MARCH AND APRIL 2010

COMMISSION ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

MARCH AND APRIL 2010

Review was granted in the following cases during the months of March and April 2010:

Mach Mining, LLC. v. Secretary of Labor, MSHA, Docket Nos. LAKE 2010-1-R and LAKE 2010-2-R. (Judge Miller, January 28, 2010)

Oak Grove Resources, LLC. v. Secretary of Labor, MSHA , Docket No. SE 2010-350-R. (Judge Zielinski, February 12, 2010)

Sec. Labor on behalf of Kevin Baird v. PCS Phosphate Company, Docket No. SE 2010-74-DM. (Judge Bulluck, February 2, 2010)

No case was filed in which review was denied during the months of March and April 2010:

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 5, 2010

SECRETARY OF LABOR,	:	Docket No. WEVA 2009-688
MINE SAFETY AND HEALTH	:	A.C. No. 46-08693-164121
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2009-689
v.	:	A.C. No. 46-08693-167069
	:	
HIGHLAND MINING COMPANY	:	Docket No. WEVA 2009-1037
	:	A.C. No. 46-06558-169988

BEFORE: Jordan, Chairman; Duffy, 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"). During the course of over five months in 2008 and 2009, the Commission received from Highland Mining Company ("Highland") motions by counsel to reopen four penalty assessments that had each become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1] In *Highland Mining Co.*, 31 FMSHRC 1313 (Nov. 2009), the Commission unanimously denied the first of the motions with prejudice, and a majority denied the remaining three motions without prejudice. That order stated that with respect to the three motions denied without prejudice:

> Should Highland renew its reopening requests, it must do so within 30 days, and fully explain the circumstances in the three failures to timely contest the proposed assessments. It must also address what it has done to ensure that it does not misplace penalty assessments in the future and to ensure that it responds to them in a more timely

[1] 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).

manner, in order to avoid a repeat of the mistakes it outlined in its four motions.

Id. at 1316.

In a motion filed on February 3, 2010, counsel for Highland informed the Commission that he did not receive his service copy of the Commission's decision, and consequently did not learn of the decision until nearly two months later. Highland requests "a reasonable extension of time to consider and renew its reopening requests" in the three dockets in which the Commission indicated that it would entertain renewed requests to reopen. The Secretary of Labor has not filed a response to Highland's February 3 motion.

Having considered Highland's motion, we grant its request for an extension of time. It shall have 20 days from the date of this order in which to file renewed requests to reopen in the three dockets.

Mary Lu Jordan, Chairman

Michael F. Duffy, 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 1, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 2010-538-M A.C. No. 08-00051-195649
TARMAC AMERICA, LLC	:	

BEFORE: Jordan, Chairman; Duffy, 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 March 10, 2010, the Commission received from Tarmac America, LLC ("Tarmac America") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On March 18, 2010, the Commission received a motion from Tarmac America's counsel stating that the operator has decided to pay the penalty assessment at issue in full and requesting that Tarmac America's pending request to reopen the assessment be withdrawn.

Having reviewed Tarmac America's request and its motion to withdraw the request, we hereby grant Tarmac America's motion to withdraw its request to reopen.

Mary Lu Jordan, Chairman

Michael F. Duffy, 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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April 26, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2009-378
v.	:	A.C. No. 44-07211-185244
CEDAR CREEK COAL, LLC	:	

BEFORE: Jordan, Chairman; Duffy, 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 30, 2009, the Commission received from Cedar Creek Coal, LLC ("Cedar Creek") a letter seeking to reopen a penalty assessment 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 section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

On May 12, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Penalty Assessment No. 000185244 to Cedar Creek. The record indicates that Federal Express was unable to deliver the proposed penalty assessment. Although Federal Express indicates that the reason for non-delivery was an incorrect address, the operator claims that the assessment was addressed correctly. The Secretary states that she does not oppose the reopening of the proposed penalty assessment. She notes that the operator should ensure that its address of record is accurate for future penalty assessments.

The record indicates that Cedar Creek never received notification of the proposed penalty assessment as required under Commission Procedural Rule 25.[1] Under the circumstances of this case, we conclude that Cedar Creek was not notified of the penalty assessment, within the meaning of the Commission's Procedural Rules, and the proposed penalty assessment has not become a final order of the Commission. We also conclude that Cedar Creek has received a copy of the proposed penalty assessment since it is attached to the request to reopen.

[1] 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.

Because the proposed penalty assessment did not become a final order of the Commission, we will treat the request to reopen as moot. We hereby remand this matter 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. If the operator has not already done so, it should submit the proposed assessment form to MSHA, within 30 days of the date of this order. *See* 29 C.F.R. § 2700.26.

Mary Lu Jordan, Chairman

Michael F. Duffy, 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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April 26, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 2009-1892 A.C. No. 46-01437-186238 Q180
A.I.M., LLC	:	

BEFORE: Jordan, Chairman; Duffy, 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 31, 2009, the Commission received from A.I.M., LLC ("AIM") 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).

On May 28, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued the proposed assessment at issue. AIM claims that it received the assessment but that its clerk, who had serious health problems, failed to inform anyone that the proposed assessment had been delivered. The company director asserts that he did not learn of the proposed assessment until AIM received a delinquency notice dated August 26, 2009. The request to reopen was filed within one week of the receipt of the delinquency notice.

The Secretary initially opposed the operator's request. On September 29, 2010, AIM filed a supplementary letter addressing the Secretary's concerns and more fully explaining the reasons for its failure to timely contest the proposed assessment. On October 1, 2010, the Secretary withdrew her earlier opposition to the request to reopen.

Having reviewed AIM's request and the Secretary's responses, 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.

Mary Lu Jordan, Chairman

Michael F. Duffy, 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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April 26, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2009-1273-M
v.	:	A.C. No. 02-03045-183807
CRAIG'S OPERATED EQUIPMENT	:	

BEFORE: Jordan, Chairman; Duffy, 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, 2009, the Commission received from Craig's Operated Equipment ("Craig's Equipment") a letter seeking to reopen a penalty assessment issued to the operator 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).

On April 29, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000183807 to Craig's Equipment for seven citations and orders MSHA had issued to the operator on March 17, 2009. MSHA asserts that the proposed assessment was delivered by Federal Express on May 5, 2009. On July 21, 2009, MSHA sent a delinquency notice to Craig's Equipment. On August 20, 2009, Craig's Equipment sent a request to the Commission seeking to dispute the penalties for six of the seven citations contained on the proposed assessment at issue.

The Secretary opposes the request to reopen on the ground that the operator has failed to explain or provide any reason as to why it did not contest the proposed assessment within 30 days after receiving it.

Having reviewed Craig's Equipment's request to reopen and the Secretary's response, we agree with the Secretary that Craig's Equipment has failed to provide an explanation for its failure to timely contest the proposed penalty assessment. Craig's Equipment has submitted no justifications for its failure to contest the proposed penalty within 30 days of receiving it and therefore has not provided the Commission with an adequate basis to reopen. Accordingly, we deny without prejudice Craig's Equipment's request. *See, e.g., BRS Inc.*, 30 FMSHRC 626, 628 (July 2008); *Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008). The words "without prejudice" mean Craig's Equipment may submit another request to reopen the case so that it can contest the citation and penalty assessment.[1] Any amended or renewed request by Craig's Equipment to reopen Assessment No. 000183807 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

[1] If Craig's Equipment submits another request to reopen the case, it must establish good cause for not contesting the citation and proposed assessment within 30 days from the date it received the proposed penalty assessment 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. Craig's Equipment should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented Craig's Equipment from responding within the time limits provided in the Mine Act, as part of its request to reopen the case. Craig's Equipment should also include copies of all documents supporting its request to reopen the case.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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April 27, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2009-1673 A.C. No. 46-08684-180113 F354
v.	:	
COAL HAULERS, INC.	:	

BEFORE: Jordan, Chairman; Duffy, 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 13, 2009, the Commission received from Coal Haulers, Inc. ("Coal Haulers") a letter from its president 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).

On March 24, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000180113 to Coal Haulers. Coal Haulers states that on April 10, 2009, it faxed a letter to MSHA requesting a conference and that it also mailed the proposed assessment form contesting the penalty and requesting a hearing. However, it further states that it received a letter from MSHA dated June 24, 2009, indicating that the penalty was delinquent.

The Secretary does not oppose the operator's request to reopen. She notes that on the front of all proposed assessments, it states that an operator who wishes to contest the penalties and/or citations listed, should mark the form accordingly and mail it to the MSHA Civil Penalty Compliance Office in Arlington, Virginia. She urges the operator to take all steps necessary to ensure that future penalty assessments are contested in the required manner.

Having reviewed Coal Haulers' request to reopen and the Secretary's response, 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. 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.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 27, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 2009-743-M A.C. No. 13-02062-183095 K038
WENDLING QUARRIES, INC.	:	

BEFORE: Jordan, Chairman; Duffy, 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 18, 2009, the Commission received from Wendling Quarries, Inc. ("Wendling") 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).

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).

On March 4, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 6494021. Wendling filed a notice of contest challenging the citation on March 14, 2009 (Docket No. CENT 2009-338-RM). MSHA issued the proposed assessment covering that citation on April 22, 2009. Wendling claims that, because of its prior contest of the underlying citation, it was unaware that it needed to send in the penalty contest and it did not forward the proposed penalty assessment to its counsel. It further asserts that its accounting office mistakenly paid the penalty because the proposed assessment form included the penalty for another citation which had not been contested. Wendling asserts that it discovered that the penalty had been paid and not contested when it consulted its counsel about a related Mine Act proceeding on August 18, 2009. Counsel submitted the motion to reopen on that same day.

Although the Secretary does not oppose the motion to reopen, she urges the operator to take all steps necessary to ensure that future penalty assessments are contested in a timely manner.

Having reviewed Wendling'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.

Mary Lu Jordan, Chairman

Michael F. Duffy, 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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April 27, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. LAKE 2009-588
	:	A.C. No. 11-03058-181275
v.	:	
WHITE COUNTY COAL, LLC	:	

BEFORE: Jordan, Chairman; Duffy, 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 28, 2009, the Commission received from White County Coal, LLC ("White County") 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).

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).

On April 7, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000181275 to White County, proposing civil penalties for several citations. White County maintains that it filled out the proposed assessment form indicating that it intended to challenge 14 of the citations and their associated penalties in the sum of $39,838, and sent the contest to MSHA's Civil Penalty Compliance Office. White County states that it sent its payment in the amount of $8,053 for the remaining citations to MSHA's Payment Processing Center in St. Louis, Missouri. The operator further states that on approximately July 1, 2009, MSHA sent White County a notice stating that it was delinquent in paying $39,838 in penalties to MSHA.

The Secretary does not oppose White County's request to reopen the proposed penalty assessment. She notes that a payment dated April 27, 2009, in the amount of $8,053 was timely received at MSHA's Payment Processing Center. However, the Secretary states that MSHA has no record of receiving the penalty contest form at its Civil Penalty Compliance Office in Arlington, Virginia.

Having reviewed White County'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.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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April 27, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 2010-394-M
	:	A.C. No. 09-00075-196270
MARTIN MARIETTA MATERIALS, INC.	:	

BEFORE: Jordan, Chairman; Duffy, 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 January 22, 2010, the Commission received from Martin Marietta Materials, Inc. ("Martin Marietta") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On March 12, 2010, the Commission received a motion from Martin Marietta's counsel stating that the operator has decided to pay the penalty assessment at issue in full and requesting that Martin Marietta's pending request to reopen the assessment be withdrawn.

Having reviewed Martin Marietta's request and its motion to withdraw the request, we hereby grant Martin Marietta's motion to withdraw its request to reopen.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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April 27, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2010-322-M
v.	:	A.C. No. 33-04147-198682
THE OLEN CORPORATION	:	

BEFORE: Jordan, Chairman; Duffy, 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 January 11, 2010, the Commission received from the Olen Corporation ("Olen") 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).

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

The Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000198682 to Olen on September 29, 2009, proposing penalties for six citations that had been issued to Olen in August 2009, including Citation Nos. 6403708, 6403709, and 6403712. Olen states that it had requested a conference with the local MSHA office regarding Citation Nos. 6403709 and 6403712, and sent the proposed assessment form designating the two citations as contested along with payment for other citations to MSHA. Olen further states that MSHA's Civil Penalty Compliance Office does not have a copy of its request, and that Olen received a notice from MSHA stating that it was delinquent in paying penalties associated with Citations Nos. 6403708 and 6403709. Olen clarifies that it did not want a conference on Citation No. 6403708.

The Secretary of Labor does not oppose reopening but notes that the records of MSHA's Civil Penalty Compliance Office do not indicate that it received a contest of Proposed Assessment No. 000198682.

Having reviewed Olen's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.[1] Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty with respect to Citation Nos. 6403709 and 6403712 within 45 days of the date of this order.[2] *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

[1] Despite its outstanding conference request on the citations, Olen was obligated to file a formal contest of the associated penalties in the assessment within 30 days of receiving the assessment with MSHA's Arlington, Virginia, office and to pay any penalties to MSHA's St. Louis, Missouri, office. *See* 29 C.F.R. § 2700.26. Olen should take appropriate steps to ensure that it complies with these requirements in the future.

[2] MSHA should reapply Olen's payment to the penalty associated with Citation No. 6403708 as appropriate.

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April 27, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2009-1038
	:	A.C. No. 46-08122-170790
v.	:	
	:	Docket No. WEVA 2009-1039
	:	A.C. No. 46-08904-170801
KWV OPERATIONS, LLC	:	

BEFORE: Jordan, Chairman; Duffy, 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 10, 2009, the Commission received from KWV Operations, LLC ("KWV") an amended motion by counsel 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).

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).

In its original motions, filed on March 25, 2009, KWV's vice president stated that he received the assessments and marked the citations that he intended to contest and then forwarded them to KWV's corporate office. KWV asserted that through "inadvertence or mistake" the assessments were not timely returned to MSHA. The Secretary did not oppose reopening the proposed penalty assessments. The Commission subsequently denied the requests to reopen without prejudice because of KWV's failure to provide a sufficiently detailed explanation for its failure to file timely contests. *KWV Operations, LLC*, 31 FMSHRC 613, 615 (June 2009).

The amended request to reopen from KWV includes a more detailed affidavit from the vice-president, who explains that he has further investigated the matter with KWV's corporate office, and that the office may have mistakenly sent the notices of contest to the MSHA address for penalties payments. He further states that KWV has changed its handling procedures for penalty assessments in an attempt to avoid this occurring in the future.

Having reviewed KWV's amended request and the Secretary's original 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.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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April 27, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2010-590
v.	:	A.C. No. 46-08759-199280
NEWTOWN ENERGY, INC.	:	

BEFORE: Jordan, Chairman; Duffy, 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 2, 2010, the Commission received from Newtown Energy, Inc. ("Newtown") a motion to reopen a penalty assessment 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 section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

On October 2, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000199280 to Newtown, proposing a penalty for a citation that had been previously issued to the operator. According to both Newtown and the Secretary, the assessment was addressed to the correct location, but was returned undelivered to the Secretary, with no further explanation provided by Federal Express. Newtown states that it learned of the assessment when it checked the MSHA web site or around January 20, 2010, and that it never received a delinquency notice from MSHA. The Secretary does not oppose reopening, but notes that MSHA sent a delinquency notice to the address of record dated January 5, 2010.

Having reviewed Newtown's request and the Secretary's response, we conclude that Assessment No. 000199280 has not become a final order of the Commission because it was never received by Newtown. Accordingly, we deny the request to reopen as moot and remand this matter 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. If the operator has not already done so, it should submit the proposed assessment form to MSHA within 30 days of the date of this order. *See* 29 C.F.R. § 2700.26.[1]

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

[1] It appears that the operator is having difficulty receiving packages and correspondence from MSHA. It is incumbent upon the operator to work with MSHA to solve this problem.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 27, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 2010-630-M A.C. No. 24-02236-205673
GLACIER STONE SUPPLY, LLC	:	

BEFORE: Jordan, Chairman; Duffy, 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 1, 2010, the Commission received from Glacier Stone Supply, LLC ("Glacier") 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).

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

The Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000205673 to Glacier on December 10, 2009, proposing a penalty for a citation that had been issued to Glacier on October 21, 2009. Glacier states that it sent its notice of contest to the wrong MSHA office and that, while it wishes to pursue its contest, it has also paid the penalty. Glacier also requests a conference on the citation. The Secretary does not oppose reopening, but urges the operator to make certain in the future that it sends all notices of contest to the MSHA office specified on the contest form.

Having reviewed Glacier'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.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution:

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April 27, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2010-159-M
v.	:	A.C. No. 30-02268-196081
BARTON MINES COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Duffy, 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 3, 2010, the Commission received from Barton Mines Company, LLC ("Barton") 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).

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).

Barton states that shortly after receiving eight citations in July 2009 from the Department of Labor's Mine Safety and Health Administration ("MSHA"), it sent a letter requesting a conference on the citations to the local MSHA office, as it had been instructed at the time it received the citations. Barton further explains that later that month, in connection with an MSHA inspection of a separate facility, it received different instructions regarding how to request a conference on the citations. On September 8, 2009, MSHA issued Proposed Assessment No. 000196081 to Barton regarding the original set of eight citations. On September 17, 2010, Barton submitted a letter expressly contesting all of the citations and penalties to the MSHA district office from which it had requested a conference, with the marked-up assessment attached. Barton now acknowledges in its letter to the Commission that it sent the assessment form to the wrong address. It also asks that its previous request for a conference be reconsidered.

The Secretary of Labor opposes reopening the assessment on the ground that the operator is not requesting reopening, but rather is seeking a conference on the citations, a matter over which the Commission does not have jurisdiction.

Having reviewed Barton'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. We note that Barton did send a letter expressly contesting the proposed assessments to the local MSHA district office within the 30-day period for contests, and there is no indication that Barton has previously sent contests to the wrong address in circumstances such as these.[1] While the Commission cannot grant Barton's request for a conference, it can reopen the proceeding so that Barton is not foreclosed from contesting the citations and penalties, as it has indicated a number of times that it wished to do. 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.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

[1] We caution Barton that it must send any future notices of contest regarding proposed penalties to the address for the Civil Penalty Compliance Office in Arlington, Virginia, specified on the proposed assessment form.

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April 27, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2010-444-M
v.	:	A.C. No. 23-01892-196053
TABLE ROCK ASPHALT CONSTRUCTION, INC.	:	

BEFORE: Jordan, Chairman; Duffy, 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 3, 2010, the Commission received from Table Rock Asphalt Construction, Inc. ("Table Rock") 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).

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).

On September 8, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000196053 to Table Rock, proposing penalties for four citations that had been issued to the operator in July 2009. According to its request, Table Rock received the assessment, its representative marked the form to indicate that it was contesting all the proposed penalties, and it mailed the notice of contest within the required 30 days.

The Secretary states that MSHA has no record of receiving the notice of contest and that she does not oppose reopening.

Having reviewed Table Rock'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.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 27, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 2009-1299-M
ADMINISTRATION (MSHA)	:	A.C. No. 15-18389-132599
	:	
v.	:	Docket No. KENT 2009-1300-M
	:	A.C. No. 15-18389-166970
DIX RIVER STONE	:	
	:	

BEFORE: Jordan, Chairman; Duffy, 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 6, 2009, the Commission received from Dix River Stone ("DRS") a letter from its president that we construe as a request 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).[1]

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*

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2009-1299-M and KENT 2009-1300-M, both captioned *Dix River Stone* and involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

In his letter to the Commission, DRS's president states that DRS learned by phone from "an attorney" that it was overdue on paying three citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") in 2007 and 2008, and "[u]pon reviewing our files, we found that we had resubmitted these citations as contested, yet received no response." DRS included with its request marked pages from two assessments that indicated that the penalties in connection with four citations were to be contested.

The Secretary of Labor opposes DRS's request to reopen the two assessments. The record shows that the operator submitted the same statement to MSHA regarding having "resubmitted" the citations, and MSHA responded that it had no record of having ever received contests of the proposed penalties.

A. Assessment No. 000132599

The Secretary further states that because this assessment became a final Commission order on January 3, 2008, DRS's submission of a request to reopen approximately 18 months later should be denied. Under Rule 60(b), any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect, not more than one year after the order was entered. Fed. R. Civ. P. 60(b). Because DRS's request to reopen was filed over a year after the proposed assessment became a final order, its request as to this assessment is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Accordingly, DRS's request to reopen is denied as to this assessment.

B. Assessment No. 000166970

The Secretary offers evidence that this assessment was received by DRS and opposes reopening it on the ground that the operator offers no explanation for why it failed to contest the assessment in a timely manner. The Secretary also notes that the request to reopen was not filed until five months had passed after MSHA sent DRS a delinquency notice regarding the assessment, and may have been prompted by efforts by the U.S. Treasury Department to collect the outstanding penalties.

Having reviewed DRS's request and the Secretary's response, we conclude that DRS has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments. The statements in DRS' request do not provide the Commission with an adequate basis to justify reopening. Accordingly, we deny the request for relief as to this

assessment without prejudice.[2] *See Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

[2] The words "without prejudice" mean that DRS may submit another request to reopen this assessment so that it can contest specific citations and penalty assessments. If DRS submits another request to reopen, it must establish good cause for not contesting the citations and proposed assessments within 30 days from the date it received the proposed penalty assessment 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 fault on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. DRS should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented DRS from responding within the time limits provided in the Mine Act, as part of its request to reopen. DRS should also submit copies of supporting documents with its request to reopen.

In any such request DRS must also address why it did not file its request to reopen until months after the MSHA notice should have alerted it to its delinquency. In the context of penalty assessments, in considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice or other notification from MSHA and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009). Since the time DRS filed its request, the Commission has held that any request to reopen filed more than 30 days after the receipt of such a notice is grounds for denial of that request. *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009).

Any amended or renewed request by DRS to reopen Assessment No. 000166970 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

Mary Lu Jordan, Chairman

Michael F. Duffy, 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, DC 20001

March 2, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2008-858-M A.C. No. 42-01975-143531
v.	:	
LAKEVIEW ROCK PRODUCTS, INC., Respondent	:	Lakeview Rock Products

DECISION

Appearances: Hillary A. Smith, Conference & Litigation Representative, U.S. Department of Labor, MSHA, Denver, Colorado, for the Petitioner;
Kevin R. Watkins, Esq., Lakeview Rock Products, Inc., North Salt Lake, Utah, for the Respondent.

Before: Judge Feldman

This civil penalty proceeding concerns a Petition for the Assessment of Civil Penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"), 30 U.S.C. § 820(a), by the Secretary of Labor ("the Secretary") against the respondent, Lakeview Rock Products, Inc., ("Lakeview"). This matter was heard on November 17, 2009, in Salt Lake City, Utah. The parties' post-hearing briefs are of record.

The Secretary seeks to impose a total civil penalty of $1,602.00 for two alleged violations of mandatory safety standards governing surface metal and nonmetal mines. Specifically, the Secretary proposes a civil penalty of $1,412.00 for Citation No. 6318475 that cites an alleged significant and substantial (S&S) violation[1] of 30 C.F.R. § 56.3131. This safety

[1] Generally speaking, a violation is S&S if it is reasonably likely that a hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum,* 3 FMSHRC 822, 825 (April 1981).

standard requires mine operators to keep the area near the perimeter of the pit or quarry highwall free of conditions that create a fall-of-material hazard to persons working or traveling below.[2] The Secretary also sought to assess a civil penalty of $190.00 for Citation No. 6318476 that alleges a non-S&S violation of 30 C.F.R. § 56.6132(b) that requires nonmetal magazines to be grounded. At the trial, the parties agreed that Lakeview will pay a reduced civil penalty of $100.00 in satisfaction of Citation No. 6318476. (Tr. 123). Thus, the only remaining unresolved issue is the fact of occurrence of the alleged highwall violation in Citation No. 6318475.

I. Findings of Fact

Lakeview owns and operates a surface gravel pit located in North Salt Lake, Utah. The highwall at this surface mine is not vertical. Rather, the natural rock formation is recessed and slopes away from the point where the base of the highwall meets the quarry floor. (Gov. Ex. 1, pps. 2-4). The gravel material is loosened from the highwall by an explosive blast. The loosened material is pushed by a dozer from an upper bench to a feed deck below where a loader operator picks up the material at the pit floor and transports it directly to one of several screens and four stationary crushers. (Gov. Ex 1, p. 1). Alternatively, the extracted gravel material is loaded at the bottom of the feed deck by the loader operator and dumped into haul trucks for transport to the crushers. In either case, the route traveled by the loader to and from the feeder deck to the crushers or trucks is in a general direction that is away from the base of the highwall. Specifically, the distance between the loader and the base of the highwall during the course of travel by the loader to and from the crusher and trucks is at least 80 feet as depicted in the photographic evidence. (Gov. Ex. 1, pps. 2, 3; Tr. 110-112,119). At the crushers the material is crushed, sized and stockpiled for sale and use in construction projects.

Mine Safety and Health Administration (MSHA) Inspector Curtis Pittman inspected the Lakeview Quarry on February 11, 2008. Pittman was accompanied by Greg Fowers, Lakeview's plant manager. Pittman initially observed the general condition of the roadways and highwall. Pittman observed the feed deck where a loader operator was removing material that had been extracted and pushed down by a dozer from the bench above. During his testimony, Pittman expressed concern that the angle of repose can be disturbed if the loader operator gets ahead of the dozer by removing unconsolidated material from the pit of the quarry floor in instances when the dozer has not pushed additional material from the bench above for several days. However, Pittman conceded that, at the time of his inspection, the loose unconsolidated material at the feeder deck was resting at an angle of repose and did not create a hazard to the loader operator. (Tr. 31, 49-52).

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[2] Citation No. 6318475 initially cited a violation of the mandatory standard in 30 C.F.R. § 56.3130. The Secretary's motion to amend the citation to reflect the cited standard as 30 C.F.R. § 56.3131 was granted on the record. (Tr. 8-12). The provisions of section 56.3131 are repeated verbatim in Citation No. 6318475 thus negating any claim by Lakeview that it has been surprised or otherwise prejudiced by the Secretary's amendment.

Rather, Pittman was concerned about "some very large rocks precariously perched kind of up on the side of the hill there, and the loader tracks, and where the loader was at, caused me to be concerned that he was close to that area." (Tr. 31-32). The very large rocks observed by Pittman were located on a ledge to the right of the feeder deck area. The ledge where these rocks were located was recessed back approximately 100 feet from the base of the unconsolidated dolomite stockpile and the pit floor. (Tr. 115). The subject rocks that concerned Pittman were recessed on the highwall in an area where large rock boulders were located at the base of the highwall. (Gov. Ex 1, p. 3). Pittman opined that these large boulders situated at the base of the highwall had fallen from the rock formation. (Tr. 90-91). Lakeview contends that they were intentionally placed there for safety to prevent the loader from traveling near the highwall. In any event, these boulders served as a barrier that prevents the loader from traveling in close proximity to the base of the highwall.

Scott Glen Hughes, Vice-President of Lakeview Rock Products, testified that the subject large recessed rocks that concerned Pittman were placed on the ledge over five years ago as a protective berm for the dozer operating on the upper bench. Although Pittman testified that the rocks were in a "precarious" location, Hughes credibly testified that the rocks were located approximately 30 feet from the edge of the bench or ledge. (Tr. 107; *see* Gov. Ex. 1, pps. 2, 3). Hughes was familiar with the location of the rocks because of their placement as a berm, and because he was responsible for removing the rocks to abate the subject citation. The discrepancy between Pittman's "precarious" characterization, and Hughes' testimony that the rocks were 30 feet from the highwall edge, can be attributable to Pittman's poor vantage point on the pit floor. (Tr. 108). In this regard, Pittman was observing rocks located on a highwall that was approximately 100 feet high, at a location that was recessed approximately 100 feet from the base of the highwall. In addition, Hughes testified that the rocks were stationary and unlikely to move because they required a 150,000 pound D-11 dozer with 1,000,000 pounds of drawbar force to push them off the highwall. (Tr. 109-10).

As a result of his observations, Pittman issued Citation No. 6318475. The second paragraph of the citation contains verbatim the entire provisions of section 56.3131. The citation states:

> The loader operators on the feed deck of the upper pit are exposed to loose unconsolidated rocks (some as large as 5 ft. in diameter) from the highwall above.
>
> In places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected.

(Gov. Ex. 2, p. 1).

The alleged violation was designated as significant and substantial based on Pittman's belief that the recessed rocks would fall down, either on or in very close proximity to the loader. (Tr. 53). Pittman conceded that the loader could not be directly exposed at the toe of the highwall in the event the subject recessed rocks fell because of the barrier created by the boulders that were located at the highwall base. Moreover, Pittman admitted that it was unlikely that the subject very heavy rocks could defy gravity and pose a hazard to the loader operator situated in the operator's compartment approximately 10 feet above the ground in a loader traveling at least 80 feet from the base of the highwall. (Tr. 65). Undeterred, Pittman concluded that it was possible that the loader operator could be exposed to falling rock as far as 80 feet from the base of the highwall, where the loader tracks are depicted in Gov. Ex. 1, p. 2, because "rocks can bounce." (Tr. 63- 64).

II. Further Findings and Conclusions

Section 56.3131, the subject mandatory standard, concerns two separate and discrete hazards. The first hazard, not relevant here, is caused by loose unconsolidated material. When loose or unconsolidated material is located near the perimeter of a vertical highwall, section 56.3131 requires that such material must be stripped back a distance of at least ten feet from the edge of the quarry highwall. When the loose unconsolidated material is in a stockpile, such as the loading deck in this case, section 56.3131 requires that such stockpiles must be trimmed or sloped back to maintain the angle of repose. Although Inspector Pittman was concerned that blasted material can be removed from the bottom of the stockpile before additional material is pushed by the dozer onto the stockpile from the bench above, thus disturbing the angle of repose, Pittman conceded that the angle of repose was maintained at the time of his inspection. Thus, the Secretary does not contend that the loose unconsolidated blasted material posed a hazard to the loader operator, or otherwise violated the provisions in section 56.3131.

The second hazard in section 56.3131, that is in contention in this matter, is a generic fall-of-material hazard. Specifically, section 56.3131 requires the removal of "[o]ther conditions [not associated with unconsolidated materials in stockpiles] *at or near the perimeter of the pit or quarrywall which create a fall-of-material hazard* to persons . . . . " (Emphasis added). This potential hazard consists of two elements. The first element is whether the subject rocks or other materials pose a fall-of-material hazard. In other words, the issue is whether the subject material is essentially stable, or, in danger of falling. It is significant that the cited rocks are recessed rather than situated at the perimeter of the highwall. The second element concerns whether there is a risk that persons will be exposed to the falling material because there is a reasonable possibility that the material will fall where persons work or travel.

As a threshold matter, it is worth noting that the circumstances in this case do not present a typical risk of exposure to quarry personnel who are working on the pit floor below loose rock or unconsolidated material located at the edge of a vertical highwall. Rather, the instant case concerns boulders, as large as five feet or more in diameter, that are on a bench that is set back approximately 100 feet from the toe of the highwall. Hughes, Lakeview's Vice-President, credibly testified that these boulders were placed on the bench approximately five years ago as a protective berm for the dozer operator. These recessed boulders are located in an area where large boulders are stacked at the base of the highwall as a barrier to prevent persons from working or traveling in the area directly adjacent to the highwall. In fact, Pittman believed construction of a barrier, that would achieve the same purpose as the existing boulders located at the base of the highwall, was an acceptable alternative method of achieving abatement if Lakeview elected not to remove the subject boulders from the bench. (Tr. 45-47). The uncontradicted evidence reflects that, during the route taken by the loader to off-load the blasted material, the loader maintains a distance of at least 80 feet from the highwall base.

The Secretary bears the burden of proving by the preponderance of the evidence, that the conditions cited support the fact of a violation of the mandatory safety standard in issue. The Commission has noted that the preponderance of the evidence standard requires the trier of fact believe that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000).

To satisfy her burden of demonstrating that the subject rocks pose "a fall-of-material hazard to persons," the Secretary argues ". . . that if several ton[s] of rock fell and landed in the wrong place ... we could have tragic consequences, serious injury and potentially death." (Sec'y Br. at p. 2). Indeed. However, the Secretary's "anything can happen theory" falls far short of satisfying her burden of proof by a preponderance of the evidence. Rather, the evidence reflects that these very large rocks were essentially stationary and extremely unlikely to move. In this regard, they had remained in place for several years and they could only be moved by a very large D-11 dozer.

Assuming, for the sake of argument, that the subject rocks did roll from their recessed location to the edge of the highwall, the Secretary's speculation that they could hit the ground and bounce for a distance of more than 80 feet, or, be propelled from the edge of the highwall, and strike the side or top of the loader operator's compartment is unavailing because it is contrary to the law of gravity. Rather these rocks would fall at the base of the highwall on the boulders that currently serve as a barrier preventing the loader from operating in proximity to the toe of the highwall.

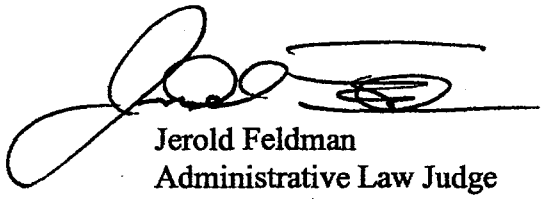
Thus, in the final analysis, the Secretary has failed to demonstrate by a preponderance of the evidence that the cited rocks "create a fall-of-material hazard to persons" as contemplated by section 56.3131. Accordingly, Citation No. 6318475 shall be vacated.

ORDER

In view of the above, **IT IS ORDERED** that Citation No. 6318475 **IS VACATED**.

IT IS FURTHER ORDERED, consistent with the parties' settlement terms, that Lakeview Rock Products, Inc., **SHALL PAY**, within 45 days of the date of this Decision, a civil penalty of $100.00 in satisfaction of Citation No. 6318476.

IT IS FURTHER ORDERED that, upon timely payment of the $100.00 civil penalty, this proceeding docketed as WEST 2008-858-M **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 5, 2010

R S & W COAL COMPANY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. PENN 2010-259-R
	:	Citation No. 7000438; 01/19/2010
v.	:	
	:	Docket No. PENN 2010-260-R
SECRETARY OF LABOR,	:	Order No. 7000439; 01/19/2010
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine ID 36-01818
Respondent	:	R S & W Drift

DECISION

Appearances: John Strawn, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Secretary of Labor; Randy Rothermel Sr., President, RS&W Coal Company, Inc., Klingerstown, Pennsylvania, *pro se*, on behalf of the Contestant.

