Robert Gatlin’s personnel file[;]
2. Any documents showing disciplinary action that was taken against Robert Gatlin by [HCC;]
3. Documents showing any hazards or potentially hazardous conditions, including but not limited to pre-shift, on-shift and conveyor belt examination books at the . . . [m]ine for the period July 1, 2008 - January 31, 2009[;]
4. Any employee handbook or employee manual that was used by [HCC] from January 1, 2004 - January 31, 2009[;]
5. The personnel files of all employees at the . . . [m]ine who were disciplined, reprimanded, or terminated during the period of January 1, 2004 - January 20, 2009 for engaging in the conduct which lead to the termination of Robert Gatlin.
6. All documents relied upon by [HCC] in its decision to terminate Robert Gatlin.

Sec.’s Mot. for Sum. Decision (March 26, 2009), Exh. 4. MSHA asked that the documents be given to the special investigator by the close of business on March 2, 2009.

On March 2, in a letter to the district manager, counsel for HCC stated he regretted not responding sooner, but the letter of February 23 was not received by counsel until Thursday, February 26, when counsel was out of the office. In the March 2 letter counsel again asserted the

complaint did not state a protected activity, and counsel renewed his request that MSHA clarify “how . . . [the complaint] states a claim under the Mine Act.” Sec.’s Mot. for Sum. Decision (March 26, 2009), Exh. 5. Counsel noted the record books requested in the February 26 letter were available for review at MSHA’s convenience, and counsel stated he would respond to the request for the other items once he discussed the request with HCC officials. *Id.*

On March 17, the district manager again wrote to counsel, advising him that MSHA’s special investigators would be at the mine on March 23 and that they intended to review and copy the specified examination books. The district manager asked counsel to “remind [his] client of its obligation to cooperate in [the] investigation and produce the records that have been requested.” Sec.’s Mot. for Sum. Dec. (March 26, 2009), Exh. 6. The letter also requested HCC have “all documents listed in the February 23 . . . letter available for inspection . . . on March 23.” *Id.*

On March 18, counsel for HHC wrote to the district manager, supplementing counsel’s response of March 2. In the March 18 letter, counsel again requested “clarification regarding how [Gatlin’s complaint] states a claim under the Mine Act.” Sec.’s Mot. for Sum. Decision (March 26, 2009), Exh. 7. Counsel asserted one of HCC’s rights under the Act “is to know what it is the agency is investigating.” *Id.* Counsel also responded in detail to the items requested by MSHA. With regard to Gatlin’s personnel file, counsel stated that, in view of the confidential nature of the contents of the file, the agency should provide HCC with a waiver and release from Gatlin. Sec.’s Mot. for Sum. Dec. (March 26, 2009), Exh. 7. With regard to the documents showing disciplinary action taken against Gatlin, counsel attached them to his letter. *Id.* With regard to the pre-shift, on-shift, and conveyor belt examination books for July 1, 2008 - January 31, 2009, counsel advised the district manager, as he had in his March 2 letter, that the record books were available for review at the mine at MSHA’s convenience. *Id.* With regard to a manual or handbook that employees used at the mine from January 1, 2004 - January 20, 2009, counsel attached the material to his letter. *Id.* With regard to the personnel files of employees disciplined, reprimanded or terminated between January 1, 2004, and July 20, 2009, “for engaging in conduct which led to the termination of . . . Gatlin,” counsel stated the company objected to the request, “given that no protected activity exists in this case, that the company does not release personnel files as requested absent consent from the individual employee, and that otherwise, no employee other than . . . Gatlin was disciplined, reprimanded or terminated for engaging in conduct which led to his own termination.” *Id.* Finally, with regard to the documents relied upon by HCC in its decision to terminate Gatlin, counsel referred MSHA to the documents he attached in response to the government’s request for “documents showing disciplinary action that was taken . . . against Gatlin” and to the employee handbook. *Id.*