Before: Judge Paez

These cases are before me on a request for expedited hearing by RS&W Coal Company, Inc. ("RS&W"), to contest Citation No. 7000438 and Withdrawal Order No. 7000439, both issued on January 19, 2010, pursuant to sections 104(a) and 104(b), respectively, of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act").[1] The general issues before me are whether RS&W violated 30 C.F.R. § 75.370(a)(1) for operating a mine without an approved ventilation plan, as alleged by the Secretary; and whether the Secretary properly issued a withdrawal order under section 104(b) of the Act for RS&W's alleged failure to abate the citation.

A hearing was held on February 18, 2010 in Harrisburg, Pennsylvania, pursuant to section 105 of the Act, 30 U.S.C. § 815. At the hearing, the parties stipulated that RS&W is subject to the jurisdiction of the Act, the RS&W Drift mine is owned and operated by RS&W, and the Commission judge has jurisdiction pursuant to section 105 of the Act, and further stipulated to the authenticity of their exhibits but not to the relevance or truth of the matters asserted therein.

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[1] By order dated February 2, 2010, I granted the request for an expedited hearing under Commission Rule 52, 29 C.F.R. § 2700.52, and a hearing was set for February 10, 2010 in Pottsville, PA. Due to two unprecedented snowstorms that closed federal government offices in Washington, D.C., from February 5 through February 12, the hearing was postponed.

(Joint Ex. 1.) At the conclusion of the hearing, the parties were permitted to submit written closing arguments and additional documentation.[2]

For the reasons stated below, Citation No. 7000438 is affirmed, except that the operator's negligence is reduced to "low", and Withdrawal Order No. 7000439 is accordingly affirmed.

Findings of Fact

RS&W operates the RS&W Drift anthracite mine located near Klingerstown, Pennsylvania. The mine is not mechanized. (Tr. 21-22.) The operator engages in conventional mining where coal is loaded by hand and gravity loaded, and explosives are used to blast the rock to reach the coal. (Tr. 142, 170.)

Citation No. 7000438 alleges a violation of 30 C.F.R. § 75.370(a)(1), which requires that operators develop and follow a ventilation plan approved by the MSHA district manager, which consists of a written document and a mine map. (Ex. G-11.) RS&W's written plan generally remains the same, but an accompanying map – reflecting changes in the working areas and mined out areas – is resubmitted every year on the plan anniversary date, which for RS&W happens to be in November, and the map becomes part of the ventilation plan if approved by the district manager. (Exs. G-4, G-5, C-1; Tr. 24-25.)

Citation No. 7000438, issued on January 19, 2010 by Gregory Mehalchick, an authorized representative of the Secretary (Tr. 18), alleges a non-"significant and substantial" violation of the standard at 30 C.F.R. § 75.370(a)(1), and charges as follows:

> The operator is working without a ventilation plan approved by the district manager. The ventilation plan shall consist of two parts, one part being the ventilation map with information prescribed in Sec. 75.372. The operator submitted a mine ventilation map to the District Office on November 16, 2009. Upon review by the district, deficiencies were found on the map and the map was returned to the operator with a letter of non-approval, listing the deficiencies that had to be corrected. The operator, Randy Rothermel, met with this inspector in the District's Pottsville Field Office on December 29, 2009 to address all deficiencies. During this meeting, the operator insisted that a permanent ventilation control, that being an evaluation point (EP), was going to be removed from the map and that one deficiency, that being the airflow direction in an area of the mine, was not going to be added to the map. The operator was informed at

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[2] After the hearing, RS&W submitted a copy of a letter dated December 17, 2009, from Randy Rothermel, President, RS&W Coal Co., Inc., to MSHA District Manager John A. Kuzar requesting a meeting on the ventilation map, which is hereby marked as Exhibit C-3. Counsel for the Secretary commented on this submission by letter dated March 3, 2010, noting that MSHA checked its files and could not locate that document. Exhibit C-3, as well as Exhibits C-1 and C-2 which were marked but not admitted at the hearing, are hereby received into evidence.

> this meeting that the mine ventilation map would not be approved by the district if these two edits were made. However, the operator removed the EP and did not add the airflow directions. The operator was called twice since this December meeting, January 4, 2010 and January 6, 2010 and was left messages regarding the necessity to meet again and resolve the two items. A return call was not received.

(Ex. G-11.) Mehalchick determined the operator's negligence to be high. Section 75.370(a)(1) provides in relevant part:

> The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan shall consist of two parts, the plan content as prescribed in § 75.371 and the ventilation map with information as prescribed in § 75.372. Only that portion of the map which contains information required under § 75.371 will be subject to approval by the district manager.

30 C.F.R. § 75.370(a)(1).

The parties agree, and the evidence introduced at hearing establishes, that the May 13, 2009 prior-approved ventilation map – which is part of the overall ventilation plan in conjunction with the written plan (Ex. G-5) – contained an evaluation point ("EP") near the Skidmore section of the mine ("Skidmore EP"), as well as directional arrows indicating airflow in an inby direction along the Skidmore section. (Ex. C-1.) As part of the process, RS&W submitted its ventilation map for annual review on November 11, 2009, which was received by MSHA on November 16, 2009. (Exs. G-3, G-4.) This submission included the Skidmore EP but did not include arrows indicating airflow along the Skidmore section. (Ex. G-4.) MSHA issued a deficiency letter on December 9, 2009, which included, among other things, approval of the Skidmore EP and MSHA's request to add directional airflow arrows on the mine map along the Skidmore section. (Ex. G-6.) Randy Rothermel Sr. testified that he wrote to MSHA District Manager John Kuzar on December 17, 2009 requesting a meeting on the ventilation plan. (Tr. 181; Ex. C-3.) Randy Rothermel Sr. and MSHA District Mining Engineer Greg Mehalchick, who was Acting Supervisory Specialist at that time, met at the MSHA Pottsville field office on December 29, 2009 to resolve the outstanding issues on the proposed ventilation map. (Tr. 15-16, 33.)

At the December 29, 2009 meeting, Rothermel Sr. deleted the Skidmore EP from the map and would not add the airflow directional arrows along the Skidmore section of the mine, which had been identified as a deficiency. (Exs. G-6, G-8.) During the meeting, Mehalchick told Rothermel Sr. that the ventilation plan would in all probability not be approved by the district manager with those two items missing, thus compelling Mehalchick to return over these same issues. (Tr. 85-86, 222-23.) Thereafter, in early January, Mehalchick left a voice mail message for Rothermel Sr. informing him that the ventilation plan would not be approved without those two changes. (Tr. 86.) Rothermel Sr. called back Mehalchick the next day and left a message asking to have a meeting with the district manager. (Tr. 86-87, 194-96.) Mehalchick testified at

the hearing that he returned that call, though he could not state when, and left another voice mail message indicating that Rothermel Sr. would have to arrange a meeting in the MSHA Wilkes-Barre district office if he wanted to meet about resolving the ventilation plan. (Tr. 87.) The parties exchanged no further communications until January 19, 2010.

On January 19, 2010, Mehalchick went to the RS&W Drift mine specifically to determine if the ventilation plan was in compliance. He met with Foreman Steve Rothermel to notify him that the two missing items – the Skidmore EP and the directional airflow arrows along the Skidmore section – on the ventilation map were grounds for a citation. Steve Rothermel contacted Randy Rothermel Sr. who told Mehalchick by telephone that RS&W would not add those two items to the ventilation map, even when warned the mine would be subject to a section 104(b) withdrawal order. Mehalchick then issued Citation No. 7000438 and Withdrawal Order No. 7000439.

General Legal Principles - Standard of Review

The law applicable to plan disputes was recently explained by the Commission in *Twentymile Coal Company*, where the Commission stated as follows:

> One of the cornerstone principles with regard to plan formulation under the Mine Act is that MSHA and the affected operator must negotiate in good faith for a reasonable period concerning a disputed plan provision. *Carbon County Coal Co.*, 7 FMSHRC 1367, 1371 (Sept. 1985). The Commission has noted, "Two key elements of good faith consultation are giving notice of a party's position and adequate discussion of disputed provisions." *C.W. Mining Co.*, 18 FMSHRC 1740, 1747 (Oct. 1996). . . .
>
> While the contents of a plan are based on consultations between the Secretary and the operators, the Commission has recognized that "the Secretary is [not] in the same position as a private party conducting arm's length negotiations in a free market." *Id.* at 1746. As one court has noted, "the Secretary must independently exercise [her] judgment with respect to the content of . . . plans in connection with [her] final approval of the plan." *UMWA v. Dole*, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989), *quoting* S. Rep. No. 181, 95th Cong., 25 (1977), *reprinted* in Senate Subcom. on Labor, Com. on Human Res., 95th Cong., Legislative History of the Federal Mine Safety and Health Act of 1977, at 613 (1978). Ultimately, the plan approval process involves an element of judgment on the Secretary's part. *Peabody Coal Co.*, 18 FMSHRC 686, 692 (May 1996) ("*Peabody II*"). "[A]bsent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval." *C.W. Mining*, 18 FMSHRC at 1746; *see also Monterey Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983) (withdrawal of approval of water impoundment plan was not arbitrary or capricious where MSHA's conduct

throughout the process was reasonable). *Emerald Coal* [*Res., LP*], 29 FMSHRC [956,] 965 [(Dec. 2007)].

Twentymile Coal Company, 30 FMSHRC 736, 747-48 (Aug. 2008). The standard involves a review of the record to determine whether the Secretary properly exercised her discretion and judgment in the plan approval process. In the event a plan provision is challenged by an operator, the Commission has held that the Secretary carries the burden of proving the disputed provision is "suitable" to the particular mine in question. *Peabody II*, 18 FMSHRC at 690 (applying the ordinary meaning of the word "suitable").

Further Factual Findings and Conclusions of Law

This case involves the removal of the very same evaluation point for the Skidmore area of the mine that RS&W itself included in its November 11, 2009 ventilation map and had submitted to MSHA for approval. However, over a month later at the December 29, 2009 meeting between Randy Rothermel Sr. and Mehalchick, RS&W proposed eliminating this EP for the Skidmore area of the mine, an area that had been worked out and which was some 2400 feet from the current working face. (Ex. G-4; Tr. 56, 78, 145.) In addition, RS&W would not indicate with arrows the airflow direction on the Skidmore section of the map. These two issues are what led to the dispute over approval of the ventilation plan resulting in MSHA's issuance of the citation and withdrawal order.

1. Good Faith Negotiations

Denying an operator's proposed ventilation plan must be done in writing from the district manager with an opportunity for the operator to discuss the denial, as noted in 30 C.F.R 75.370(c).[3] Technically, MSHA did provide the written denial of the operator's November 11 submission in its December 9, 2009 letter, along with an opportunity to discuss those deficiencies on December 29, 2009. I do not find RS&W's suggested change to eliminate the Skidmore EP or its continued refusal to place airflow arrows bad faith negotiating. The testimony by RS&W's witnesses provided a rationale for the positions the operator took on these two issues, and testimony from Rothermel Sr. and Mehalchick himself indicates that Rothermel Sr. did communicate his rationale to Mehalchick at that time. (Tr. 38-39, 50, 183-85, 190, 193.)

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[3] Section 75.370(c) provides as follows:

(c)(1) The district manager will notify the operator in writing of the approval or denial of approval of a proposed ventilation plan or proposed revision. A copy of this notification will be sent to the representative of miners by the district manager.

(2) If the district manager denies approval of a proposed plan or revision, the deficiencies of the plan or revision shall be specified in writing and the operator will be provided an opportunity to discuss the deficiencies with the district manager.

Nevertheless, Mehalchick informed Rothermel Sr. at the December 29 meeting of the unlikelihood that this change would be accepted, as the December 9 deficiency letter had required the Skidmore EP to be in the plan and stated the plan would not be approved with the absence of the airflow arrows. (Tr. 85-86.) At this point, disapproval by the MSHA district manager of RS&W's ventilation plan was inevitable, and for all intents and purposes the parties were at an impasse. I find that both sides had given notice of their positions and had adequate negotiations. Thus, I conclude that the parties had met their duty to negotiate in good faith and had done so over a reasonable period of time.

2. Arbitrary and Capricious Analysis

Absent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition for approval of RS&W's ventilation plan. Thus, the Secretary must establish a rational basis for her inclusion of the Skidmore EP and the airflow directional arrows along the Skidmore section.

RS&W's Arguments

At the hearing, RS&W gave several reasons for wanting to remove the Skidmore EP, including the difficulty of traversing that area, especially walking hazards for an examiner going to the Skidmore EP. These walking hazards involved various pitted areas some six inches wide and deep in the mine floor created when RS&W tore out the rail lines that existed on the way to the Skidmore EP. (Tr. 146.) RS&W had begun tearing up the rail lines for reuse in other parts of the mine after May 2009, or approximately six months before the hearing. (Tr. 146, 215-16.) The removal of the rails from the area of the Skidmore EP could cause some tripping hazards. Testimony from Foreman Steve Rothermel, the miner who actually conducted the weekly examinations of the Skidmore EP, indicated it was not a regularly maintained part of the mine and that the "conditions aren't nice to travel back there," though he never stated he was unable to conduct the Skidmore EP examinations due to these conditions. (Tr. 146.) Indeed, RS&W still continued to conduct the weekly examinations of the Skidmore EP, a requirement under the old ventilation plan, up until the time the mine became subject to a withdrawal order on January 19, 2010. (Tr. 197-199.)

Rothermel Sr. also testified at the hearing that he understood if he put arrows on the map indicating the airflow for a particular part of the mine, then RS&W would be required to have an examiner walk that whole area of the mine to check the airflow. If that were true, the weekly examiner would need to walk down the length of the Skidmore section, which both Mehalchick and Rothermel Sr. agree is towards a worked out and hazardous area of the mine. (Tr. 112,179.) RS&W also presented testimony from Rothermel Sr. that as long as air was flowing and ventilating the Skidmore section, it was immaterial which direction the air flowed. (Tr. 210-14.) I find these last two arguments disingenuous given the testimony of the MSHA witnesses. Mehalchick, who was Acting Specialist Supervisor at the time and is the District Mining Engineer tasked with reviewing ventilation plans for the district manager, stated there is no requirement that placing airflow arrows on the ventilation map requires RS&W to have an

examiner walk the area to inspect it. Moreover, Mehalchick and MSHA Supervisor Specialist Thomas Garcia both testified that having air flowing constantly and in one direction through various sections of the mine is the proper way to ventilate the mine and prevent the build up of gases and dust. (Tr. 38-39, 45-48, 55-56, 62-63, 233-35.) They unequivocally stated that vacillating airflow is to be avoided. I credit their testimony over that of Randy Rothermel Sr. on these points.

Analysis of Secretary's Evidence

The Secretary has established through the testimony of Mehalchick and Garcia, that weekly monitoring at the Skidmore EP for sustained and non-variable airflow to the Skidmore section of the mine is needed to ensure proper ventilation to prevent the build up of methane, dust, and low oxygen levels. Steve Rothermel, who conducts the examination of the Skidmore EP, and Rothermel Sr. admitted in testimony that the airflow in the Skidmore section of the mine varied and that, depending on barometric conditions and outside temperatures, the directional flow of air could fluctuate in that part of the mine. (Tr. 157-60, 186-89.) Rothermel Sr. indicated that as long as air was flowing in that part of the mine – regardless of direction – there was no hazard to the working sections, which were some 2400 feet outby the Skidmore EP. Nevertheless, this ignores that inby areas adjacent to and east of the Skidmore section, some several hundred feet east of the Skidmore EP, had collapsed after being worked out and were sealed because they were difficult to reach, not maintained, and dangerous. (Tr. 111-12, 163-64, 183-84, 233.) Nothing indicates that over time similar problems could not occur in the Skidmore section, which had been worked out and was not an active area of the mine (Tr. 179), making it imperative that proper airflow be monitored at the Skidmore EP.

Moreover, Mehalchick testified that this mine does not use push ventilation, which entails placing a large blower fan at the entrance to the mine that pushes air into the mine. Rather, an exhaust fan sucks air out of the mine and it is that sucking function that creates a vacuum pulling air from other parts of the mine, like the mine entrance, to ventilate the various worked out portions as well as the active workings of the mine.

Witnesses for both MSHA and RS&W observed breaches that ran from the mine ceiling up to the surface in areas extending several hundred feet to the east and west of the exhaust fan. (Gov't Ex. 8; Tr. 116-19.) These breaches indicate that some of the air exiting through the exhaust fan could be pulled down from the surface through these breaches and then back up and out through the exhaust fan, thereby short-circuiting the mine's ventilation. Crediting Rothermel Sr.'s testimony and Mehalchick's rebuttal testimony that these breaches did not extend down as far as the length of the Skidmore section, it is clear that the breaches reduce the vacuum that would otherwise be created if there were no such breaches. (Tr. 116-19.) It stands to reason that, with the potential for inaccurate readings due to breaches, removal of the Skidmore EP reduces the ability of the operator to determine the amount and direction of airflow along the length of the Skidmore section.

Consequently, I find that the Secretary has established that placement of the Skidmore EP and the directional arrows on the mine map were suitable for the conditions at this mine. Having determined the suitability of these provisions, I must determine whether the Secretary acted in a manner that was arbitrary or capricious or whether she abused her discretion in requiring these items for approval of the ventilation plan. Based on my review of the record, I conclude the Secretary did not. Therefore, Citation No. 7000438 for a violation of 30 C.F.R. § 75.370(a)(1) is sustained.

3. Negligence

It is undisputed that at the time Citation No. 7000438 was issued, RS&W did not have an approved ventilation plan, as the EP and airflow direction for the Skidmore section were not placed on the mine map, which is part of the ventilation plan. Consequently, the operator was technically in violation of the regulatory provision. An examination of the circumstances surrounding the period of time leading up to the issuance of the citation, however, leads me to conclude there is no basis for the Secretary's allegation that RS&W's violation was highly negligent. The communication, or lack thereof, between RS&W and MSHA personnel, coupled with the fact that no direct communication took place between the parties as to the next steps in resolving the two remaining issues on the mine map until Mehalchick appeared at the mine, may not technically be bad faith negotiation, but it begins to approach a line that governmental agencies such as MSHA should not cross.

While the parties were technically at an impasse at the conclusion of the December 29 meeting, MSHA left the door open for the possibility of further negotiation. Yet MSHA believed it sufficient to simply leave a voice-mail message reconfirming the plan's denial.

Arguably, Randy Rothermel Sr.'s change to the ventilation map on December 29 without a corresponding written rationale for the change created a problem. However, MSHA compounded that problem by not issuing a reply in writing. RS&W then responded in kind by leaving a message asking to meet with the district manager. The testimony from Mehalchick is unclear as to when he left a message for Rothermel Sr. to come to the Wilkes-Barre MSHA office if he wanted another meeting on the ventilation plan. Nevertheless, the lack of a paper trail before the inspector visited the mine on January 19 and issued the citation and withdrawal order is troublesome. Moreover, it appears to be a departure from nine years of past practice. This, coupled with the fact that under the old plan (still in effect at the time the withdrawal order was issued) the Skidmore EP airflow measurements were still being taken throughout the plan approval process, indicates that RS&W's negligence was "low" given the overall context of the negotiations. Indeed, the Commission decisions that explain the process by which MSHA and operators negotiate invariably find that both parties had sufficient time to explain their positions and consider the alternatives. RS&W was given an opportunity to explain its position, which it did on December 29, 2009. Although RS&W was told its position would likely be rejected, the operator was still under the impression that MSHA might reconsider after another meeting – right up until the time Mehalchick was at the mine and provided the operator 15 minutes during a telephone conversation to consider whether to capitulate to MSHA's demands.

While it is clear that Rothermel Sr. chose not to acquiesce to Mehachick's request to place the EP and directional airflow arrows on the ventilation map on January 19, 2010, the designation of the violation as involving "high" negligence is not supported by the evidence of record. In the Secretary's closing brief, she states that "Mehalchick testified that RS&W's negligence was high because Mr. Rothermel was aware that MSHA had not approved the ventilation map but continued to operate." (Sec'y Post-hearing Br. at 4.) That statement is also true as of December 29, 2009, but both Rothermel Sr. and Mehalchick testified that at their meeting on that date, the two remaining provisions in the plan, removal of the Skidmore EP and the directional arrows, were going to be reconsidered by MSHA. (Tr. 131, 194.)

Much like the fact that the operator cannot prove MSHA received Rothermel Sr.'s December 17, 2009 letter requesting a meeting with the district manager, the Secretary is likewise at a loss to prove Rothermel Sr. received Mehalchick's voice message that Rothermel Sr. could meet about the ventilation plan at the Wilkes-Barre office. Based on my evaluation of the demeanor of the witnesses, I believe each side genuinely could not understand the other side's reaction – Rothermel Sr. could not understand why he was being cited when he had an outstanding request to meet with the district manager, and Mehalchick was equally perplexed as to why the operator would be recalcitrant to place two simple marks on the ventilation plan mine map that, if not done, would shut down his mine operation. This does not amount to bad faith as the Commission has defined that term. What occurred, instead, was a miscommunication. This miscommunication could have been avoided had both sides stated their positions in writing, as Rothermel Sr.'s unrebutted testimony revealed to be the practice between the two sides for the past nine years – or at least spoke to one another directly. Accordingly, I find that the operator's negligence should be reduced to "low". This is especially true considering airflow measurements at the Skidmore EP were being taken up until the issuance of the withdrawal order.

4. Withdrawal Order

Withdrawal Order No. 7000439 was issued under section 104(b) of the Act[4] because Citation No. 7000438 had not been abated within the time frame provided. Based on the testimony of Mehalchick and Randy Rothermel Sr. regarding their telephone conversation on

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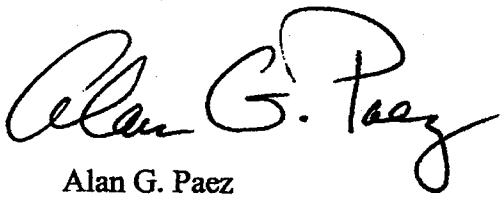
[4] Section 104(b) of the Act states:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

January 19, 2010, it is clear the operator did not intend to abate Citation No. 7000438 at the time of its issuance, and thus extending the abatement period further would have been fruitless. I conclude the two requirements for issuance of the withdrawal order were met, and Order No. 7000439 is hereby affirmed.

ORDER

In view of the above, **IT IS ORDERED** that RS&W Coal Company's contests are **DISMISSED**; section 104(a) Citation No. 7000438 is **MODIFIED**, by reducing the level of negligence from "high" to "low," and is **AFFIRMED** as modified; and section 104(b) Order No. 7000439 is **AFFIRMED**.



Alan G. Paez
Administrative Law Judge

Distribution:

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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

March 9, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 2008-71-M A.C. No. 40-03269-127960
v.	:	
CLAYSVILLE QUARRY, Respondent	:	Claysville Quarry

DECISION ON CIVIL PENALTY
AND
ORDER TO PAY

Before: Judge Feldman

The Claysville Quarry (Claysville) is a dimensional stone quarry, owned and operated by Dennis Roy Hinch. At the facility stone is extracted and stacked on pallets for customer delivery. The blasting is performed by Hinch. Hinch employs four employees who operate the mine equipment used during the extraction process. Francisco Morales Stone Stackers, a contractor, provides the services to load the extracted dimensional stone onto pallets.

I. Background

Section 104(g) of the Mine Safety and Health Act of 1977, as amended, ("the Act"), 30 U.S.C. § 814(g), authorizes an inspector to immediately withdraw individuals working at a mine who have not received the requisite new miner training. On August 21, 2007, Inspector Russell E. Ware issued 104(g)(1) Order No. 6123908, the sole subject of this proceeding, for an alleged violation of the mandatory safety standard in 30 C.F.R. § 46.8(a)(1) that specifies the requirements for new miner training. The 104(g) order was issued after Ware observed nine contract employees stacking stone on pallets. These contract employees had not received new miner training.

Inspector Ware designated the violation as significant and substantial (S&S). Generally speaking, a violation is S&S if it is reasonably likely that a hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum,* 3 FMSHRC 822, 825 (April 1981). The violation was attributable to a high degree of negligence. However, although Hinch was aware of the training requirements for new miners, the 104(g) order does not allege that Hinch knew he was responsible for training contract employees. Moreover, although these laborers are "miners" as defined by section 3(g) of the Act by virtue of their work at a mine, they are not operating mine equipment or otherwise exposed to hazards normally associated with the extraction process. 30 U.S.C, § 803(g). Significantly, the Secretary does not allege that the violation is attributable to a reckless or conscious disregard evidencing an unwarrantable failure. Consequently, the failure to provide new miner training evidences, at most, a moderate degree of negligence. The Secretary proposes a penalty of $3,224.00 for 104(g)(1) Order No. 6123908.

II. Settlement Conferences

In an attempt to encourage settlement a telephone conference was conducted with the parties on January 20, 2010. During the conference call Hinch stipulated that the necessary training was not provided to the nine contract employees. Hinch also stated that he did not dispute that the violation was significant and substantial. Consequently, with the exception of the appropriate civil penalty to be assessed, there are no remaining unresolved issues of material fact. Given the Commission's unprecedented caseload, in an effort to encourage settlement, I explained to the Secretary's counsel that the appropriate civil penalty is a *de novo* determination that is not affected by the Secretary's civil penalty formula in 30 C.F.R. Part 100. I noted that I failed to see any aggravating circumstances that would warrant the $3,224.00 proposed civil penalty. On the contrary, I noted that the small size of the operator, the lack of any significant history of previous violations, and Claysville's rapid compliance with the training requirements after service of the 104(g) order were mitigating factors. In addition, I explained that the failure to provide new miner training to nine contract employees was one oversight that did not justify multiplying the gravity ninefold.

In view of the above, I urged the parties to settle this matter for a reduced civil penalty of $240.00. During the January 20, 2010, telephone conference, Hinch agreed to pay $240.00 in settlement of the subject 104(g) order. In a subsequent telephone conference with the parties, on January 27, 2010, the Secretary's counsel, after conferring with Mine Safety and Health Administration officials, rejected the $240.00 civil penalty that I had suggested. Consequently, over the objection of the Secretary's counsel, I advised the parties that I was canceling the previously scheduled hearing as there are no unresolved material facts that warrant litigation.

On January 29, 2010, I issued an Order canceling the hearing and ordering the Secretary to address the statutory penalty criteria to the facts of this case. The Secretary responded on February 19, 2010. The Secretary's response did not identify any aggravating circumstances, and her response did not refute the above mentioned mitigating circumstances.

III. Statutory and Case Law Framework

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

> The principles governing the Commission's authority to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. § § 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria.
>
> > [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600 *citing* 30 U.S.C. § 820(i).

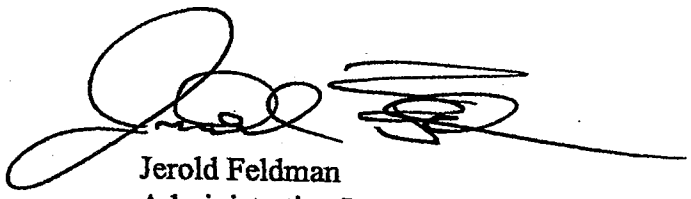
In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Act. *Id.* At 294, *Canera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission has noted that the *de novo* assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

ORDER

As discussed above, there are no remaining unresolved material questions of fact. Applying the section 110(i) statutory criteria, the small size of the operator, rapid efforts at good faith abatement, lack of a significant history of previous violations, a reduction in gravity because

the failure to train nine individuals is attributable to one oversight, and a reduction in negligence from high to moderate, warrant a significant reduction in the $3,224.00 civil penalty proposed by the Secretary. Rather, consistent with the statutory penalty criteria, a civil penalty of $240.00 shall be imposed for the subjection 104(g)(1) order. I note, parenthetically, that imposition of a $240.00 penalty is commensurate with the total $281.00 civil penalty proposed by the Secretary in a similar case for two separate violations of the new miner and hazard training provisions in Part 46 of the Secretary's regulations also committed by a small mine operator. 30 C.F.R. Part 46. *See SCP Investments, LLC.*, 32 FMSHRC 119, 129 (Jan. 2010) (ALJ).

Accordingly, **IT IS ORDERED** that the Claysville Quarry pay a civil penalty of $240.00 within 30 days of the date of this order in satisfaction of 104(g)(1) Order No. 6123908. Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. The payment should reference Docket No. SE 2008-71-M and A.C. No. 40-03269-127960. Upon receipt of timely payment, **IT IS ORDERED** that the captioned civil penalty case **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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/rps

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 10, 2010

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of KEVIN BAIRD, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING Docket No. SE 2010-74-DM SE-MD-09-08
	:	DISCRIMINATION PROCEEDING
v.	:	
	:	Docket No. SE 2010-304-DM SE-MD-09-08
PCS PHOSPHATE COMPANY, INC., Respondent	:	Mine ID 31-00212 Mine: Lee Creek

DISSOLUTION OF ORDER OF TEMPORARY ECONOMIC REINSTATEMENT AND DISMISSAL OF PROCEEDINGS

Before: Judge Bulluck

These matters are before me upon an Application for Temporary Reinstatement and a Complaint of Discrimination filed by the Secretary of Labor ("the Secretary") on behalf of Kevin Baird ("Baird") against PCS Phosphate Company, Inc. ("PCS"), pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c).

On October 14, 2009, the Secretary filed an Application for Temporary Reinstatement for an order requiring PCS to temporarily reinstate Kevin Baird to his former position or similar position at the same rate of pay as prior to his alleged termination. On December 18, 2009, an Order Granting Temporary Reinstatement of Baird to his former position of shift foreman, or to a similar position at the Lee Creek Mine, retroactive to November 16, 2009, was issued. Thereafter, on January, 11, 2010, the parties filed a Joint Motion to Amend the Order Granting Temporary Reinstatement, seeking temporary **economic** reinstatement of Baird. I granted the joint motion in an Amended Order on February 2, 2010.

On February 4, 2010, the Secretary filed a Notice of Withdrawal of her Discrimination Complaint filed on behalf of Baird, and requested that Baird's economic reinstatement remain in effect until the Commission's entry of a final order on the merits of Baird's potential action under section 105(c)(3) of the Act. The Secretary essentially asserts that the Act provides for temporary reinstatement under sections 105(c)2 **and 105(c)(3)**, notwithstanding a determination

by the Secretary, under section 105(c)(2), that no discrimination has occurred. As support for her position, the Secretary notes that, currently, there is no Commission precedent on this issue. Specifically, in *Peter Phillips v. A&S Construction Co.*, 31 FMSHRC 975 (Sept. 2009), the Commission split evenly on the question, which allowed ALJ David Barbour's dissolution of a temporary reinstatement, in the absence of a 105(c)(2) complaint, to stand.[1] This issue, again, is currently before the Commission. *See Mark Gray v. North Fork Coal Corp.*, 31 FMSHRC 1167 (Sept. 2009) (ALJ).

In response to the Secretary's withdrawal of the Baird Complaint, PCS filed a Motion to Dissolve Order of Economic Reinstatement on February 12, 2010, arguing that dissolution of a temporary reinstatement is required when the Secretary determines that no discrimination has occurred and consequently withdraws her section 105(c)(2) complaint. PCS asserts that this conclusion is consistent with the plain language of section 105(c). Additionally, in its March 5, 2010, reply to the Secretary's opposition to dissolution, PCS argues that a miner's private action under section 105(c)(3) is an additional remedy, rather than a continuation of the Secretary's section 105(c)(2) complaint under which temporary reinstatement is afforded.

Section 105(c)(2) provides, in pertinent part:

> If the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner *pending final order on the complaint* (emphasis added).

30 U.S.C. § 815(c)(2).

Section 105(c)(3) provides, in pertinent part:

> If the Secretary, upon investigation determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference. . . .

30 U.S.C. § 815(c)(3).

Although the Commission in *Phillips*, 31 FMSHRC 975, was unable to reach a majority decision, I find the reasoning of Commissioners Young and Duffy persuasive. The statutory language of sections 105(c)(2) and 105(c)(3) directly speaks to the issue before me. Section 105(c)(2) explicitly provides for temporary reinstatement under the Secretary's involvement in investigating and filing a complaint with the Commission, whereas language to that effect is notably absent from section 105(c)(3).

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[1] See *Peter Phillips v. A&S Construction Co.*, 30 FMSHRC 1119 (Nov. 2008) (ALJ).

The legislative history further demonstrates Congressional intent to restrict temporary reinstatement to the Secretary's responsibilities under the anti-discrimination provision of the Act. Under section 105(c)(2), only the Secretary is charged with conducting the initial investigation into the miner's claims, and is required to complete her investigation within a limited time. Congress sought to balance the miner's likely economic hardship against the operator's interest in controlling its workforce. *Phillips*, 31 FMSHRC at 984-85; *Peter Phillips v. A&S Construction Co.*, 30 FMSHRC 1119 (Nov. 2008) (ALJ).[2] Consequently, it implemented the remedy of temporary reinstatement, which would protect the miner until completion of the Secretary's investigation, and would only **temporarily** burden the operator. *Phillips*, 31 FMSHRC at 985-86. Therefore, based on the Secretary's determination that section 105(c)(1) has not been violated, I conclude that temporary reinstatement shall terminate as of the date of her determination.

WHEREFORE, the Amended Order Granting Temporary Economic Reinstatement is hereby **DISSOLVED**, effective February 4, 2010, and these proceedings are **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

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[2] *See* S. Conf. Rep. No. 95-461, at 52-53 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at 1330-31.

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 10, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 2008-184 A.C. No. 11-03141-137716
v.	:	
MACH MINING, LLC., Respondent	:	Mach # 1 Mine

DECISION

Appearances: Travis W. Gosselin, Esq., U.S. Department of Labor, Chicago, Illinois, on behalf of the Petitioner
David J. Hardy, Esq., Charleston, West Virginia, on behalf of the Respondent

Before: Judge Barbour

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor on behalf of her Mine Safety and Health Administration ("MSHA") against Mach Mining Company ("Mach") pursuant to section 105(d) (30 U.S.C. § 815(d)) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 801, *et seq.* The Secretary alleges that, in two instances, Mach violated mandatory safety standards for the surface areas of underground coal mines at its No. 1 Mine, an underground bituminous coal mine located in Williamson County, Illinois. The Secretary also charges that the violations were due to Mach's "high negligence." The Secretary seeks to assess Mach $550 for each alleged violation. Mach denies that it violated the standards or, if it did, that the violations were due to high negligence. The matter was heard in Carbondale, Illinois.

STIPULATIONS

At the commencement of the hearing the parties stipulated as follows:

1. Mach is an "operator" as defined in Section 3(d) of the Act.

2. The operations of Mach at its No. 1 Mine are subject to the Act.

3. [The] proceeding is subject to the Federal Mine Safety and Health Review Commission (the "Commission") and its designated administrative law judge.

4. [The inspector who issued the citations in which the violations are alleged] was acting in his official capacity as an authorized representative of the Secretary when the citations were issued.

5. A true copy of each of the citations . . . was served on Mach as required by the Act.

6. The total proposed penalty for the citations at issue will not affect Mach's ability to continue in business.

7. The citations contain in Exhibit A attached to the petition are authentic copies of the citations at issue in this proceeding.

8. The R17 assessed violation history report is an authentic copy and may be admitted as a business record of MSHA.

9. On September 7, 2007, Mach . . . installed and was operating an energized 480-volt non[-]permissible pump in the No. 1 south shaft at the . . .bleeder shaft construction site.

See Tr. 10-12; *See also* Jnt. Exh. 1

THE PARTIES' CONTENTIONS

Prior to the testimony, counsels explained their positions. Counsel for the Secretary stated he would show that the company pumped water from a shaft at the mine using a non-permissible 480 volt submersible pump and that the pump was located below the collar of the shaft.[1] Because section 77.1914(a) requires all electrical equipment used below the collar of a shaft during excavation to be permissible, the Secretary maintained the company violated the standard as charged. Counsel stated the critical question is whether "excavation" was underway when the shaft was dewatered. He maintained that within the context of the standard, "excavation" means the entire process of bringing the shaft to the point where it can serve its

[1]The pumping process is referred to as "de-watering" the shaft.

purpose of ventilating the bleeder entries of the mine's underground workings. Dewatering the shaft is a necessary part of this process and, therefore, should be regarded as "excavation."

Counsel also stated that he expected the testimony to show that on September 7, 2007, the company did not have a plan approved by MSHA to de-water the shaft. He maintained that, in addition to violating section 77.1914(a), Mach violated section 77.1900(a), which requires each operator of a coal mine to prepare and submit for the MSHA district manager's approval a plan providing for the safety of its workmen in each shaft that is constructed. Tr. 19-21.

Counsel for Mach countered that on September 7, 2007, excavation had been completed on the shaft. The shaft was sunk by Mach's contractor, North American Drillers ("North American"), and North American had moved all of its equipment to the site where it would sink another shaft.[2] Counsel admitted the pump was in fact non-permissible, but because the work of excavating the shaft was finished, electrical equipment used below the shaft's collar was not required to be permissible.

Counsel also maintained that Mach did not need a plan approved by MSHA in order to dewater the shaft. An approved plan that permitted dewatering was already in place on September 7. Once Mach decided that it would dewater the shaft, Mach's personnel used a pump that had been used in 2005 to dewater another shaft. The pump was non-permissible and MSHA had not objected when it was used in 2005. On September 7, 2007, MSHA surprised Mach by taking the position that the dewatering method had to be approved in another plan. Tr. 22. Counsel further stated that in the event MSHA was right and it needed an approved plan, the requirement was met by a provision in North American's MSHA-approved plan that stated either employees of Mach's contractor or employees of Mach could dewater the shaft. Tr. 23.

THE TESTIMONY

Dean Cripps is an electrical engineer who also works for MSHA as a coal mine electrical inspector. His duties include conducting electrical inspections of shaft construction sites. Tr. 26. Prior to September 7, 2007, Cripps inspected Mach's No. 1 Mine several times. Tr. 28-29. On September 7, Cripps was assigned to go again to the mine. He was instructed that this time his inspection should include the south shaft area.[3]

Cripps drove to the mine, parked, and walked to the mine office. At the office, Cripps informed mine management that he would be inspecting the south shaft site. Tr. 32. Cripps

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[2]The two shafts were approximately 150 feet apart. Tr. 76.

[3]The south shaft is a bleeder shaft, an air shaft that, according to Cripps, is "drilled down into the works of the mine usually at the back of a long wall panel." Tr. 33. A bleeder shaft assists in ventilating the long wall and the long wall gob. *Id.*; *see also* Tr. 40.

proceeded to the area, which was approximately five and one-half miles from the mine portal. *Id.*, Tr. 75.

At the site, Cripps met Mike Jackson, a shift foreman and job supervisor for North American. North American had finished drilling the south shaft to its final depth [[4]]and was in the process of drilling another shaft, the north bleeder shaft (the north shaft). The north shaft was located about 550 feet to 600 feet from the south shaft. Tr. 33. North American's drilling equipment had been removed from the south shaft. The shaft had been collared and a steel grate had been installed over its mouth. Tr. 73. The south shaft was full of water. Tr. 39. Before the shaft could serve its purpose of ventilating underground parts of the mine, it had to be de-watered and lined.[5] After the shaft was de-watered and lined, Mach intended to connect the shaft to the active underground workings.[6] Tr. 39-40; 40-41.

Jackson told Cripps that the water from the south shaft would be pumped to and into the north shaft, because the water in the north shaft was "too heavy." Tr. 42. Cripps asked Jackson what he meant, and Jackson explained the "blind drilling" process to Cripps. The process was used by North American to drill both the south and north shafts. Under the process, as drilling advanced, water was allowed to fill the shaft.

Cripps described the process:

> [T]hey excavate the topsoil . . . down to the bedrock. And then they form up and pour a concrete collar at

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[4]Cripps understood that the south shaft had been drilled through the seam of coal that Mach was actively mining and that it continued downward for approximately 100 more feet into another coal seam then being mined. The shaft "bottomed" in the second seam. Tr. 34.

[5]Mach typically contracted out such work, and in this instance, Heartland Pump ("Heartland") was hired to install de-watering pumps at the south shaft and Cowin Co. ("Cowin") was hired to line the shaft.

[6]Cripps stated:

> Once the shaft had been lined and driven to its depth . . . the mine operator would take . . . equipment . . . normally used underground . . . to excavate coal from the coal seam . . . . They would take their continuous miners and remove the coal . . . to the point [where] . . . they intersect with the shaft . . . and . . . connect the . . . coal seam with the shaft.

Tr. 40-41.

> the surface . . . . And then they line the top . . . 25 feet of the shaft with steel. So you'd have . . . approximately, a 25-foot hole there, 14 feet in diameter. . . . They then set up a drilling rig. First they drill a small pilot hole . . . and they set their big drill rig up on the hole and they proceed to drill a hole[,] down into the [e]arth. As they're drilling the hole[,] the hole is filled with water the whole time and the water is used to mix with the drill cuttings . . . so . . . [the cuttings] can be pumped out of the hole as the hole [is] extended down to the [e]arth.

Tr. 35.[7]

Cripps understood that water in the north shaft contained so many drill filings and other drilling residue, it was too "heavy" to be pumped to the surface and sent to the pit where it was ultimately deposited. To make the water/filings mixture "pumpable," the mixture had to be diluted with water from the south shaft. *Id.* This process was underway and a non-permissible pump was used in the south shaft to take the water from the south shaft to the north shaft.[8] Tr. 42, 74. The pump in the south shaft was fully submerged in water when it was operated. r. 74.

At the time of Cripps's inspection, only Jackson and Heartland's employees were present at the south shaft site. Tr. 75. They told Cripps the non-permissible pump had been installed in the south shaft for "a couple of weeks" Tr. 63. In addition, Heartland's employees told Cripps that, at Mach's request, they were preparing to install a second pump in the south shaft. Tr. 38, 52, 75. The second pump also would be non-permissible. *Id.*, Tr. 41. Cripps described the non-permissible pumps as cylindrical, and approximately six to eight inches in diameter and eight feet

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[7]Pete Hendrick, Mach's mine superintendent, also described the process. He stated:

> Blind drilling is a . . . relatively new technique . . . . A . . . large bit is placed on the surface, a pilot hole is drilled and you . . . .drill it out. You float the cuttings out with heavy water and air.

Tr. 99.

[8]Because drilling had been completed in the south shaft and most of the solids had been removed, the water in the south shaft contained very few filings and/or other drilling residue. Most of the residue that remained had settled to the bottom of the shaft. Tr. 123-124. The water in the south shaft was described by Hendrick as "crystal clear." Tr. 123.

in length. Their motors were located at the bottom of the cylinders. The pumps' "intakes" were below the motors. Water and any residue in the water was taken into the pumps through the intakes and forced to the surface. The pumps were operational only when they were submerged. Tr. 37-38.

Cripps testified that mandatory safety standard section 77.1914(a) requires "any electrical equipment used below the collar of the shaft or slope during excavation [to] be permissible." Tr. 37. In his opinion, Mach violated the standard because a non-permissible electric pump had been installed and used below the collar of the south shaft and a second such pump was being installed. Tr. 37. Cripps believed that Mach was highly negligent in allowing the use of a non-permissible pump. Cripps explained that his supervisor, Ron Stahlhut, told him that he, Stahlhut, had spoken with a Cowin official or officials and explained that Cowin's shaft-sinking plan had to include "how they were going to dewater [the] shaft using permissible pumps before [the] plan would be approved." Tr. 44. Although Stahlhut did not tell Cripps he had spoken with any of Mach's officials about having to use permissible pumps before a plan would be approved, Cripps believed that at least some of Mach's employees knew about Stalhut's conversation with Cowin's employees. Tr. 47. In Cripps's view, Hendrick was involved in everything at the mine, including all of the plans submitted by Mach's contractors for MSHA's approval. Although Cripps had no first-hand knowledge as to any of Hendrick's conversations, he speculated that Hendrick knew that failing to provide for permissible pumps would prevent MSHA from approving a shaft-sinking plan for the mine. Tr. 85. Therefore, Mach officials "took it upon [themselves]" to proceed without an approved plan. Tr. 48. They "contact[ed] Heartland . . . to install the non-permissible pumps in the shaft and [to] pump the water." *Id.* Cripps stated, "I made an assumption that Mr. Hendrick was aware of what MSHA had informed Cowin." Tr. 85. Therefore, in Cripps's opinion, use of the non-permissible pump was the result of Mach's "high negligence." *Id.*

With regard to the hazard posed by using a non-permissible pump, Cripps explained that because the shaft was being sunk through a coal seam, methane could be liberated and could accumulate above the water level in the shaft. Tr. 45. If the water seeped out of the shaft and the water level dropped below the level of the pump – something that could happen if there was a crack in the shaft's walls or in a coal seam the shaft penetrated – when the pump was turned on, "you would have a non[-]permissible electric motor that would no longer be covered by water and [there] could possibly be an explosive atmosphere of methane." Tr. 46. In other words, "[U]se of a non-permissible pump . . . in an atmosphere that contains methane could cause a methane . . . [ignition] or explosion." Tr. 45. The resultant heat would "at least"cause burns to miners. *Id.*

In addition to violating section 77.1914(a), Cripps believed Mach violated section 77.1900(a). He based his belief on the fact that water was being pumped from the shaft with a non-permissible pump and a shaft-sinking plan had not been approved by MSHA allowing this kind of work. Tr. 50. Cripps acknowledged that nowhere in the standard is it specifically stated that the plan must include a provision requiring the use of permissible pumps. He also agreed

that in March 2004, MSHA issued a compliance guide to operators and other interested parties regarding the information that the agency required in a plan submitted for approval (Tr. 79; Resp. Exh. 1) and that the guide did not state that the method of dewatering the shaft had to be included. Tr. 78. In fact, the guide did not mention dewatering at all. Tr. 80. However, Cripps pointed out that in setting forth what must be included in a plan, section 77.1900(a)(3) requires "[a] description of the construction work and methods . . . used in the construction of the slope or shaft," and he stated he viewed dewatering the shaft as "construction work." Tr. 92.

The only approved plan in existence on September 7, 2007, was North American's, which, according to Cripps, did not allow water to be pumped from the shaft. Tr 51. 54; Gov't Exh. 4. Although Provision 3-DV of the North American plan stated, "The finished shaft will be left full of water to be removed at a later date by either the lining contractor or mine personnel," the plan did not state how the water would be removed.[9] Tr. 76-77. Tr. 54, 76; Gov't Exh. 4.

Cripps identified an approved plan that Cowin had submitted for a shaft that was sunk earlier during the initial construction of the mine. Tr. 58-59; Gov't Exh. 6. According to Cripps, this plan approved the use of two types of pumps for de-watering the shaft – a submersible permissible pump and a surface, non-permissible pump.[10] Tr. 60-61. In a cover letter to Cowin approving the plan, the district manager stated, "You are reminded that all electrical equipment used below the collar of the shaft must be permissible. See §77.1914 for a reference." Gov't Exh. 6 at 1; Tr. 62. Cripps noted that although the letter was addressed to a vice president of Cowin, a copy was sent to Hendrick. Tr. 62-63.

Cripps believed that Mach was highly negligent in failing to have an approved plan. He explained that in making the finding, he relied on, "Basically, the same facts that I used in the determination of negligence on the previous citation." Tr. 64.

According to Cripps, the hazard presented by working without an approved plan was that non-permissible equipment would be used below the shaft's collar, which in turn created the possibility of a methane ignition that would cause those working at or near the head of the shaft to suffer serious burn injuries. Tr. 64-65. However, Cripps agreed that such an accident was unlikely to occur (Tr. 88) and that he had no knowledge of a methane ignition ever occurring when a submerged, non-permissible pump was used to dewater a shaft. Tr. 89.

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[9]In fact, either shortly before or shortly after the inspection, Cowin submitted a plan to the MSHA district manager, but the plan, which was dated September 4, 2007, was not received in the MSHA district office until September 27. Tr. 56; Gov't Exh. 5. The only reference to dewatering the south shaft in the plan was on page 4, where it described the shaft as having been blind drilled and dewatered. Tr. 57; Gov't Exh. 5 at 4. In Cripps's view, the Cowin plan assumed the work of dewatering and lining the shaft had been completed.

[10]Cripps stated the surface pump was not required to be permissible because "[t]he electric components of . . . [the] pump [were] on the surface . . . not below the collar of the shaft." Tr. 61.

Peter Hendrick testified for Mach. He holds a B.S. in mining engineering and has extensive practical experience in underground coal mining, including the excavations of shafts. Tr. 95-97. He has been involved in the development of approximately 20 shafts, going back to 1992 when he worked for a company other than Mach. Tr. 100.

Hendrick explained that the first shaft drilled in connection with the mine was a return shaft and that Mach's contractor, North American, submitted a plan to MSHA for developing the shaft. Tr. 100. The plan involved the blind drilling method. The plan was approved by MSHA's district manager. TR. 100-101; Resp. Exh. 2. Hendrick testified that under North American's plan, the "finished shaft" was to be "left full of water to be removed at a later date by either the lining contractor . . . or mine personnel." Tr. 101. In practice, this meant that the shaft was left full of water for several months. Tr. 102. According to Hendrick, the only job North American was hired for was to "[e]xcavate the shaft." *Id.*

Because one of the Secretary's allegations was that a non-permissible pump had been used in the shaft "during [the shaft's] excavation" and in violation of section 77.1914(a), there was much discussion at the trial regarding the meaning of the word "excavation" as used in section 77.1914(a). In Hendrick's view, the word meant "the removal of material from the hole. Plain and simple." Tr. 102. He added, "There is nothing else involved in it." *Id.* Hendrick noted that the definition of "excavation" in an online dictionary is "to engage in digging, hauling out or removing," which is entirely consistent with his understanding of the word's meaning in section 77.1914(a). Tr 103; Resp. Exh. 3.

Hendrick was asked about the process of developing the south shaft. He testified that the first step was hiring a contractor to drill the shaft. The second step was for the contractor – in this case, North American – to drill the shaft. The third step was to de-water the shaft. The fourth step was cutting into the shaft from the active workings. Tr. 136-137. The fifth step was lining the shaft. The sixth step was preparing the shaft to be used for ventilation of the mine, a process requiring the installation of manifolds and a fan at the top of the shaft. Tr. 137-138. Hendrick agreed that approved plans were needed to drill the shaft, to cut into the shaft from the mine and to line the shaft. Tr. 138-139. However, Hendrick did not think a plan was needed to dewater the shaft. Tr. 139. Although Cowin included a provision that referenced de-watering in its 2005 plan, Hendrick did not know why. Gov't Exh. 6; Tr. 139. He speculated that, "[Y]ou put stuff in your plan . . . that's not required" in order to "get your plan through." Tr. 139-140.

Hendrick had never heard that de-watering the shaft was considered "excavation." Tr. 104. Hendrick believed the requirement to use a permissible pump was an archaic leftover from the days before "blind drilling," the days when the shaft was drilled, shot and mucked out.[11] Tr.

[11]Hendrick described mucking out as the process of "pulling all the rock out in a muck bucket." Tr. 107.

107. Before "blind drilling," miners actually worked in the shaft. According to Hendrick, that was the reason for requiring the pump to be permissible. Tr. 108. However, with blind drilling, the only time miners entered the shaft was during the lining process, and this process took place after all of the water was removed from the shaft. *Id.*

Hendrick recalled that when the citations were issued, he called the MSHA assistant district manager, Dave Wickham, and complained about having to use a permissible pump to dewater the shaft and to have a provision in an approved plan requiring the use of such a pump. According to Hendrick, Wickham told him that was "just the way [MSHA] District 8 interpret[ed]" the regulations. Tr. 114. Hendrick testified that he told Wickham, "[T]hey don't even make a permissible pump that will pump at this depth . . . There is not a single pump out there that will do this job" (Tr. 114; *see also* Tr. 124-125), and Wickham replied, "[Y]ou're a smart guy, Pete, go figure it out."[12] Tr. 114. Hendrick emphasized that using a non-permissible pump was not hazardous, because the pump's motor functions only when it is under water. If the energized pump were exposed to air, the pump would automatically shut down. Tr. 117. Hendrick felt that defining dewatering the shaft as "excavation" was "really reaching." Tr. 119. Although he agreed that when the shaft was dewatered, a little of the drilling residue that had gone into suspension was removed with the water, he maintained most of the material just "settled out" (Tr. 119; *see also* Tr. 123), which was why he described the water removed from the shaft as "crystal clear." Tr. 120.

Hendrick did not think the company violated section 77.1900(a). He stated:

> I can't read any work in any of the MSHA publication[s] or the Code of Federal Regulations that requires us to have a plan to pump that water out of that hole. . . . I've never had a plan in the past to pump water out of a hole.

Tr. 118.

THE ISSUES

The issues are whether Mach violated the standards alleged in the citations, and, if so, whether the violations were caused by Mach's high negligence, and the amount of the civil penalties that must be assessed for any violations taking into consideration the civil penalty criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i).

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[12]In fact, Mach dewatered the shaft by linking a series of permissible pumps and by incrementally lowering them as water was pumped from the shaft. Tr. 115.

CITATION NO. 6666936
30 C.F.R. § 77.1914(a) – THE NON-PERMISSIBLE PUMP

THE PARTIES' ARGUMENTS

THE SECRETARY

In the Secretary's view, the essential question is the meaning of the word "excavation" as it is used in the standard. The Secretary argues that the word encompasses "the entire process of constructing the shaft - up to and including when the mine is connected into the shaft and the shaft is lined." Sec. Br. 12. The Secretary states:

> The excavation of a shaft is not simply the act of digging out a hole; it is a multi-step process involving a series of distinct, but interrelated phases: drilling, dewatering, connecting, lining. The successful completion of each step is predicated on the completion of the preceding step, and all four steps must be completed before the shaft is capable of being put into service to ventilate the mine. Only then has the shaft been fully excavated.
>
> Sec. Br. 12.

She asserts that "[d]ewatering is no more or less a process of 'removal of material from the hole' than is . . . floating out cut material." Sec. Br. 13. This is especially true since when the pump was first installed and energized[,] it removed some of the material left from the drilling process along with the water. *Id.* n. 4 (*citing* Tr. 108).

The Secretary argues her interpretation of the word "excavation" is consistent with the dictionary definition of the word as set forth in Webster's Third New International Dictionary (2002). There, the word is defined as "the action *or process* of excavating." (*emphasis added*) Sec. Br. 13. She notes that the word "process" is defined as "a progressive forward movement from one point to another on the way to completion: the action of passing through continuing development from a beginning to a contemplated end: the action of *continuously* going along *through each of a succession of acts*, events or developmental stages" (*emphasis added),* and she argues that "[t]o the extent that dewatering is part of a succession of acts directed towards completion of the shaft, it is clear that dewatering is part of the process of 'excavation' as that term is used in [s]ection 77.1914(a)." Sec. Br. 13-14. Because the parties agree that the pump used to dewater the shaft was non-permissible (Stip. 9), and because the pump was located below the collar of the shaft, Mach violated Section 77.1914(a) as charged.

The Secretary also argues that Cripps's finding of "high negligence" is fully supported by his reasonable assumption that Hendrick knew a permissible pump was required, yet Mach used a non-permissible pump. It is reasonable for Cripps to assume Hendrick knew that MSHA would require language in a shaft-sinking plan requiring the use of a permissible pump because MSHA sent Hendrick a copy of its letter to Cowin, in which it reminded Cowin that "all electric equipment used below the collar of the shaft must be permissible." Gov't Exh. 6 at 1; Sec. Br. at 15-16. Despite this knowledge, Mach had a non-permissible pump installed below the south shaft's collar and Mach used the pump. Sec. Br. at 7.

MACH

Like the Secretary, Mach asserts that the key to understanding whether or not a violation of section 77.1914(a) occurred is the meaning of "excavation" as the word is used in the standard. Mach relies on an internet dictionary definition of "excavation," which defines the word as meaning "to engage in digging, hollowing out or removing." Op Br. at 7. It argues that the record supports finding that at the time of the inspection, excavation of the shaft had been completed. North American had hollowed out the shaft all of the way to its bottom. North American had moved its equipment to another shaft, and it had placed a steel grate over the shaft, which prevented miners entering it. *Id.*

Moreover, it asserts that if a violation occurred, it was not due to Mach's "high negligence." There is no evidence of any conversations between MSHA and Mach regarding the use of non-permissible pumps for dewatering a shaft. Op. Br. at 8. Cripps's assessment of negligence was based entirely upon assumptions based on communications between MSHA and third parties. *Id.* at 8-9. Moreover, in 2005, the company used the same non-permissible pump to dewater a return ventilation shaft, and MSHA knew about it; yet the agency did not charge Mach with a violation of the standard. *Id.* at 9.

THE VIOLATION

The citation states:

> An energized 480 volt non-permissible pump is installed below the collar of the # 1 (south) bleeder shaft at the Mach # 1 mine bleeder shaft construction site.

Gov't Exh. 2

As has been stated repeatedly, section 77.1914(a) requires in pertinent part that, "Electric equipment employed below the collar of a . . . shaft during excavation shall be permissible." The parties essentially agree that the citation accurately describes the situation Cripps found at the south shaft on September 7, 2007, and that a non-permissible pump was in fact installed below

the collar of the shaft. Stip. 9. They also agree the pump had been used to pump water from the south shaft to the north shaft. *Id.*; Tr. 37, 42, 51, 74. Under the standard, the electrical equipment must be "employed." "Employed" is the past tense of the verb "employ." The verb means "to make use of." *Websters Third New International Dictionary* (2002) at 743. Obviously, the pump was made use of when it pumped water from one shaft to another. Therefore, I find the pump was "employed" within the meaning of section 77.1914(a).

The all important question is whether the pump was employed "during excavation." If so, the violation existed as charged. If not, the citation must be vacated. "Excavation" is not defined in the Act, in the standards, or in any official MSHA publication that has been brought to my attention. However, as used in the mining industry, "excavation" is recognized to mean: "The act *or process* of removing soil and/or rock materials from one location and transporting them to another. It includes digging, blasting, braking, loading and hauling either at the surface or underground." American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms*, 2nd ed. (1997) at 193 (*emphasis added*).[13]

Although the question is close, I conclude that as used in the standard "excavation" means the "process" of removing soil and/or rock materials from one location and transporting them to another and that this process includes dewatering the shaft. I reach this conclusion based on the definitions in the *Mining Dictionary* and in *Websters* that define excavation as a process, and on testimonial evidence that the process of dewatering the shaft involved the removal of at least a small amount of suspended residue that remained from drilling the shaft. The definitions require me to look beyond the individual steps in the shaft sinking process and to regard as "excavation" all of the steps necessary to remove the rock materials resulting from the process prior to the shaft's serving its ventilation purpose. When viewed from this perspective, dewatering is a part of the shaft's excavation process and any pump used below the collar of the shaft must be permissible.

I reach this conclusion not in deference to the Secretary's view, but as a result of the plain meaning of the term "excavation" as used in the standard. While it is true that in colloquial speech the word "excavation" frequently is restricted to the actual digging out of soil and rock, the emphasis in the definitions on the "process" of excavation connotes a broader, more expansive meaning, one that, here, I find the Secretary has properly applied. The Secretary established the violation as alleged.

NEGLIGENCE

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[13]In *Webster's*, too, "excavation" is defined as an "action *or process*," and while "excavating" is defined as "[t]o hollow out: to form a cavity or [a] hole," and to "dig out and remove," it also is defined as to "[s]hape by removing material so as to leave a space." *Webster's* at 791.

While I conclude Mach violated section 77.1914(a), I do not subscribe to the Secretary's view that the violation was due to the company's "high negligence." As the company accurately points out and as the Secretary recognizes, Cripps's high negligence finding was based entirely on assumptions. Cripps believed that Hendrick knew MSHA required the use of a permissible pump because Cripps's supervisor told Cripps that he, the supervisor, had informed an official (or officials) of Cowin that a permissible pump had to be used. Tr. 44. Because Hendrick was "involved in all of the operations of [the] mine[,]" Cripps surmised that Hendrick knew of the permissibility requirement. Tr. 48. However, there is no evidence to support finding that Hendrick spoke with anyone from Cowin about the requirement to use permissible pumps below the shaft's collar. Nor is there any evidence that MSHA communicated directly either orally or in writing with any Mach official on the subject. Cripps's assumptions are reeds too slender to support his high negligence finding.

However, the fact that MSHA never communicated directly with Mach on the requirement prior to September 7, 2007, does not absolve the company of meeting the standard of care required by the circumstances. A careful reading of the standard should have revealed to company officials that excavation of the shaft included the entire process of removing material to allow the shaft to fulfill its purpose, and this process included dewatering. Although Mach's officials did not meet this standard of care, their lack of care was ordinary, not high.

CITATION NO. 6666935
SECTION 77.1900(a) - THE LACK OF AN APPROVED PLAN

THE PARTIES' ARGUMENTS

THE SECRETARY

The Secretary asserts that Mach or its contractors did not have an MSHA-approved plan in place specifying how the shaft would be dewatered.[14] The Secretary maintains it was Mach's responsibility to make sure an approved plan was in place, a plan that specified how a contractor or mine personnel would remove the water from the shaft. She further asserts that to gain approval under section 77.1900(a), the plan had to stipulate that all electrical equipment, including a dewatering pump, used below the collar of the shaft, would be permissible. In the Secretary's view, dewatering the shaft without an approved plan violated section 77.1900(a). Sec. Br. at 2.

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[14]The only MSHA-approved plan that mentioned removing water from the south shaft was North American's plan. It was approved by the agency on January 8, 2005. It stated, "The finished shafts will be left full of water to be removed at a later date by either the lining contractor or mine personnel." *Id.*; Gov't Exh. 4. No language in the plan spoke to how the shafts would be dewatered. Sec. Br. 14.

The Secretary notes that section 77.1900(a)(3) states that all shaft-sinking plans shall include, "A description of the construction work and methods to be used in the construction of the slope or shaft, and whether part of all of the work will be performed by a contractor and a description of that part of the work to be performed by a contractor." Referencing Cripps's testimony, the Secretary maintains that "construction work," as the term is used in the standard, includes the process of dewatering the shaft. Sec. Br. 18 (*citing* Tr. 83). Therefore, an approved plan needs to include language specifying how a shaft will be dewatered (including a description of the methods to be used, as well as language identifying which contractor will perform the dewatering). North American's approved plan, which states, "The finished shafts will be left full of water to be removed at a later date by either the lining contractor or mine personnel" did not meet these requirements. Sec. Br. 17-18.

The Secretary maintains that Mach was aware that MSHA required an approved plan to be in place before dewatering began. She points out that several months before Cripps's visit to the mine, his supervisor, Ron Stahlhut, told Cripps that he (Stahlhut) spoke with Cowin's personnel and told them that in order for MSHA to approve Cowin's shaft and slope sinking plan, the plan would have to include a provision that the shaft would be dewatered using a permissible pump or pumps. Sec. Br. at 7; 15. Cripps was sure Hendrick knew of this conversation.

In addition, in 2005, when MSHA approved a plan for dewatering a shaft, the agency advised Cowin's Vice President for Safety by letter that "all electrical equipment used below the collar of the shaft must be permissible," and Hendrick was sent a copy of the letter. Sec. Br. at 8 (*quoting* Gov't Exh. 6). Therefore, Cripps properly found that Mach's failure to make sure an approved plan was in place prior to dewatering the shaft represented high negligence on the company's part. *Id.*

MACH

Mach notes that section 77.1900(a) requires plans be submitted to protect the safety of workmen "[i]n each . . . shaft." Op. Br. at 10 (*quoting* section 77.1900(a); "Each operator of a coal mine shall prepare and submit for approval . . . a plan *providing for the safety of workmen in each . . . shaft* (emphasis added).) Workmen were not in the shaft during the dewatering process. Therefore, requiring a plan is inconsistent with the purpose of the regulation. Op Br. at 11-12. Mach further notes that none of the listed topics that must be included in an approved plan, topics found in section 77.1900(a)(1) through section 77.1900(a)(9), mention dewatering. *Id.* Moreover, MSHA's own compliance guide on slope and shaft sinking plans, dated March 2004, contains no mention of dewatering a shaft. *Id.* at 10-11; *See* Op. Exh. 1. Absent any requirement that dewatering be included in a plan, there is no basis to find that a failure to have an approved plan that includes dewatering violates section 77.1900(a).

Mach further argues that even if section 77.1900(a) is somehow construed as requiring a plan for dewatering the shaft, North American had a plan approved by MSHA which provided

that the shaft would be left full of water to be removed later by either the lining contractor or mine personnel.

Finally, Mach reiterates its argument that Cripps's negligence finding cannot be upheld, because it is based solely on hearsay and assumptions. Op. Br. at 12-13.

THE VIOLATION

The citation states:

> Work is being performed at the #1 (south) bleeder shaft at the Mach #1 mine bleeder shaft construction area. Water that was left in the shaft when North American Drillers completed drilling the shaft is now being pumped out of the shaft. One submersible pump has been installed in the shaft and another is being prepared to be installed by Heartland Pump. Mach . . . does not have an approved plan to allow this work in the shaft.

Gov't Exh. 3.

Section 77.1900(a) states in part:

> Each operator of a coal mine shall prepare and submit for approval by the . . . [MSHA] District Manager for the district in which the mine is located, a plan providing for the safety of workmen in each slope or shaft . . . . The plan shall be consistent with prudent engineering design. The methods employed by the operator shall be selected to minimize the hazards to those employed in the initial or subsequent development of any slope or shaft[.]

Following section 77.1900(a), the standard sets forth nine topics the plan must include. 30 C.F.R. § 77.1900(a)(1) through (a)(9).

Cripps testified, and Mach does not dispute, that on September 7, 2007, neither Mach nor any of its contractors had a plan approved under section 77.1900(a) that required the use of permissible pumps to dewater the south shaft. Tr. 51, 54. The only approved plan, that of Mach's contractor, North American, left open the specifics of how the shaft would be dewatered.

Tr. 53-55, Gov't Exh. 4. The plan simply stated, "The finished shaft will be left full of water to be removed at a later date by either the lining contractor or mine personnel." Gov't Exh. 4 at 3. North American's plan also specified, "There is no electrical equipment required below the shaft collars." *Id.* at 4.

Section 77.1900(a) states that "[t]he methods employed by the operator shall be selected to minimize the hazards to those employed in the initial or subsequent development" of a shaft. While, as Mach notes, that plan is required to provide for the safety of workman "*in* each . . . shaft," I do not subscribe to Mach's view that because workmen were not "in" the south shaft when it was dewatered, and/or when a second pump was being installed, a plan requiring the use of a permissible pump or pumps to dewater the shaft was not required, because such a plan would not have furthered the purpose of the regulation. Op. Br. 11-12. It seems clear that the phrase "in each . . . shaft" as used in the regulation pertains to the shaft construction site, not just to the shaft itself. The standard requires a description of the "construction work and methods to be used in the construction of the . . . shaft" and some of the equipment used in a shaft's construction is operated from and on the surface. The safety of the workmen operating such equipment must also be a concern of the plan. For this reason, I agree with the Secretary that the safety of those workmen on the surface above the collar who install and operate the dewatering pump or pumps must be taken into account of by any approved plan.[15]

It was incumbent on Mach as the operator of the Mach No. 1 Mine either to submit its own plan for the entire process of excavating the south bleeder shaft or to make sure its contractors had approved plans for those parts of the process that lay within their areas of responsibility. As the Secretary points out, section 77.1900(a)(3) requires inclusion in the plan of "a description of the construction work and methods to be used in the construction of the . . . shaft." Further, section 77.1900(7) makes the operator responsible for ensuring that the type of equipment used in the construction work be specified in the plan. I agree with the Secretary that, when taken together, these sections require the operator to ensure that either it or its contractors have an approved plan specifically describing how water will be removed from the shaft and specifying the equipment used to do so. It is a fact that on September 7, 2007, neither Mach nor any of its contractors had such a plan. This means that when Mach engaged in dewatering the shaft, it violated section 77.1900(a).