After counsel’s March 18 response, the issues dividing the parties appeared to have been MSHA’s request for the personnel files of Gatlin and MSHA’s request for the personnel files of employees disciplined, reprimanded or terminated “for engaging in conduct which led to the termination of . . . Gatlin.” Sec.’s Mot. for Sum. Decision (March 26, 2009), Exh. 4. The impasse over the files led the district manager to again write to the company’s counsel. In a letter

dated March 20, the district manager stated that HCC “refuse[d] to produce many documents . . . [MSHA] requested[,] [s]pecifically . . . Gatlin’s personnel file and the personnel files of any other employees who were terminated for the reason . . . Gatlin was terminated.” *Id.*, Exh. 8. The district manager further stated he expected the files to be provided to the special investigators on March 23, and he added “we note the tactics used by the company . . . to delay this investigation [and, w]e also note the repeated refusals of the company to provide documents and information to which MSHA is clearly entitled under the Act.” *Id.*

On March 23, counsel for HCC responded, terming “unfounded” the district manager’s allegations of the company’s “repeated refusals to produce documents and information to which MSHA is ‘clearly entitled under the Act.’” Sec.’s Mot. for Sum. Decision (March 26, 2009), Exh. 9. Counsel again advised the district manager that Gatlin’s file would be given to the special investigators once MSHA obtained a consent and release form from Gatlin. Counsel did not mention the request for other files. However, counsel did assert, if MSHA could not inform HCC of Gatlin’s alleged protected activity, then “the agency [had] no case to investigate, no jurisdiction, no entitlement and no basis upon which to make any request.” *Id.*

When Kirby Smith and another special investigator arrived at the mine at 8:00 a.m. on March 23, they reviewed the conveyor belt examination book, apparently the only book in which they were interested. They also asked for the personnel files, which the company refused to produce. Kirby Smith then issued Citation No. 6694904, Order No. 6694905, and Citation No. 6694906 in quick succession, and HCC immediately filed its contests.

### **PROCEEDINGS FOLLOWING THE CONTESTS**

Judge Bulluck was assigned the cases the next day, and she promptly initiated a conference call with counsels. A few days after the March 24 call, HCC sent numerous documents to MSHA via fax, and MSHA abated the order and subsequent citation.<sup>7</sup>

In the meantime, because of the difficulty of contacting the parties and receiving facsimile copies at a remote duty station, the matter was reassigned from Judge Bulluck to me.

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<sup>7</sup>According to counsel for HCC’s letter of March 26, regarding “Supplemental Document Production to Discrimination Complaint,” submission of the supplemental documents was based on “oral clarifications as to the scope of the request made by counsel for the Secretary in the March 24 [conference call].” *Letter of Marco Rajkovich, Jr., Esq., Counsel for HCC to Teresa Ball, Esq., Associate Regional Solicitor* (March 26, 2009). The documents submitted by HCC included Gatlin’s personnel file (released with the caveat HCC be held blameless should the personal information contained in the file enter the public domain) and the personnel files (with personal information redacted) of four employees. Counsel also stated it was not until the conference call of March 24 that counsels for MSHA made HCC aware that MSHA was seeking the “files of employees who were disciplined for engaging in conduct which **HCC claims** lead to the termination of Gatlin.” *Id.* 2 (*emphasis in original*).

In a conference call on March 27, the parties agreed abatement of the order and citation, which apparently occurred on March 26, ending HCC's continuing liability under section 110(b)(1) of the Act for daily penalty assessments. 30 U.S.C. § 820(b)(1). Counsels also reiterated their belief resolution of the contests was appropriate for summary decision. Counsel for the Secretary stated she intended to file a response to HCC's cross-motion, and I advised the parties, once I received it, I would allow counsels ten days to file any additional arguments they wished to make.<sup>8</sup> Also, counsels led me to understand the abatement of the order and citation obviated the need to expedite the proceedings. Nonetheless, both sides indicated they wanted the issues decided forthwith. At the time, I concurred. On April 2, I issued an order denying HCC's motion to expedite, but stated I would decide the issues promptly. Denial of Motion to Expedite (April 2, 2009). Following this, counsel for the Secretary filed her response to HCC's cross motion for summary decision.

### **ARGUMENTS FOR SUMMARY DECISION** **THE SECRETARY**

The Secretary argues the citations and order were issued because of HCC's intentional refusal to produce documents to which the Secretary "was clearly entitled." Sec's Mot. for Sum. Decision 1. She asserts her actions in issuing the three enforcement actions "were within her investigative and enforcement authority and correct as a matter of law." *Id.* 2.