NEGLIGENCE

While I conclude Mach violated section 77.1900(a) as alleged, I do not find that the violation was due to the company's "high negligence." Cripps's finding of high negligence was based solely on assumptions that I have found cannot support his finding. There is no evidence that Hendrick spoke with anyone from Cowin about the requirement to use permissible pumps

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[15]This was certainly recognized by North American, which submitted a plan to MSHA that covered North American's "[p]re-[e]xcavation activities," activities that took place on the surface. Gov't Exh. 4 at 2.

below the shaft's collar. Nor is there any evidence that MSHA communicated either orally or in writing with any Mach official on the subject.[16] Further, although Hendrick agreed on cross-examination that he knew the 2005 plan had been submitted by Cowin and approved by MSHA, he was not asked whether he read the cover letter and understood that MSHA interpreted the plan as requiring the use of permissible pumps.[17]

Negligence is the failure to meet the standard of care required by the circumstances. Here, where the hazard posed to workers was minimal (*see* discussion of the gravity criteria, *infra*), where the standard required a careful reading to determine what was required, and where

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[16]To gainsay the obvious, when seeking to ensure that a particular standard is followed in a particular way, direct, clear communication between MSHA and an operator is preferable to communicating through an operator's contractor via word of mouth and letter copy.

[17]The closest he came being asked is the following exchange:

> Q. [Y]ou testified that you never had to submit a plan for to dewater a shaft; isn't that right?
>
> A. Yes, sir.
>
> Q. But . . . [Cowin's approved November 2005 plan] includes the language for dewatering a shaft. Didn't you submit this plan?
>
> A. No, Cowin did.
>
> Q. And when it was approved[,] weren't you copied on it?
>
> A. Uh-huh.
>
> Q. So, you were aware that this one was out there and had been submitted?
>
> A. Yes.

Tr. 140.

In other words, Hendrick knew of the plan, but he did not testify as to his understanding of what it required insofar as permissible pumps were concerned. I find that this exchange falls short of unequivocally establishing what Hendrick knew and understood with regard to the permissibility requirement for shaft pumps.

MSHA's communication to the operator of the standard's requirements was indirect at best, I find Mach's failure to meet the standard of care was the result of Mach's ordinary neglect.

OTHER CIVIL PENALTY CRITERIA

Neither violation was serious. The hazard posed by the installation and use of a non-permissible pump below the collar of the south shaft was that the pump would ignite accumulated methane. However, and as the testimony established, the likelihood of the hazard coming to fruition was negligible. First, when pumping was underway, the underwater location of the non-permissible pump made it impossible for the pump to serve as an ignition source. Tr. 74. For the impossible to become possible, the water level in the shaft had to drop below the location of the pump, methane had to seep from the coal seams through which or to which the shaft had been drilled, and methane had to accumulate to explosive range inside the shaft at the pump's location. Tr. 45-46, 64-65. The Secretary presented no evidence that such a scenario ever had occurred at Mach's No. 1 Mine – indeed, at any mine. She also presented no evidence that water ever seeped out of the shaft, and she presented no evidence regarding methane liberation at the No. 1 Mine and in uncompleted bleeder ventilation shafts at the mine. Cripps found that the violation was "unlikely" to cause "lost workdays or restricted duty" to any of Mach's miners or to its contractors' employees, and the testimony bears him out. *See* Gov't Exh. 2.]

The hazard posed by the lack of an approved plan was that it allowed the installing and use of a non-permissible pump for use below the collar of the south shaft, and that the pump would ignite accumulated methane. Tr. 64-65. For reasons stated regarding the gravity of Citation No. 6666936, I find the likelihood of this hazard coming to fruition also was negligible and that Cripps's finding that the violation was "unlikely" to cause "lost workdays or restricted duty" is more than supported by the record. *See* Gov't Exh. 3.

Regarding other civil penalty criteria, the parties stipulated that the total proposed penalty would not affect Mach's ability to continue in business. Stip. 6. The agency's assessed violation history report (Gov't Exh. 1) indicates that in the two years prior to September 7, 2007, 57 citations and orders were issued for alleged violations of mandatory safety standards at the mine. The Secretary contends this represents a "medium" history of previous violations. Mach contends it represents a "small" history. I find that, as counsel for the Secretary maintained, given the size of the mine, this is a "medium" history, one that neither increases nor decreases the size of the penalties that must be assessed. I further find that the mine is "small" in size. Tr. 143. However, the agency's Office of Assessments' proposed assessment sheet (Petition, Exhibit A) indicates the mine's controlling entity is large. Therefore, when considering the criteria of size, I conclude it should have a medium effect on the amount of any penalty assessed. Finally, the citations were abated promptly. *See* Gov't Exh. 2, Gov't Exh. 3. Since Mach's good faith is evident, penalties otherwise assessed will not be increased.

CIVIL PENALTY ASSESSMENTS

CITATION NO.	DATE	30 C.F.R.§	PROPOSED ASSESSMENT
6666935	9/7/07	1900(a)	$550.00

I have found that the violation occurred, that it was due to Mach's ordinary negligence, and that it was not serious. Given these findings and the other civil penalty discussed above, I conclude a civil penalty of $250.00 is appropriate.

CITATION NO.	DATE	30 C.F.R.§	PROPOSED ASSESSMENT
6666936	9/7/07	1914(a)	$550.00

I have found that the violation occurred, that is was due to Mach's ordinary negligence and that it was not serious.. Given these findings and the other civil penalty discussed above, I conclude a civil penalty of $250.00 is appropriate.

ORDER

Within 40 days of the date of this decision, Mach **IS ORDERED** to pay a total civil penalty of $500.00 for the violations found above. Also, within the same 40 days, the Secretary **IS ORDERED** to modify the inspector's negligence findings in the citations from "high" to "moderate." Upon payment of the total civil penalty and modification of the citations, this proceeding **IS DISMISSED**.

David F. Barbour

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 23, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2009-693-M A.C. No. 42-01996-179938 U82
v.	:	
AMES CONSTRUCTION, INC., Respondent	:	Mine: Copperton Concentrator

DECISION

Appearances: Matthew Finnigan , Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Michael Homer, Noah Hoagland, Suitter Axland PLLC, Salt Lake City, Utah, for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Ames Construction, 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 case involves one citation issued by MSHA under section 104(a) of the Mine Act at the Kennecott Utah Copper mine, at the Tailings Facility operated by Ames Construction. The parties presented testimony and documentary evidence at the hearing held on January 12, 2010 in Salt Lake City, Utah.

The parties stipulated that, at all pertinent times, Ames Construction, Inc. was a mine operator subject to the provisions of the Mine Act. Stip. 1-3.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ames Construction, Inc. ("Ames") is a contractor responsible for the construction of a tailings dam, and the raising of the tailings dam, pipe and roadways at the Kennecott Tailings Facility near Magna, Utah. Stip. 4; (Tr. 261-262). On October 29, 2008, Shane Julian, an

MSHA inspector and accident investigator, was called to the Kennecott Mine to investigate the death of William Kay, an employee of Bob Orton Trucking ("Orton"), a subcontractor at the facility. Subsequently, Julien issued a citation to both Ames and Orton for the identical violation. (Tr. 33-40, 71-71). Orton acknowledged that it is a contractor of Ames and admitted the fact of violation, but seeks to have the penalty reduced by means of a separate hearing.

a. Citation No. 6328009

As a result of the investigation Julien issued Citation No. 6328009 to Ames alleging a violation of 30 C.F.R. § 56.9201, which requires "[e]quipment and supplies shall be loaded, transported, and unloaded in a manner which does not create a hazard to persons from falling or shifting equipment or supplies." The citation described the violation as follows:

> A fatal accident occurred on October 29, 2008, when a delivery truck driver was struck by a section of pipe. The victim had operated a truck containing a supply of pipes which was loaded, transported and unloaded in a manner which was hazardous to persons from falling supplies. The pipes had been inadequately secured and the driver had begun to unload nine sections of pipe when one 50 foot section of pipe fell from the flat bed trailer and struck him.

Julien determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was significant and substantial, that one employee was affected, and that the negligence of Ames was low. A civil penalty in the amount of $13,268.00 has been proposed for this violation.

I. The Accident

The facts of the accident that killed William Kay are undisputed. On October 29, 2008, Kay arrived at the mine around 7:30 a.m. Kay was employed as a truck driver for Orton. *See* Stip. 5; (Tr. 192). Kay was 81 years old, had been a truck driver for more than 30 years, and had a hazard card, dated September 27, 2007, from Kennecott indicating that he had received training from Ames. (Tr. 88); Ex. G-11. The training did not include unloading of the truck or the use of a forklift to safely unload a truck. (Tr. 104, 118).

On October 29, 2008, Kay's flatbed truck was loaded with plastic pipe to be used at the tailings operation at the mine. WL Plastics Corporation loaded the pipes, which included nine separate pipes, each about 50 feet long and weighing approximately 3,000 pounds. (Tr. 65); *See* Ex. G-31 (photo). The pipes were strapped to the flatbed truck and separated by wood dunnage (i.e. general purpose landscape timber) to help secure the load. (Tr.129). Chocks, wedge-shaped devices which are designed to prevent rolling, were not used, although, according to witnesses, chocks should have been added onto the dunnage to help prevent rolling. (Tr. 131-132). The

mine received many deliveries of pipe each month, as pipe is an integral part of the process of building and maintaining the tailings ponds. (Tr. 150-151, 226).

When Kay arrived at the mine on the day of the accident, he stopped at the office and was then escorted to the delivery drop-off location by a pipe crew consisting of Greg Davis, James Hilton and Juan Florez. (Tr. 151). Kay's flatbed truck followed the pickup with the pipe crew for approximately eight miles to the unloading area. (Tr.154). Florez got out of the pickup to stay with Kay while Davis and Hilton went to retrieve a forklift to unload the truck. (Tr. 160); Stip. 12, 13. Davis told Kay to "stay right here" until he returned with the forklift, but gave Kay no further instruction. (Tr.194-195). Normally the Orton drivers do not unload the truck on their own, but do participate in the unloading process by loosening the straps that secure the load with a long tool that they carry in the truck, while the remainder of the process is left to the contractor who is in charge of the site. (Tr. 90).

While waiting in the unloading area with Kay, Florez crossed the road for a few minutes, then returned to the passenger side of the flatbed truck. He observed Kay out of the truck, near his toolbox. Florez assumed that Kay was getting tools and preparing to unload the truck, but couldn't remember if he saw Kay with the bar used to loosen the straps. (Tr. 62-64, 84, 169). Florez was at the passenger side of the truck, looking down the road, when he heard a loud crack, followed by a thump. He found Kay lying on the ground next to the truck. (Tr. 174-175). Kay had removed the straps for the top layer of pipes, causing a pipe to roll off the truck onto Kay, crushing him. Photographs of the scene of the accident provide a view of the truck driven by Kay, the forklift used to stabilize the load when it was removed, and the pipe that had been a part of the load delivered by Kay. Ex. G-29, 31, 33.

While it is Ames' responsibility to unload the pipes from the truck, it is generally the driver of the truck who loosens the straps prior to unloading. (Tr. 232). The driver normally has the tool, much like a long bar, to loosen the straps in the toolbox of the truck. (Tr.168-169). Inspector Julien testified that when Florez, or any person at the mine, saw what he thought might be some action on the part of Kay to loosen the straps without a safe support, he should have stopped the unloading and instructed Kay to wait. Florez agrees that it was his job to keep Kay safe. (Tr. 167). The Ames pipe crew normally speaks to the truck driver about the unloading procedure and conducts a safety meeting prior to the actual unloading of pipe. However, because two pipe crew members left in search of a forklift, safety procedures and instructions were not given prior to the time Kay began unloading. (Tr. 156, 162-165).

Ames has a Job Safety Analysis ("JSA") in place for the training and guidance of employees who are unloading pipe. The JSA does not address either what should be done while waiting for a forklift to arrive, or the role of the driver while waiting. (Tr. 163, 198-199). Florez, who was relatively new to Ames, testified that his experience extended to observing two flatbeds unloaded on the previous day. (Tr. 159-160). Florez and the other two men on the pipe crew that day were familiar with the JSA. (Tr. 140). The JSA requires a forklift to be stationed in a position to secure the load prior to loosening the straps or taking any other action. Ex. G-12.

ii. The Violation

Ames was cited for failing to safely transport and unload the pipes that were on the flatbed truck operated by Kay. The purpose of the regulation found at 30 C.F.R § 56.9201 is to assure that accidents, such as the one addressed here, do not occur. The standard requires that "equipment and supplies shall be . . . transported, and unloaded in a manner which does not create a hazard." The violation is straightforward; Kay was transporting the pipes for the use of Ames, on property that was under the control of Ames, and the pipes were to be unloaded by Ames employees with the limited assistance of the driver of the truck. (Tr. 56-58). Kay and the three Ames employees traveled to the unloading zone. Two of the pipe crew members left to retrieve the forklift. Kay began to loosen the straps on the load. (Tr. 210-212). As soon as he began to loosen the straps he was clearly "unloading" the "supplies", and according to the standard, he was required to do so in such a way so as to not create a hazard. Inspector Julien opined that the unloading process had begun at the time of the accident. (Tr. 91).

Ames essentially raises two arguments: (1) that its employees were not actively unloading the truck at the time of the accident and therefore it did not violate the cited standard, and (2) that Ames is not responsible for the actions of Orton's employee who had started to unload the delivery. Ames argues that escorting the truck to the "set down" location is purely for the purpose of making certain that contractors do not wander around the mine and suffer any injury or find themselves lost on the maze of roadways and, therefore, Ames has nothing to do with the actual transport of the materials.

Ames further argues that since its personnel had gone to find a forklift and had not yet had the opportunity to discuss the unloading process with Kay, the unloading had not begun for the Ames' pipe team and therefore the standard cited does not apply to Ames. However, it is undisputed that Kay retrieved his bar and had loosened the strap, an integral first step in the unloading process. Florez, the Ames employee was present when Kay began to unload but did nothing to ascertain that Kay was aware of the JSA or the safest manner in which to unload.

There is no argument that, at the very least, a violation of 30 C.F.R. § 56.9201, occurred when Kay unstrapped the load of pipes without a forklift to hold them in place and therefore did not unload "in a manner which does not create a hazard to persons from falling or shifting equipment". Without the forklift, or some other means securing the pipes, at least one pipe rolled off the truck and onto Kay. Orton has admitted to a violation of this standard. The next issue then is, did Ames violate this standard; was it a part of the unloading process when Kay began to loosen to the straps.

Ames first had contact with Kay when he checked in with the mine at the mine gate. The mine then arranged to have a pipe crew escort Kay to the loading site where the crew would then unload the pipe hauled by Kay. (Tr. 54-56). Instead of meeting with Kay and discussing the unloading process, two Ames employees left Florez with Kay and went to retrieve a forklift. Florez, who was with Kay the entire time and observed Kay retrieve the tools necessary to begin the unloading process, said little if anything to Kay. The Secretary argues that because Ames

escorted Kay, communicated with him to a limited degree, and left an employee with Kay at the unloading site, the mine was involved in the unloading process and therefore was required to submit to the requirements of the regulation cited. Ames argues that the escort is a mere formality accorded all persons who enter the mine, and that the unloading process would not begin until the forklift was retrieved, brought to the unloading location, and a safety meeting was held.

I agree with Ames that it was not responsible for the loading or transportation of the load. The part of the mandatory standard that is violated, therefore, is the portion regarding the unloading of the delivery. I agree with the MSHA inspector and find that once the mine escorted Kay to the loading site and left an employee with him while they retrieved the forklift, the unloading process had begun and Ames was responsible for doing it correctly, i.e. not allowing the restraints to be removed from the load until the forklift was in place and the load secured so that it could be safely unloaded. The unloading process includes parking the truck in the correct location so that the mine employees, along with the driver, can begin the physical removal of the pipe from the truck. Once the truck is in position and a member of the pipe crew is present for the sole purpose of unloading, it can be said that unloading has begun.

The Ames pipe crew and Kay together were to unload the truck and the process began with Kay loosening the straps while a member of the pipe crew was present. Kay had to undo a number of straps along the entire length of the truck from the cab to the end in order for the pipe to fall. During that period of time, Kay should have been observed and his progress halted by Florez. *See* (Tr. 114-115). I find that Kay was a part of the pipe crew as much as the three Ames' employees, and when he started to unload, the entire crew was in the unloading process whether they were ready to do so or not. Hence, when Kay began unloading in an unsafe manner, the unloading had begun and Ames violated the mandatory standard.

Next, Ames argues that it is not responsible for the actions of Kay as he began to unload the delivery. Section 104(a) of the Act, 30 U.S.C. § 814(a), requires that MSHA inspectors issue a citation whenever he or she believes an "operator" has violated the Act or any mandatory safety standard promulgated pursuant to the Act. Section 3(d) of the Act defines "operator" as including "any independent contractor performing services or construction at [a] mine." (30 U.S.C. § 802(d). The case turns upon the question of whether Ames was responsible for the actions of its contractor, Bob Orton Trucking. For the reasons that follow, I find Ames is responsible for the actions of Orton.

It is well established by Commission precedent that "in instances of multiple operators," the Secretary has "wide enforcement discretion" and "may, in general, proceed against either an owner/operator, his contractor, or both." *W-P Coal Co.* 16 FMSHRC 1407, 1411 (July 1994). Thus, MSHA may properly hold an operator strictly liable for all violations of the Mine Act that occurred on the mine site "whether committed by one of its employees or an employee of one of its contractors." *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249 (Feb. 1997). In *Mingo Logan*, the Commission, quoting its own earlier precedent, stated that "the Act's scheme of liability [that] provides that an operator, although faultless itself, may be held liable for violative acts of its employees, agents and contractors." *Id.* (quoting *Bulk Transportation Services, Inc.* 13 FMSHRC 1354, 1359-60 (Sep. 1991)). Both Ames and Orton, the employer of Kay,

acknowledge that they are operators within the meaning of the Act. Orton was also cited for the violation and has stipulated to the facts of the violation. Orton's remaining argument is the amount of penalty to be assessed.

The Commission's holding in *Mingo Logan, supra*, related to the citing of an *operator* for violations committed by its contractor. There, the Commission rejected the operator's assertion "that the citation against it fails to promote the safety purposes of the Act." 19 FMSHRC at 251. The Commission reasoned that this assertion was inconsistent with the rationale of the Ninth Circuit in *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F 2d. 1116, 1119-1120 (9th Cir. 1981). The Commission quoted the following language from *Cyprus*, "[i]f the Secretary could not cite the owner, the owner could evade responsibility for safety and health requirements by using independent contractors for most of the work." 19 FMSHRC at 251. Applying this language, the Commission reasoned that holding a production-operator liable for violations of their independent contractors "provides operators with an incentive to use independent contractors with strong health and safety records." *Id.* I find that the same rationale applies with equal force to holding a contractor liable for the violation of its subcontractor, i.e., that there is an incentive to use a subcontractor with strong health and safety records.

The Court in *Cyprus* also anticipated the situation herein, where the owner/lessee contracts extraction and safety functions to another entity and then argues that the owner/lessee is not liable for ensuing violations. In *Cyprus* case, the Court stated:

> The Secretary presents sound policy reasons for holding owners liable for violations committed by independent contractors. For one thing the owner is generally in continuous control of the conditions at the entire mine. The owner is more likely to know the federal safety and health requirements. If the Secretary could not cite the owner, the owner could evade responsibility for safety and health requirements by using independent contractors for most of the work. The Secretary should be able to cite either the independent contractor or the owner depending on the circumstances. *Cyprus Industrial Minerals Co. v. FMSHRC*, 664 F.2d 1116, 119 (9th Cir. 1981)

The Commission has further explained the rationale for holding owner/lessee operators liable under the Act in *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359 (1991), wherein the Commission wrote:

> Thus, an owner is held liable for the acts of its contractor not merely because the owner has continuous control of the entire mine but, rather, because the Act's scheme of liability provides that an operator, although faultless itself, may be held liable for the violative acts of its employees, agents and contractors.

Therefore, I find that Ames is responsible for the actions of its subcontractor, Orton, and violated the standard as cited. I find further that the Secretary, who has the burden of proving all

elements of an alleged violation by a preponderance of the evidence, has met that burden. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd, Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

iii. Significant and Substantial Violation

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

The Commission has explained that:

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

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

As noted above, I find that there is a violation of the mandatory safety standard as alleged by the Secretary. I find, further, that the violation contributed to the hazard of the pipes falling off the bed of the truck and striking persons involved in the unloading. Third, the hazard contributed to will result in an injury as a result of enormous pipes rolling off the truck. Finally, given the length and weight of the pipes, the injury would certainly be serious and potentially fatal, as was the case here.

The Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek coal Inc. v. MSHA*, 52 F.3d. 133, 135-136 (7th Cr. 1995). Inspector Julien qualifies, without question, as an experienced MSHA inspector. He described the violation as significant and substantial and explained that improperly removing the straps that secure a load of pipes is reasonably likely to

lead to an event that causes serious injury. He further explained that there is a reasonable likelihood of fatal injury if "a 3,000-pound pipe [falls] from any height." (Tr. 74).

The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). I find that the facts of this violation clearly lead to a finding that it was a significant and substantial violation.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(I) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(I). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.
>
> 30 U.S.C. § 820(I).

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

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business and that the violations were abated in good faith. The history is normal for this size operator. I accept the Secretary's finding of low negligence. Further, I find that the Secretary has established the gravity as described in the citation.

III. ORDER

Based on the criteria in section 110(I) of the Mine Act, 30 U.S.C. § 820(I), I agree with that the penalty as proposed by the Secretary is appropriate and assess a penalty of $13,268.00 for the violation. Ames Construction Company is hereby **ORDERED** to pay the Secretary of Labor the sum of $13,268.00 within 30 days of the date of this decision.[1]

Margaret A. Miller
Administrative Law Judge

Distribution:

Matthew Finnigan, Office of the Solicitor, U.S. Department of Labor, 1999 Broadway Suite 1600, Denver, CO 80202

Michael W. Homer, Suitter Axland, PLLC, 8 East Broadway, Suite 200 Salt Lake City, UT 84111
/atc

[1] Payment should be sent to Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5267/FAX 303-844-5268

March 25, 2010

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

DECISION

Appearances: Lisa Williams, Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
R. Henry Moore, Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Black Beauty Coal Company, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act"). The case involves one Section 104(d)(1) citation and two orders issued by MSHA under section 104(d) of the Mine Act at the Somerville Central Mine operated by Black Beauty Coal Company. The parties presented testimony and documentary evidence at the hearing held in Evansville, Indiana on December 1, 2009.

At all pertinent times, Black Beauty Coal Company operated the Somerville Central Mine in Gibson, Indiana. The Somerville Central Mine mined coal and/or coal byproducts which affected commerce. The operation is subject to the Mine Act.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Black Beauty Coal Company ("Black Beauty") operates a surface coal mine, the Somerville Central Mine (the "mine") near Gibson, Indiana. The mine is subject to regular inspections by the Secretary's Mine Safety and Health Administration ("MSHA") pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated that Black Beauty is an

operator as defined by the Act, and is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission. Stip. ¶¶ 1-3.

On September 11, 2007, Vernon Stumbo, an MSHA inspector, conducted a regular inspection at the Somerville Central Mine. He was accompanied during most of his inspection by Chad Wirthwein, the mine's safety director. Stumbo, along with his supervisor at the time, traveled to the mine to address issues involving berms and to terminate citations that had been previously issued for failure to provide berms on elevated roadways. While at the mine, Stumbo issued one citation and one order for berm violations. He determined that both violations were the result of an unwarrantable failure to comply with the cited standard. Stumbo returned to the mine a few weeks later and issued another unwarrantable failure order for a berming violation. The testimony in this case addresses these three berm violations: two issued on September 11, 2009 and one issued on September 27, 2009.

a. Citation No. 6671134

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

> The dragline bench travel road does not have a berm for a distance of approximately 2/10 of a mile where a service truck with two miners traveled within 18' of the outer banks of a bench with approximately a 50' vertical drop to the pit floor. The mid-axle height of the largest vehicle traveling this road at this time is approximately 21 inches. In addition, four company full size pick-up trucks also traveled the bench travel road. Two management personnel were also in the area and having traveled the road were fully aware that there was no berm. Management was put on notice of berm issues by MSHA within the past week during a previous visit on 09/06/2007. Gov. Ex. 4.

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

1. <u>The Violation</u>

Vernon Stumbo, now retired, was an MSHA mine inspector from 1994 until 2008. (Tr. 25). Prior to joining MSHA, Stumbo was employed in the mining industry for 15 years, working his way up from a general laborer to foreman, and eventually to superintendent. (Tr. 26).

Since approximately 1998 or 1999, the Somerville Central Mine has utilized an electrically-powered dragline to remove the burden between the coal seams. (Tr. 53, 83, 162-163). The dragline moves by means of feet, also referred to as shoes or pontoons, that lift the back of the dragline and move the machine in a reverse direction eight feet every 55 seconds. (Tr. 64-67). As the dragline moves in a reverse direction, the front section of the machinery housing located between the feet, also known as the tub, is dragged along the ground, creating six-inch-tall "speed bumps," while the feet create indentations ranging from three inches to three feet in depth. (Tr. 66, 93-94). The dragline requires an area approximately 150 feet wide in order to be moved.[1] (Tr. 84).

On September 11, 2009, the day of Inspector Stumbo's arrival, the mine was in the process of moving the dragline along the bench to a new location. Stip. ¶ 12. The berm on the bench had been lowered in order to provide ample room to maneuver the dragline as it moved along the bench. Generally, after the dragline is moved, the berms are rebuilt by a dozer. After moving only some of the distance to the intended destination, the dragline began experiencing electrical problems which required the mine to halt the move. (Tr. 72-73, 93). Upon arriving at the site in question, Stumbo observed a lack of berms on the bench. (Tr. 29). Stumbo and his MSHA colleagues parked their vehicle and began walking along the bench toward the dragline. (Tr. 29). They followed the tire tracks of a service truck that had been driven along the bench and parked near the dragline. (Tr. 29). Based on information provided by the mine, Stumbo determined that two persons were in the vehicle at the time it traveled along the bench to the dragline. (Tr. 33). Stumbo measured the tracks of the service truck to within 18 feet of the edge of the bench. (Tr. 29-30). He estimated the drop-off from the edge to be 50 feet. (Tr. 29-30).

The parties do not dispute that only a remnant berm existed for the two-tenths of a mile from the bottom of the road to the area where the service truck was located. Terry Traylor, the operations manager at the mine, testified that the remnant berm measured approximately 16 to 17 inches in height. (Tr. 74). Stumbo testified that, while a remnant berm existed on the part of the bench that the service truck had driven on, no berms existed on other parts. (Tr. 29, 31). Stumbo explained that a dragline, or other tracked vehicle, may travel on the bench if berms are not present. (Tr. 44-45). However, he stated, berms are required to be at least mid-axle height of the largest rubber-tired vehicle that travels on the bench. (Tr. 30-31, 38). Stumbo measured the mid-axle height of the rubber-tired service truck, the largest tired truck on the bench at that time, to be 21 inches. (Tr. 30). Stumbo issued the citation under section 104(d)(1) because the operator had been put on high notice regarding berm issues when two citations for berm violations were issued the previous week. (Tr. 31).

Black Beauty argues that, because the bench was used to move the dragline, it was not a roadway, and, therefore, not required to have a berm. Black Beauty argues that the bench was only being used to move the dragline. Further, the vehicles in the vicinity of the dragline were there to assist in the move of the dragline, and no other vehicles would have traveled on the

[1] The dragline itself disturbs an area approximately 100 feet in width. (Tr. 84). The Mine tries to have at least 25 feet of bench on each side of the dragline as it is moved. (Tr. 84).

bench. Finally, the width of the bench, coupled with the fact that high speed travel was unlikely given the rough condition of the bench, rendered the bench safe for travel. Resp. Post Hearing Br. at 8.

The issue of whether a bench is a roadway is driven by the particular facts of each case. *See El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 36 (Jan. 1981). Here, the fact that the rubber-tired service truck was traveling on the bench is, by itself, enough for me to consider it a roadway. While the bench in this case was approximately 200 feet wide, the tire tracks observed by Stumbo indicate that the service truck traveled within 18 feet of the edge. I find that the rough condition of the bench, while it may necessitate slower travel, increases the potential for mechanical failure or driver error. I agree with Inspector Stumbo and find that the bench would not be considered an elevated roadway if the dragline were the only piece of equipment on the bench; however, once rubber-tired equipment begins operating on the bench, especially within close proximity to the edge (i.e., 18 feet), even if it is there exclusively to provide assistance in the move of the dragline, the bench becomes a roadway. For those reasons I find that the bench at issue was an elevated roadway.

Black Beauty argues that, even if the bench is found to be an elevated roadway, there were adequate berms present. As support for their argument they cite Traylor's testimony that he observed a remnant berm that was as tall as the tire on the MSHA vehicle that was present the day of the inspection. It is Black Beauty's position that a berm the height of the MSHA vehicle tire would undoubtedly reach the mid-axle of any truck that traveled on the bench during the time in question. Resp. Post Hearing Br. at 10-11.

In *U.S. Steel Corp.* the Commission held that "the adequacy of a berm . . . under section 77.1605(k) is to be measured against the standard of whether the berm . . . is one a reasonably prudent person familiar with all the facts, including those peculiar to the mining industry, would have constructed to provide the protection intended by the standard." 5 FMSHRC 3, 5 (Jan. 1983). MSHA generally requires an adequate berm to be at least 50% of the height of the wheel, i.e., mid-axle height, of the largest vehicle to travel the roadway. I find that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard at issue would have recognized that the safety standard required a berm that was at least mid-axle height of the service truck that traveled along the bench to the dragline.

I credit Stumbo's testimony and find that, for approximately two-tenths of a mile on the bench/roadway, there were inadequate berms. While the remnant berm near the MSHA vehicle may have been adequate, the berm was not adequate in the area cited by Inspector Stumbo. The record established that there was 50 foot vertical drop-off from the edge of the bench and that the service truck had traveled within 18 feet of the edge of the roadway when approaching the dragline.

In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd, Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*,

15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152. The Secretary has met her burden of proving that, on the day of inspection, the mine had not provided adequate berms on the bench/elevated roadway that the service truck had traveled on. I find that the Secretary has established a violation.

2. Significant and Substantial Violation

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

The Commission has explained that:

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

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

As noted above, I find that there is a violation of the mandatory safety standard as alleged by the Secretary. Further, I find that the violation contributes to the danger of a vehicle veering off the elevated roadway and rolling, or falling, down the spoil incline.

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

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

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

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

Stumbo testified that the closer a vehicle travels to the edge of a highwall, the more unstable the ground becomes. (Tr. 32). The record is clear that a service truck drove within close proximity, i.e., 18 feet, of the edge of the inadequately-bermed bench. If a truck, traveling along an inadequately-bermed elevated roadway, as was the case here, were to go over the edge and fall the estimated 50 feet to the surface below, it is reasonably likely that the driver and any passengers would sustain broken bones and injuries of a serious and potentially fatal nature. *See e.g., Gatliff Coal Co.*, 13 FMSHRC 368 (Mar. 8, 1991) (ALJ). Berms exist to prevent exactly such an occurrence. There is no question that a service truck did travel along the inadequately-bermed bench. While Black Beauty argues that, given the speed the service truck was traveling, it is unlikely a truck would have gone over the edge, it fails to account for potential mechanical failure or driver error that could occur. The probability of occurrence of mechanical failure or driver error would seem to be much greater on a road as rough and torn up as Mr. Traylor described in his testimony. I find that the Secretary has satisfied the four *Mathies* criteria and established the violation as S&S.

3. Unwarrantable Failure

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol,* 22 FMSHRC at 353.

The day the subject citation was issued, Stumbo had traveled to the Sommerville Central Mine to terminate citations issued for previous inadequate berm violations. The previous citations, issued on September 6, 2007, were issued for inadequate berms on an elevated dragline haul road, and inadequate berms or bumper blocks at the dumping locations on the dragline bench roadway. Gov. Ex. 2; Gov. Ex. 3. Stumbo testified that, based on past berm violations, the Sommerville Central Mine had been place on "high alert of berm issues at [the] mine" prior to the September 11, 2007 inspection. (Tr. 27). Relying on the citations issued on September 6, 2007, as well as Inspector Stumbo's testimony, I find that the mine was on notice regarding its berming issues. Further, I credit Stumbo's testimony and find that the condition of the bench was as he described it.

While the condition may not have been overly extensive, or been present for an extended period of time, the total lack of berms in areas along the bench was extremely obvious. The high degree of danger associated with inadequate berms is spelled out clearly in my S&S findings, *supra*. The mine was well aware of the condition, as evidenced by the testimony of C.B. Howell, the dragline foreman, who testified that it is the practice of the mine to lower the berm when the dragline is being moved, as was the case here. (Tr. 91). The dragline moves so slowly, it would have been easy for a dozer to build berms as the dragline was moved along the bench. In the alternative, the mine could have simply barricaded the road, thereby making it unable to be traveled by rubber-tired vehicles. Instead, Black Beauty did neither and, as a result, any vehicle on the property could have traveled along the inadequately-bermed roadway. It is up to the company to keep employees off the road if it chooses to keep only a remnant berm on the bench while the dragline is moved. Here, the road was not guarded against entry, there were management trucks in the vicinity, and inadequate berms existed. The mine has a recent history of berm violations, and was on high notice of the need to comply. In spite of that, the lack of reasonable care exhibited by management has resulted in continued berm violations, and clearly amounts to more than ordinary negligence.

b. Order No. 6671135

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

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

of tire tracks indicate that the road has been traveled by mobile equipment. Gov. Ex. 6

Stumbo determined that it was reasonably likely that the violation would result in an injury that would be permanently disabling, that the violation was S&S, that one employee was affected, and that the operator's negligence was high. A civil penalty in the amount of $4,440.00 has been proposed for this violation.

1. The Violation

Later in the day on September 11, 2007, Stumbo, while abating a separate violation, observed a newly-built, 30% grade, 110-120 foot road constructed from the #6 bench to the top of the pit to provide access for the Cat-Mounted drill rig. Stip. ¶ 17; (Tr. 99, 105-106, 107, 108-109, 113). Stumbo noted that, while there were partial berms at the bottom of the road, there were inadequate-to-no berms for 75 feet of the road. (Tr. 99, 107); Gov. Ex. 6. He observed tire tracks on the road, indicating truck travel. (Tr. 99). Stumbo estimated a drop-off of approximately 50 feet from the edge of the road to the bench below. (Tr. 99). After speaking with the safety department at the mine, Stumbo determined that the tire tracks on the road were from a pickup truck driven by Andrew Alano, the mine's drill foreman. (Tr. 99-100). Stumbo issued an order under section 104(d)(1) because the violation met the S&S criteria, discussed *infra*, and management knew, or should have known, that it was inappropriate for a manager to set an example by driving on an unbermed, elevated roadway. (Tr. 103).