The Secretary insists section 103(a) (authorizing the Secretary to make "frequent . . . investigations . . . for the purpose of . . . determining whether there is compliance with . . . requirements of this Act"); section 103(h) (requiring operators to "provide such information, as the Secretary . . . may reasonably require from time to time to enable him to perform his functions under this Act"); and section 108 (allowing the Secretary to seek civil relief when an operator does not, *inter alia*, "permit access to, and copying of, such records as the Secretary . . . determines necessary to carry out the provisions of [the] Act") require HCC to produce the requested files and information. She asserts, when HCC failed to produce the materials, the Secretary had the discretion to proceed against the company either by issuing the subject citations and order, or by seeking relief in federal district court under section 108 of the Act (30 U.S.C. § 818), or by proceeding on both tracks. Sec.'s Mot. for Sum. Decision 6-7.

The Secretary asserts HCC cannot refuse to provide the information because the Secretary lacks a waiver and release from Gatlin and/or the other employees. According to the Secretary, HCC bears the burden of showing the Secretary's investigative authority under section 103(a) and section 103(h) of the Act is subject to any statutory exception requiring the Secretary to obtain waivers and releases, and HCC has not done so. Sec. Mot. for Sum. Decision 7.

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<sup>8</sup>Counsel for the Secretary's Response was received on April 7. *See* Order Governing Final Submissions (April 7, 2009). On April 17, 2009, HCC filed a Supplemental Response for Summary Decision ("HCC's Sup. Resp.").



Alleging that HCC has engaged in “dilatory tactics,” the Secretary notes, although it had requested interviews with five specific employees on January 26, HCC had, according to the Secretary, “refused to permit these interviews.” Sec.’s Mot. for Sum. Decision 8. The Secretary asserts HCC’s motive is to delay and obstruct the Secretary’s investigation by refusing to provide the information to which the Secretary lawfully is entitled.<sup>9</sup> *Id.* 9.

Finally, the Secretary argues she “has only sought . . . [Gatlin’s] files and the files of those employees and former employees whom [HCC] has ‘disciplined, reprimanded or terminated . . . for engaging in the conduct which led to the termination of . . . Gatlin’” Sec.’s Mot. for Sum. Decision 9 (*quoting MSHA Letter of February 23, 2009, Carl E. Boone II, District 10 Manager to Marco M. Rajkovich, Counsel to HCC*). She describes her requests as “clear, narrowly drawn and relevant.” *Id.* In summarizing her position, the Secretary states she must determine whether Gatlin was treated differently than other similarly situated employees, and that HCC cannot avoid production of lawfully demanded records by making “unsupported and baseless demands for waivers and releases designed for the purpose of impeding the Secretary’s investigation.” Sec.’s Mot. for Sum. Decision 10.

### HCC

HCC asserts Gatlin was terminated on January 8, 2009, for insubordination, because he refused to conduct a required pre-shift examination on January 5. According to HCC, Gatlin refused because he claimed he was “due extra pay.” HCC’s Resp. to Sec.’s Mot. for Sum. Decision and Cross-Mot. for Sum. Decision (“HCC’s Resp.”) 2.

HCC acknowledges receipt of a January 26 letter from MSHA to its General Manager requesting interviews with specified HCC personnel. HCC states it previously asked that all requests for information of an investigative nature be directed to its legal department. As a result of the misdirection of the request, on February 6, HCC again asked that inquiries relating to MSHA investigations be sent to its legal department. The company also requested MSHA clarify the nature of the alleged discriminatory conduct. HCC states two weeks passed before MSHA responded. It notes in that response, dated February 23, MSHA ignored HCC’s request for clarification and, among other things, requested the disputed personnel files. HCC’s Resp. 2-3.

HCC asserts it was not until the March 24 conference call with Judge Bulluck that it understood what it thinks MSHA wanted, that the requested documents were “presumably . . . [those] related to **HCC’s reason** for termination of Gatlin, as may be applicable to other similarly disciplined employees, and **apparently not** documents related to **Gatlin’s reason** for

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<sup>9</sup>However, the lack of interviews with the employees does not appear to have played a role in the issuance of the contested citations and order, since they were abated when HCC produced copies of the requested files, and as it is unclear to me if the employees have yet been interviewed. Indeed, it is unclear if MSHA’s request in this regard is outstanding.

why he thinks he was terminated.”<sup>10</sup> HCC’s Resp. 4 (*emphasis in original*). With this understanding, it produced over 106 pages of documents in response to MSHA’s request. *Id.*