Chad Wirthwein, the safety manager at the mine, was accompanying Stumbo at the time this order was issued. (Tr. 122). He testified that a berm, which would have been sufficient to prevent the "overtravel" of a full-size pickup with approximately 30-inch tires, existed on the outer edge of the road. (Tr. 124-125, 128-129). Further, he testified, a double berm existed at the bottom portion of the road. (Tr. 125). Wirthwein, utilizing photographs of the road in question, identified what he described as the two berms. (Tr. 127); Resp. Exs. 6, 7. Wirthwein also confirmed that he was aware that a pickup truck had traveled the subject road. (Tr. 128).

Andrew Alano, the drilling and blasting supervisor at the mine, as well as the individual who ordered the subject road to be constructed, confirmed that he drove his pickup truck on the road. (Tr. 138, 141). He testified that the berm on the road was sufficient for the size of the wheels on his pickup truck, which he estimated at 16 ½ to 17 inches at the mid-axle. (Tr. 145).

Black Beauty argues that there were two berms on this road, and that if a vehicle traveled over one berm, there would be a second berm to prevent it from going over the edge. The Secretary, relying on Stumbo's testimony, disputes this argument and contends that the two berms did not satisfy the standard.

I credit Stumbo's testimony and find that, while adequate berms may have existed at the bottom of the road, inadequate berms existed for part of the drill road. Stumbo described the cited area on the side of the road as "horizontal, straight out." (Tr. 147-148). In addition to

Stumbo's testimony I rely, in part, on the photographs provided by the Respondent, particularly Respondent's Exhibit 6. In that photograph it seems clear that little to no berm existed for at least part of the length of the road. Resp. Ex. 6. Stumbo's testimony regarding the picture confirms as much.

I find that no berm existed for a portion of the road. While the road may have been intended for the exclusive use of the Cat-Mounted drill, a supervisor at the mine admittedly traveled the road in his rubber-tired vehicle because "it was quicker" to get to his destination. (Tr. 142).

In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd, Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152. The Secretary has met her burden of proving that, on the day of inspection, the mine had not provided adequate berms on the drill road that Mr. Alano traveled on with his rubber-tired pickup truck. I find that the Secretary has established a violation.

2. Significant and Substantial Violation

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

In accordance with the *Mathies* criteria set forth *supra*, I find that there is a violation of the mandatory safety standard as alleged by the Secretary. Further, I find that the violation contributes to the danger of a vehicle veering off the elevated roadway and rolling, or falling, down the spoil incline. Mr. Alano's admitted travel on the drill road, coupled with his lax explanation as to why he traveled the road, is an extremely poor example for a supervisor at the mine to set for the rank and file miners. While the drill road is described as a temporary road, there is nothing to prevent other miners from driving their vehicles on the same road. If normal mining operations would have continued, it seems the road would have been removed, but the example set by Mr. Alano makes it reasonably likely that other trucks would have traveled on the road and used it as a "short-cut" during the time that it existed. In addition, because this was a new road, the drivers of other vehicles would not have been familiar with the violative condition of the road (i.e., lack of adequate berms). If a truck traveling along an inadequately-bermed, elevated roadway experienced mechanical failure or user error and were to go over the edge and fall the estimated 50 feet to the surface below, it is reasonably likely that anyone in the vehicle would sustain injuries of serious and potentially fatal nature. I find that the Secretary has satisfied the four *Mathies* criteria and established the violation as S&S.

3. Unwarrantable Failure

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol,* 22 FMSHRC at 353.

I credit Mr. Stumbo's testimony that the mine was on notice regarding its berming issues, and that the condition of the drill road was as he described it. The dangers associated with such lack of berms are spelled out clearly in my S&S findings, *supra*. The road was described as "temporary" and for the exclusive use of the drill. Black Beauty contends that the road would have been removed after the drill was moved. Nevertheless, the drill manager traveled the road in his pickup truck, setting an extremely poor example for the rank and file miners. Black Beauty could have easily avoided the situation by blocking the road when the drill was not traveling on it, yet, it did not do so. The fact that Black Beauty did not block access to the road, coupled with Alano's use of the road as a short cut, leads me to question whether the road was truly a "temporary" road. The mine has a recent history of berm violations, and was on high notice of the need to comply. In spite of that, management displayed a certain level of indifference to the requirements of the standard when one of its own foremen utilized the road as a shortcut to travel in his pickup truck. This set an extremely poor example for rank and file miners and amounts to more than ordinary negligence on the part of the mine.

c. *Order No. 6671177*

As a result of the inspection on September 27, 2007, Stumbo issued Order No. 6671177 as a 104(d)(1) order alleging a violation of 30 C.F.R. § 77.1605(k), which requires that "[b]erms or guards shall be provided on the outer bank of elevated roadways." The citation described the violation as follows:

> On the 001 pit south end spoil bank, haul trucks are traveling and dumping in an area with an inadequate and non-existent berm. On the east side of the spoil bank, an inadequate berm measuring approximately 45" tall for a distance of approximately 38'. Another area has no berm for a distance of approximately 60'. Both areas are where three haul trucks, with a mid-axle height of approximately 66", are traveling and dumping spoil. The vertical

height of the spoil bank down to the dragline bench ranges from approximately 115' on the east side to 129' on the west side with a slope of approximately 40% grade. Gov. Ex. 8.

The Secretary filed a Motion to Amend Petition and Order to Plead in the Alternative proposing that if the facts do not demonstrate a violation of 77.1605(k) for elevated roadways, then they do fit a violation of 30 C.F.R. § 77.1605(l) for dumping locations. The alternative standard requires that "berms, bumper blocks, safety blocks, or similar means shall be provided to prevent overtravel and overturning at dumping locations." Black Beauty opposes this motion. The Federal Rules of Civil Procedure permit such an amendment and alternative pleading. Fed. R. Civ. P. 8(d)(2), 15(a). Generally, administrative pleadings are "liberally construed and easily amended, as long as adequate notice is provided and there is no prejudice to the opposing party." CDK Contracting Co., 23 FMSHRC 783, 784 (July 2001) (ALJ). The two safety standards are exceedingly similar in their requirements for protecting against overtravel of vehicles, a very serious concern at surface mines. If anything, section 77.1605(l) offers additional means to satisfy the standard (i.e., bumper blocks, safety blocks, or similar means) that section 77.1505(k) does not. The evidence presented by Black Beauty is equally applicable to its defense of violation of either standard. Further, the motion was made prior to hearing, and provided ample notice for Black Beauty to prepare any additional defenses. For those reasons I find that Black Beauty is not prejudiced by such an amendment and alternative pleading. As a result, I grant the Secretary's motion to charge Black Beauty with a violation of Section 77.1605(l), in the alternative.

Inspector Stumbo determined that it was highly likely that the violation would result in a fatal injury, that the violation was S&S, that one employee was affected, and that the operator's negligence was high. The order was later changed to modify the likelihood of injury from highly likely to reasonably likely. A civil penalty in the amount of $7,774.00 has been proposed for this violation.

1. The Violation

On September 27, 2009, Stumbo was again at the mine to conduct an inspection. On that particular day, three haul trucks were being used to transport materials to the dumpsite. (Tr. 193). In order to dump the materials, the haul trucks had to travel up a slightly inclined road from the shovel to the dumpsite. Once they reached the dumpsite they had to turn around, back up to the actual dump area, and dump their loads. David Miller, the dozer operator on the day in question, was in charge of "spotting" the haul truck drivers and letting them know when they should stop and dump their loads. (Tr. 192-193). Miller testified that, generally, after materials are dumped by the haul trucks, he uses the dozer to reestablish a berm or push the material down the spoil hill to stabilize the ground. (Tr. 193). He stated that, during the course of the dumping on September 27th, a supervisor called him away from his spotting duty to repair a berm in another area of the mine. (Tr. 194). He stated that the trucks were put on hold and were not to dump their loads while he was gone. (Tr. 194)

As Inspector Stumbo arrived at the dumpsite he observed a haul truck preparing to dump its load. (Tr. 163). Stumbo stopped the haul truck before it could dump its load and asked the driver where his spotter was. (Tr. 163). He testified that the haul truck driver told him that the dozer operator had been spotting the haul trucks, but had to leave. (Tr. 163). Stumbo observed no berms in the area where the haul truck would have been dumping, as well as inadequate berms in the area where other haul trucks had traveled to dump materials. (Tr. 169-170). He measured the mid-axle height of the haul truck (i.e., the largest rubber-tired vehicle that traveled in the area) to be approximately 66 inches, and found the inadequate berm to measure approximately 45 inches tall. (Tr. 162, 164, 170). Further, he estimated the vertical height of the edge above the area below to be 115 feet on one side and 125 feet on the other at an approximate 40% gradient. (Tr. 164). At 1:00 p.m. he issued Order No. 6671177 under 77.1605(k) for inadequate berms and total lack of berms. (Tr. 162)

I agree with and accept Black Beauty's argument that the dumpsite is different from the elevated roadway addressed by Secretary's regulation at section 77.1605(k). For that reason, I refuse to affirm the Secretary's Order, as issued, and instead address only the alternative pleading alleging a violation of section 77.1605(l). Black Beauty admits that the cited area is correctly categorized as a dumpsite. Therefore, the only issue is whether "berms, bumper blocks, safety blocks, or similar means [were] provided to prevent overtravel and overturning" in the cited area.

I credit Inspector Stumbo's testimony with regard to his description of the scene of the alleged violation. Stumbo testified that there were no berms in one area of the dumpsite, as well as inadequate berms in other areas. He measured the height of the mid-axle of the haul truck to be approximately 66 inches, while the inadequate berm was measured at an estimated 45 inches. The 21-inch difference between the mid-axle height and the top of the berm is significant and amounts to a violation of the standard. Black Beauty argues that, even if the berms were not adequate, other measures were in place that would prevent any kind of overtravel. Specifically, it alleges that its haul trucks do not dump without the assistance of spotters who let the truck driver know how far to back up and when to dump the truck's load. Again, I credit Inspector Stumbo's testimony, this time with regard to his having to stop a truck from attempting to dump its load without the assistance of a spotter or the presence of adequate berms. Miller, who was in charge of spotting, admitted that he was not present when Stumbo arrived at the dumpsite. (Tr. 194-195). Even if he had attempted to place the trucks on hold it seems that at least one truck was beginning to dump its load and had to be stopped by Inspector Stumbo.

In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd, Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152. The Secretary has met her burden of proving that, on the day of inspection, the mine had not provided adequate berms or other measures to prevent overtravel at the dumping site.

2. Significant and Substantial Violation

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

In accordance with the *Mathies* criteria set forth *supra*, I find that there is a violation of the alternatively-pled mandatory safety standard as alleged by the Secretary. Further, I find that the violation contributes to the danger of a vehicle veering off the elevated dumpsite and rolling, or falling, down the spoil incline. If normal mining operations would have continued, it is likely that haul trucks would have continued to dump their loads at the dumpsite. Miller said that he told the trucks not to dump while he was at the shovel building another berm. However, Stumbo testified that he observed a truck preparing to dump a load without the assistance of a spotter or presence of adequate berms. I credit the testimony of Stumbo that trucks were working and traveling in the area where there were no means to prevent them from going over the edge. The vertical drop was 115 feet on one side and 129 feet on the other. If a truck were to travel over the edge, dropping more than 100 vertical feet, it would likely lead to the death of the driver. I find that the Secretary has satisfied the four *Mathies* criteria and established the violation as S&S.

3. Unwarrantable Failure

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

I credit Stumbo's testimony that the mine was on notice regarding its berming issues, and that the condition of the dumpsite was as he described it. The dangers associated with such lack of berms, or other means associated with preventing overtravel at a dumpsite, are spelled out clearly in my S&S findings, *supra*.

While the length of time that the violation existed may have been rather short, I find that the mine places little to no importance on the issue of preventing overtravel at dumpsites. The truck driver that Stumbo stopped from dumping acknowledged that his spotter was not there at

the time. (Tr. 163). In spite of that knowledge, he was preparing to dump his load at the time Stumbo stopped him. I find this especially troubling given that less than a month earlier, on September 6, 2007, the mine had been issued a citation for the exact same thing (i.e., lack of means to prevent overtravel at the dumpsite), and had abated that citation by providing a spotter at the dumpsite. Gov. Ex. 3. A pattern of berming violations has begun to emerge at this mine which is indicative of the indifference of management to the dangers associated with overtravel on elevated roadways and at dumpsites. The mine knew that spotters,or other means of preventing overtravel, were necessary, yet it neglected to provide them, or, in the alternative, neglected to halt work when those preventive measures weren't present. In either case, the mine has exhibited more than ordinary negligence.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R.§ 2700.28. The Act requires that, "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

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

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business. The violations were abated in good faith, and no evidence has been presented to the contrary. The history shows a number of violations associated with inadequate berms, including the violations discussed above. I find that the Secretary has established that the negligence is high for the three violations and that the gravity determined in the citation and orders is accurate. The total proposed penalty is $16,543.00

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of $16,543.00 for these violation. Black Beauty Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of $16,543.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

April 1, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v.	:	EMERGENCY RESPONSE PLAN DISPUTE PROCEEDING Docket No. PENN 2010-339-E Citation No. 7000116
ORCHARD COAL COMPANY, Respondent.	:	Primrose Slope Mine Mine ID 36-08346
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v.	:	EMERGENCY RESPONSE PLAN DISPUTE PROCEEDING Docket No. PENN 2010-340-E Citation No. 7000440
S & M COAL COMPANY, Respondent.	:	Buck Mountain Slope Mine Mine ID: 36-02022
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v.	:	EMERGENCY RESPONSE PLAN DISPUTE PROCEEDING Docket No. PENN 2010-342-E Citation No. 7000117
ALFRED BROWN COAL COMPANY, Respondent.	:	7 Ft. Slope Mine Mine ID: 36-08893
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v.	:	EMERGENCY RESPONSE PLAN DISPUTE PROCEEDING Docket No. PENN 2010-343-E Citation No. 7000115
B & B COAL COMPANY, Respondent.	:	Rock Ridge No. 1 Slope Mine Mine ID: 36-7741

DECISION

Appearances: Stephen D. Turow, Esq., Mary Forrest-Doyle, Esq., Matthew Babington, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, on behalf of the Secretary of Labor.

Alfred J. Brown, Foreman, Alfred Brown Coal Company, Hegins, Pennsylvania; Darryl Koperna, Superintendent, S & M Coal Company, Tower City, Pennyslvania, *pro se*, on behalf of the Respondents.

Before: Judge Paez

These consolidated cases are before me on referrals of Emergency Response Plan disputes by the Secretary of Labor ("Secretary") pursuant to Commission Rule 24(a), 29 C.F.R. § 2700.24(a), and section 316(b)(2)(G) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act" or "Act"), as amended by the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"), 30 U.S.C. § 876(b)(2)(G). At issue are four section 104(a) citations issued on March 1, 2010, charging each of the Respondents – Orchard Coal Company ("Orchard"), S & M Coal Company ("S&M Coal"), Alfred Brown Coal Company ("Alfred Brown Coal"), and B & B Coal Company ("B&B") – for failing to comply with section 316(b)(2)(F)(ii) of the Act, which requires operators to provide for post-accident communication between underground and surface personnel via a wireless two-way medium, and an electronic tracking system, in their Emergency Response Plans.

A hearing was held in Pottsville, Pennsylvania, on March 17, 2010, pursuant to Commission Rule 24(e), 29 C.F.R. § 2700.24(e), and the parties were permitted to submit all relevant material regarding the disputes.[1] At the hearing, the parties stipulated that: (1) the citations at issue were served on the date listed in the citations and were properly served by the Secretary of Labor; and (2) the Commission Judge has jurisdiction over these proceedings with the mine operators subject to the Act. (Tr. 8-9.) At the conclusion of the hearing, the parties filed post-hearing briefs.

The general issues before me are whether the Respondents were properly cited under sections 104(a) and 316(b)(2)(G)(ii) of the Act for failing to submit a revised plan for their respective mines that can be approved under section 316(b)(2)(C) of the Act. For the reasons set forth below, the citations are affirmed.

The Statutory and Regulatory Backdrop

Section 2 of the MINER Act, which became effective on June 15, 2006, amends section

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[1] All four of the operators belong to the Independent Miners and Associates, a group of anthracite operators, and have raised substantially identical issues with regard to updating their Emergency Response Plans. By order dated March 10, 2010, I consolidated these cases, set a hearing date, and ordered the parties to submit prehearing reports. Two of the operators, B&B and Orchard, did not submit a prehearing report but stated at the hearing that they would be represented by Alfred Brown of Alfred Brown Coal and Darryl Koperna of S&M Coal, who would question witnesses, elicit testimony, and/or submit documentation on behalf of all the operators. (Tr. 7.) However, S&M Coal alone raised the separate issue of financial inability to pay for new communication and tracking equipment. (Tr. 16-17.)

316 of the Mine Act, 30 U.S.C. § 876, to require underground coal mine operators to develop and submit for MSHA approval and periodic review an emergency response and preparedness plan ("Emergency Response Plan" or "ERP"). 30 U.S.C. § 876(b)(2)(A). The basic goals of an ERP are twofold: to provide for the evacuation of miners who are endangered by a mine emergency; and to assure the survival of miners who are trapped underground and are not able to evacuate. 30 U.S.C. § 876(b)(2)(B)(i)-(ii). The MINER Act specifies that operators develop and submit ERPs to the Secretary for approval within 60 days of June 15, 2006, the date of enactment. 30 U.S.C. § 876(b)(2)(A), (C). Thus, mine operators were required to submit ERPs to MSHA by August 14, 2006.

Within three years of enactment of the MINER Act, each underground coal mine operator is required to develop, adopt, and submit an ERP that includes, inter alia, provisions for the use of wireless, two-way communication and electronic tracking ("C&T") systems following a mine accident. 30 U.S.C. § 876(b)(2)(E), (F)(ii).[2] If such a C&T system "can not be adopted," the operator must "set forth within the plan the reasons" why it cannot adopt such a system and identify an "alternative means of compliance." 30 U.S.C. § 876(b)(2)(F)(ii). Any alternative system "shall approximate, as closely as possible," the level of safety and effectiveness provided by an MSHA approved C&T system. *Id.* Except when a mine operator could satisfy this exception, MSHA could not approve a mine operator's ERP after June 15, 2009 unless the ERP provided upgraded C&T systems for use in the mine. Indeed, the legislative history of this section indicates that "[t]he intent . . . is for operators to use the most advanced technology available that works best in their particular mine, to provide a means for the [ERP] to be continuously adapted to changes in the mine or in the commercial technical equipment market, and to avoid the 'behave only to the letter of the standard' syndrome that stifles innovation and delays the implementation of new methods or equipment." S. Rep. No. 109-365, at 13 (2006).

Despite this congressional mandate, there are currently no totally wireless communication

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[2] Section 316(b)(2)(F)(ii) of the Mine Act, which is primarily at issue here, states as follows:

> (ii) POST ACCIDENT COMMUNICATIONS.—Not later than 3 years after the date of enactment of the Mine Improvement and New Emergency Response Act of 2006, a plan shall, to be approved, provide for post accident communication between underground and surface personnel via a wireless two-way medium, and provide for an electronic tracking system permitting surface personnel to determine the location of any persons trapped underground, or set forth within the plan the reasons such provisions can not be adopted. Where such plan sets forth the reasons such provisions can not be adopted, the plan shall also set forth the operator's alternative means of compliance. Such alternative shall approximate, as closely as possible, the degree of functional utility and safety protection provided by the wireless two-way medium and tracking system referred to in this subpart.

30 U.S.C. § 876(b)(2)(F)(ii).

devices commercially available and approved by MSHA that can be used in underground mines. Rather, as the Secretary acknowledges in MSHA Program Policy Letter ("PPL") No. P09-V-01 (January 16, 2009), alternative technology exists in the form of "partially-wireless" systems that use "untethered" two-way communication devices to transmit signals to a node that is hard-wired to surface equipment. (Ex. G-6 at 1, 3.) Because fully wireless C&T systems were not yet technologically feasible, MSHA sought to offer guidance to operators on acceptable alternatives to fully wireless systems in formulating the required revisions to their ERPs. MSHA PPL No. P09-V-01 states, with respect to communications systems:

> General Considerations – An alternative to a fully wireless communications system used to meet the requirements of the MINER Act for post-accident communication either can be a system used for day-to-day operations or a stored system used in the event of an accident. Examples of currently available technologies that may be capable of best approximating a fully wireless communications system include, but are not limited to, leaky feeder, mesh, Wi-Fi and medium frequency systems. Any alternative system generally should:
>
> a. Have an untethered device that miners can use to communicate with the surface. The untethered device should be readily accessible to each group of miners working or traveling together and to any individual miner working or traveling alone.
>
> b. Provide communication in the form of two-way voice and/or two-way text messages. If used, pre-programmed text messages should be capable of providing information to the surface necessary to determine the status of miners and the conditions in the mine, as well as providing the necessary emergency response information to miners.
>
> c. Provide an audible, visual, and/or vibrating alarm that is activated by an incoming signal on each untethered device. The alarm should be distinguishable from the surrounding environment.
>
> d. Be capable of sending an emergency message to each of the untethered devices.
>
> e. Be installed to prevent interference with blasting circuits and other electrical systems.

(Ex. G-6 at 3.) Thus, this case involves whether the Respondents provided alternatives to a fully wireless C&T system, and whether such alternatives approximate, as closely as possible, the degree of functional utility and safety protection provided by a wireless two-way medium communication and electronic tracking system.

Findings of Fact and Procedural Background

The Respondents all operate underground anthracite coal mines. Anthracite coal "is hard and black, and has a semimetallic luster and semiconchoidal fracture [i.e., fractures result in smoothly curved surfaces]." *Dictionary of Mining, Mineral, and Related Terms* 21, 117 (2d ed. 1996). Anthracite has a very high carbon content, the highest of any variety of coal, and "ignites

with difficulty and burns with a short blue flame, without smoke." *Id.* at 21, 52, 311. Anthracite mining in the United States is primarily confined to eastern Pennsylvania. *Id.* at 21. According to MSHA's website, in 1917, anthracite coal production peaked at over 100 million tons.[3] Underground anthracite mining declined throughout the 20th century, such that by 2008, there were only 13 such mines operating in Pennsylvania employing 91 miners, and they produced approximately 240,000 short tons.[4] Underground anthracite mining is far less mechanized than underground bituminous coal mining. Anthracite is mined underground using "conventional methods" – the coal is blasted from the surrounding rock at a working face using explosives. Once blasting has loosened the coal, it is loaded onto carts by hand using picks and shovels or by gravity loading. The coal is then transported out of the mine. Blasting occurs through the use of explosives detonated by electric detonators or blasting circuits. (Tr. 44-46.)

The evidence introduced at the hearing establishes that in March 2009, MSHA District Manager John A. Kuzar, along with several other MSHA representatives, met with members of the Independent Miners and Associates ("IMA"), an association of anthracite miners of which the Respondents are members. They discussed the IMA's concern about the potential for radio frequency ("RF") devices, which are associated with upgraded C&T systems, to cause unintended, premature detonation of blasting circuits used in the members' mines. (Exs. G-1–G-4; Tr. 123-24.) Kuzar subsequently agreed to postpone the deadline for the operators to provide C&T system purchase orders from June 15, 2009 until a time after the date on which MSHA tested the RF devices in one of the IMA-member mines. (Ex. G-5.) Nevertheless, Kuzar still required each of the anthracite mine operators to submit revised ERPs identifying the upgraded C&T provisions by June 15, 2009. (*Id.*) The IMA had expressed interest in two MSHA-approved C&T systems for possible installation in anthracite mines: the L-3 Communications' "Wireless Mesh Communication and Tracking System" and the Matrix Design Group, LLC's, "RFID Miner Tracking and Text Messaging System." (Ex. G-1H at 2; Tr. 203.)

On or around June 15, 2009, all but one of the Respondents submitted statements to MSHA indicating that, if the Respondents were to choose an upgraded C&T system, the Matrix METS 2.1 system would be the system of choice.[5] (Exs. G-2A, G-3A, G-4A.) None of the Respondents submitted revised their ERPs at that time. (Exs. G-1A, G-2A, G-3A, G-4A.) On July 2, 2009, Kuzar notified the Respondents by letter that the June statements did not qualify as revised and compliant ERPs and that they must submit compliant ERPs by July 16, 2009. (Exs. G-1B, G-2B, G-3B, G-4B.) None of the Respondents filed revised ERPs by the July 16, 2009 deadline. (Exs. G-1, G-2, G-3, G-4; *see* Tr. 124, 128.)

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[3] www.msha.gov/District/Dist_01/History/history.htm.

[4] www.msha.gov/ACCINJ/ANTHRACI.HTM.

[5] Alfred Brown Coal's statement merely asserted that "[a]ny system that is guaranteed in writing and proved safe through extensive testing not to endanger my employees with radio frequency while using electronic detonators will be acceptable." (Ex. G-1A.)

On July 21, 2009, MSHA tested RF devices of the L-3 Communications ACCOLADE ("L-3") system at Alfred Brown Coal's 7 Ft. Slope Mine.[6] (Ex. G-10; Tr. 203.) MSHA's investigative report, which summarized the test results, concluded that the L-3 system could be safely used in underground anthracite mines. (Ex. G-10.) Accordingly, on August 28, 2009, Kuzar contacted the Respondents by letter, informing them of the results of MSHA's testing and attaching a copy of the investigative report. (Exs. G-1C, G-2C, G-3C, G-4C.) Kuzar further notified the Respondents that the new deadline for submitting their ERPs would be September 11, 2009. (*Id.*)

On September 4, 2009, Kuzar again contacted the Respondents by letter, this time to provide further guidance on how to develop a revised and compliant ERP. (Exs. G-1D, G-2D, G-3D, G-4D.) This letter attached copies of MSHA PPL P09-V-01 as well as an "ERP Checklist."[7] (Exs. G-6, G-9.)

On or around September 11, 2009, each of the Respondents submitted an ERP. (Exs. G-1E, G-2E, G-3E, G-4E.) None of the ERPs included upgraded C&T provisions. Instead, the ERPs included reasons why the Respondents believed they could not adopt upgraded C&T systems, and provided for alternative C&T systems. The alternative C&T systems consisted of manual, magnetic board tracking systems and redundant, hard-wired communications systems that were the same or very similar to the systems each of the operators had originally installed to comply with the Mine Act's ERP provisions for C&T systems before June 15, 2009. (Tr. 75-77.) The Respondents' main reasons for not including upgraded C&T systems in their revised, post-June 15, 2009 ERPs were that: (1) no fully wireless system existed; (2) the RF devices used in upgraded C&T systems potentially could cause unintended, premature detonation of explosives; and (3) upgraded C&T systems had not been proven effective for use in the Respondents' underground anthracite mines. (Exs. G-1E, G-2E, G-3E, G-4E.)

On October 5, 2009, Kuzar contacted the Respondents by letter, detailing the deficiencies in each of the Respondents' September 2009 ERPs. (Exs. G-1F, G-2F, G-3F, G-4F.) Kuzar responded directly to each of the Respondents' listed reasons for not providing upgraded C&T systems by explaining that: (1) while no fully wireless system existed, virtually wireless systems did exist and those systems would provide for approximately the same level of safety and effectiveness as totally wireless systems; (2) MSHA had investigated the potential for unintended, premature detonation caused by RF devices used in one of the upgraded C&T systems (i.e., the L-3 system) and found that upgraded C&T systems could be used safely in conjunction with electric detonators; and (3) based on MSHA's understanding of anthracite

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[6] The L-3 system is another upgraded C&T system that IMA members considered for use in their underground anthracite mines. (Tr. 105.)

[7] MSHA also posted two "Q&A's" that discussed the PPL on its website. (Exs. G-7, G-8.) Yet no date is indicated as to when the second Q&A was posted and MSHA provided no testimony as to the date it was posted. (Ex. G-8; Tr. 108-09.)

mining, the upgraded C&T systems could be used effectively in such mines.[8] (*Id.*) However, Kuzar explained that if the Respondents still felt there were reasons why the upgraded C&T systems could not be installed in their mines, they should provide more detailed explanations of their reasons for his consideration. Kuzar established a new deadline for ERP submission of October 28, 2009. (*Id.*)

On or around October 28, 2009, B&B, Orchard, and S&M Coal each submitted ERPs which were exact copies of the ERPs they had submitted in September 2009. (Exs. G-2G, G-3G, G-4G.) Alfred Brown Coal submitted a letter, rather than an ERP, reiterating its earlier concerns and explaining that it wanted to attend a meeting with the Institute of the Makers of Explosives ("IME") on October 29, 2009 prior to submitting a revised ERP.[9] (Ex. G-1G.)

On January 12, 2010, Kuzar contacted the Respondents by letter, explaining that their October ERP submissions did not qualify as revised and compliant ERPs.[10] (Exs. G-1H, G-2H, G-3H, G-4H.) To B&B, Orchard, and S&M Coal, Kuzar stated that the October copies of their September ERP submissions still were inadequate and that the same deficiencies existed. (Exs. G-2H, G-3H, G-4H.) To Alfred Brown Coal, Kuzar explained that the operator had failed to submit a revised and compliant ERP following the October 30, 2009 IME meeting. (Ex. G-1H.) Kuzar also conveyed his understanding that information provided at the IME meeting demonstrated that upgraded C&T systems could be safely used in underground anthracite mines. For three of the operators, Kuzar set a new deadline for ERP submissions of January 22, 2010. (Exs. G-1H, G-2H, G-3H.) Because S&M Coal also indicated in its October 2009 submission that installation of an upgraded C&T system "ultimately would force [it] into closure" (Ex. G-4G

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[8] Thomas J. Garcia, MSHA District 1's representative at the hearing, testified about the manner in which an upgraded C&T system would be installed and used in a typical, underground anthracite mine. (Tr. 80-90.) Garcia supported his position by explaining how other underground anthracite operators (and IMA members) had planned to install upgraded C&T systems as provided for in their compliant and revised ERPs, all of which had been approved by District 1 at the time of the hearing. (Tr. 96-99, 117-18.)

[9] At the October 29 meeting, the IME provided participants with Safety Library Publication (SLP) 20, "Safety Guide for the Prevention of Radio Frequency Radiation Hazards in the USE of Commercial Electric Detonators (Blasting Caps)" and its recent addendum. (Exs. G-1–G-4, G-20, G-21.) SLP-20 states that, when proper and established precautions are taken, the risk of unintended, premature detonation of blasting circuits by radiofrequency devices is "practically nil." (Ex. G-20 at 2.)

[10] In the January 12, 2010 letter, Kuzar also described the ALJ's decision in *RS&W Coal Company*, an ERP dispute proceeding involving an underground anthracite operator (and fellow IMA member) who had failed to submit a revised ERP with upgraded C&T provisions. 31 FMSHRC 1440 (Dec. 9, 2009) (ALJ). Kuzar attached a copy of this decision to his letter. (Exs. G-1H, G-2H, G-3H, G-4H.)

at 3), Kuzar provided S&M Coal an additional week to submit a revised ERP and/or to provide documentation to demonstrate financial infeasibility. (Ex. G-4H.)

On or around January 22, 2010, Alfred Brown Coal, B&B, and Orchard submitted ERPs. (Exs. G-1I, G-2I, G-3I.) Once again, none of the ERPs included upgraded C&T provisions. (*Id.*) Instead, the ERPs again listed reasons why the operators believed the upgraded C&T systems could not be installed, and provided for alternative C&T systems that were the same or similar to the ones the operators' had used in their original ERPs. (*Id.*) Meanwhile, S&M Coal submitted a request for an extension of time to provide support for its financial infeasibility argument. (Ex. G-4I.) On February 12, 2010, S&M Coal provided copies of several financial documents to MSHA for review. (Ex. G-4; Tr. 284.) On February 17, 2010, Kuzar contacted S&M Coal by letter, informing it that MSHA had refused to exempt it from submitting a revised ERP with upgraded C&T systems for reasons of "financial hardship," and establishing a new ERP submission deadline of February 22, 2010. (Ex. G-4J.) S&M Coal declined to revise and re-submit its existing ERP. (Ex. G-4.)

On March 1, 2010, MSHA District 1 authorized representative Gregory Mehalchick, acting under Kuzar's direction, issued citations to each of the Respondents for failing to submit revised and compliant ERPs. (Tr. 137-38; Exs. G-1J, G-2J, G-3J, G-4K.) These proceedings ensued soon thereafter.

General Legal Principles - Standard of Review

When the Secretary and an operator are unable to agree on a particular ERP provision, the Mine Act directs the Secretary to "issue a citation which shall be immediately referred to a Commission Administrative Law Judge" for expedited adjudication. 30 U.S.C. § 876(b)(2)(G). In *Emerald Coal Resources*, the Commission set forth the principles under which any such referral would be decided:

> One of the cornerstone principles with regard to plan formulation under the Mine Act is that MSHA and the affected operator must negotiate in good faith for a reasonable period concerning a disputed plan provision. *Carbon County Coal Co.*, 7 FMSHRC 1367, 1371 (Sept. 1985). The Commission has noted, "Two key elements of good faith consultation are giving notice of a party's position and adequate discussion of disputed provisions." *C.W. Mining Co.*, 18 FMSHRC 1740, 1747 (Oct. 1996).
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> While the contents of a plan are based on consultations between the Secretary and the operators, the Commission has recognized that "the Secretary is [not] in the same position as a private party conducting arm's length negotiations in a free market." *Id.* at 1746. As one court has noted, "the Secretary must independently exercise [her] judgment with respect to the content of . . . plans in connection with [her] final approval of the plan." *UMWA v. Dole*, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989), *quoting* S. Rep. No. 181, 95th Cong., 25 (1977), *reprinted* in Senate Subcom. on Labor, Com. on Human Res., 95th Cong.,

> Legislative History of the Federal Mine Safety and Health Act of 1977, at 613 (1978). Ultimately, the plan approval process involves an element of judgment on the Secretary's part. *Peabody Coal Co.*, 18 FMSHRC 686, 692 (May 1996) ("*Peabody II*"). "[A]bsent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval." *C.W. Mining*, 18 FMSHRC at 1746; *see also Monterey Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983) (withdrawal of approval of water impoundment plan was not arbitrary or capricious where MSHA's conduct throughout the process was reasonable).