HCC argues the contested citations and order must be vacated because MSHA is not entitled to the personnel files it requested. According to HCC, the files are protected by the Fourth Amendment of the Constitution and involve confidentiality and privacy concerns of HCC’s employees. Turning them over without releases could expose HCC to litigation. *Id.* at 5-6. The company insists the government does not have a right to “rummage in any wholesale way or to initiate a general search” for records and documents not required to be kept under the Mine Act. *Id.* at 6 (*quoting Youghioghney and Ohio Coal Co. v. Morton*, 364 F.Supp. 48, 51, n.5 (D. Ohio 1973)). HCC also points to Commission Administrative Law Judge James Broderick’s decision in *Sewell Coal Co.*, 1 FMSHRC 864 (Feb. 1979) in which, according to HCC, Judge Broderick recognized constitutional difficulties prevented MSHA for validly issuing a citation and order when Sewell refused to allow MSHA to inspect personnel files containing accident, injury and illness records and medical and compensation records in order to determine Sewell’s compliance with Part 50 reporting requirements.<sup>11</sup> *Id.* at 6-7.

HCC asserts the Commission also recognized in *Peabody Coal Co.*, 6 FMSHRC 183 (February 1984), while records required to be kept under the Mine Act must be available to MSHA, and while an operator has no realistic expectation of privacy for such records, the same is not true if sought-after files contain data not required to be maintained by the Mine Act as well as data open to MSHA. HCC’s Resp. 8. HCC emphasizes that MSHA is requesting the entire files of its employees, and HCC insists the government is not entitled to the entire contents of the files without a warrant. *Id.*; *see also* HCC’s Sup. Resp. 5.

Summarizing its objections, the company again takes issue with the wording of the February 23 request. According to HCC, MSHA actually sought “files evidencing that other employees have been disciplined for similar reasons as the reason that HCC claims it disciplined Gatlin.” HCC Resp. 10. Such evidence, if it existed, would support HCC’s affirmative defense, it would not support the existence of a valid claim. HCC states MSHA should have requested

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<sup>10</sup>I interpret this to mean HCC did not respond concerning the personnel files other than Gatlin’s, because it thought MSHA wanted the files of those employees who were terminated for the same reason Gatlin believed he was fired; that HCC was unable to tell from Gatlin’s complaint why Gatlin thought he was let go, and that this was one of the reasons why the company made repeated (and unanswered) requests for clarification of Gatlin’s complaint.

<sup>11</sup>HCC notes its sought-after files contain social security numbers, bank names, account numbers, and health information of its employees and their dependents, all of it information to which MSHA is not entitled without a warrant. HCC’s Resp. 9-10. HCC also notes it ultimately released all information relating to Gatlin, but only after the Secretary assured HCC that Gatlin did not object to his file being produced in its entirety.

“personnel files of individuals who engaged in the same conduct as Gatlin, but were **not** disciplined.” *Id.*; *see also* HCC’s Sup. Resp. 5. HCC concludes by stating that MSHA and Gatlin have no information any employees have been treated disparately, and it asserts Gatlin and the Secretary are engaged in a fishing expedition to see if they can uncover a case without any reasonable cause to believe that discrimination actually has occurred. *Id.* at 10-11.

### **SECRETARY’S RESPONSE**

The Secretary responds that HCC’s contests are “without merit and there are no constitutional matters at issue.” Sec.’s Resp. (April 3, 2009) at 1.

### **DEFERRAL OF RULING**

As I previously noted, in denying HCC’s motion to expedite the proceedings, I stated, “[T]he important issues raised in the parties’ . . . cross-motions . . . will be decided promptly.” Denial of Mot. to Expedite (April 2, 2009). However, after a more complete consideration of the facts and the arguments, I conclude there is no need to rush. The Secretary must propose penalties for the company’s alleged failure to produce the requested materials and for the company’s failing to correct the alleged violation. 30 U.S.C. §§ 820(a), 820(b). In the meantime, the contested enforcement actions have been abated, and the Secretary’s investigation is ongoing. Much may happen between now and the parties’ consideration of the Secretary’s penalty proposals to obviate the parties’ present desire for summary decision. Judicial restraint warrants deferring ruling on an issue until required to do so, and neither party has shown an immediate ruling is needed.