Emerald Coal Res., 29 FMSHRC 956, 965-66 (Dec. 2007); *see also Twentymile Coal Co.*, 30 FMSHRC 736, 747-48 (Aug. 2008) (quoting same language for review of ERP disputes).

The Commission went on to hold that a judge hearing an ERP dispute must decide whether the record shows that the Secretary's refusal to approve a proposed ERP provision was arbitrary and capricious, stating:

> The standard involves a review of the record to determine whether the Secretary properly exercised her discretion and judgment in the plan approval process. In this regard, the Commission's decision in *Monterey Coal* is instructive. In affirming a citation for failing to supply data relating to impoundment pond construction, the Commission applied the "arbitrary and capricious" standard in reviewing MSHA's withdrawal of its approval of an impoundment plan:
>
> > We cannot conclude that MSHA's use of the Table [of recommended minimum design storm criteria] or its act of withdrawing the plan approval was arbitrary and capricious. . . . [P]rior to issuance of the citation Monterey was given unequivocal notice of and a reasonable opportunity to comply with MSHA's interpretation and use of the Table. In sum, we find the course of action taken by MSHA to have been a reasonable approach, and not arbitrary or capricious.
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> *Monterey Coal*, 5 FMSHRC at 1019 (citation and footnote omitted); *accord Peabody II*, 18 FMSHRC at 692 n.6 (in reviewing the Secretary's refusal to approve a ventilation plan provision, Commission noted that the plan approval process involves an element of judgment on the part of the Secretary that is reviewed under an arbitrary and capricious standard). This standard appropriately respects the Secretary's judgment while allowing review for abuse of discretion, errors of law, and review of the record under the substantial evidence test. *See Energy West Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996) ("abuse of discretion" has been found when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law") (citations omitted).

Emerald Coal, 29 FMSHRC at 966 (footnote omitted); *Twentymile Coal Co.*, 30 FMSHRC at 748.

Conclusions of Law – Further Factual Findings

This case involves the safety of using mandated C&T devices that emit RF energy in anthracite mines where blasting is integral to mining coal. These cases turn on whether the Respondents have met the C&T alternative requirements under section 316(b)(2)(F)(ii).

A. Good Faith Negotiations

The record reflects, and the parties acknowledge, that ERP negotiations regarding the installation of updated C&T systems began in March 2009 when MSHA held a meeting with the IMA, of which all four Respondents are members. Because no truly wireless communication systems existed, MSHA attempted to rectify that issue by providing guidance through MSHA PPL P09-V-01, which references partially-wireless C&T devices that emit RF energy. The Respondents' fears over the risk of unintentional detonation if new C&T devices emitting RF energy were to be introduced in the vicinity of their anthracite blasting operations led MSHA to extend ERP deadlines and agree to testing of C&T systems in an anthracite mine. MSHA subsequently gave extensions for ERP submissions, completed one test of a C&T system at the 7 Ft. Slope Mine of Alfred Brown Coal, and disseminated those test results to the Respondents. The record is replete with correspondence between the mine operators and the district manager providing information and stating positions on ERPs. (Exs. G-1–G-4.)

However, it is clear the ERP negotiations were at an impasse by March 1, 2010 after nearly a year of negotiating, especially given that none of the operators had changed their positions or modified their ERPs as requested by MSHA. (E.g., Exs. G-1E, G-1G, G-1I, G-2E, G-2G, G-2I, G-3E, G-3G, G-3I, G-4E, G-4G.) I find that both sides had given notice of their positions and had adequate negotiations. *See Emerald Coal*, 29 FMSHRC at 965 ("One of the cornerstone principles with regard to plan formulation under the Mine Act is that MSHA and the affected operator must negotiate in good faith for a reasonable period concerning a disputed plan provision." (citing *Carbon County Coal*, 7 FMSHRC at 1371)). Thus, I conclude that the parties had met their duty to negotiate in good faith and had done so over a reasonable period of time.

B. Arbitrary and Capricious Analysis

Absent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition for approval of the Respondents' ERPs. Thus, the Secretary must establish a rational basis for her rejection of the Respondents' proposed alternatives to commercially-available C&T systems approved by MSHA for use in anthracite mines.

1. Operators' Arguments

The operators mainly argue that the new ERP requirements for upgraded C&T systems have not been proven 100% safe for use in anthracite mines. Indeed, they note their anthracite

region is unique and anthracite mining is not analogous to other types of coal mining, such as at bituminous mines, which use highly mechanized operations including longwall mining to extract coal. Rather, all of the underground anthracite mine operators in these proceedings rely on conventional mining techniques. Moreover, the Respondents are all small operators, employing a handful of miners at their respective mines, which in most cases include fathers, sons, and other family members of the principals. Consequently, anything that could remotely cause a blasting cap to ignite prematurely worries these operators, as it could put themselves as well as others at grave risk of possible injury or death.

As Judge Zielinski noted in his ERP decision involving another anthracite coal operator, concerns about the hazards of introducing RF sources into an anthracite mine's blasting environment were, and are, understandable and well-founded. *RS&W Coal Co.*, 31 FMSHRC 1440, 1454 (Dec. 2009) (ALJ). These concerns were understandably heightened by the manner in which some of the technical information is presented. Statements in authoritative technical literature to the effect that the "probability of an accidental firing from RF energy is practically nil," or "extremely remote," could easily be seen as less than reassuring to a miner who has to connect detonator leg wires in close proximity to high explosives. *Id.* (quoting the IME's Safety Library Publication No. 20, *Safety Guide for the Prevention of Radio Frequency Radiation Hazards in the Use of Commercial Electric Detonators (Blasting Caps)* (July 2001) ("SLP-20")). Brown put it best during his cross-examination of the Secretary's expert, Chad Huntley, when he noted that papers he received on C&T systems state they are "safe, safe, safe, but at the end of every chapter there is a disclaimer." (Tr. 242.) Indeed, even Huntley testified that "nothing is a hundred percent safe." (Tr. 240.) For Respondents, not being able to receive 100 percent assurances from C&T system manufacturers does not provide them with the level of comfort expected when putting themselves or family members in potentially dangerous situations.

Nevertheless, facts and science, not visceral fears, drive the analysis of these congressionally-mandated C&T systems, and the Secretary presented much technical documentation and testimony at the hearing, as discussed below.

2. Technical Discussion

Fundamentally, these cases are about electricity and, more specifically, the amounts of electrical energy emitted by electronic devices used to communicate wirelessly in underground mines. The issue before me is whether the MSHA-approved electronic devices emit electrical energy at levels that could unintentionally initiate the detonation of blasting caps used to ignite larger explosions within the mines. It has long been recognized that devices emitting radio frequency ("RF") energy, such as wireless communications systems, can pose a hazard when used in proximity to electric blasting circuits. The wires of a blasting circuit function like antennae, and RF energy induces an electric current in such circuits, which could result in an unintended detonation. To understand whether such a hazard exists, it is necessary to be able to describe electrical energy, and the transmission of such energy in the form of RF energy.

A useful analogy for an electrical system is that it is akin to the water supply pipes in an average home. Three variables describe the flow of the water through the pipes: (1) the rate at

which the water flows through the pipes, (2) the water pressure, and (3) the diameter of the pipes and how much resistance they create on the flow of water. Electrical current is described using similar variables. The electrical current itself, that is, the rate at which the electricity is flowing through the system, is measured in amperes, the symbol for which is I. The "pressure" of the electrical current is measured in volts, the symbol for which is V. Finally, resistance in an electrical system is measured in ohms, the symbol for which is r. A simple equation describes the relationship between these three variables:

$$I = V/r$$

Current is equal to voltage divided by resistance. Current increases as voltage increases or as resistance decreases. Referring back to the water pipe analogy, if one were to increase the pressure of the water in the pipes in their home, or were to expand the diameter of the pipes and thus decrease the resistance, then the flow (or current) of water coming into the house would increase.

A fourth variable used to describe electrical energy is its power, which is measured in watts, the symbol for which is W. Another simple equation describes how to determine the power of an electrical system:

$$W = VI$$

Wattage is equal to voltage multiplied by current. In these proceedings, various permutations of these two formulae have been used, including voltage equals resistance multiplied by current ($V = rI$) and wattage equals resistance multiplied by current squared ($W = rI^2$).

At the hearing, the Secretary presented evidence on two C&T systems, the Matrix METS 2.1 system and the L-3 system. (Exs. G-10, G-30, G-32.) The Secretary states in her brief that "if the [R]espondents were to choose an upgraded C&T system, the Matrix METS 2.1 system would be the system of choice." (Sec'y Posthearing Br. at 3.) This system has three components that are used underground: a two-way text communicator, a wireless tag used to track miners, and a network of communication nodes that are either wireless or connected to the surface by a hard wire. (Tr. 81-86, 102-04, 186-87; Ex. G-16.)

All three of these components transmit and/or receive RF energy, which can be measured in watts. The Matrix text communicator transmits 0.015 watt (15 milliwatts, or 15mW), the tracking tag transmits 0.006 watt (6mW), and each node transmits 0.010 watt (10mW). (Tr. 186-87.) RF energy is emitted as waves at a specific operating frequency measured in hertz (the symbol for which is Hz), or cycles per second – which are commonly referred to in higher multiples such as megahertz (10^6 Hz, expressed as MHz) and gigahertz (10^9 Hz, expressed as GHz). The Matrix system operates at a frequency of 430 MHz. (Tr. 193-94.) An important characteristic of RF energy, however, is that its power diminishes dramatically as it travels through the atmosphere. (Tr. 191-92.) The power level of an RF signal diminishes one hundred times after it travels one wavelength, which is known as "free space loss." (Tr. 192.) In other words, at a distance of one wavelength from an RF antenna the available power in the RF field is

only one one-hundredth (0.01) of the power at the transmitting antenna. At a distance of two wavelengths the strength drops to one four-hundredth (0.0025) of the power at the transmitting antenna. Each time a distance of a wavelength is added, the available power drops by a factor of four so that four wavelengths would decrease the strength of the energy field by one sixteen hundredth (0.000625). (Tr. 193.)

Knowing the wavelength at which RF energy is transmitted is highly relevant to this discussion. Wavelength (measured in meters per second and the symbol for which is lambda, or λ) equals the velocity of light divided by the operating frequency of the system. For the Matrix system, the wavelength of an RF signal at 430 MHz equals 0.697 meters per second ($\lambda = 0.697$). Expressed in feet, the wavelength of the Matrix system is approximately 2.2 feet. (Tr. 195.) Through the action of free space loss, the power of a 15mW Matrix transmitter operating at 430 MHz would be diminished 100 times to 0.15mW over one wavelength of 2.2 feet. (Tr. 198.)

Having determined the characteristics of the RF energy emitted by the electronic devices approved by MSHA (for example, the 15mW emitted by a Matrix text communicator as diminished over distance), it remains to be determined whether this RF energy could initiate the detonation of a blasting cap used to ignite explosive charges in the mines. Blasting caps typically are small cylindrical metallic objects, "about the size of a pencil," with two wires extending from one end. (Tr. 47.) These are the leg wires, which are attached to lead wires running to a blasting unit or battery from which, at the time of detonation, an electrical current runs back through the lead wires to the blasting caps to detonate them and, ultimately, the explosive charge. (Tr. 49-56.)

None of the parties to these proceedings were able to testify to or otherwise document the exact amount of energy required to initiate the detonation of the blasting caps used in the Respondents' mines. Instead, the Secretary put on evidence concerning the energy level below which a detonator could not be ignited, which is called the "no-fire level." The Secretary's expert witness, Chad Huntley, an electrical engineer at MSHA's Technical Support Approval and Certification Center, testified that, according to the SLP-20, "the chance of an unintended detonation is practically nil if your power level's below 40 milliwatts."[11] (Tr. 163-64 (citing Ex. G-20 at p.2); Ex. G-18.)

Huntley also testified concerning the specifications for a blasting cap made by Austin Powder that is commercially available for use in underground coal mines, the COALSTAR II Detonator. (Tr. 179-80; Ex. 25.) According to Huntley, this detonator has a no-fire level of 105

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[11] The IME and Bureau of Mines publications refer to a "no-fire level" of 0.04 watts (W), or 40 milliwatts (mW), for commercial detonators. (Tr. 171; Ex. G-23.) The 40mW no-fire level equates to an induced current of 0.2A or 200mA at 1.0 ohm resistance, and is recognized as a "conservative" limit, because many commercially available detonators or blasting caps manufactured in North America have no-fire levels higher than 40mW. (Tr. 173, 231-32; Ex. G-24.) Detonators tested in 1973 by the Bureau of Mines were found to have no-fire levels ranging from 77mW to 275mW. (Ex. G-22 at 4-4.)

milliwatts,[12] and using a detonator with a higher no-fire level than the IME 40mW standard would also increase the level of safety. (Tr. 180-83; Ex. G-25.)

As noted above, the energy levels emitted by the Matrix system are far below the IME 40mW (0.040 watts) no-fire standard, especially as the distance between the devices and the detonators increases. Thus, a Matrix text communicator held 2.2 feet away from a detonator would emit just 0.15 milliwatts (0.00015 watts) of RF energy, or less than one-half a percent (0.375%) of the IME 40mW no-fire standard, or for that matter only 0.14 percent of the 105mW no-fire level for a COALSTAR II Detonator.

Moreover, Huntley testified that blasting in anthracite mines is often done in series where more than one blasting cap is used, which would require an increase in the power necessary to "initiate any one of the detonators." (Tr. 184-85.) Huntley testified further:

> Q: [L]et's say we're using our COALSTAR detonator that has a . . . 105 milliwatt no-fire level, and I have 10 COALSTAR detonators wired together in a series, what would be the no-fire level for . . . those detonators as a group?
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> A: It would be 10 times the power level necessary to initiate one detonator. . . . A thousand fifty milliwatts [1,050mW].

(Tr. 185.) As far as the Matrix system is concerned, if a miner were to be carrying all three components – a text communicator (15mW), a node (10mW), and a tag (6mW) – the combined RF energy emitted by them would be, at zero feet in distance, 31mW, which is less than the IME 40mW no-fire standard. However, a miner would not normally have a need to carry a node, so simply having a text communicator (15mW) and a tag (6mW) would only amount to about half (21mW) of the 40mW no-fire level at a zero separation distance.

Finally, administrative controls, such as separation distances, were also raised at the hearing. (Tr. 109-10.) On cross-examination and redirect, Garcia noted that as of January 22, 2010 when Alfred Brown Coal submitted an ERP, MSHA would approve separation distances of up to 50 feet. (Tr. 268-74.) Brown indicated in his cross-examination that it was his understanding that separation distances of 50 feet were required in his ERP. (Ex. G-1I.) However, as Garcia clarified, MSHA would approve separation distances of up to 50 feet where a mine operator was unable to specify a safe separation distance based on a manufacturer's recommendation. (Tr. 274; *see* Ex. G-3F at 3.) Huntley later explained how to read the manufacturers' component charts and this revealed the L-3 and Matrix systems, as recently as

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[12] The manufacturer specified the no-fire level as 0.45 amperes, and the "bridge wire resistance" as 0.54 ohms. To determine the no-fire level in watts, Huntley used the equation $W = rI^2$, and calculated this as 105mW. (Tr. 182.)

2008 and 2009, had recommended separation distances for various components of their C&T systems ranging from zero to seven feet. (Tr. 209-11; Ex. G-14.)[13]

3. Analysis of Secretary's evidence

The Secretary has established through her expert witness, Chad Huntley, that the chances of an unintentional ignition or detonation of a blasting cap from C&T devices, which emit such low levels of RF energy, is infinitesimally remote to the point that it is nearly non-existent. The Secretary has also demonstrated through testimony and documentation that MSHA-compliant C&T systems are commercially available and can be effectively and safely used in underground anthracite mines.

Where an ERP sets forth reasons for not adopting the specific post-accident provisions of section 316(b)(2)(F)(ii) which mandate a wireless two-way medium for communication and an electronic tracking system, the statute places the onus squarely on the operator to come up with alternative means of compliance that shall "approximate, as closely as possible," the degree of functional utility and safety protection provided by a wireless two-way communication and electronic tracking system. The Respondents failed to set forth in their ERPs such alternative systems that approximated, as closely as possible, the same level of safety and effectiveness provided by the upgraded C&T systems, as reflected in MSHA PPL P09-V-01. (Exs. G-1F, G-1H, G-2F, G-2H, G-3F, G-3H, G-4F, G-4H, G-4J.) Rather, the Respondents' ERPs continued to rely on their older hard-wired telephone systems and mechanical "magnetic board" tracking systems with little change or explanation as to why these systems provided the same functional utility and safety protection as the newer C&T systems, such as the L-3 system tested by MSHA. Consequently, I find that the Respondents' ERPs (1) did not provide the congressionally-mandated and upgraded C&T systems, and (2) did not set forth satisfactory reasons for failing to include such systems. (Exs. G-1F, G-1H, G-2F, G-2H, G-3F, G-3H, G-4F, G-4H, G-4J.) Furthermore, the Respondents failed to set forth in their ERPs alternative systems which "approximate[d], as closely as possible," the same level of safety and effectiveness provided by the upgraded C&T systems, as required by section 316(b)(2)(F)(ii).

Given the Mine Act's clear mandate, MSHA's and the IME's findings with regard to the operators' ability to safely use upgraded, commercially available C&T systems in conjunction with electric detonators, and ALJ Zielinski's decision in the *RS&W Coal Company* ERP dispute resolution proceeding, I determine that the Respondents did not satisfy section 316(b)(2)(F)(ii) of the Act. Therefore, I conclude that the Secretary did not act arbitrarily or capriciously in refusing to approve the Respondents' ERPs. *See Twentymile Coal Company*, 30 FMSHRC 736, 745-49 (Aug. 2008) (district manager's determination following review of an ERP can be reversed by Commission only if it is arbitrary and capricious).

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[13] The IME's SLP-20 provides tables of recommended safe separation distances to be maintained between blasting circuits and different types of RF equipment. (Ex. G-20.) An August 2008 SLP-20 addendum, intended to be more applicable in underground mines, sets forth a formula for calculating the field strength produced by multiple RF sources. (Ex. G-21.)

Nevertheless, while the technical evidence clearly demonstrates an extremely low risk of RF energy from C&T systems causing unintended detonations, it appears the results of these technical reports were not communicated effectively to the Respondents, which led to these proceedings. What is clear from the testimony elicited from Brown's cross-examination of the Secretary's witnesses is that the Secretary, through the district manager, did an inadequate job of explaining to the operators the safety issues surrounding the installation of C&T systems in an environment where blasting occurs. In so doing, District 1 personnel failed to assuage the fears of the Respondents.

The Secretary through her operatives at the district level seemed to give conflicting information and did not appear to appreciate the practical concerns of these operators. Indeed, as of January 22, 2010, Brown stated his belief that he was required to have, and Garcia testified that MSHA had continued to approve of, a separation distance of 50 feet for C&T devices in a revised ERP, which admittedly would make it extremely difficult for a miner to work effectively in these small anthracite mines when wearing the required gear. (Tr. 263-66.) Yet, expert witness Huntley testified that in 2009 the L-3 and Matrix manufacturers had recommended a five-foot separation distance – a 90 percent cut in the distance – which MSHA had approved. Huntley also testified that Matrix had recently requested a zero separation distance, which MSHA would be analyzing for approval in the near future. (Tr. 214-15.) While advances in technology can occur rapidly, and the onus is on the operator to submit an ERP with appropriate administrative controls, it appears MSHA did not adequately communicate to the Respondents recent changes in the safe separation distances for MSHA-approved C&T systems. A case in point is that other anthracite mines with recently updated and approved ERPs, still mandate a 50-foot separation distance even though they have Matrix systems. (Exs. G-15, G-16, G-17.) MSHA appears to have compounded the problem, and created the perception it was not proceeding in good faith, by initially promising a second test of C&T equipment in an anthracite mine and then failing to do so. (Tr. 234-35, 257.) Although Huntley explained on cross-examination that the results of the LEP testing in conjunction with the lower RF levels emitted from the Matrix system made a test of the Matrix system unnecessary (Tr. 257-60), nothing in the evidence presented at the hearing by the Secretary indicates this information was communicated effectively to the Respondents.

Furthermore, other practical solutions to assuage the fears of the Respondents do not appear to have been considered or adequately communicated to the Respondents by MSHA. For example, during questioning by the court, Garcia was asked about differences in the blasting caps with regard to no-fire levels. He indicated that the blasting caps were all the same. (Tr. 145-46.) Yet questioning of expert witness Huntley noted the existence of different no-fire levels for blasting caps and specifically pointed to research that showed higher no-fire level thresholds for certain non-foreign manufactured blasting caps (Tr. 176-78; Ex. G-22 at 4-4), which the Secretary cited in her post-hearing submission (Sec'y Closing Br. at 13-14). As the supervisor who is directly involved with approval of ERPs, Garcia's apparent lack of knowledge in this area is troubling. Granted that MSHA did share with the Respondents its technical analyses and papers regarding information on the RF levels and their safety with regard to unintended detonations; however, MSHA needs to know its audience. These are not multi-million dollar

operations that have technical experts who can digest these documents. Rather, these are small operators who have other day-to-day concerns with little background in megahertz and radio frequency analyses. Alfred Brown's cross-examination of Huntley is a case in point. Brown was repeatedly apologetic for having to ask expert Huntley questions on the stand about several concerns with regard to this new C&T technology, but he explained that he had no other forum to get his questions answered than through this expedited hearing process. Making Huntley available to the IMA to address their concerns before issuing the citations could have been an effective step to resolve these disputes.

As the operators stated in their prehearing statement, the ERP dispute process is not the best way to resolve these concerns. In this regard, MSHA initially took the right step in meeting with the IMA in March 2009 and by agreeing to test C&T systems at an anthracite mine, which were positive and productive steps to respond to the IMA's concerns. However, holding a close-out meeting with the IMA to explain testing results, answer additional questions, and discuss next steps might have avoided the need for these proceedings. Instead, MSHA made the decision to issue citations and force the issue into this forum.

C. Economic Feasibility – S & M Coal Company

While I find that the Secretary has established a rational basis for rejecting the alternate means of compliance in the ERP submitted by S&M Coal, this does not necessarily translate into an affirmance of her findings regarding the citation at issue. The Secretary published MSHA PPL No. P09-V-01 on January 16, 2009, which discussed the criteria she would use for approving ERPs. In a Question and Answer document on PPL No. P09-V-01 published on April 29, 2009, MSHA stated it would consider economic feasibility in approval of C&T systems.

S&M Coal is a very small operation, which in 2009 produced 3,526 tons of anthracite coal and employed just five miners. (Ex. R-1.) Koperna testified that in 2009, S&M Coal had gross receipts of $183,139, with net proceeds after expenses of $19,483.[14] (Tr. 285-86.) Koperna took his salary out of S&M's net proceeds. (Tr. 286.)

Although the Mine Act does not provide that an operator's ability to afford upgraded C&T systems should be considered during the ERP approval process, the Question and Answer guidance document appended to PPL No. P09-V-01 states that MSHA "will consider whether [C&T] systems are economically feasible on a case-by-case basis." (Ex. G-7, item 4.) This was done in the case of S&M Coal. In a February 17, 2010 letter, MSHA District 1 Manager John Kuzar informed S&M Coal that, after reviewing financial statements from the company, he "determined that the information does not exempt you from providing upgraded [C&T] systems for your Buck Mountain Slope mine." (Ex. G-4J.) Kuzar acknowledged that "there is a fairly

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[14] S&M's 2009 expenses included explosives ($17,392), fuel ($13,223), haulage ($20,950), accounting ($1,200), timber ($2,700), repairs and maintenance ($3,264), miscellaneous supplies ($4,500), taxes and licenses ($5,141), amortization ($1,928), depreciation ($1,655), interest ($3,264), and labor ($80,586). (Tr. 285-86; Exs. R-1, R-2.)

significant expense associated with the purchase and installation of such a [C&T] system." (*Id.*) But Kuzar went on to state:

> [I]t is my understanding that the [C&T] system can be purchased and installed at the Buck Mountain mine for an amount that is less than the average profit reported by the mine over the last three years[,] and for an amount that is substantially less than many of the other expenses associated with your operation.

(*Id.*)

However, in a December 10, 2008 guidance document, MSHA estimated the per mine cost of installing C&T systems in mines with 1-19 employees as follows: (1) $148,000 for the communication system, consisting of a base unit, amplifiers and associated barrier units, power supply, handheld radios, cable, and labor to install the system; (2) $76,200 for the tracking system, consisting of a mine server and workstation, software, cable, hubs, radio frequency identification ("RFID") readers, RFID personnel tags, and labor to install the system; and (3) $9,000 per year for maintenance and extensions of the systems. Given these figures from MSHA, I find that S&M Coal could expect to incur an initial start up cost of $224,200 to install a C&T system and, each year thereafter, maintenance costs of $9,000 per annum. (Ex. G-6 at 11.)

As stated above, S&M Coal reported a net profit of $19,483 for 2009, which was paid to Koperna as his salary. (Tr. 285-86.) I found credible and convincing Koperna's testimony that S&M Coal is a "hand to mouth" operation with few cash resources to invest in new equipment. I also note that the Secretary failed to introduce any record evidence showing that S&M Coal had alternate sources of funding for a C&T system. Nor did the Secretary rebut Koperna's testimony concerning the financial condition of S&M Coal.

In light of the foregoing, District Manager Kuzar's determination that installation of a C&T system would cost "less than the average profit reported by [S&M Coal] over the last three years"[15] would appear so perfunctory and conclusory as to fail to comport with MSHA's stated policy of "consider[ing] whether [C&T] systems are economically feasible on a case-by-case basis." (Ex. G-7, item 4.) Contrary to Kuzar's determination, the evidence before me indicates that installation of a C&T system would impose upon S&M Coal a crippling financial burden, even in light of the probability of S&M Coal obtaining such a C&T system with financing.

Kuzar's apparent failure to follow MSHA's policy to consider S&M Coal's financial ability associated with implementation of section 316(b)(2)(F) appears to have rendered that policy moot. Operators such as S&M Coal will be forced to shut their mines, and lay off their miners and have them enter a workforce in an economy that is, at this point in time, in the midst of the deepest recession since the Great Depression. MSHA published a policy its district

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[15] The net profits earned by S&M Coal for 2007 and 2008 were not introduced into evidence. I thus base my conclusions on the issue presented by Mr. Koperna on data from 2009. I note, however, that S&M Coal's production figures for 2007 (3,085 tons) and 2008 (4,667 tons) are similar to the mine's production for 2009 (3,526 tons). (Ex. R-3.)

managers apparently do not intend to support, leaving small and financially strapped operators like S&M Coal to wonder why their government is unresponsive. (*See* Ex. R-4.) MSHA can and must do better.

This is true notwithstanding the fact that the Commission has long held that MSHA's policy statements such as a Program Policy Letter or MSHA's Program Policy Manual are not binding on the Secretary or the Commission. *See D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996); *Bulk Transp. Servs.*, 13 FMSHRC 1354, 1360 (Sept. 1991); *see also Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538–39 (D.C. Cir.1986) (reversing Commission decision which improperly regarded the Secretary's general statement of an enforcement policy as a binding regulation which the Secretary was required strictly to observe). This precedent is echoed in MSHA's policy here. On page two of the guidance document it states:

> This guidance represents MSHA's current thinking with respect to two-way communication and electronic tracking for use in mine emergencies. It does not create or confer any rights for any person nor does it operate to bind mine operators or other members of the public.

(Ex. G-6 at 2.) I am cognizant that, unlike section 110(i) of the Mine Act, 30 U.S.C. § 820(i), which provides that any penalty the Commission assesses against a mine operator must take into consideration "the effect [of a penalty] on the operator's ability to continue in business," the Mine Act itself does not specify that a mine operator's compliance with section 316(b)(2)(F) is contingent upon its ability to afford a state-of-the-art C&T system. Congress mandated the use of such systems in mines regardless of cost, and both MSHA and the Commission are duty bound to enforce that mandate. I am therefore constrained to conclude that Koperna's arguments concerning the inability to afford a new C&T system, although compelling, must be rejected.

Having reached this conclusion, I would urge MSHA to work with S&M Coal in the future to find a workable solution to the company's conundrum – a solution that allows the company to continue in business.

ORDER

Citation Nos. 7000115, 7000116, 7000117, and 7000440 are hereby **AFFIRMED**. The Respondents are hereby **ORDERED** to submit revised and compliant Emergency Response Plans to the district manager within 20 days of the date of this decision.[16]

Alan G. Paez
Administrative Law Judge

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[16] The Administrative Law Judge shall retain jurisdiction over these proceedings for the limited purposes set forth in Commission Procedural Rule 24(f)(2), 29 C.F.R. § 2700.24(f)(2).

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April 14, 2010

NEWMONT USA LIMITED, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 2007-743-RM
v.	:	Citation No. 6394834;08/02/2007
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Leeville Mine Mine ID 26-02512
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2008-459-M A.C. No. 26-02512-137300
v.	:	Leeville Mine
NEWMONT USA LIMITED, Respondent	:	

ORDER DENYING THE SECRETARY'S MOTION FOR SUMMARY DECISION
ORDER GRANTING NEWMONT'S MOTION FOR SUMMARY DECISION
ORDER OF DISMISSAL

Before: Judge Manning

These cases are before me upon a notice of contest and a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (the "Act"). The Secretary filed a motion for summary decision under Commission Procedural Rule 67. 29 C.F.R. § 2700.67. In response, Newmont USA Limited ("Newmont") filed a cross-motion for summary decision. Both parties briefed the issues.

Section 2700.67 sets forth the grounds for granting summary decision, as follows:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, 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.

On August 2, 2007, Gerald Killian with the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 6394834 under section 104(a) of the Act alleging a violation of 30 C.F.R. § 50.10. The citation alleges the following violation:

> An accident happened on 07/23/2007 in the main drift between 152 stope and the 161 laydown, where a miner was pinned between the rib and a haul truck, causing him to be twisted around, breaking his left femur. The miner was treated and life flighted to the hospital. MSHA notified about the accident on 7/27/2007, when an anonymous fax was received in the Elko office at 0725 hours. It has been determined that this accident meets the criteria for an immediate reportable and the company should have reported it within 15 minutes.

Inspector Killian determined that it was unlikely that the cited condition would injure a miner and that the violation was not significant and substantial. He also determined that the operator's negligence was high. The Secretary proposed a penalty of $5,000.00 for the citation.

The cited regulation provides that the "operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred." The term "accident" is defined by the Secretary in section 50.2(h). For purposes of this citation the applicable definition of "accident" is "[a]n injury to a miner which has a reasonable potential to cause death." 30 C.F.R. § 50.2(h)(2).

The parties stipulated to the key facts, as follows:

1. On July 23, 2007, Newmont employee Andrew Little was working on electrical power moves on the 4460 level of the Leeville Mine with Primitivo Valasquez. After the two men had moved and connected the necessary power leads and trailing cables, Little walked over to the main load center on the 4460 Level to reset the breaker for the power to the Pemco (power generation box).

2. At approximately 3:56 a.m., Little walked past the cab of haul truck 055 and made eye contact with the driver of the truck. The truck was parked and idling.

3. The opening between the truck and the rib was adequate for clearance, but the opening between the truck and the rib narrowed as Little walked further back. When Little reached the point where the clearance had narrowed to approximately 2 feet, the truck began to move.

4. As Little walked by, the tire of the haul truck ran over his right boot, and grabbed as the wheel of the truck passed by him. The tire caught the light cord on his mine belt and twisted Little around as he was scrambling up the rib to avoid being pulled under the truck.

5. Immediately after the truck passed Little, Velasquez heard Little screaming. Little told Velasquez that his leg was broken and he was thirsty.

6. The truck continued down the drift and did not stop until after it had passed Little.

7. At approximately, 4:05 a.m., the truck driver called dispatch to report that there was a man down and that a man had been run over by a haul truck. The driver was so excited during his initial call to dispatch that some supervisors were unable to understand what he was saying. The truck driver called back a second time and stated, "We have an emergency down here at the 4460-161 and need an EMT."

8. An EMT arrived at the accident scene at approximately 4:20 [a.m]. He gave Little oxygen, put him in a cervical collar and strapped him to a stokes basket. Little was alert and responsive and his vital signs were good. The EMT's initial assessment was that Little had suffered an injury to his left femur. The EMT at no time believed that Little had suffered an injury that had a reasonable potential to cause death.

9. At approximately 4:25 a.m., the Leeville HSLP Rep notified the mine superintendent of the incident.

10. At approximately 4:30 a.m., the Leeville HSLP Rep notified the general foreman of the incident.

11. At approximately 4:40 a.m., Little was loaded on the back of a 12 passenger man trip vehicle and driven to the surface. At 4:44 [a.m.], Little was transferred to the Carlin ambulance, and ultimately flown by Access Air Helicopter to Northern Nevada Regional Hospital in Elko.

12. At the hospital, Little was diagnosed with an oblique mid shaft fracture of his femur that required surgical intervention (pinning). He remained hospitalized until July 27. Little was not released to go back to work until November 5.

13. The truck was approximately 2 feet from the rib when the truck ran over Little's right foot.

14. Little never lost consciousness during this incident.

15. Newmont did not notify MSHA that Little was injured within 15 minutes of learning of the injury.

16. On the morning of July 23, 2007, MSHA inspector Vic Peterson came to the Leeville Mine to do a quarterly inspection. Newmont employees explained to Inspector Peterson that an accident occurred that night and that they did not report to MSHA as they believed that it was not immediately reportable.

17. On July 27, 2007, Inspector Gerald Killian came to the Leeville Mine to investigate the July 23, 2007, accident.

18. On July 27, Killian stated that it was unknown if a citation would be issued for not reporting within 15 minutes.

19. On July 31, 2007, Killian determined he would write Newmont a citation for failing to report the accident to MSHA within 15 minutes.

20. On August 2, 2007, MSHA issued Citation No. 6394834 to Newmont for an alleged violation of 30 C.F.R. § 50.10 for failing to report the accident within 15 minutes.

I. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary of Labor

The Secretary argues that Newmont violated section 50.10 by failing to notify MSHA within 15 minutes of the accident. The Secretary argues that a fractured femur has a reasonable potential to cause death because of the risks inherent with "hospitalizations and complications in surgery." (Sec. Memo. at 5). She also argues that there are conditions linked to fractures of the femur that can cause death, such as fat embolisms and deep vein thrombosis. She concludes that there is a "potential of death, even though minimal, from a fractured femur." *Id.*

Further, the Secretary maintains that, in addition to the injury itself, the nature of the events surrounding the accident should be considered when making a determination as to whether an injury has a reasonable potential to cause death. In *Cougar Coal Co.*, 25 FMSHRC 513 (Sept. 2003), a miner was exposed to an electric shock of about 7200 volts, which in turn caused the miner to fall from a height of 18 feet, hit his head during the fall, and lose his pulse. In reversing the judge's holding that immediate notification was not required, the Commission held that the nature of the events surrounding the injury, as well as the actual injury sustained, must be considered when determining whether the accident had a reasonable potential to cause death. *Id.* at 520. In the present case, she states that "[f]or at least the first fifteen minutes after

notification, everyone believed that Little had been run over by a haul truck." (Sec. Memo. at 6). The types of injuries incurred from being run over by a haul truck have a reasonable potential to cause death.

B. Newmont USA Limited

Newmont argues that the Secretary's interpretation of the cited standard is incorrect and would lead to absurd results. The potentially fatal risks incidental to hospitalization and complications in surgery for a femoral fracture are "remote, attenuated, and twice removed" from any risks that arose from the injury in this case. (Newmont Response at 3-4). Under the Secretary's theory of the case, immediate reporting would be required anytime a miner is taken to a hospital. Further, Newmont argues that, in determining whether there is a reasonable potential for death, the court should focus on the nature of the injury itself and not the nature of the events that caused the injury. Newmont argues that the injury sustained by Little did not have a reasonable potential to cause death and maintains that nothing came to the attention of the company that should have led it to believe that such a potential existed. The injured miner in *Cougar Coal*, on the other hand, was shocked by 7,200 volts of electricity, fell 18 feet, and hit his head on a power center. That miner was initially unconscious, he did not have a pulse, and he required cardiopulmonary resuscitation ("CPR"). Mr. Little was alert and responsive immediately after his injury and told Velasquez that he had broken his leg. The EMT who arrived at the scene within approximately 15 minutes, correctly diagnosed the injury to Little's left femur and at no time believed that the injury had a reasonable potential to cause death.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

I find that the stipulated facts are sufficiently comprehensive for me to render a decision on the legal issues raised by the parties. There are no genuine issues as to any material fact and I find that Newmont is entitled to summary decision as a matter of law.

Section 3(k) of the Mine Act provides that an " 'accident' includes a mine explosion, mine ignition, mine fire, or mine inundation, or *injury to*, or death of, *any person*." (Emphasis added). 30 U.S.C. § 802(k). The Secretary's regulations at section 50.20 (Reporting of Accidents, Injuries and Illnesses) implements this provision of the Mine Act. Operators must report all accidents to MSHA on Form 7000-1 within 10 working days. The Secretary's definition of the term "accident" in section 50.2(h) is rather confusing because this definition is quite different from the definition in section 3(k) of the Mine Act. This regulatory definition sets forth specific types of section 3(k) accidents that must be reported immediately. The question in this case is not whether the injury sustained by Mr. Little was required to be reported to MSHA; the issue is whether it was required to be reported *immediately*. It was required to be immediately reported only if the injury sustained by Little had a "reasonable potential to cause death."

I find that the Secretary failed to establish a violation of section 50.10. The regulation does not require mine operators to immediately report every injury that requires off-site emergency care at a hospital or clinic. Although it is true that any hospital surgery raises a risk that the patient may die from complications during surgery or from an infectious disease contracted at the hospital, such risks are too remote from the injury sustained in this case. Little fractured his femur and he had surgery to repair his leg. Although there was some initial confusion about the extent of Little's injuries and what exactly had happened to him, it was clear within a few minutes after the incident that he suffered a broken leg and that this injury did not present a reasonable potential that he was going to die from these injuries.[1]

I agree with Newmont that the facts in *Cougar Coal* are easily distinguishable from the facts here. I have taken into consideration the events that led up to the injury, but these events do not lead me to conclude that an accident occurred. It became clear very quickly that the most serious injury sustained was a broken leg. The parties agreed that the company EMT who arrived at the scene within 15 minutes "at no time believed that Little had suffered an injury that had a reasonable potential to cause death." (Stip. 8). If, on the other hand, Little had been unconscious, confused, in shock, coughing up blood, or if he required CPR, then one could conclude that the extent of his injuries was unknown and immediate reporting was required. In *Cougar Coal*, the Commission held that the "decision to call MSHA cannot be made on clinical or hyper-technical opinions as to a miner's chance of survival." 25 FMSHRC at 521. In this instance, the decision was not based on such hyper-technical opinions, but was made based on the condition of Mr. Little a few minutes after he was injured. There is no evidence that his condition worsened at any time after that.

The Secretary contends that Newmont employees believed, for at least 15 minutes, that Little had been run over by a haul truck and, therefore, given the potentially fatal injuries that can be associated with being run over by a heavy truck, it was obligated to notify MSHA of the accident within that 15 minute period. The language of the Secretary's regulation is clear. An operator is required to notify MSHA within 15 minutes "once the operator knows or should know that an accident has occurred." 30 C.F.R. § 50.10. The regulation does not require reporting with 15 minutes after a miner sustains an injury. The operator must know that an accident occurred before the obligation to immediately report arises or the operator must have been in a position such that it should have known that an accident occurred. In this case, it became clear within a few minutes after Little was injured that an accident, as defined by the Secretary, had not occurred. Because there was not an accident that Newmont knew of or should have know of, the obligation to immediately report the injury did not arise.[2]

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[1] I do not find it significant that he was taken to the hospital in Elko, Nevada, by helicopter. Nevada is a very sparsely settled state and distances can be great.

[2] In the Secretary's reply brief to Newmont's cross-motion, the Secretary provided information that was not included in the stipulated facts or in her initial memorandum in support of her motion for summary decision. This information was from written statements made by

I am somewhat surprised that the Secretary pressed this case. If the subject Part 50 regulations were interpreted in the manner suggested by the Secretary, MSHA would receive many more calls from mine operators reporting all kinds of "accidents" that are presently not immediately reportable. Virtually every serious injury would have to be immediately reported because the operator would have to call MSHA before it could determine whether the injury had a reasonable potential to cause death. Most of these "accidents" would probably not require an immediate investigation by MSHA, but the agency would have to spend precious resources making this determination and, in many cases, MSHA would immediately send an inspector out to conduct an investigation. The MSHA inspection force is stretched pretty thin as it is and the opportunity cost of immediately investigating these types of "accidents" could be significant.

If the Secretary would like injuries similar to the injury sustained by Little to be immediately reported, she should consider modifying her regulations. It appears that the Secretary believes that a mine operator should immediately report any serious injury, at least if off-site medical care or hospitalization is required. As stated by the Commission in *Cougar Coal*, "it would benefit the mining community if the Secretary would clarify when it is urgent to notify MSHA, when it is not, and what reports are required." 25 FMSHRC at 52.

III. ORDER

For the reasons set forth above, the Secretary's motion for summary decision is **DENIED**, Newmont's motion for summary decision is **GRANTED**, Citation No. 6394834 is **VACATED**, and these proceedings are **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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miners recounting the events following Little's injury, as provided by Newmont during discovery. The Secretary attached these discovery responses to her reply brief. This information was included in her reply brief as support for her argument that, for at least 15 minutes, Newmont believed that Little had been run over by a haul truck. Newmont moved to strike these statements from the record because they were not part of the facts stipulated to by the parties. In response, the Secretary argues that this case was not submitted for summary decision on stipulated facts. Rather, the case was submitted on cross-motions for summary decision that included stipulated facts. Newmont's motion to strike is **DENIED**. The proffered statements, although more detailed, are entirely consistent with the information provided in the stipulations. The statements were provided by Newmont during discovery and are not disputed.

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April 21, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 2007-171 A.C. No. 36-01977-112019
v.	:	
READING ANTHRACITE COMPANY Respondent	:	Mine: Wadesville P-33

DECISION

Appearances: Adam F. Welsh, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Petitioner;
Martin J. Cerullo, Esq., Cerullo, Datte & Wallbillich, Pottsville, Pennsylvania, on behalf of the Respondent.

Before: Judge Bulluck

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor on behalf of her Mine Safety and Health Administration ("MSHA"), against Reading Anthracite Company ("Reading Anthracite"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Act" or "Mine Act"), 30 U.S.C. § 815. The Secretary seeks civil penalties in the amount of $88,600.00 for four alleged violations of the Act and her mandatory safety standards.

A hearing was held in Reading, Pennsylvania. The parties' Post-hearing Briefs and Reading Anthracite's Reply Brief are of record. For the reasons set forth below, I **AFFIRM**, as **AMENDED**, the two citations and two orders issued by the Secretary in connection with the fatal accident that occurred at the Wadesville P-33 mine on December 6, 2005, and assess penalties against Respondent.

I. Stipulations

The parties stipulated as follows:

1. Respondent is an "operator" at the Wadesville P-33 mine as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d).

2. Respondent is subject to the jurisdiction of the Mine Act.

3. The presiding Administrative Law Judge has jurisdiction over the proceedings pursuant to section 105 of the Mine Act, 30 U.S.C. § 815.

4. The citations and terminations involved herein were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance.

5. The Wadesville P-33 mine produces approximately 42,273 tons of coal annually.

6. Reading Anthracite Company produces approximately 112,766 tons of coal annually.

7. The imposition of the proposed civil penalties will have no effect on Respondent's ability to remain in business.

8. Respondent demonstrated good faith in the abatement of the citations.

9. On December 6, 2005, Respondent's haul truck driver, Robert Chattin, was involved in a fatal accident when the Euclid 671 haul truck he was operating overturned.

10. On December 6, 2005, before the fatal accident, the indicator lights for the transmission retarder and parking brake in the Euclid 671 were not functioning.

11. Following the December 6, 2005, accident involving the Euclid 671, grease and oil contamination was discovered on the truck's left front brake.

12. Following the December 6, 2005, accident involving the Euclid 671, the right front brake was discovered to have a piece of rubber from the inside of the hose blocking the flow of brake fluid.

13. Following the December 6, 2005, accident involving the Euclid 671, measurements on the rear brake drums were taken, which indicated that those drums were somewhere between 30.403 inches and 30.525 inches in diameter.

14. Respondent violated 30 C.F.R. § 77.1710(i) in that Chattin was not wearing his seat belt while operating the Euclid 671 on December 6, 2005.[1]

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[1] 30 C.F.R. § 77.1710(i) provides: "Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below: . . . (i) Seatbelts in a vehicle where there is a danger of

15. Chattin's failure to wear a seat belt on December 6, 2005, contributed to the fatal nature of the December 6, 2005, accident.

16. Chattin did not complete a Driver Inspection Report for the Euclid 671 on December 6, 2005.

17. On December 6, 2005, the load being hauled by the Euclid 671 during the accident did not exceed the truck's operating parameters.

18. The Euclid 671 was operated on the following dates, by the following drivers, with the operating hours for the truck set forth in parentheses:

a. May 4, 2005, by Jon Pennypacker (873 hours);

b. June 9, 2005, by William Lurwick (882 hours);

c. June 10, 2005, by William Lurwick (888 hours); and

d. September 14, 2005, by Michael Mihalsky (890 hours).

19. Michael Mihalsky did not complete a Driver Inspection Report for the Euclid 671 on September 14, 2005.

20. Respondent has never disciplined any of its employees for failing to wear a seat belt.

21. Respondent has never disciplined any of its employees for failing to conduct an adequate pre-operation inspection of mobile equipment.

22. The transmission hose for the Euclid 671 truck developed a leak at some point before the accident on December 6, 2005.

23. The authenticity and admissibility of Petitioner's Exhibits 1-7, 16-18, 20-25, 33-34, and 36.

24. Petitioner is without knowledge of any person who witnessed Chattin commence operation of the haul truck on December 6, 2005, without conducting a pre-operational inspection.

25. From December 6, 2003, to December 6, 2005, Respondent was not cited by MSHA as a result of any of Respondent's miners failing to comply with seat belt safety guidelines, conduct pre-operational inspections of mobile equipment, or properly perform regular

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overturning and where roll protection is provided."

maintenance inspections of mobile equipment.

26. Petitioner is without knowledge of any fact(s) proving the hole in the transmission hose existed at any point in time before the commencement of the operation of the haul truck on December 6, 2005.

27. Even if the transmission retarder indicator light and parking brake indicator light inside the cab of the haul truck were connected and functional on December 6, 2005, such condition of the lights would not have prevented the accident from occurring.

28. After the investigation of the accident of December 6, 2005, Petitioner is without knowledge of any person who witnessed Chattin complaining of leaking fluids or braking problems on the haul truck on the day of the accident.

29. On December 6, 2005, before the haul on which the accident occurred, Chattin made four (4) hauls of material along a path that was similar to the path he was traveling on before the accident.

30. On December 6, 2005, the rear brakes on the haul truck were in a state where the distance between the pads and drums was sufficient to stop the haul truck, assuming all other systems on the haul truck were operating adequately.

31. On December 6, 2005, the parking brake on the haul truck was operating properly.

32. After the investigation of the accident of December 6, 2005, Petitioner is without knowledge of any fact(s) that would prove the alleged defect of the check valve of the air system on the haul truck was present before the accident, rather than becoming present during the accident or while the haul truck was being set upright after the accident.

33. The authenticity and admissibility of Respondent's proposed Exhibits 1-4, 6-15, and 18-23.

II. Findings of Fact and Conclusions of Law

The stipulations of the parties provide an adequate background as to the facts and circumstances surrounding the citations and orders at issue in this proceeding. Having reviewed the record, I have made additional findings of fact.

Robert Chattin, the deceased driver of the Euclid 671 truck, died as a result of injuries he sustained in the accident. This finding is consistent with the report of the coroner, who ruled: "Because the injuries found on autopsy were directly causal to demise AND were the result of the vehicle's tipping over and sliding down an embankment, the Manner of Death is hereby ruled Accidental." Ex. G-18 (emphasis in original). The coroner also noted the results of an autopsy,

which revealed that Chattin died from asphyxia as a result of blunt force trauma to the chest, sustained when he was partially ejected from the truck when it tipped over. Ex. G-18. This finding is also consistent with MSHA's conclusion that Chattin died as a result of the accident. Tr. 87.

In making this finding, I have considered the testimony of Robert Shellhammer, Reading Anthracite's maintenance supervisor, in whose opinion the accident occurred because Chattin "passed out." Tr. 267. Shellhammer was the first to arrive at the scene of the accident some two to three minutes after being alerted about it, although it is not clear from the record exactly when the accident occurred. Tr. 247-50. He approached the truck and saw that Chattin's "face was completely blue." Tr. 249. Shellhammer believed that the accident was caused by Chattin passing out "[b]ecause just the way the truck hit the berm and the route it followed and the condition he was in in a short period of time," and because after the accident, while still in the cab, Chattin "wasn't bleeding at all. Even his glasses weren't . . . knocked off his face. I thought that was very odd. And he had a couple minor cuts and he wasn't even bleeding." Tr. 267-69. Shellhammer also testified that Chattin "was taking the pills because I seen them all over the ground the day of the accident," and that on at least one occasion, he observed Chattin short of breath while performing a task involving minimal exertion. Tr. 268.

Reading Anthracite offered no medical evidence to corroborate Shellhammer's conclusions. While I do not discredit Shellhammer's testimony, I find that his anecdotal testimony is outweighed by the coroner's report. I am, thus, unpersuaded that Chattin lost consciousness or died at the wheel of the Euclid 671 truck before it careened out of control.

I also find that Reading Anthracite had no preventive maintenance program or policy in place adequate enough to have prevented the equipment failure that led to Chattin's death. Edward Mitchell, a mechanic at Reading Anthracite for 35 years, explained the company's maintenance policy: "If a driver complains about a problem with the truck, you repaired it. If he had a problem on his driver's sheet, his daily report sheet, you repaired the problem." Tr. 22-24. MSHA Inspector George McIntyre, who investigated the fatal accident, testified that Reading Anthracite was unable to produce for him a schedule of preventive maintenance procedures. Tr. 113. McIntyre's conclusion about Reading Anthracite's lack of a maintenance program was consistent with Mitchell's testimony: "Well, we felt that after looking at the way the operator . . . was doing their maintenance work, that all they were doing was what we call patch maintenances. If something happened they would fix it, but as far as trying to prevent something from happening, they weren't doing any form of that type of work." Tr. 129-30.

Although Reading Anthracite introduced evidence that it performed regular maintenance on its trucks, and that it had serviced the Euclid 671's brakes approximately 80 operating hours before the accident (Tr. 321), it failed to document with any clarity or exactitude whether the Euclid 671 truck in which Chattin died had been regularly maintained according to any such schedule. See Tr. 124-25 (McIntyre's testimony that Reading Anthracite was unable to produce for MSHA any records of preventive brake maintenance performed on the Euclid 671 truck).

This is particularly and most significantly true, as I explain further below, with respect to the company's 500-hour check, which Shellhammer testified is when "they do [the] transmission . . . they look at lines and they see if there's any leaks or anything like that that we fix before it goes back out." Tr. 253-55. Eugene Hennen, an MSHA mechanical engineer who assisted in the investigation of the accident, by referencing the Euclid 671 Manual's section on Transmission Lines and Fittings, explained that the truck manufacturer advises an operator "to inspect the hoses for cracks and deterioration and inspect for damages and replace if necessary," and that this should have been done "[p]robably about every 100 hours." Tr. 170, 187-90. No such inspections were performed by Reading Anthracite. In Hennen's opinion, had the company adhered to such a maintenance schedule for the transmission of the Euclid 671, the hazard that led to the accident would have been prevented. Tr. 190. Hennen further emphasized that "a complete check of the machine" should have been performed because the truck had sat idle for approximately three months, during which time seals and hoses could have deteriorated. Tr. 191-93.[2]

As for routine checks performed by the drivers before operating the trucks, although Reading Anthracite required that its drivers perform pre-operational inspections, even Mitchell, Reading Anthracite's own mechanic, questioned the thoroughness of such inspections. Drivers, he stated, "would maybe walk around and glance at the truck, but I've never actually seen one do a complete check." Tr. 31-32. Indeed, the parties stipulated that neither Chattin, on the day of the accident, nor the last driver to have used the truck before the accident, completed a Driver Inspection Report. See Stip. 16, 19. From this, I infer that Reading Anthracite was, at best, lax in enforcing its pre-operational inspection policy.

MSHA concluded that the accident that led to Robert Chattin's death occurred because on the Euclid 671 truck, the transmission retarder failed and the condition of the brakes was "compromised." Tr. 175. I find that the failure of the transmission, and particularly the retarder, was the primary cause of the accident.[3] After the accident, a hole approximately 1 inch in diameter was discovered in a transmission hose. Tr. 185; Ex. G-33. Inspector McIntyre testified that the ruptured hose "was rubbing against another hose," and that the rupture "occurred before the accident," which was apparent "[f]rom the way it was rubbing on the other hose." Tr. 127-28. Shellhammer agreed that the hose ruptured before the accident. Tr. 277. McIntyre opined that Chattin "made four previous trips and had no trouble, so the hose must have been

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[2] In light of the overwhelming weight of the evidence to the contrary, I discredit Shellhammer's testimony that Reading Anthracite made "sure that the machines [were] taken care of by what the manual says." Tr. 251.

[3] A transmission retarder is an auxiliary braking device that, when activated by the driver, applies a retarding (or slowing) force to the vehicle without the use of friction. Retarders are used to keep friction brakes cool so that "they are ready to respond to panic stop conditions, and stopping distances are greatly reduced." WILLIAM C. PETERS, FIRE APPARATUS PURCHASING HANDBOOK 155 (1994).

okay up until that point. It was on the last trip when the hose failed that the truck got into trouble." Tr. 128. David Imschweiler, a maintenance supervisor at Reading Anthracite, testified that on the morning of December 6, 2005, Chattin waved him down to tell him that the Euclid 671 had run out of gas. Tr. 313-14. Imschweiler arranged to have the truck refueled, which also necessitated the installation of new fuel filters, which he also supervised. Tr. 316. Although the filters were replaced close to where the transmission hose ruptured, Imschweiler did not see any leaking of transmission fluid. Tr. 317. According to MSHA Investigator Hennen, the Euclid 671 transmission's fluid capacity was approximately 30 gallons and after the accident, the truck's transmission held less than 5 gallons. Hennen testified that low oil pressure in the transmission led to the failure of the retarder. Tr. 176-77.

Based on the record in its entirety, I make the following findings: (1) the transmission hose on the Euclid 671 ruptured as Chattin made his last trip; (2) the hose had worn over time as a result of rubbing against another hose; and (3) when the hose ruptured, the transmission lost approximately 85 percent of its oil, which, in turn, led to the failure of the retarder to operate. The effect of the loss of the retarder was catastrophic. As Edward Mitchell explained, Chattin "needed the transmission. He needed his retarder. Without the oil he had no retarder, he had no transmission. . . . We wouldn't be having [this] conversation if that hole wasn't there." Tr. 40. On his final trip, Chattin attempted to engage the retarder: "The retarder lever was on," Mitchell explained (Tr. 56), but it failed and the truck ran out of control on a steep downgrade and overturned as the road leveled out and ended at an embankment. Tr. 74-75, 79.

I note that Mitchell stated that, "he had no transmission." Tr. 40. This may explain one circumstance for which none of the witnesses had any explanation, i.e., that the truck was in sixth gear after the accident. Mitchell testified that, at the time of the accident, the truck was, in fact, in sixth gear, indicating that it was traveling fast, and that customarily, a driver would not travel downhill in sixth gear. Tr. 45-46. Shellhammer also observed that the truck was in sixth gear after the accident. When asked whether the gear shift "could have been knocked into that position in the accident," he explained that it could not simply be pushed into gear. Shellhammer said that he "didn't know why it would be in sixth gear because that's the highest gear and you're going as fast as you can go. . . . I would never use it coming downhill, no. You'd use your low gears coming downhill." Tr. 269-70. Given the general downhill grade of the road on which Chattin was traveling, he had no reason to have the truck in sixth gear. Tr. 271-72. As Mitchell pointed out, however, "he had no transmission." I find it reasonable to infer that, in a frantic effort to operate the truck's transmission, Chattin somehow forced the gear shift into sixth gear, then was unable to move it any further. This only made Chattin's situation more dire, as it allowed the truck to travel at an ever higher speed, thereby placing an ever greater strain on the only element slowing the truck down - - its brakes.

I find that the brakes on the truck, while not in the best repair, were in satisfactory enough condition to stop the truck under normal operating conditions. See Stip. 11-13. Both Mitchell and Shellhammer testified that the truck's brakes were working. Tr. 51, 258-59. Shellhammer further explained that, after the accident, the truck's "brakes were all locked up," and that it took

a piece of heavy equipment to move the truck. Tr. 258. However, Chattin operated the Euclid 671 on that last trip under far from normal operating conditions, given that the retarder and, indeed, the entire transmission, had failed. He apparently did his best to stop the truck by using the brakes alone. When Mitchell arrived at the scene of the accident, the truck was still running and the "brakes were hot and they smelled." Tr. 37. Under the circumstances, however, the brakes were not able to do the job.

McIntyre offered his opinion that "if all the brakes had been working properly, even though the hose failed going to the retarder, the truck [would have been] capable of stopping." Tr. 111. In light of the fact that the brakes were "locked up" after the accident, and a heavy piece of machinery had to be used to move the truck, I am not convinced that McIntyre's opinion is well founded. However, it is undisputed that the brakes were not in good repair. The right front brake was not operating at all because the brake line was plugged with a piece of rubber; rust found on the brake after the accident was further evidence that it had not been functioning. Tr. 39, 108-09, 194-96, 302. Grease and oil contaminating the left front brake diminished its braking capacity. Tr. 108, 199, 303. Wear on the rear brake drums also diminished their braking capacity. Tr. 38, 110, 202-03, 256, 335-36. In light of these facts, I find that the condition of the brakes on the Euclid 671 contributed to the accident, although, in terms of causation, the inability of the brakes to stop the truck was secondary to the far more serious failure of the truck's transmission.

A. Citation No. 7008313

Section 104(a) Citation No. 7008313 alleges that Reading Anthracite failed to perform an adequate pre-operational inspection of the Euclid 671 truck that overturned on December 6, 2005, in violation of 30 C.F.R. § 77.1606(a).[4] In light of my finding that neither Chattin nor any other Reading Anthracite employee performed a pre-operational inspection of the Euclid 671 truck that Chattin drove on December 6, 2005, I conclude that Reading Anthracite violated section 77.1606(a). See also Stip. 19 (no pre-operational inspection performed on the truck on September 14, 2005, the last time it was operated before December 6, 2005).

The Secretary further alleges that the violation occurred as a result of Reading Anthracite's moderate negligence. According to the Secretary's civil penalty criteria, found at 30 C.F.R. Part 100, a mine operator is moderately negligent when it "knew or should have known of the violative condition or practice, *but there are mitigating circumstances*." Sec'y Br. at 14 (quoting 30 C.F.R. § 100.3(d)) (emphasis added). In light of Mitchell's testimony that drivers rarely, if ever, performed complete pre-operational inspections (Tr. 31-32), and my finding that Reading Anthracite was lax in ensuring that such inspections were regularly performed, I find that no mitigating circumstances exist that would justify ascribing a moderate degree of

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[4] 30 C.F.R. § 77.1606(a) provides: "Mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation. Equipment defects affecting safety shall be recorded and reported to the mine operator."

negligence to Reading Anthracite for this violation. Indeed, the Secretary's arguments point to no such circumstances.

Had Chattin known that the company expected and required him to adequately inspect the truck that he was about to drive, especially in light of the fact that it had been sitting idle for almost three months, it is very likely that he would have found that a critical transmission hose had begun to show wear and needed to be replaced. David Imschweiler, who supervised the replacement of fuel filters on the truck on the day of the accident, testified that the transmission hose that ruptured "was probably close, right above my head, within a couple inches or feet, because I was underneath the transmission watching them put the fuel filters on the truck." Tr. 317. I also note Hennen's testimony that, consistent with the Euclid 671 manual, Reading Anthracite should have performed a thorough inspection of the truck, including inspecting the transmission hose, because it had been idle for so long. Tr. 187-90. From this, I infer that the transmission hose would have been either visible or accessible, and its defects apparent, had Chattin been directed to perform a thorough inspection of the truck before operating it. In light of these circumstances, I find Reading Anthracite highly negligent for failure to ensure that Chattin perform a thorough inspection.

Inspector McIntyre determined that the gravity of the violation was "significant and substantial" ("S&S"). The S&S terminology is taken from section 104(d)(1) of the Act, which distinguishes as more serious any violation that is "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine or safety hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 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. 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding the violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

Applying the *Mathies* criteria, I have found a violation and that, but for Reading Anthracite's failure to direct Chattin to perform a thorough inspection of the Euclid 671 truck before driving it on December 6, 2005, Chattin would have discovered the worn transmission

hose that ultimately ruptured and caused the transmission to fail. As I have already found, the failure of the transmission was the primary cause of the accident that killed Chattin. Accordingly, I find that the violation was S&S.

B. Citation No. 7008315

Section 104(d)(1) Citation No. 7008315 alleges that Reading Anthracite failed to equip the Euclid 671 truck with adequate brakes, in violation of 30 C.F.R. § 77.1605(b).[5] I have already found that, although the brakes on the Euclid 671 were in poor repair, they were adequate under normal driving conditions. This is further supported by the fact that Chattin made four haulage trips and apparently experienced no problems with the brakes before the transmission failed. Tr. 328. However, when the transmission failed, the brakes proved inadequate, despite Chattin's efforts to stop the truck by applying them. See Tr. 37. As I have noted, when Chattin's truck careened out of control, the driving conditions that he encountered were anything but normal. Section 77.1605(b), however, draws no distinction between normal and abnormal driving conditions. The regulation simply requires that brakes be "adequate." Because, under the circumstances of this case, the brakes were inadequate, I conclude that Reading Anthracite violated section 77.1605(b).

Respecting the gravity of the violation, I agree with the Secretary. I have found that the condition of the brakes contributed to a fatal accident. Accordingly, I find that the violation was S&S.

The Secretary argues that Reading Anthracite failed to make any effort to inspect the brakes on the Euclid 671 "on a regular basis," and that this "demonstrates a reckless disregard of its obligations to maintain those brakes in adequate working condition and justifies the classification of this citation as 'unwarrantable.'" Sec'y Br. at 19. The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, and refers to more serious conduct by an operator in connection with a violation. 30 U.S.C.§ 814(d). In *Emery Mining Corp.*, the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance,

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[5] 30 C.F.R. § 77.1605(b) provides, in relevant part: "Mobile equipment shall be equipped with adequate brakes."

the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

I conclude that the violation was not caused by Reading Anthracite's unwarrantable failure to comply with the standard. The record does not support the Secretary's contention that the company performed no preventive maintenance whatsoever on the Euclid 671's brakes. On the contrary, David Imschweiler testified that the truck's brakes had been serviced approximately 80 operating hours before the accident. Tr. 321. Furthermore, as I have already noted, Chattin did not report any problems with the brakes on the day of the accident. See Tr. 328. In light of these facts, and my finding that the brakes were adequate for normal driving conditions, I find that the Secretary has failed to establish the requisite aggravating factors that would support a finding of unwarrantable failure. Given that I have found that the condition of the brakes contributed to the accident, I, nevertheless, find Reading Anthracite's violation of section 77.1605(b) to have occurred as the result of the company's negligence. As to the degree of negligence, I have already noted several mitigating factors, including that the brakes operated adequately until the transmission failed, and that the brakes were serviced 80 operating hours before the accident. Accordingly, I ascribe to Reading Anthracite a moderate degree of negligence with respect to this violation.

C. Order No. 7008316

Section 104(d)(1) Order No. 7008316 alleges that Reading Anthracite failed to maintain the Euclid 671 truck in safe operating condition, in violation of 30 C.F.R. § 77.404(a).[6] Unlike the preceding violation, in considering the Secretary's allegations, I must consider the truck as a whole, specifically, how its operating condition on December 6, 2005, was affected by Reading Anthracite's maintenance policies and practices. Having reviewed the record, and consistent with my previous findings, I find that when Chattin began his haulage trips that day, he was driving a ticking time-bomb. The truck had become the instrumentality of Chattin's death, as it laid idle for almost three months and, when brought back into service, instead of defusing the bomb, Reading Anthracite allowed its timer to commence tolling the minutes leading to catastrophe. Reading Anthracite allowed this to happen because the company had a woefully

[6] 30 C.F.R. § 77.404(a) provides: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

inadequate preventive maintenance program. Standard operating procedure at the Wadesville P-33 mine was for truck drivers to operate their rigs and report any problems they encountered. In essence, Reading Anthracite turned its drivers into human guinea pigs that the company relied upon to test whether its trucks were in safe operating condition. This amounted to a grievous violation of section 77.404(a), one that led inexorably to the death of Robert Chattin, and one that involved unconscionably gross negligence.

To summarize the facts that lead me to this conclusion, I first point to Edward Mitchell's testimony that Reading Anthracite had no regular preventive maintenance program. When MSHA Inspector McIntyre asked Reading Anthracite for a schedule of preventive maintenance procedures, the company was unable to produce one. I credit McIntyre's compelling testimony that Reading Anthracite relied upon patch maintenance. Furthermore, the Euclid 671 manual advises operators to inspect the transmission hoses for damage on a regular basis and replace them, if necessary. Tr. 187-89. Reading Anthracite's performance in this regard failed miserably, especially in light of the fact that the truck had not been operated for a prolonged period. Tr. 190-93.[7]

Accordingly, I find that Reading Anthracite violated section 77.404(a), that the violation was S&S, and that it occurred as a direct result of Reading Anthracite's unwarrantable failure to comply with the requirements of the regulation.

D. Order No. 7008317

The parties agree that Chattin was not wearing a seatbelt at the time of the accident, and have stipulated that Reading Anthracite violated 30 C.F.R. § 77.1710(i), which requires the use of seatbelts "in a vehicle where there is a danger of overturning and where roll protection is provided." See Stip. 14. The parties also have stipulated that "Chattin's failure to wear a seat belt . . . contributed to the fatal nature" of the accident and, therefore, agree, in essence, that the violation was properly designated S&S. See Stip. 15. The sole issue before me is whether the Secretary had sufficient grounds for determining that the violation was due to Reading Anthracite's unwarrantable failure.

I have not yet addressed the specific circumstances surrounding this violation. Beyond the stipulated fact that Chattin was not wearing a seatbelt when the truck that he was driving overturned, having reviewed the record, I make several findings.

Reading Anthracite's Safety Guidelines include a provision mirroring section 77.1710(i), requiring that seat belts be worn in any vehicle where there is a danger of overturning and where

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[7] Although Shellhammer testified that "at 500 hours, they do [the] transmission . . . [to] look at lines and they see if there's any leaks or anything like that," Reading Anthracite adduced no evidence showing that any such maintenance had ever been performed on the subject Euclid 671 truck. See Tr. 253-55.

roll protection is provided. Ex. R-9. The company enforced this policy during safety meetings that were held approximately once every other month, by reminding its drivers to wear seat belts. Tr. 236-37. Reading Anthracite's safety director, Stanley Wapinski, told of one driver, Bill Zack, who objected to wearing a seat belt because he thought it "would be safer being able to jump out without a seatbelt." Wapinski testified that he "reminded [Zack] of the movies that he saw at the training and what could actually happen to him if he got thrown out of the truck or jumped out of the truck and the truck rolled on him," after which Zack never again questioned the company policy. Tr. 238-39. For drivers operating Euclid 671 trucks, Reading Anthracite's policy was difficult to enforce beyond such reminders because, given that the cabs of these trucks are approximately 12-15 feet off the ground, it would be physically impossible to observe whether a driver was wearing a seat belt while driving. Tr. 238.