Indeed, upon reflection, the parties may well come to share my doubts as to whether these cases present a desirable basis for resolving the questions at issues. Obviously, the Secretary has a statutory duty to conduct an investigation of Gatlin’s complaint. Obviously, too, HCC has a concomitant duty to cooperate in the investigation. However, the Secretary’s investigation must be “reasonable” (*see* 30 U.S.C. § 813(h)), and part of being “reasonable” when requesting materials is to make sure that which is sought is clearly described. MSHA’s request for, “[t]he personnel files of all employees at the . . . [m]ine who were disciplined, reprimanded, or terminated during the period of January 1, 2004 - January 20, 2009 for engaging in the conduct which led to the termination of Robert Gatlin.” (*MSHA Letter of February 23, 2009, Carl E. Boone II, District 10 Manager to Marco M. Rajkovich, Counsel to HCC*) is far from clear and can be interpreted in a number of different ways, as HCC rightly notes. HCC’s Resp. 4, Exh. 5. Moreover, and as HCC points out, if read literally, MSHA’s request is for files in their entirety. Only later did the Secretary seem to acknowledge private information in the files could be redacted. One might conclude a reasonably conducted investigation would make sure the operator’s right to redact objectionable information was plainly stated from the beginning. Further, MSHA repeatedly ignored, without explanation, HCC’s understandable requests for clarification of a complaint that on its face sets forth no discernable allegations of protected activity. Surely, part of the agency’s duty to conduct a reasonable investigation is to

apprise those being investigated of how the law was allegedly broken.

For its part, the company's conduct, too, has been faulty. It did not immediately request a clarification of the district manager's February 23 request for the personnel files, and its objection to the release of Gatlin's file without a waiver, while perhaps technically warranted, seems overly protective.<sup>12</sup> Further, being represented by experienced counsels, the company must have known, without being told, that it is common when materials are requested for the party providing the materials to redact those parts it deems are not properly subject to the request. Apparently, this is what ultimately was done, but only after the threat of daily penalties was made real.

Unfortunately, the entire controversy smacks of "who struck John," with a lack of cooperation and clear, forthright communication on both sides. The parties have ensnared themselves in what is essentially a discovery dispute. Had the same dispute arisen after a discrimination complaint was filed with the Commission, it would have been resolved before a judge without the objector hazarding penalties of up to \$5,000 per day. Had the dispute been taken before a United States federal district court pursuant to section 108 of the Act (30 U.S.C. § 818) it also most likely would have been resolved without a monetary penalty threat.<sup>13</sup>

In my view, when penalties finally are proposed, it will behoove the parties to take into account the state of the Secretary's investigation, the amount of the penalties, the prior missteps on both sides and, working together, to resolve the contest and civil penalty proceedings in one stroke, short of summary decision. The adage "hard cases make bad law" often is misquoted as "bad cases make bad law," and, here, the aphoristic error is entirely apt. This is not to say the parties have raised issues that are incapable of decision. Rather, it is to recognize because issues can be decided does not mean they should be. The flawed context within which these particular issues have arisen suggests a second look at all aspects of the matter may lead the parties to conclude the issues are best reserved for another day and another case.

### **ORDER**

For the reasons set forth above, a ruling on the parties' cross-motions for summary decision **IS DEFERRED** and these contest proceedings **ARE STAYED** pending the filing of an associated civil penalty case or cases by the Secretary. Counsel for the Secretary **IS**

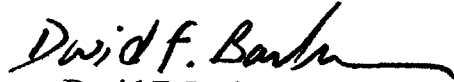
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<sup>12</sup>If a complaint is filed by the Secretary charging the company with discrimination, the Secretary and the miner are separate parties (29 C.F.R. § 2700.4(a)), but during the investigatory stage of the miner's complaint, the Secretary surely may be assumed to be acting on behalf of the miner.

<sup>13</sup>In fact, it takes little imagination to envision the reaction of a district court judge or federal magistrate if presented with a request for injunctive relief in a discovery dispute the parties should have been able to resolve themselves.

**REQUESTED** to advise me on or before June 1, 2009, and by the first day of each succeeding month, as to the status of the penalty assessment case(s).

Within 15 days of the date of this Order, counsel for the Secretary **IS ORDERED** to file a copy or copies of the abatement or abatements at issue. If the abatement or abatements do not specify and describe in full the documents HCC filed and MSHA concluded abated the order and citations, within the same 15 days counsels **ARE ORDERED** to submit a written stipulation specifying and describing the documents.



David F. Barbour  
Administrative Law Judge

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