MSHA Inspector McIntyre testified that not all drivers wore seat belts all the time, but I find that his testimony on this point was speculative. Tr. 134, 163-64. His conclusion that the company was "not following their own procedures" was equally speculative. Tr. 136. I lack a basis upon which to infer, as the Secretary suggests, that because Reading Anthracite never disciplined anyone for not wearing a seat belt, the company failed to enforce the policy. Sec'y Br. at 24 (citing Tr. 241-43). The only fault I find in Reading Anthracite's enforcement of its seat belt policy is that reminders were given just once every two months. The company failed to introduce any evidence showing that greater efforts were made to ensure that its drivers were *constantly* reminded of the necessity to use seat belts, such as signage in the cabs of the trucks.

This is not to suggest that this violation involved anything less than a very high degree of negligence. The negligence was Chattin's, however, not Reading Anthracite's. It is well settled that the negligence of a rank-and-file miner is not imputable to an operator for the purposes of penalty assessment or unwarrantable failure determinations. *Whayne Supply Co.*, 19 FMSHRC 447, 451, 453 (Mar. 1997); *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982). Furthermore, there is nothing in the record to suggest that Chattin was anything other than a rank-and-file miner. I, thus, conclude that the violation was not caused by Reading Anthracite's unwarrantable failure to comply with section 77.1710(i). In light of my finding that Reading Anthracite's enforcement of its policy lacked vigor, I ascribe to the company a moderate degree of negligence.

III. Penalty

A. Section 110(i) Criteria

While the Secretary has proposed a total civil penalty of $88,600.00, 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 Co.*, 5 FMSHRC 287, 291-92 (Mar. 1993), *aff'd*, 763 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Reading Anthracite is a medium-sized operator, with a history of prior violations that is not an aggravating factor in assessing an appropriate

penalty. Stip. 5-6; Ex. G-35. As stipulated by the parties, the total proposed penalty will not affect Reading Anthracite's ability to continue in business, and the company demonstrated good faith in achieving rapid compliance after notice of the violations. Stip. 7-8. The remaining criteria involve consideration of the gravity of the violations and Reading Anthracite's negligence in committing them. These factors have been discussed fully respecting each citation and order. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

B. Assessment

1. Citation No. 7008313

The Secretary has established a very serious violation of 30 C.F.R. § 77.1606(a). Although she has alleged that the violation was due to Reading Anthracite's moderate negligence, I find the operator's negligence to be high. The Secretary petitioned the Commission to assess a penalty of $9,100.00 for this violation. Applying the civil penalty criteria, and in consideration of my finding of high negligence, I find that a penalty of $12,000.00 is appropriate.

2. Citation No. 7008315

The Secretary has established a very serious violation of 30 C.F.R. § 77.1605(b). However, she has failed to establish that the violation was due to Reading Anthracite's unwarrantable failure. I find that the violation was due to Reading Anthracite's moderate negligence. The Secretary petitioned the Commission to assess a penalty of $26,500.00 for this violation. Applying the civil penalty criteria, and in consideration of my findings as to Reading Anthracite's negligence, I find that a penalty of $8,500.00 is appropriate.

3. Order No. 7008316

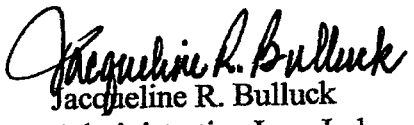
The Secretary has established a very serious violation of 30 C.F.R. § 77.404(a), and that it was due to Reading Anthracite's unwarrantable failure. She petitioned the Commission to assess a penalty of $26,500.00 for this violation. Applying the civil penalty criteria, and in consideration of my findings as to Reading Anthracite's unconscionably gross negligence, I find that a penalty of $50,000.00 is appropriate.

4. Order No. 7008317

The parties stipulated that Reading Anthracite violated 30 C.F.R. § 77.1710, and that the violation was S&S. However, the Secretary has failed to establish that the violation was due to Reading Anthracite's unwarrantable failure. Instead, I find that the violation was due to Reading Anthracite's moderate negligence. The Secretary petitioned the Commission to assess a penalty of $26,500.00 for this violation. Applying the civil penalty criteria, and in consideration of my findings as to Reading Anthracite's negligence, I find that a penalty of $8,500.00 is appropriate.

ORDER

Accordingly, it is **ORDERED** that Order No. 7008316 is **AFFIRMED**, as issued, that the Secretary **MODIFY** Citation No. 7008315 and Order No. 7008317 to citations issued under section 104(a) of the Act with a "moderate" degree of negligence, Citation No. 7008313 to increase the degree of negligence to "high," and that Reading Anthracite Company **PAY** a civil penalty of $79,000.00 within 30 days of this Decision. Accordingly, this case is **DISMISSED**.



Jacqueline R. Bulluck
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

March 10, 2010

ABUNDANCE COAL, INC.,	:	EQUAL ACCESS TO JUSTICE
Applicant	:	PROCEEDING
	:	
v.	:	DOCKET NO. EAJ 2010-01
	:	Formerly KENT 2010-5-R
SECRETARY OF LABOR,	:	KENT 2020-6-R
MINE SAFETY & HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine ID 15-18711
Respondent	:	No. 1 Mine

DECISION ON LIABILITY/ ORDER TO SUPPLEMENT THE RECORD

This case is before me upon a Motion for Fees and Costs filed by Abundance Coal, Inc. (Abundance) pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 the "Act", and the Commission's implementing regulations at 29 C.F.R. § 2704.

Abundance was the prevailing party in an expedited contest proceeding, *Abundance Coal, Inc.*, 31 FMSHRC 1241 (Oct. 2009) (ALJ). The citation at issue therein alleged a non-"significant and substantial" violation of the standard at 30 C.F.R. § 75.336(c)--which is applicable to sealed mine atmospheres with seals of less than 120 psi strength and requires the withdrawal of miners when certain action levels of methane and oxygen are found in the sealed atmosphere. In my decision, I found that the language of the cited standard was "perfectly clear" and that because Abundance was using seals of 120 psi strength separating its workings from the sealed atmosphere at issue, Section 75.336(c) was, in effect, inapplicable. Accordingly, the citation and related "Section 104(b)" order were vacated. I also noted in my decision that the Secretary (through her designated agent, the District Manager) had, consistent with the cited standard, previously approved Abundance's plan (alternate seal sampling plan-ventilation plan revision) which permitted Abundance to not sample behind its 120 psi seals.

On December 23, 2009, Abundance moved for attorney fees and costs associated with the underlying case in the amount of $13,911.59. Abundance also submitted its financial statement, itemized statements for attorney fees, expert fees, and costs, and a petition for attorney fees at $175 per hour. On January 22, 2009, the Secretary filed her response to Abundance's motion and, on February 2, 2010, Abundance filed its reply to that response.

The Equal Access to Justice Act provides as follows:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds

> that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

5 U.S.C. § 504(a)(1)

The Commission's regulations similarly provide that:

> [A] prevailing applicant may receive an award of fees and expenses incurred in connection with a proceeding . . . unless the position of the Secretary was substantially justified. . . . The burden of proof that an award should not be made to a prevailing applicant because the Secretary's position was substantially justified is on the Secretary, who may avoid an award by showing that his position was reasonable in law and fact.

29 C.F.R. § 2704.105(a)

There is no dispute that the previous litigation was an "adversary adjudication" under 29 C.F.R. § 2704.103, that Abundance was the prevailing party in the previous litigation as defined in 29 C.F.R. § 2704.104 and that Abundance meets the definition of a "party" under the Act. Therefore, the only issue to be determined regarding the issue of liability is whether the Secretary has met her burden of proving that her position at trial was substantially justified.

In support of its motion, Abundance argues that the Secretary's position was not substantially justified for two reasons. First, that the plain language of 30 C.F.R. § 75.336(c) provides that it only applies where the seals are of less than 120 psi strength and the seals at issue were of 120 psi strength. Abundance asserts, therefore, that the regulation is not applicable. Abundance argues, secondly, that because the Secretary had previously approved Abundance's ventilation plan, which explicitly stated that Abundance would not be sampling behind its 120 psi seals, the Secretary's position at trial was contradictory and, implicitly, the Secretary was, for this additional reason, without justification to have cited Abundance for not sampling behind those very same seals.

The Secretary asserts that her position at trial was reasonable, both in law and in fact, and that she was substantially justified under the circumstances. She first argues that because the case presented a novel issue of first impression under a fairly new regulatory requirement, there was no prior case law available. As previously noted however, the language of the cited standard is "perfectly clear" on its face and therefore needs no interpretive "case law". I find that the Secretary's attempt to ignore a cardinal rule of regulatory construction was clearly without justification. I find, moreover, that the so-called novel issue of first impression was solely the creation of the Secretary's imagination and is without rational connection to the plain meaning of the cited standard.

The Secretary also argues that her position was substantially justified based on the facts presented--namely, that the abandoned workings had once been under a single legal identity and that

a "Section 103(k)" order had been issued in 2006 for all three mines. These factors are, however, without relevance to the narrow issue presented in the underlying case i.e. whether Abundance violated 30 C.F.R. § 75.336(c) as charged.

The Secretary next argues that her actions were justified because the situation presented was very serious. The Secretary, however, clearly contradicts herself in this regard by having issued the citation as not "significant and substantial". Even assuming, *arguendo*, that the situation was as serious as the Secretary now alleges, that is no justification to misapply a safety standard. Indeed, there are appropriate remedies, such as "imminent danger" withdrawal orders, available in the case of very serious safety hazards.

Finally, with regard to Abundance's assertion that the Secretary's prior approval of its ventilation plan revision made the Secretary's position unjustified, the Secretary suggests, but without any supportive evidence, that the approval of the ventilation plan revision may have been in error. The credibility of this "suggestion" is also clearly at issue, moreover, since there is no evidence that the Secretary attempted to modify or rescind the ventilation plan in this regard. This further suggests that the Secretary's position was indeed without justification.

Under all the circumstances, I find that I am in agreement with Abundance's position and find that the Secretary has failed to have met her burden of proving that her position in the underlying proceeding was substantially justified. I find, accordingly, that Abundance is entitled to an award under the Equal Access to Justice Act.

Fees and Expenses

Abundance has failed in its motion to comply with the second sentence of 29 C.F.R. § 2704.201(d) and in part, with the second sentence of 29 C.F.R. § 2704.205. Similarly, the Secretary has failed in her response to support her factual allegations as required by 29 C.F. R. § 2704.203(c) Accordingly, no final decision can be rendered at this time regarding the issue of fees and expenses and the parties are directed to file, within 30 days, documentation necessary to comply with the aforesaid regulatory provisions.

Gary Melick
Administrative Law Judge
(202) 434-9977

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Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

/lh

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 17, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2007-742
Petitioner	:	A.C. No. 46-07165-122306-01
v.	:	
	:	Docket No. WEVA 2007-743
	:	A.C. No. 46-07165-122306-02
	:	
	:	North Surface Mine
	:	
	:	Docket No. WEVA 2007-821
	:	A.C. No. 46-08838-124903
ALEX ENERGY, INC.,	:	
Respondent	:	Superior Surface Mine

NOTICE OF HEARING SITE

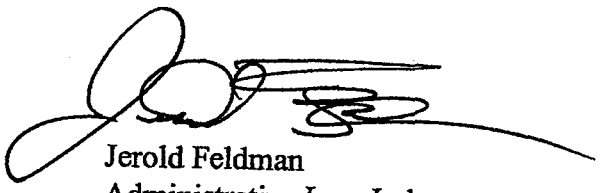
The captioned civil penalty proceedings are scheduled for hearing on April 7, 2010. The initial Prehearing Order in these matters, issued on July 14, 2009, required the parties to engage in, and complete, settlement negotiations by September 25, 2009. As the September 25, 2009, settlement deadline approached, the parties made repeated representations that they were continuing to negotiate with the anticipation of reaching an agreement. Today, on March 17, 2010, the respondent's counsel advised my office, via email, that the parties "reached a settlement agreement in principle" with respect the citations contained in Docket No. WEVA 2007-742. However, to date, no motions for the approval of settlement have been filed in any of the captioned proceedings.

In view of the above, given the Commission's unprecedented workload, the hearing in these matters will proceed as scheduled at **9:00 a.m.**, on **Wednesday, April 7, 2010,** at Commission headquarters. No requests for continuance will be favorably entertained. Any motions for the approval of settlement of these matters must be received in my office on or before March 31, 2010, by facsimile or regular mail. Any settlement agreement after March 31, 2010, must be presented by the parties for my approval on the record at the scheduled hearing. The failure of either party to appear at the hearing will result in the entry of a dismissal order or default judgment.

The hearing location is:

The Richard V. Beckley Hearing Room
Suite 9500 - Ninth Floor
601 New Jersey Ave, NW
Washington, DC 20001

Any person who plans to attend this hearing and requires special accessibility features and/or any auxiliary aids, such as sign language interpreters, must request them in advance (subject to the limitations set forth in § 2706.160(d)).



Jerold Feldman
Administrative Law Judge

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/rps

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 6, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2010-128-M
Petitioner	:	A.C. No. 21-03404-201338 A
v.	:	
	:	
BILL SIMOLA, employed by	:	United Plant
UNITED TACONITE, LLC,	:	Mine ID 21-03404
Respondent	:	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

On October 1, 2008, 104(d)(1) Citation No. 6407901 and 104(d)(1) Order No. 6407902 were issued to United Taconite, LLC ("United Taconite"). Citation No. 6407901 was issued for an alleged violation of the mandatory safety standard in 30 C.F.R. § 56.11001. This standard requires that a safe means of access shall be provided and maintained to all working places. Order No. 6407902 was issued for an alleged violation of the mandatory safety standard in 30 C.F.R. § 56.4107(a). This standard provides that moving machine parts shall be guarded to protect persons from moving parts that can cause injury.

At issue is a Petition for Assessment of Civil Penalties filed on December 21, 2009, by the Secretary of Labor ("the Secretary"), pursuant to the provisions section 110(c) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"). The petition seeks to impose personal liability against Bill Simola, as an agent of United Taconite, for the violations alleged in Citation No. 6407901 and Order No. 6407902. Section 110(c) of the Mine Act provides, in pertinent part:

> 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, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

30 U.S.C. § 820(c).

Simola is employed as the Pellet Plant Coordinator at the United Plant operated by United Taconite, a limited liability company ("LLC") organized under the laws of the State of Delaware. As a general proposition, a LLC, first recognized in 1977 by the State of Wyoming, is a hybrid business structure that is taxed as a partnership while benefitting from the personal liability shield afforded to employee agents of corporations. *Sec'y Interpretive Bulletin*, 71 Fed. Reg. 38902.

On February 26, 2010, Simola filed a Motion for Summary Decision asserting that section 110(c) of the Mine Act should be narrowly construed to limit personal liability only to agents of corporate mine operators. As United Taconite is a limited liability company, authorized under a Certificate of Formation filed with the Office of the Delaware Secretary of State in the Division of Corporations, Simola argues that he is not subject to personal liability under section 110(c) of the Act. I construe Simola's motion as a motion to dismiss.

The Secretary filed her opposition to Simola's motion on March 22, 2010. The Secretary's opposition primarily relies on her July 10, 2006, Interpretive Bulletin regarding section 110(c) of the Mine Act as it relates to agents of LLCs. *Id.* The relevant history of LLC entities noted in the bulletin is not disputed by Simola. Although LLCs were first recognized in 1977, LLCs did not achieve significant popularity until 1988, when the Internal Revenue Service announced that LLCs could be taxed as partnerships despite their limited corporate-like liability. *Id.* In recent years, the number of mine operators doing business as LLCs has significantly increased. According to Mine Safety and Health Administration (MSHA) records at least 10 percent of mine operators now identify themselves as LLC business entities. *Id.*

The Secretary asserts that LLCs should be treated the same as corporate mine operators because both business structures enjoy the benefits of shielding personal liability. Since LLCs were first recognized and have become popular as business entities after section 110(c) of the Mine Act was promulgated, the Secretary contends that the reach of the provisions of section 110(c) that limit personal liability to agents of corporations can be reasonably interpreted to extend to agents of limited liability companies.

Findings and Conclusions

At the outset, I note that the first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (April 1996). "If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency must give effect of the unambiguously expressed intent of Congress." *Chevron* at 842-843. If the statute is silent or ambiguous with respect to the specific issue, the question is whether the Secretary's interpretation is based on a reasonable construction and application of the statute. *Id.* at 843.

Here, Congress obviously did not consider the applicability of section 110(c) to agents of LLCs because the operation of mines as LLC entities occurred after the legislation was adopted. Accordingly, the focus shifts to whether the Secretary's interpretation of section 110(c) is reasonable. Generally speaking, the Secretary's interpretation of the enabling statute she is authorized to enforce should be given deference so long as it is consistent with the intent of the statutory language, and if the interpretation serves a permissible regulatory function. *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 234 (Feb. 1977) (citations omitted). In addition, the legislative history of the Act provides that "the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." *Id.* at 234-35 citing S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 637 (1978).

The Commission has addressed the purpose and intent of the limited personal liability provisions of section 110(c) in *Donald Guess,* 15 FMSHRC 2440 (Dec. 1993), *aff'd sub nom. Sec'y of Labor v. Shirel*, 52 F.3d 1123 (D.C. Cir. 1995). In *Guess*, the Commission affirmed the dismissal of civil penalty proceedings under section 110(c) against two employees of the Pyro Mining Company doing business as a partnership. The Commission noted that unlike corporations, agents of partnerships were not shielded from personal liability. *Id.* at 2442-43. The Commission emphasized that:

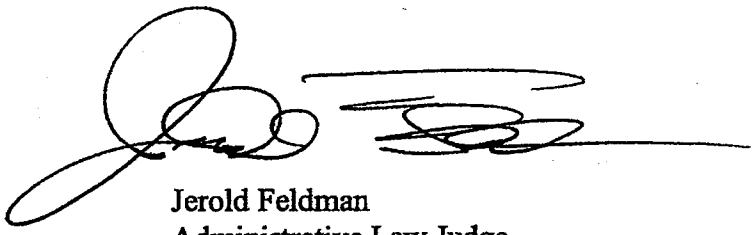
> The legislative history of section 110(c) of the Mine Act, and its predecessor, section 109(c) of the Coal Act, manifests a Congressional intent to proceed individually against persons employed by corporate operators "to assure that the decision-makers responsible for illegal acts of corporate operators would also be held personally liable for violations."

Id. citing *Richardson v. Secretary of Labor*, 689 F.2d 632, 633 (6th Cir. 1982), *aff'g, Kenny Richardson*, 3 FMSHRC 8 (January 1981), *cert. denied*, 461 U.S. 928 (1983)(emphasis added). *See also* H.R. Rep. No. 563, 91st Cong., 1st Sess. 11-12 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Congress, 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969,* at 1041-42 (1975).

Simola, in essence, seeks to differentiate a limited liability company from a corporation based on its Internal Revenue Service tax treatment despite the fact that both business entities shield agents from personal liability. Thus, Simola relies on a distinction without a difference. As the purpose of section 110(c) is to pierce the corporate-like liability shield, the Secretary's interpretation that the provisions of section 110(c) apply to agents of mine operators operating as both corporate and limited liability companies is manifestly reasonable and consistent with the intent of the legislation. In the final analysis, United Taconite is a "limited liability" company that has registered in the Division of Corporations in the Office of the Delaware Secretary of State. Consequently, it should receive the same coverage as a corporation under section 110(c).

ORDER

In view of the above, **IT IS ORDERED** that Simola's motion to dismiss for lack of jurisdiction under section 110(c) of the Act with respect to his personal liability as an agent of a limited liability company **IS DENIED.**



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
U.S. CUSTOM HOUSE
721 19TH STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5267/FAX 303-844-5268

April 9, 2009

SPARTAN MINING CO., INC.,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. WEVA 2007-517-R
	:	Citation No. 7261540; 05/16/2007
	:	
	:	Docket No. WEVA 2007-518-R
v.	:	Citation No. 7261541; 05/16/2007
	:	
	:	Docket No. WEVA 2007-519-R
	:	Citation No. 7261542; 05/16/2007
	:	
	:	Docket No. WEVA 2007-520-R
SECRETARY OF LABOR,	:	Citation No. 7261543; 05/16/2007
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Ruby Energy Mine
Respondent,	:	Mine ID 46-08808
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2008-1756
Petitioner,	:	A.C. No. 46-08808-158980
	:	
v.	:	
	:	
SPARTAN MINING CO., INC.,	:	
Respondent.	:	Ruby Energy Mine

ORDER DENYING MOTION FOR CONTINUANCE OF HEARING

On January 14, 2010 a hearing on the above captioned matters was set to commence on Tuesday, April 13, 2010. On Wednesday, April 7, 2010, less than one week prior to the hearing date, and more than two and one-half months after the matter had been set for hearing, counsel for Spartan Mining Company ("Spartan") filed a Motion for Continuance of Hearing (the "Motion"). The Secretary opposes the Motion.

Following the filing of the Motion, counsel for Spartan requested a telephone conference call to discuss the matter. Counsel was advised that the Motion would be denied and that a conference call was not necessary. Counsel subsequently requested a written denial of the Motion in order to seek review by the Commission. Counsel was advised that any additional information, beyond that which was included in the Motion, could be submitted via email and would be considered in making a determination about rescheduling the hearing and in this written ruling on the Motion. Counsel's response failed to include any additional information beyond that which was included in the Motion. Instead, Counsel for Spartan said that she wished to have the opportunity to "orally expound" on the Motion.

Spartan contends that hearing preparation had been suspended as a result of a "pending settlement offer [by the Secretary] and intended acceptance [by Spartan]." Mot. at 2. Further, Spartan contends that, in light of the April 5, 2010 tragedy at Upper Big Branch Mine[1], its corporate counsel has been unable to provide settlement approval. *Id.* Finally, Spartan states that its witnesses "have asked that this case be rescheduled due to their inability to focus on the issues in this case due to their grief and help needed with the Upper Big Branch [M]ine." *Id.*

Both Spartan and the Secretary have had ample time to settle this matter. By next week, nearly three months will have elapsed since these dockets were set for hearing. Further, these citations are very old, having been issued in May of 2007. While I am conscious of and deeply saddened by the events at the Upper Big Branch Mine, I am also aware that close to a week remains before the commencement of the hearing. If the parties are as close to settlement as Spartan's Motion alleges, then little effort is required on the part of its corporate counsel, and more than enough time remains for the case to settle before hearing. The same applies for the Secretary to obtain the District Manager's approval of the settlement.

I am sympathetic to Spartan's concerns regarding its witnesses' "lack of focus" and "grief" stemming from the Upper Big Branch Mine tragedy. However, Spartan's lack of specificity in describing its witnesses' actual involvement in, or connection to, the Upper Big Branch Mine tragedy leaves me without the information necessary for a potential finding of good cause shown to continue the hearing. Spartan has listed three witnesses for the hearing, but has not described the witnesses' locations or their positions at the mine.

As a result of the current case backlog, Commission judges are inundated with cases, many of which are set for hearing. At present, my own hearing docket extends into October of this year. Where good cause for a continuance is not shown, I cannot be held hostage by the parties' decision to suspend hearing preparation in the days leading up to a hearing that has been set for almost three months. For this reason, and the reasons cited above, I **DENY** Spartan's

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[1] Massey Energy Company is the current controller of both Performance Coal, which operates the Upper Big Branch Mine, and Spartan Mining Co., Inc., which operates the mine at issue in this matter.

Motion for Continuance of Hearing. I will, however, allow any Spartan witness who finds it a hardship to attend the hearing based upon incidents at the Upper Branch Mine to appear by telephone to present testimony.

Margaret A. Miller
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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April 14, 2010

JIM WALTER RESOURCES, INC., Contestant,	:	CONTEST PROCEEDINGS
	:	Docket No. SE 2008-124-R
v.	:	Citation No. 7693357, 11/02/2007
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	:	Mine ID: 01-00758
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDINGS Docket No. SE 2008-792 A.C. No. 01-00758-148659
v.	:	
JIM WALTER RESOURCES, INC., Respondent.	:	Mine: No. 3

ORDER GRANTING THE SECRETARY'S MOTION FOR A PROTECTIVE ORDER

Before: Judge Barbour

On March 30, 2010, Jim Walter Resources ("JWR") served upon the Secretary of Labor ("Secretary") a supplemental 30(b)(6) Deposition Notice and Request for Production of Documents. The notice requested the Secretary to make available for deposition "the person or persons designated by [MSHA] as being able to testify as the MSHA representatives in regard to the following topic:

> 9. MSHA District 11's citation history and enforcement actions related to all citations and/or orders issued to Jim Walter Resources, Inc., and/or any independent contractor or subcontractor from January 1, 2000 through November 2, 2007 alleging violations of 30 C.F.R. §77.1710(g) on any Jim Walter Resources, Inc. Mine site or property, including but not limited to each citation

listed and/or included in Exhibit A attached hereto.[1]

JWR also requested that the Secretary produce

> 1. The complete investigation file of each of the citations listed ... in Exhibit A, and
>
> 2. Any and all documents relating to the citations listed in Exhibit A.

Although the subject citation contested in Docket No. SE 2008-124-R and Docket No. SE 2008-792 was issued on November 2, 2007, the citations listed on Exhibit A were issued between October 12, 2000 and December 12, 2007.

The Secretary objects to the broad nature of the topic upon which the company seeks to depose MSHA's representatives. She asserts that "[the] citation history and enforcement actions relating to all citations and/or orders issued to [JWR] and/or any independent contractor or subcontractor from January 1, 2000 through November 2, 2007 alleging violations of [section] 77.1710(g)," is information not likely to produce relevant evidence. She further argues that producing the nine inspectors required to give the requested deposition testimony would be "oppressive and unduly burdensome," as would be the production of the requested documents. Further, in the Secretary's view, the documents can lead to no admissible evidence because she has "unlimited discretion" to cite a contractor or a production operator. Therefore, and contrary to JWR's assertions, she cannot have abused her discretion when she cited JWR for the alleged violation at issue. (The Secretary cites *Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 318 (4th Cir. 2008).)

RULING

The Secretary's motion **IS GRANTED**. She need not comply with the requests made in JWR's March 30, 2010 supplemental 30(b)(6) Deposition Notice.[2] In a letter directed to Counsels on April 7 and before I was aware of the Secretary's motion, I stated my belief that JWR's request was a distraction from "the matter at hand." I further stated that I viewed the issues in the captioned matters as being "relatively simple." I stated that they were whether "the alleged violation [of section] 77.1710(g) occur[ed]; if so, [whether] JWR is liable; if so what is the amount of the civil penalty I must assess." I noted that "the company's relevant history of previous violations can easily be obtained from the agency's print-out of past violations." Since I

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[1]Exhibit A is an MSHA computer print-out that lists 22 citations issued for alleged violations of section 77.1710(g). Seven of the citations were issued to JWR, three were issued to JWR's agents and 12 were issued to JWR's contractors.

[2]Because I believe other principals resolve this matter, I, like the Secretary, take no position on whether a request under Rule 30(b)(6) is appropriate at this juncture of the case. Fed. R. Civ. P. 30 (b)(6).

will not consider as relevant past violations cited prior to November 2, 2005, JWR's deposition and production request clearly includes irrelevant material. Moreover, I agree with the Secretary that the voluminous nature of the material sought and the number of personnel required to testify about it, make the request oppressive and unduly burdensome.

Finally, as I read the law, the Secretary enjoys broad discretionary authority to cite the operator, the independent contractor, or both for contractor violations. *See Jim Walter Resources, Inc.*, 31 FMSHRC 724, 726-727 (May/June 2009). As the court in *Speed Mining* expressly noted, the strong presumption in favor of judicial review of agency actions is overcome when the authorizing act provides "no judicially manageable standards ... for judging how and when an agency should exercise its discretion." *Speed Mining*, 528 F.3d at 317 (*citing Heckler v. Chaney*, 470 U.S. 821, 832 (1985).) The court went on to find the Mine Act to provide no manageable standard by which to judge MSHA's exercise of discretion and concluded, as the Secretary rightfully states, that the Secretary's "citation decisions are 'committed to agency discretion by law' and, and therefore, are unreviewable." *Id.* I am compelled to follow the court's holding. Therefore, in the cases at bar, if the Secretary can show the violations occurred, that JWR was the operator of the mine, that Hooper and Chandler Steel Erectors ("Hooper") was an independent contractor of JWR, and that Hooper committed the contested violation, the issue of whether JWR was properly cited will not arise because the Secretary has unreviewable discretion to cite Hooper, JWR or both. For this reason too, JWR's request is unlikely to lead to the discovery of admissible evidence and must be rejected.

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, N.W. Suite 9500
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April 15, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v.	:	EMERGENCY RESPONSE PLAN DISPUTE PROCEEDING Docket No. PENN 2010-339-E Citation No. 7000116
ORCHARD COAL COMPANY, Respondent.	:	Primrose Slope Mine Mine ID 36-08346
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v.	:	EMERGENCY RESPONSE PLAN DISPUTE PROCEEDING Docket No. PENN 2010-340-E Citation No. 7000440
S & M COAL COMPANY, Respondent.	:	Buck Mountain Slope Mine Mine ID: 36-02022
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v.	:	EMERGENCY RESPONSE PLAN DISPUTE PROCEEDING Docket No. PENN 2010-342-E Citation No. 7000117
ALFRED BROWN COAL COMPANY, Respondent.	:	7 Ft. Slope Mine Mine ID: 36-08893
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v.	:	EMERGENCY RESPONSE PLAN DISPUTE PROCEEDING Docket No. PENN 2010-343-E Citation No. 7000115
B & B COAL COMPANY, Respondent.	:	Rock Ridge No. 1 Slope Mine Mine ID: 36-7741

ORDER ON MOTION FOR STAY

These consolidated cases are before me on referrals of Emergency Response Plan ("ERP") disputes by the Secretary of Labor ("Secretary") pursuant to Commission Rule 24,

29 C.F.R. § 2700.24, and section 316(b)(2)(G)(iii) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"). I issued my decision in these proceedings on April 1, 2010.[1] *Orchard Coal Co.*, 31 FMSHRC __, PENN 2010-339-E *et al.* (Apr. 1, 2010) (ALJ). In that decision, I affirmed four section 104(a) citations charging each of the Respondents for failing to comply with section 316(b)(2)(F)(ii) of the Act, which requires operators to provide for post-accident communication between underground and surface personnel via a wireless, two-way communication and electronic tracking ("C&T") system in ERPs, mandated under section 316(b)(2)(A) of the Act. I also ordered the Respondents to submit revised and compliant ERPs to the district manager within 20 days of the date of the decision.

I retain jurisdiction over the proceedings for the limited purposes set forth in Commission Procedural Rule 24(f)(2), which provides:

> *Stay of plan provision.* Notwithstanding § 2700.69(b), a Judge shall retain jurisdiction over a request for a stay in an emergency response plan dispute proceeding. Within two business days following service of the decision, the operator may file with the judge a request to stay the inclusion of the disputed provision in the plan during the pendency of an appeal to the Commission pursuant to paragraph (g) of this section. The Secretary shall respond to the operator's motion within two business days following service of the motion. The judge shall issue an order granting or denying the relief sought within two business days after the filing of the Secretary's response.

29 C.F.R. § 2700.24(f)(2).

In a motion dated April 7, 2010, Alfred Brown Coal Company, on behalf of itself and the other Respondents, Orchard Coal Company, S & M Coal Company, and B & B Coal Company, filed a Request for Stay of Plan Provision.[2] The Secretary filed a Statement in Opposition to Respondent's Request on April 13, 2010.

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[1] My decision was served on all the parties by facsimile on April 1, 2010. However, the Commission did not send the Respondents' facsimiles to the Independent Miners & Associates number as previously requested by the Respondents. This error was corrected on April 5, 2010. The decision was also served to all parties by certified mail, return receipt requested.

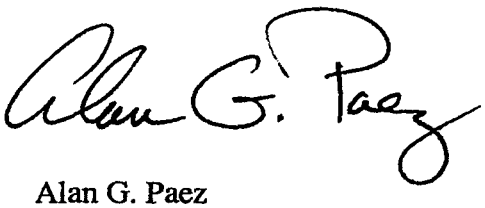
[2] There is no automatic time and date stamp typically generated by a facsimile on Respondents' Request for Stay of Plan Provision. Although the request filed by Alfred Brown Coal is date stamped by the Commission as having been received on April 9, 2010, for purposes of ruling on it, I deem it to have been timely filed on April 7, 2010. The request was not served properly upon the Secretary, who received it from the Commission on April 12, 2010.

In their request for a stay of the plan provision at issue in these proceedings, the Respondents argue that the safety of C&T systems in their particular mines remains in doubt. They rely heavily on comments made by Commission Administrative Law Judge Michael E. Zielinski in a decision issued December 9, 2009, involving an anthracite operator and issues similar to those in this case. *See RS&W Coal Co.*, 31 FMSHRC 1440 (Dec. 2009) (ALJ). In his decision, Judge Zielinski noted, *inter alia*, that "[t]here is no question that requiring RF [radio frequency energy] sources in its mine would create hazards that did not exist under RS&W's currently approved plan." 31 FMSHRC at 1455. But he went on to note that "it has been conclusively demonstrated that currently approved [C&T] systems can be used safely in RS&W's mine," and affirmed the citation issued by the Secretary to RS&W Coal. *Id.* at 1455, 1457. The Respondents' reliance on Judge Zielinski's comments, taken out of context, is thus unavailing.

Moreover, I found in my April 1, 2010, decision that "that the chances of an unintentional ignition or detonation of a blasting cap from C&T devices, which emit such low levels of RF energy, is infinitesimally remote to the point that it is nearly non-existent." *Orchard Coal Co.*, slip op. at 15. The Respondents' request for a stay fails to convince me otherwise. I thus reject their request for a stay based on their arguments that C&T systems are too dangerous for use in their mines.

The Respondents' also argue that, as to S&M Coal Company, the Secretary has failed to engage in good faith negotiations with the company. In response, the Secretary attached to her statement in opposition a letter dated April 12, 2010 from the District Manager, John A. Kuzar, to S&M Coal offering "to work with S&M Coal to develop a compliant ERP that provides upgraded communication and tracking capability." (Sec'y Statement in Opp'n, Attachment at 1.) In light of my April 1, 2010 decision on S&M Coal's economic feasibility arguments, I need not reach this issue.

Accordingly, the Respondents' Request for Stay of Plan Provision is **DENIED**.[3]



Alan G. Paez
Administrative Law Judge

[3] In light of my denial of the Respondents' request for stay, I need not reach any of the other arguments made by the Secretary in her statement in opposition.

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